NSRLP
NATIONAL SELF-REPRESENTED LITIGANTS PROJECT

The Honourable Justice Cary Boswell
Superior Court of Justice

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Dear Civil Rules Review Co-Chairs:

Leadership at the National Self-Represented Litigants Project (NSRLP) have reviewed the Phase Two Consultation Paper (Consultation Paper) by the Civil Rules Review, and submit the following comments as the NSRLP's official position in respect of the proposed reforms. After a brief discussion of certain foundational assumptions that we believe ought to inform the nature of the reforms moving forward, we will discuss specific aspects of the proposed reform framework, including observations about particular elements of the proposed framework as well as questions that the proposed reform raises in the context of self-representation and access to justice. We have not prepared comments on every aspect of the proposed reform framework, having chosen to focus our discussion on certain key elements of the framework that are most likely to impact self-represented litigants (SRLs). Throughout these discussions, and in accordance with the NSRLP mandate, we seek to centre the voices and experiences of SRLs themselves in the civil justice system in Ontario. In our review of the Consultation Paper, therefore, we consider the proposed reform from the perspective of Ontario SRLs, and in some instances, provide additional food for thought for the Civil Rules Review going forward.

Foundational Assumptions

We strongly believe that there are certain foundational assumptions about the adversarial system, the organization and deployment of civil procedure, and participants in the civil justice system that ought to inform the development and implementation of civil justice reform initiatives:

- Firstly, adjudication is a zero-sum game in which there will always be parties that are successful and parties that are not. The Consultation Paper makes specific reference to the culture of maximalism which has developed in response to the current procedural framework organization. However, it is important to remember that these rules are operationalized by lawyers: the procedural system is not manipulated by parties, it is deployed by their representatives. Thus, a fundamental change in procedure needs to take a critical account of the ethical and professional role of lawyers within this system – if we seek to change the culture of litigation, it is important to challenge the culture of those who seek to litigate within the system. Moreover, party autonomy and party prosecution within

the adversarial system means that parties are driven to optimize their advantages and, in many cases, their opponent's disadvantages. This means that deployment of procedure is often weaponized for a party's purposes. This has particularly problematic consequences in cases where the parties are unequal in experience, knowledge, resources, and representation. The fact is that more often than not, disputes in our civil justice system involve unequal parties – self-represented parties being a prime example. This leads to a second assumption:

- While there is much discussion of lawyers navigating cases within the civil justice system, there are great swaths of the system that now contain more non-lawyers than lawyers – family law being a prime example of this. One of the most significant understandings about self-representation involves the fact that a large proportion of SRLs start by retaining legal representation and, at some point, run out of financial resources (See NSRLP's SRL Intake Report 2021-2023 page 16). Moreover, given broader economic factors and the ever-increasing cost of legal services, the number of self-represented parties is not likely to decline, but rather to increase in the future. The consequence is that many litigants are left with two choices: they either lump their legal problem, or, in circumstances where their problem cannot be ignored, they go it alone. We also want to stress that what we do *not* find in our research is that SRLs turn to private arbitration to resolve their legal issues (as per page 2 of the Consultation Paper). Thus, meaningful procedural reform must recognize and respond to this reality; it cannot serve to re-trench SRLs' exclusion from the civil justice system. Efficiency for represented parties cannot be the sole focus of substantial reform. Instead, the animating question must be: what do we need to do differently to ensure that everyone has the ability to seek justice? In addressing this question, a consciously designed civil justice system should strive to be cost-efficient and timely, but it must also be a system that is accessible to and navigable by all. And while perfection should not be the enemy of the good, neither should efficiency be the enemy of meaningful participation.

Implications for Self-Represented Litigants

The following discussion will highlight certain of the components of the proposed reform from the perspective of self-represented litigants. We hope that the Civil Rules Review will take account of the impact of its proposed reforms on this growing population of people.

Shifting to Court-Driven Process

Broadly speaking, we believe that there are important aspects of the proposed reform that could serve to improve SRLs' ability to participate in the civil justice system, but these must take further account of the challenges and struggles that SRLs often face. For instance, the shift from a party-driven process to a court-driven process is beneficial to SRLs *so long as* the judicial officers

engaged in this process appreciate and understand the challenges that SRLs face in navigating the various procedural steps in litigation, and actively engage with the parties at points such as the Directions Conference.

More specifically, we believe that a commitment to move away from the use of formal motions to resolve interlocutory issues within litigation and toward a case conferencing system is a positive development for SRLs. To reinforce this commitment and ensure that SRLs can benefit from such a shift, we query whether, in line with delineating cases that require minimal intervention, the Rules also recognize that cases involving SRLs may require more court intervention to ensure that all parties are proceeding appropriately.

It is commonly understood that SRLs tend to know the least about their case, the applicable law, and procedure at the outset of their claim, effectively 'learning as they go' because they have to – this helps to explain the significant statistics surrounding successful summary judgement motions against SRLs (see NSRLP's Summary Judgment Research Report). Taking account of this fact, the shift to earlier and proactive disclosure processes (including the issuance of sworn statements) may be extremely challenging for SRLs. A direction that cases involving SRLs move to a Directions Conference where issues such as disclosure would be addressed early in the proceeding could counter this challenge. In fact, a greater reliance on trial management in a variety of forms would serve to ensure that, with proper guidance, SRLs are preparing their cases and able to move them toward resolution.

Streamlining Processes

With respect to the initiation of claim, we applaud the elimination of the action/application distinction, as well as the creation of an automated general claim that serves as an originating service for all claims. However, respecting the automated nature of this claim document, we raise questions about the guidance that will be included. From the SRL perspective, a claim template that presents a clear, plain language question and answer format that allows litigants to fill in prompted detail (see, for example, CLEO's Steps to Justice Guided Pathways) would better assist them in initiating viable claims. It is our position that spending the time and effort to develop this format would ultimately facilitate more efficient court processes that are not bogged down with disjointed and irrelevant pleadings, that are subsequently subject to time-consuming motion and amendment processes.

The relaxing of the service rules is also seen as a positive step, given the challenges that SRLs often face in understanding and navigating various rules. While the inclusion of service by email reflects an important modern approach, it is imperative that the Ministry remain cognizant of the impact of the digital divide. Our recent report on virtual hearings highlighted the continued digital divide that often cuts across socio-economic factors – SRL populations are particularly susceptible to this.

Elimination of Oral Discoveries

With respect to the elimination of oral discoveries, the NSRLP raises two points for consideration. First, the use of oral discovery (even if limited in scope and time) is consistent with a democratic process whereby parties are, in theory, able to seek and obtain relevant information about a dispute, often from parties much more well-resourced. This can happen despite power imbalances between the parties to the dispute, and the result can be that parties of lesser power are able to secure information from more powerful entities about potential wrongdoing. Second, while sworn statements and written interrogatories may work well for clients with experienced counsel who are able to assist in the preparation of answers, the same does not apply in the context of SRLs who lack legal experience, including legal drafting skills. Thus, it is likely that written interrogatories will primarily benefit represented parties, and potentially disadvantage unrepresented parties. We already see this with SRLs struggling to draft materials such as affidavits.

Duty to Cooperate

Regarding the duty to cooperate, NSRLP research, plus anecdotal and case-based evidence, suggests that SRLs often feel they are subject to very problematic conduct by opposing counsel. In fact, the Consultation Paper itself references *Girao v Cunningham*, in which case the plaintiff SRL was subject to manipulation by opposing counsel. In light of this all-too-common context, we question how the duty to cooperate will be operationalized when the system remains adversarial and the lawyer's primary duty is to act as a resolute advocate. We understand that mutual chronologies and Joint Books of Documents are steps that could serve to address the issue to some extent. However, we remain concerned about the engagement of unrepresented and represented parties outside of the court's view. In other words, what does a breach of the duty to cooperate look like? Practically speaking, we must ask what oversight there will be regarding the preparation of documents like the Joint Book of Documents, to ensure that all parties are able to contribute to the preparation of such materials. How is a breach of the 'duty to cooperate' to be identified and addressed, and how is this duty reconciled within the lawyer's ethical duties under the Rules of Professional Conduct?

Summary Proceedings

To the extent that there is an increase in the number of cases that are resolved via a presumptive summary proceeding, we wish to reiterate a concern about the impact of summary proceedings (proceedings that advance by way of written affidavit evidence) on cases involving SRLs. The research undertaken by the NSRLP suggests that approximately 95% of these are successful against SRLs when brought by represented parties. We believe this is often due to the timing of the

motion and the reliance on written materials. Thus, if summary proceedings are to be an integral part of civil justice reform (and proffered as a means of providing a more cost-efficient and timely form of adjudication), the process must account for the challenges faced by non-lawyers. And, more specifically, if such a process is replacing the summary judgement motion and the associated challenges involving judicial determinations of genuine issues for trial, will this consideration be assessed at the Directions Conference before a summary hearing takes place? Related to these types of proceedings are the motions to strike, where one of the options available to a judge would be to direct a trial of a specific issue. Again, in cases involving SRLs would that judge then be seized of the matter, and what are the scope of directions provided to an SRL regarding the trial of that issue?

Binding Judicial Dispute Resolution

The Consultation Paper references the use of binding judicial dispute resolution and suggests that the limited deployment of this approach has been successful (at page 62). While we have not reviewed any reports on this topic, we do believe that there are reasons why this approach would be positive vis-à-vis SRLs (assuming that certain safeguards/procedures are in place). For example, we believe that the assignment of one judicial officer who becomes familiar with the facts and issues of the SRL's case (as well as the parties involved) and is therefore able to assist the parties in potentially narrowing issues and provide direction regarding the trial of the matter, is a better mode of adjudication for SRLs.

As such, we support the expansion of binding judicial dispute resolution. However, we would strongly urge the Ministry to undertake user feedback on this approach to ensure it is effective and fair, and to determine how it might be improved upon. In fact, this latter point extends to much of the reform that is being proposed in the Consultation Paper, namely that research be undertaken to understand how this reform is faring, and how it might be tweaked or enhanced to further improve access to justice. As an example, one avenue for data collection is at the point of entry where parties complete a digital pre-populated claim form, and the progression of a case through the system could be traced and the parties surveyed. Civil justice system users could be encouraged to provide feedback at various stages of the litigation process, including the points at which forms are completed, and where Directions Conferences are undertaken, or matters resolved. Platforms such as the Civil Resolution Tribunal in British Columbia regularly take the opportunity to gather and assess user experiences, and this data serves to inform the operation and adjustment of the system going forward.

Expert Reports

With respect to the use of expert reports, again we note that the preparation, presentation, and certification of experts can be particularly challenging for SRLs (see recent decision of Justice

Agarwal in *Ozdemir v Economical Mutual Insurance Group*). Therefore, we are supportive of a process that streamlines and standardizes the form and preparation of expert reports. Moreover, the development of a presumption about the use of joint experts may also serve to alleviate some of the challenges SRLs confront when they face the need for an expert in litigation. As with many other proposed reforms, it is imperative that both the form of an expert report and the articulation of a presumption and process for retaining joint experts be clearly articulated for non-lawyers in plain and accessible language.

Appeal Routes

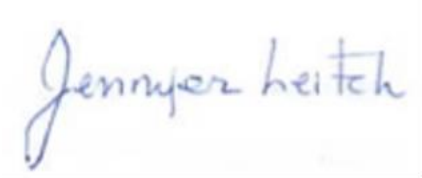
Finally, the elimination of the distinction between final and interlocutory motions for the purposes of appeal routes, and the replacement with an exhaustive list of the types of decisions that result in different appeal routes, would be helpful to SRLs. Given that lawyers (and occasionally members of the bench) are often mistaken about the final vs interlocutory distinction, it would not be surprising to learn that this presents a serious hurdle to SRLs, resulting in misfiled appeals and delays. Providing an exhaustive list that clearly outlines the decisions that are subject to different appeal routes will help SRLs more clearly understand when and where they might launch an appeal.

Final Remarks

While there are elements of the proposed reform not discussed in this response to the Consultation Paper, we believe the issues referenced here provide a clear and balanced outline of the types of challenges SRLs face in the civil justice system. It is also essential to look at the ways in which the proposed reform may serve to ameliorate or further impair SRLs' ability to participate in the civil justice system.

We are, of course, happy to further discuss these or other elements of the proposed framework at your convenience.

Regards,



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