

Civil Justice Reform Working Group: Reducing Cost, Complexity and Delay in Relation to Motor Vehicle Accident Disputes

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PURPOSE OF THIS DOCUMENT

This document captures the discussions of the Civil Justice Reform Working Group (CJRWG) in its efforts to develop recommendations for reducing the cost, complexity and delay through amendments to rules of process and procedure in motor vehicle accident disputes.

The CJRWG is a multi-stakeholder group created in fall 2017, following a meeting between the Attorney General and the Trial Lawyers Association of BC.

The CJRWG was asked to make recommendations to the Attorney General with the objectives of improving efficiency and reducing costs in motor vehicle accidents by July 2018.

The CJRWG's outputs reflect higher level recommendations or "signposts" to inform future work, analysis and consultation that could in turn, lead to potential rules amendments initiated by other committees or bodies.

THE CJRWG

Members of the CJRWG include participants from the Ministry of Attorney General, the Insurance Corporation of BC (ICBC), the Civil Resolution Tribunal (CRT), the Canadian Bar Association BC Branch, and senior litigators who act on behalf of claimants and defendants in motor vehicle litigation.

While the CJRWG recommended that one or more members of the judiciary participate in the Working Group, this recommendation was not fulfilled.

The CJRWG acts as a non-binding discussion group. Members were not considered to have authority to bind their organizations to any recommendations. In addition, contributions from individual members don't necessarily reflect the views of any of their respective organizations. Any suggestions in this document that individual proposals were advanced by specific individuals, or on behalf of specific organizations, are unintentional and should be disregarded.

CJRWG members volunteered their time to participate in high level, informal discussions. Participants contributed in the interest of the public.

SCOPE OF CJRWG

In the context of motor vehicle accident dispute resolution, the scope of the CJRWG can be described as follows:

In scope:

- Identifying amendments to court and tribunal rules.
- Recommending changes to existing court and tribunal processes and identifying new processes.
- Suggesting high level timelines for the changes to come into effect.

Out of scope:

- Analyzing and recommending options related to vehicle insurance product reform.
- Development of a new legislative scheme for resolving accident claims at the CRT.
- Implementation of any recommendations made by this group.

While the CJRWG members were drawn primarily from litigators familiar with the BC Supreme Court, there was also some expectation that the group's recommendations could inform work to create new processes for the motor vehicle accident dispute resolution added to the CRT jurisdiction beginning April 2019.

In addition, it was hoped that the group's recommendations might inform the creation or amendment of Regulations under the *Civil Resolution Tribunal Act* and the *Insurance (Vehicle) Act*.

CJRWG RECOMMENDATIONS

This section outlines the CJRWG's recommendations for reducing cost, complexity and delay in relation to motor vehicle litigation.

Due to time constraints, the CJRWG did not focus on developing Key Performance Indicators or perform detailed analyses of the evidence required to measure performance of any of the possible changes laid out below. In many cases, further consultation may be required and consideration must be given to appropriate implementation steps and timelines, should any of the options be pursued further.

1. Expert Evidence

Issue: Costs associated with obtaining and using expert evidence in the motor vehicle accident dispute resolution process.

Relevant Rules: Supreme Court Civil Rules – Part 11 – R 11-4 to 11-7.

The Problem: Fees paid to experts add to the cost of litigation. The costs are borne by the litigants.

The CJRWG seemed to share a relatively common understanding that expert evidence costs can be significant in motor vehicle litigation.

The CJRWG noted that many of the proposals discussed below are heavily dependent on context. Considering each of the following proposals in isolation from other system changes may limit their effectiveness.

The desire to promote early resolution by agreement was a consistent theme in CJRWG discussions about expert evidence. Although expert evidence is presumed to assist the court in an adjudicative process, group members felt that the inputs (e.g. cost) and outputs (clarity of the facts) should not be considered in a vacuum. Rather, expert evidence should be considered in the context of the litigation process overall, including incentives to settle at specific points in the process or other considerations at various stages well before an actual trial.

Moreover, there was general agreement among the group that a relatively small portion of motor vehicle litigation cases are resolved in a trial. One member suggested that, out of the approximately 15,000 motor vehicle claims commenced annually, the number of these cases that go through a trial annually in BC is approximately 200.

The CJRWG also generally agreed that limitations on experts, whether in the form of restrictions on the number of experts, or in the form of restrictions on the amount a party can spend or recover for experts, could result in restrictions on the ability of a party to make their case or determine a claim amount that maximizes that amount of recoverable damages.

The group generally agreed that consideration should be given to the issue of proportionality when it comes to the costs of experts, and that resources are finite. Enumerating the right balance between potential limits on experts and proportionality proved to be a challenge for CJRWG members.

Proposals and Considerations:

A. Limits on expert fees

A proposal was made to place limits on expert fees. It was suggested that this proposal could generate cost savings to plaintiffs and defendants.

In terms of the method, it was suggested that there could be a rule in the civil tariff specifying recoverable amounts for various types of reports (e.g. the amount for Report type X is \$Y). Another suggestion was made to make the amounts charged by experts reviewable by a Registrar. Another method identified was the designation of an hourly rate for each type of expert. In light of various problems around setting hard limits or specific numbers, the CJRWG seemed to favour a proportionality-based approach that set limits based on a percentage of the damages at issue. Some members of the group supported an approach that would involve some preset caps or limits, accompanied by the option to apply for an exemption from those limits should the need arise.

Insofar as these limits would represent caps, a suggestion was made to also include the means to agree on, or apply for, exemptions from the caps in certain circumstances.

However, some members suggested that the savings resulting from limits on expert fees could be small in the context of the overall costs of litigation. Some group members suggested that it is quite appropriate to spend varying amounts on expert fees depending on the needs of the case. Some members indicated that restrictions could be challenging in terms of meeting the requirement to effectively make out their clients' cases. It was also mentioned that some experts may be less willing to provide evidence if the pre-determined rates were too low. The group heard anecdotal evidence that other tribunals like the Workers' Compensation Appeal Tribunal has been able to engage experts despite limits on the amount payable or recoverable for their evidence on the basis of a BC Medical Association guide, with the option to compensate experts at a higher amount in extraordinary circumstances.

B. Abandon R 11-6 (4) and the necessity of written response reports

Another proposal was made to abandon the requirement under R 11-6 (4) and the necessity of written response reports. It was suggested that this proposal could result in a more streamlined process, and could generate savings of \$500 - \$1000 per case.

However, it was also noted that the savings may be small in the context of the overall cost of litigation. It was also suggested that this change could create advantages for plaintiff counsel and therefore cause higher payouts from ICBC. In addition, it was noted that precluding a rebuttal report from the defence could result in a lack of buy-in from ICBC.

C. Expansion of the existing limitations on direct evidence of an expert report

It was suggested that time spent clarifying the content of an expert's opinion is often not a good use of time and resources. Expanding limits on such inquiries could result in cost and time savings.

However, it was noted that this type of restriction might be ineffective if it is based on minor amendments to the rules. There were also concerns that such limitations might not always be strictly enforced by the courts. Generally, the group seemed to express a view that savings in this area would be relatively minor in the overall context of litigation.

There was general agreement that the existing rules on this subject need to be enforced more strictly.

D. Relaxation of the formal requirements for reports authored outside the context of litigation (e.g. MRIs or RCMP Accident Reconstruction Reports)

A proposal was made to relax the requirements for expert reports set out in R 11-6.

It was suggested that this change could encourage settlement before counsel commence formal legal proceedings. It was also noted that this change could produce minor savings by avoiding having to pay for new expert reports to replace improperly formatted reports.

However, it was also noted that the case law sets out a relatively clear purpose for the formal requirements in these reports. It was also noted that counsel are already trying to settle without formal legal proceedings. Accordingly, it was suggested that this change might not lead to much improvement. Moreover, a member of the group noted that this change would be unlikely to have much positive benefit because the current system incentivizes settlements close to scheduled trial date, meaning that formal reports will likely have already been prepared.

E. Adopt reforms in other Canadian jurisdictions by limiting the number of experts per issue in all types of matters

This proposal would set limits on the number of experts per issue.

It was suggested that this change would accord with the proportionality principle. It was also suggested that this change could reduce litigation costs in complex cases that would otherwise involve multiple experts. A view was expressed that this change could help level the playing field between parties and promote good judicial decision making by ensuring the court and litigants aren't overwhelmed by expert evidence beyond what is proportional to the complexity and significance of the matter. Finally, it was suggested that this change could encourage shorter trials and timely resolutions.

However, it was also noted that this change could increase pressure on the parties to select and arrange their expert evidence carefully. A group member also suggested that it can be very difficult to define the issues in a case. It was also suggested that this change might not lower overall costs if few cases have multiple experts per issue. The effectiveness of this change was also said to likely depend on also implementing reforms regarding the cost of expert reports.

F. Apply proportionality to experts so that the total number of experts permitted is linked to the quantum of damages (e.g. < \$50,000 in damages = 1 expert / \$50,001 - \$100,000 = 2 experts)

It was suggested that these limits would accord with the proportionality principle. It was also suggested that this approach could encourage shorter trials and more timely resolution.

However, it was also noted that this change could encourage plaintiffs to increase their estimate of damages to avoid limitations on the total number of experts, thereby increasing costs of settlement and litigation. It was suggested that parties often do not have the means to determine damage amounts in advance of using experts. It was also suggested that the effectiveness of this approach would likely depend on implementing reforms regarding the cost of expert reports. A general concern was raised to express the challenges around knowing what is appropriate in terms of individual claimants at various stages in the litigation.

G. Limit disbursements to a percentage of the settlement value (e.g. 5% of settlement for all types of claims)

It was suggested that this change would accord with the proportionality principle and promote early resolution. In terms of incentives, this change could be used to deter counsel who might otherwise retain broad numbers of experts at an early stage of the litigation.

However it was also noted that this approach could reduce the amount a plaintiff or plaintiff's counsel would receive from any settlement. It was also suggested that the effectiveness of this change would likely depend on also implementing reforms regarding the number of expert witnesses.

H. Set the permissible costs of medical reports as a schedule to the court / CRT rules

It was suggested that this change could provide certainty for both parties on the amount payable for medical reports. It was further suggested that this approach would minimize the need for taxation.

However, it was noted that without other changes to the information-gathering system, this approach may limit the number of physicians who are willing to provide expert medical reports. It was also suggested that a lack of discretion or flexibility may lead to suboptimal outcomes in certain cases.

- I. Proposal for CRT approach on experts: 1) the CRT selects joint experts, one per specialty; 2) the CRT requires the expert to fill out standardized forms created by the CRT to streamline the process; 3) in most cases, the expert will not be called to give testimony; 4) the CRT keeps an internal roster of experts and will assign experts sequentially from a list; and 5) the parties may request to rebut a specific issue by retaining their own expert, whose fees the CRT will pay if the adjudicator determines the opinion was helpful.

It was suggested that this approach could generate substantial savings through mandatory joint experts over independently-retained experts. It was also noted that a randomized selection process and payment through the CRT could reduce risks of bias. It was suggested that the roster system would allow for incentives to experts to offer greater, unbiased assistance in resolving the issues in dispute. It was also suggested that a streamlined information-gathering process would mean less time required completing forms, and in turn, less expense. The group heard a suggestion that eliminating the current approach to expert oral testimony could increase the number of doctors willing to serve as experts. Finally, it was suggested that the possibility of a second opinion would safeguard the injured person's ability to put all relevant information before a decision-maker.

However, it was noted that this approach would reduce the role for counsel in the vetting of experts.

CJRWG Recommendations to Address the Problem:

Of the many proposals raised and considered by the CJRWG, Option G – Limit Disbursements to a percentage of the settlement value seemed to attract some of the strongest support. Group members felt that the principle was generally appropriate.

However, the group was unable to reach consensus on a specific amount for the percentage. Several proposals were made, including: 1) setting a specific percentage regardless of amount of damages; 2) setting a tiered amount (e.g. X% on the first \$200,000, with a different percentage for anything above that amount of damages).

The CJRWG indicated that a deeper analysis of this issue could include a review of ICBC data on the amounts paid for experts on certain settlement amounts, or a review of a large number of bills of costs to determine the amounts claimed. It was also suggested that the research conducted by Christopher Hope and Kathryn Sainty QC for their book *The Assessment of Costs and Disbursements in Motor Vehicle Injury Litigation* would be helpful.

The proposal to impose flat-rate limits on expert fees, as suggested by Option A – Limits on expert fees, did not attract wide support among the group. Some members appeared to feel strongly that the approach would be too arbitrary, and would generate modest savings at the expense of limiting the ability of plaintiffs and their counsel to make out their cases.

Some members considered some of the group's proposals to be relatively modest in terms of the overall savings in the context of litigation.

The CJRWG noted many times that the failure to consider changes relating to experts in context, as opposed to considering them in isolation, could have unintended consequences in the litigation process.

Based on the CJRWG discussions, it would seem that critical success factors for any changes relating to expert evidence would need to include (among other things):

- Amendments to the BC Supreme Court Rules
- The active enforcement of any relevant rules by the court
- The means to apply some form of limit to expert costs, with a mechanism to “opt out” or exempt certain cases in appropriate circumstances

2. Pre-Trial Examination of Witnesses

Issue: Examination of non-party witnesses with leave of the court before trial when you can't get the witness's information any other way.

Relevant Rules: Supreme Court Civil Rules 7-5 and 8-1

The Problem: While this process to do pre-trial examinations of experts could generate cost savings, it is not used as much as it could be.

The group only discussed anecdotal evidence in relation to this problem.

Proposal and Considerations:

Use pre-trial examination to examine experts

It was suggested that the pre-trial examination process could be used more frequently to examine experts in order to save costs and avoid the logistical challenges of getting these witnesses to trial. It was also suggested that this process could generate benefits in relation to non-expert witnesses by avoiding having witnesses waiting around for long periods of time for trial. A group member suggested an increase in the use of pre-trial process could lead to more settlements by helping to reveal what witnesses will say in advance of trial. A suggestion was also made that videos of witnesses recorded before trial could produce practical benefits because they could be played and replayed any time. It was also noted that face-to-face time with witnesses could be much more efficient than exchanging questions and answers in writing.

However, it was also suggested that increased pre-trial examination of witnesses could result in more time spent on cases that would have settled anyway. It was also acknowledged that a party wanting to use this process has to invest the time and cost of making an application to the court unless there is agreement among the parties. A group member suggested that it can be difficult to gain access to witnesses. It was also noted that counsel generally don't facilitate pre-trial examinations of witnesses without a court order. The group also heard a view that the costs of pre-trial examinations can outweigh the benefits in some cases. It was also suggested that counsel are very busy on both sides and may not initiate these processes soon enough in advance of trial.

CJRWG Recommendation:

The group did not identify any specific recommendations on this issue. While the group was generally open to increasing the use of the pre-trial process as a means to save time and money, there was no clear consensus on what specific changes should take place.

3. Encouraging Early Settlement

Issue: Procedural requirements to reduce cost and delay by encouraging early settlement of cases.

Relevant Rules: Supreme Court Civil Rules – 9-1.

The Problem: Significant costs can be incurred in preparation for trial. Incentives to settle could encourage earlier resolution of disputes and reduce cost and delay. The group expressed a view that formal offers to settle should not encourage settlement very late in the process (e.g. not at “the 11th hour”). The group acknowledged that, ideally, settlements should occur, and offers to settle should be made, well in advance of trial.

A view was expressed that one of the problems in this area is not that we are having too many trials, but that settlements are occurring too late in the litigation process.

Proposals and Considerations:

A. Time parameters for formal offers to settle

The CJRWG generally supported the view that formal offers to settle should ideally be made well in advance of trial to avoid incurring costs that arise in the weeks before trial. One suggestion was made that formal offers should be made at least 28 days before trial and left open for a minimum of 2 weeks. Another suggestion was made that the offers should be made more than 4 weeks before trial. The CJRWG noted that courts tend not to enforce consequences for refusal to accept formal offers made within 7 days of trial.

B. Pre-determined costs consequences for failing to beat an offer to settle

It was suggested that the rules could include pre-determined consequences for failing to achieve a better outcome than one offered in a formal settlement offer. For example, there could be a penalty of \$1,650 per day of trial (the equivalent of the tariff units for preparation and attendance for each day of trial).

Some members of the CJRWG expressed views that the cost consequences in this area are skewed toward the benefit of defendants in motor vehicle injury litigation. This view also held that the

consequences for plaintiffs could bring unequally harsh results for plaintiffs. A view was also expressed that the rules could contain more severe penalties for defendants.

Some members suggested that it would be unhelpful to return to the approach in place prior to the 2010 Supreme Court Rules Revisions which afforded little or no discretion to the court.

The CJRWG engaged in a constructive discussion about the extent to which cost consequences influenced the behavior of plaintiffs and their counsel. There were examples given suggesting that cost consequences do indeed influence the decision of plaintiffs and their legal representatives. However, those influences were said to vary considerably depending on the amount in dispute. For example, costs consequences on a \$50,000 claim could be considered to be quite harsh and would indeed guide the decisions around accepting offers to settle. On the other hand, the costs consequences on a \$1.8 million dollar claim would be less severe in relative terms and have a significantly diminished influence on behavior.

The group also generally agreed that litigants may have the opportunity to reduce potential costs consequences by purchasing “after the event insurance.” No suggestions were made to address this form of indemnity in rules of procedure.

C. Sliding scale of cost awards for rejected settlement offer

It was suggested that the rules include a sliding scale of costs that would be awarded based on reasonableness and timing of any settlement offers that are rejected.

D. Settlement history review (CRT)

A suggestion was made that parties appearing before the CRT could request a formal review of the settlement history of the dispute. In such cases, a CRT decision maker could review the settlement history leading up to the tribunal decision process or to an accepted final settlement offer to determine whether a party had been uncooperative. It was suggested that the CRT decision maker could consider factors such as reasonableness and timing of each settlement offer and whether an offer was accepted or rejected. It was also suggested that a CRT decision maker who found a party to have rejected a reasonable offer could then modify the settlement amount or vary a cost award.

E. Supported settlement offer requirements prior to starting an action

The CJRWG noted that there is currently no requirement under the rules for parties to take steps to resolve disputes by agreement prior to commencing an action. It was noted that more than 94% of all ICBC personal injury files in the BC Supreme Court have no demands on file for settlement by the plaintiff, while more than 40% of them have offers of settlement on behalf of ICBC as the defendant.

The group heard an opinion that there is no reasonable basis why litigation costs and drains on court and judicial resources should occur prior to any effort by a plaintiff (or their counsel) to articulate and resolve a claim for personal injury, at least in situations where the injury has substantially resolved.

It was suggested that even in cases that are unable to resolve without litigation, a further benefit of this type of reform is that it could allow the parties to better understand the claim at issue early in the

litigation process. It was also suggested that earlier and better disclosure of materials and clear articulation of positions should reduce the period of time that litigated disputes remain unresolved.

The CJRWG acknowledged that pre-action protocols exist in some jurisdictions. For example, the United Kingdom relies on pre-action protocols for personal injury claims which detail required conduct prior to the commencement of litigation, including:

- Claimants are required to provide a Letter of Claim before starting an action which includes an indication of the nature of any injuries suffered, and accounts of the way in which these impact the claimant's day-to-day functioning and prognosis. Any financial loss incurred by the claimant must also be outlined with an indication of the heads of damage to be claimed and the amount of that loss, unless this is impracticable;
- The defendant is expected to provide a written response to the claimant. If a defendant denies liability and/or causation, their version of events should be supplied. The defendant should also enclose with the response, documents in their possession which are material to the issues between the parties, and which would likely be ordered to be disclosed by the court;
- Where a defendant admits liability which has caused some damage, before proceedings are issued, the claimant should send to that defendant any medical reports obtained through this protocol along with a schedule of any past and future expenses and losses which are expected to be claimed, including an identification of losses that are ongoing; and
- The claimant should delay starting an action for 21 days from disclosure of these materials to see if the action is capable of settlement.

The CJRWG also noted that the Federal Court of Australia (with similar requirements in Victoria, Australia) requires parties to file a statement indicating that they have taken genuine steps to resolve a dispute before commencing litigation. These steps include: providing relevant information and documents to the other party to enable them to understand the issues involved and how the dispute might be resolved; and negotiation attempts to resolve some or all the issues in dispute before litigation commences.

The CJRWG heard suggestions that a regime requiring a supported settlement offer as a condition for starting an action would only be appropriate for lower value claims. This view was based on assertions that it takes considerable effort to properly quantify the value of a claim, and that it is often necessary to commence litigation in order to acquire the necessary information from the other side. The group heard an opinion that in some cases, it would take years to get damages sorted out on a complex claim, and years to get a trial date. The group did not hear any suggestions as to an appropriate threshold for any requirement of this type. It was suggested by some that further analysis on this issue could be deferred until we learn more about how the CRT process works for lower value motor vehicle litigation claims.

F. Supported settlement offer as a condition of cost entitlement

The CJRWG acknowledged that effective rules requiring the payment of costs and disbursements of a successful party in litigation will motivate parties towards early and fair settlement. A view was expressed that the current rules of court may fail to achieve this objective for motor vehicle accident litigation.

The CJRWG noted that in 2015, ICBC made payment towards the costs and/or disbursements incurred by claimants in approximately 99% of BC Supreme Court actions that resolved for an amount between \$25,000 and \$100,000. It was suggested that a cost structure of this nature does not motivate injured parties to provide early disclosure of information or make and/or accept reasonable settlement offers as early as possible in the litigation. It was also suggested that the current costs structure also fails to motivate defendants if there is little likelihood that ICBC insured defendants can avoid cost consequences by making early and fair settlement proposals.

It was suggested that parties might be motivated to seek an early resolution by starting a claimant's entitlement to costs at the point where there has been a fair articulation of their claim with supporting evidence and an offer of settlement consistent with those facts. It was suggested that these offers could include:

- Particularization of the injuries sustained and the financial costs and expenses arising from the injury;
- Documentation supporting the losses, expenses and nature of the injuries described; and
- An offer of settlement for the claim.

CJRWG Recommendations:

The CJRWG did not appear to find many of the proposals in this area to be particularly objectionable although no clear consensus emerged on any particular recommendation.

Critical Success Factors:

The CJRWG did not identify critical success factors or key performance indicators.

4. Part 7 Filing Fees

Issue: Costs resulting from filing fees for claims over benefits under Part 7 of the *Insurance (Vehicle) Act*.

Relevant Rules: N/A

The Problem: Parties wanting to dispute entitlement to Part 7 benefits have to pay to file a Notice of Civil Claim for something that is basically a placeholder or something commenced for what some members of the CJRWG referred to as a "safety net".

Proposal and Considerations:

Eliminate the need for filing a Notice of Civil Claim with the court for Part 7 benefits

The CJRWG acknowledged that this issue arguably falls outside the scope of its work, since the proposal refers to amending the Insurance (Vehicle) Regulation rather than to rules of procedure.

It was suggested that the Part 7 Notice of Civil Claim is really just a placeholder that results in cost and work for all parties as well as for registry staff. A proposal was made to amend s. 103 of the Insurance (Vehicle) Regulation to remove the notice requirement to ICBC from its current 2 year timeline. In addition, it was proposed that a statutory form could be used to send notice directly to ICBC to maintain the claimant's right to proceed with a Part 7 claim. It was suggested that this new form of notice would cover off the necessary aspects of the limitation period.

It was suggested that a potential drawback to this approach would be the reduction in fees for government. However, the group did hear a suggestion that the fees associated with court process and procedure often fail to cover the costs of staff time to complete the necessary work.

CJRWG Recommendation:

The CJRWG appeared to reach a consensus around the benefits of eliminating the need to file a Notice of Civil Claim with the court in relation to Part 7 benefits. It was suggested that an alternative form of notice could be used in relation to claims or to preserving the right to claims in the context of limitation periods.

5. Limitation on Examinations for Discovery

Issue: Use of the discovery process to acquire information about a case.

Relevant Rules: Supreme Court Civil Rule 7-2

The Problem: The costs resulting from discovery increase with the duration of the process.

Proposal and Considerations:

The CJRWG had a very brief discussion on this issue. Members acknowledged the current 7-hour limit and noted that this full amount of time is rarely exceeded. Anecdotally, the group heard that plaintiff counsel often take less than 1 hour in an examination for discovery and defendant counsel often take 2-4 hours.

The group seemed to generally agree that shortening the current time limit of 7 hours would be unlikely to save money. It was suggested that a shorter limit could prompt more chambers applications seeking an extension of time and ultimately increase the costs of the litigation process.

6. Controlling the Court Process

Issue: Intervention by members of the Supreme Court Judiciary in a courtroom setting.

Relevant Rules: N/A

The Problem: Counsel may make unnecessarily lengthy submissions or examinations in the courtroom.

Proposals and Considerations:

The CJRWG considered the possibility that judges could play an expanded role and intervene when counsel are making lengthy submissions or examining witnesses to avoid unnecessary excess.

As a starting point, the group acknowledged that judges have discretion at common law to intervene. However, it was suggested that rule amendments could provide judges with more explicit discretionary control in limiting submissions or examinations that would, in turn, help promote efficiency.

However, the group was very sensitive to the fact that there can often be good reasons for the reluctance of judges to intervene in these cases. In addition, it was suggested that drafting blanket rules to address this matter could be quite difficult.

There was general agreement among CJRWG members that further discussion or analysis on this issue should be continued only in more direct collaboration with the court.

CIVIL TARIFF CONSULTATION PAPER

Issue: In late April-early May 2018, the CJRWG was asked to review and comment on the “Consultation Paper – Cost Awards: Supreme Court Civil Rules: Fast Track Litigation Rule 15-1 and Appendix B: Party and Party Costs” (Consultation Paper).

The Problem: The Consultation Paper states its purpose is to present and request feedback on suggested changes to the costs of fast track action and to the civil tariff, Supreme Court Civil Rules Appendix B: Party and Party Costs. The paper was drafted to solicit comments from the bar, litigants, and members of the public about the approach to reform cost awards and the proposed civil tariff. Feedback collected through the consultation is to be received by the AG Supreme Court Rules Committee in preparation for formulating recommendations to the Attorney General.

Proposals and Considerations:

Group members supported, in principle, proposed changes to the tariff that would encourage earlier resolution of cases. However, it was suggested that the proposed changes were unlikely to achieve this goal, which could bring significant financial impacts to larger, higher volume, institutional litigants. It was also suggested that increases in costs earlier in the litigation process could actually make early settlement less likely to occur. Insofar as the tariff rates are said to support access to justice, the group heard a suggestion that that access issues for motor vehicle personal injury cases is different from many other types of civil litigation.

It was also suggested that increasing rates at early stages of litigation could drive up costs without creating significant benefits, particularly for smaller cases, and cases that do not involve considerable complexity.

Some group members noted that BC’s cost scheme compensates at considerably lower levels than in other jurisdictions.

It was suggested that the costs scheme should deal with motor vehicle litigation cases separately. However, there were also opposing views expressed on this point.

CJRWG Recommendation:

The group generally agreed that the steps to amend the tariff should be deferred until after the motor vehicle litigation changes planned for April 2019 have been implemented. Views were expressed that the proposed changes were potentially fundamental and that consideration of any potential tariff amendments should wait until the effects of the motor vehicle litigation changes are known. Suggestions were made that any further analysis should occur once the currently planned motor vehicle changes (many targeted for April 1, 2019) have been in effect for a minimum of one year.

POTENTIAL FUTURE WORK

The CJRWG, or a slightly different version of this group, may be available for future work in relation to the group's stated goals.

If recommendations are chosen to be moved forward, consideration should be given to strengthening them through the analysis of data from the courts, ICBC and other sources in an effort to identify the frequency and scale of the problems considered by the group.

The CJRWG did hear suggestions that the quality of its deliberations and recommendations would also be strengthened through the direct participation from members of the judiciary.

CONCLUSION AND ACKNOWLEDGEMENTS

The CJRWG members remain dedicated to finding ways to reduce cost complexity and delay in motor vehicle litigation. While the various members of the group often expressed opposing views on the actual approaches or specific details of generally-well supported approaches, the members nevertheless share a strong commitment to improving the functioning of the BC justice system.

The CJRWG wishes to thank the Attorney General for this opportunity to share its views.