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Civil rules reform based on blind data of personal injury litigation

By **Tom Connolly**

Law360 Canada (May 15, 2025, 2:31 PM EDT) -- In September 2023, Attorney General Doug Downey created the Civil Rules Review (CRR) with a mandate to identify issues and develop proposals for reforming the *Rules of Civil Procedure* to make civil court proceedings more efficient, affordable and accessible. The CRR co-chairs are Justice Cary Boswell of the Ontario Superior Court of Justice and Allison Speigel, a commercial lawyer in private practice.

The CRR attempted to identify the scope of potential reforms without the benefit of effective statistical data or management information systems about the existing inventory of the civil caseload. In the CRR's Phase 2 Consultation Paper, released April 1, it proposed that a "one size fits all" up-front evidence model be implemented.



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Justice Boswell stated, at a webinar on April 28, that the Attorney General has not invested in the creation of effective statistical data and "the data was not tracked very well. The case management system called FRANK is rubbish; it is terrible. Courts have not been in the business of keeping careful data." Justice Boswell readily acknowledged that "the CRR is not a data-driven process." He further stated, "We do not have the statistics, and the amount of time needed to do studies." Choosing to blindly proceed in the absence of the best data that could have been obtained in advance of making recommendations, the CRR has made an unsupported assumption that under its recommended new system, trials will occur within two years of a claim's commencement.



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As a result of the lack of fine-grained statistical data, the CRR did not have information on the nature of cases actually tried, and the number of settlements achieved and when settlements take place. No examination of actual court files or interviews of counsel building actual personal injury cases was obtained. No analysis of the economic factors promoting or hindering the settlement of disputes was undertaken, resulting in a lack of understanding of the settlement process in personal injury

litigation.

The current size and architecture of the system of civil trials is quite dependent on an extremely high settlement rate. Any change of that settlement rate would have profound impact on the functioning of the courts.

Without data behind it, the recommendation of the CRR that the elimination of oral discovery will reduce delay and save costs is a dangerous assumption that appears to be based not on data, but on rules that may have been implemented in foreign jurisdictions where the litigation culture, the insurance regimes, the role of experts and the administration apparatus of the courts are entirely different from that which exists in Ontario.

If the elimination of discovery has the effect of decreasing settlement rates by only one or two per cent, the impact on the number of trials occurring could increase by one-third to two-thirds, if the current settlement rate is 98 per cent.

The absence of actual good statistical data or management information systems within the existing civil courts stands as a virtual insurmountable hurdle to a rational analysis of the CRR's proposals for reform. The result is that the CRR front-end model is fundamentally flawed, unworkable in Ontario and will not increase settlement rates nor reduce costs to the average citizen. The stated goal of obtaining a trial date within two years of commencement of a claim is illusory and unsupported by good data and an informed understanding of the many nuances of achieving settlement in personal injury litigation.

Tom Connolly is a founding partner of the Ottawa law firm of Connolly Obagi LLP. Tom was called to the bar in 1975 and practises serious personal injury and medical malpractice litigation. He is a past president of the Ontario Trial Lawyers Association, a member of the American Association for Justice and The Advocates' Society. Tom is a frequent contributor to various continuing legal education programs in civil litigation and has published numerous articles and papers on personal injury litigation.

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