May 3, 2024

VIA EMAIL

The Honourable Justice Darla A. Wilson
Chair, Refusals Motions Subcommittee
c/o Laura Craig, Counsel, Office of the Chief Justice
Superior Court of Justice
361 University Avenue
Toronto, Ontario M5G 1T3

Dear Justice Wilson:

RE: Proposed Amendments to Rule 34.12 and Rule 30.03 of the Rules of Civil Procedure

Thank you for seeking The Advocates' Society's input on the proposed amendments to Rule 34.12 and Rule 30.03 of Ontario's *Rules of Civil Procedure* (the "Rules").

As you know, The Advocates' Society is a not-for-profit organization representing approximately 5,500 diverse lawyers and students across the country—unified in their calling as advocates. As the leading national association of litigation counsel in Canada, The Advocates' Society and its members are dedicated to promoting a fair and accessible system of justice, excellence in advocacy, and a strong, independent, and courageous bar. A core part of our mission is to provide policymakers with the views of legal advocates on matters that affect access to justice, the administration of justice, the independence of the bar and the judiciary, the practice of law by advocates, and equity, diversity, inclusion, and reconciliation with Indigenous peoples in the justice system and legal profession.

The Advocates' Society's submissions in response to the questions set out in your letter dated March 14, 2024 are as follows:

Question 1: Do you agree that the ability to bring a refusals motion should be limited to parties that have met the mandatory document production requirements under the Rules?

Yes. The Advocates' Society agrees with the addition of the proposed Rule 34.12(4) to the Rules.

Question 2: Is it appropriate to discourage inappropriate refusals motions with cost consequences, such as those in subrule (5)?

No. The Advocates' Society does not agree with the addition of the proposed Rule 34.12(5) to the Rules. We recognize that there is a problem with parties refusing questions that should be answered, but we also believe that too often, parties bring motions to compel answers to refusals when:

i) the refusals are not material to the case; or
ii) succeeding on the motion will not significantly help the case progress to resolution or trial.

Creating a presumption that the Court will award costs for refusals motions on a substantial indemnity basis may have the unintended consequence of encouraging parties to bring more of these motions, as parties may anticipate recovering more of their costs of doing so. Costs for refusals motions should remain in the Court's discretion exercised in accordance with the general factors listed in Rule 57.

At the same time, we take this opportunity to highlight that The Advocates' Society wrote to the Civil Rules Committee on April 3, 2024, to recommend amendments to the Rules to diminish delay in the civil courts. One of our recommendations in that letter was to amend Rule 34.12 to clarify that parties do not need to bring a motion to compel an answer to an improperly refused discovery question in order to ask the Court to draw an adverse inference from the improper refusal at trial. We anticipate that clarification will help avoid unnecessary refusals motions. We append our April 3, 2024 letter hereto for your consideration in the context of this consultation on refusals motions (please see Recommendation #2 on page 3 of the letter).

Question 3: Do you agree with imposing mandatory documentary disclosures in personal injury cases?

Yes, The Advocates' Society supports adding to the Rules a list of documents that must be disclosed in personal injury cases. This mandatory list should still be subject to the qualification that a party need only produce records in its possession, power or control. In some cases, it will not be possible for the plaintiff to obtain documents included on the list. For example, some hospitals have been subject to cyberattacks that have wiped out entire portions of their records; those documents are no longer available at all, and the plaintiff should not be obligated to produce records that do not exist.

The Advocates' Society suggests that in an action involving a claim for personal injury, the lawyer's certificate required by Rule 30.03(4) also include a requirement for the lawyer to certify that there has been compliance with Rule 30.03(2.1) or (2.2), as applicable. This additional requirement would avoid arguments about whether a party can properly bring a refusals motion pursuant to the proposed Rule 34.12(4).

The Advocates' Society has some additional concerns with some of the specifics that are being proposed, on which we elaborate in response to the questions below.

Question 4: Do you have any concerns with the proposed mandatory disclosures under new subrules (2.1) and (2.2)?

Yes, The Advocates' Society has some concerns with the proposed mandatory disclosures.

First, while the documents listed in subrules (2.1) and (2.2) are likely to exist in every personal injury case arising from a motor vehicle accident, the entire list may not be applicable to other types of personal injury cases like medical malpractice or *Occupier's Liability Act* cases (e.g., the police records referenced in (2.1)(d)-(e) and (2.2)(c)-(d), or the file from the statutory accident benefit provider referenced in (2.1)(f), would likely not exist in medical malpractice cases). The Advocates' Society suggests that the list be reframed to be "as applicable" or to apply only to personal injury matters arising from motor vehicle accidents. In addition, the Subcommittee may wish to consider whether a different rule mandating

disclosures should apply to civil claims based on sexual assault, which may involve contextual factors and sensitivities that are not present in other types of personal injury matters.

Second, items (2.2)(b) (party or witness statements) and (2.2)(e) (surveillance evidence) are generally considered to be privileged by the defendant in a personal injury action. Instead of requiring production of these documents to the plaintiff, The Advocates' Society recommends that defendants be required to list these items in Schedule B to their affidavits of documents.

An additional issue that sometimes leads to disputes is which party is responsible for paying the costs of obtaining the types of records listed in proposed subrules (2.1) and (2.2). The Advocates' Society suggests that the Rules should make clear that the plaintiff and defendant are each responsible for the costs of the documents they are required by Rules 30.03(2.1) and (2.2) to disclose, to avoid any unnecessary litigation over this issue. This rule should not extend to determining which party pays for ongoing or updated production requests that follow during the life of the file.

Question 5: Do you have any concerns with the timing of disclosures?

Yes. The Advocates' Society is of the view that the Rules should require the plaintiff to make best efforts to obtain and produce the proposed mandatory disclosure within six months of the service of the statement of claim, not the issuance of the statement of claim.

Since the Rules currently allow plaintiffs six months from the time of issuance to serve their claims, if the time for service of the affidavit of documents is six months, it should run from service of the claim, not issuance of the claim.

In addition, the Rule should require "best efforts" because in some cases, it will not be possible to obtain the records within the six-month time frame. For example, some custodians of relevant records (e.g., the Ontario Health Insurance Plan and some hospitals) are severely backlogged in responding to requests for health records and may not produce records within six months of a request. While the plaintiff can be fairly required by the Rules to make their best efforts to obtain and produce the documents within a six-month timeframe, it could be unfair in some cases to obligate the plaintiff to produce the documents within that timeframe. In addition, this qualification will allow a party who has made their best efforts to obtain and produce the mandatory disclosures to act on another party's refusal in a timely manner; if a party needs to wait for a third party to produce documents (which may include needing to obtain a court order to compel production) in order to bring a motion to compel the answer to a refused question, this could occasion delay in a case that the party is attempting to advance expeditiously.

Question 6: Are there additional disclosures that you would recommend? For example, should disclosure of social media be required or an obligation to maintain social media (i.e. not deleting it)?

Yes, The Advocates' Society recommends adding the following items to the list of mandatory disclosure in subrule (2.1):

- if loss of income or loss of earning capacity is being claimed, any employment file of the plaintiff for three years prior to the incident giving rise to the claim; and
- if loss of income or loss of earning capacity is being claimed, any extant resume or curriculum vitae of the plaintiff.

The Advocates' Society does not agree with adding social media to the list in subrule (2.1), or requiring its maintenance – social media is not relevant in every personal injury case. Disclosure of relevant social media can be left to the parties' general obligation to preserve and disclose documents that are relevant to the case (see our response to Question 7 below).

Question 7: The list of required disclosures is not meant to be an exhaustive list. Rather, at the very least, the listed items must be disclosed in any case involving personal injury. Do you agree with this approach?

Yes, subject to the caveat that not all of the documents listed will be applicable to every personal injury case (see our response to Question 4 above). The Rules cannot envision every eventuality. There will often be cases concerning personal injuries in which additional documents will be relevant. The general obligation in Rule 30.03(1) for parties to disclose "all documents relevant to any matter in issue in the action" ought to continue to apply to parties to personal injury actions, even if mandatory disclosure rules exist.

Question 8: Additional amendments would also indicate that if there have been redactions to a document, the fact of a redaction must be made clear. As well, a procedure for reviewing redactions would be introduced. Namely, if the opposing party questions the legitimacy of a redaction, the unredacted version of the document would be provided to the Court for determination regarding whether the redacted information is relevant to the case and should be disclosed.

The Advocates' Society supports these amendments, and encourages the Subcommittee to consider putting additional parameters around redactions so that information that is not relevant to the litigation may be redacted. Currently, the case law suggests that the entirety of a document must be produced even if only (small) parts of it are relevant, which may result in unnecessarily voluminous productions.

Question 9: The amendments would also provide that only relevant excerpts of the transcript of evidence should be included in the party's compendium (i.e. the full transcript should not be provided). Do you have concerns with this approach?

We agree with this approach, which will reduce the volume of materials filed for refusals motions and preserve the deemed undertaking with respect to those parts of the transcript that are not necessary for the motion.

Question 10: Should the rules specify that, where the plaintiff intends to argue threshold, when setting the matter down for trial the plaintiff must confirm that they have served a threshold report on the defendant?

This question will be answered in conjunction with Question 11.

Question 11: In conjunction with question 10, if the defendant is served with the plaintiff's threshold report and intends to respond, should the rules specify a timeline for the defendant's response (e.g. within six months of receiving the plaintiff's threshold report)?

The Advocates' Society does not agree with adding obligations to the Rules that are specific to threshold reports. Threshold reports are simply a type of expert report and should be subject to the general rules applicable to expert reports under Rule 53.03.

We invite you to contact The Advocates' Society if you have any questions about our recommendations.

Yours sincerely,

Dominique T. Hussey
President

Attachments:

1. The Advocates' Society Letter to the Civil Rules Committee re: Proposed Amendments to the Rules of Civil Procedure to Diminish Delay (April 3, 2024)

CC: Vicki White, Chief Executive Officer, The Advocates' Society

The Advocates Society's Task Force on Rule 34.12 and 30.03

Lisa D. Belcourt, *Ferguson Deacon Taws LLP* (Midland)
Hilary Book, *Book Erskine LLP* (Toronto, chair)
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Brian G. Sunohara, *Rogers Partners LLP* (Toronto)

April 3, 2024

VIA EMAIL

The Honourable Justice Peter D. Lauwers
Chair of the Ontario Civil Rules Committee
c/o Shannon Chace, Secretary of the Civil Rules Committee
Osgoode Hall
130 Queen Street West
Toronto, Ontario M5H 2N5

Dear Justice Lauwers:

RE: Proposed Amendments to the *Rules of Civil Procedure* to Diminish Delay

The Advocates' Society writes in response to the August 2, 2023 letter from Chief Justice Michael Tulloch and the former Chair of the Civil Rules Committee, Justice Kathryn Feldman, requesting the Society's views on the most pressing amendments to make to the *Rules of Civil Procedure* ("Rules") to reduce delay in civil proceedings and promote timely access to justice. (The August 2, 2023, letter is attached hereto for your reference.)

We are aware that the Civil Rules Review Working Group is currently undertaking a comprehensive review of the Rules. As such, our suggestions to the Civil Rules Committee focus on discrete, high-impact changes that we believe can be readily implemented within the current structure of the Rules and court processes.

Recommendation #1: Expand the Use of Simplified Procedure in Rule 76

Proposed Amendments:

> **Availability of Simplified Procedure**
> ***When Mandatory***
> **76.02** (1) The procedure set out in this Rule shall be used in an action if the following conditions are satisfied:
> […]
> 2. The total of the following amounts is ~~$200,000~~ $400,000[1] or less exclusive of interest and costs:
> i. The amount of money claimed, if any.
> ii. The fair market value of any real property and of any personal property, as at the date the action is commenced.
>
> ~~**Limits on Costs and Disbursements Awards**~~
> ~~***Limits***~~
> ~~**76.12.1** (1) Except as provided for under rule 76.13 or an Act, no party to an action under this Rule may recover costs exceeding $50,000 or disbursements exceeding $25,000, exclusive of harmonized sales tax (HST).~~

[1] This change will need to be replicated throughout Rule 76 in the other places the $200,000 figure appears.

Rationale for the Amendments:

Rule 76's simplified procedure reduces the court time required for trials and motions, thereby reducing delay, but it is presently underutilized. The Advocates' Society believes the proposed amendments will encourage more parties to make use of the simplified procedure in appropriate cases.

Simplified Procedure Reduces Delay

It has become common in many regions of Ontario for trials not to be reached because of a lack of available judges and court time. Especially in regions that use "rolling lists" rather than fixed trial dates, adjournments of initial or subsequently scheduled trial dates are routine. The prospect that a trial is unlikely to proceed, even with an imminent date, discourages settlement, resulting in a higher volume of cases remaining in the court system.

The simplified procedure set out in Rule 76 substantially reduces the use of court time for trials by requiring portions of the evidence to be adduced in writing and limiting the length of the trial to five days. Other features of Rule 76 (e.g., the lack of availability of examinations under rules 39.02 and 39.03) streamline motions in simplified procedure cases, meaning that less court time is required to address these interlocutory steps. Shorter trials and motions permit more trials and motions to be heard, using less court time overall.

Simplified Procedure Is Underutilized

Rule 76 is not currently being employed to the extent it might be. Two possible reasons for the underuse of the simplified procedure are that: (1) the monetary threshold for mandatory application of the rule is too low; and (2) the recoverable costs and disbursements in a simplified procedure matter are too low.

Regarding the monetary threshold, the true monetary value of a claim is not always clear at the outset of an action. In a personal injury action, a plaintiff may continue to recover from their injury after the claim is commenced. However, in the event recovery does not occur, the plaintiff is reluctant to limit their claim from the outset. A similar concern may exist in a wrongful dismissal action or other contract actions: the true value of the claim is clarified later, after mitigation. Increasing the monetary threshold will reduce the risk that the true monetary value of the claim will ultimately exceed the threshold. Further, the current monetary threshold has not been adjusted to address the significant inflation that has occurred in the five years since the last increase to the monetary threshold,[2] and inflation that is expected over the next few years.

Regarding the costs and disbursements recoverable after a simplified procedure action, the current limits make Rule 76 prohibitive for all but the most straightforward actions. The cost of expert opinions has increased substantially in recent years. The imposition of specific limits on costs and disbursements requires frequent review to ensure they reflect the true cost of litigation. These limits are not necessary in Rule 76, and unduly discourage the use of the simplified procedure by parties who might otherwise benefit from its summary trial process. Rules 1.04(1.1) and 57.01 are sufficient to address proportionality in simplified procedure actions, as they are in other actions.

[2] In 2019, the monetary threshold was raised from $100,000 to $200,000 (O. Reg. 344/19, s. 3(1)). The change came into force on January 1, 2020.

The Advocates' Society's proposed amendments therefore address two of the key barriers that we believe are preventing Rule 76 from being used to its full potential.

Recommendation #2: Amend Rule 34.12 to Avoid Unnecessary Refusals Motions

Proposed Amendment:

> **Objections and Rulings**
> **34.12** (1) Where a question is objected to, the objector shall state briefly the reason for the objection, and the question and the brief statement shall be recorded.
> (2) A question that is objected to may be answered with the objector's consent, and where the question is answered, a ruling shall be obtained from the court before the evidence is used at a hearing.
> (3) A ruling on the propriety of a question that is objected to and not answered may be obtained on motion to the court.
> (4) Where a party seeks to have an adverse inference drawn as a result of the objector's failure to answer a proper question, the moving party's failure to bring a motion pursuant to subrule 34.12(3) shall not be a factor in determining whether to draw an adverse inference.

Rationale for the Amendment:

Refusals motions consume significant party resources and court time. The Advocates' Society believes that the proposed amendment will reduce the number and scope of refusals motions by addressing the concern that a party's failure to bring a motion to compel an answer to a discovery question will later be held against that party at trial.

Although not expressly provided for in the Rules, courts may draw an adverse inference from a party's refusal to answer a proper question posed in discovery.[3] There are many instances in which a party may be content to rely on the adverse inference instead of attempting to obtain an order compelling the answer to a question.

However, parties who ask the court to draw an adverse inference against an opposing party for their failure to answer a proper discovery question may still be met with the argument that they ought to have brought a motion to compel an answer to the question.[4] The proposed amendment makes clear that not bringing a motion to compel will not be held against the party if they later ask for an adverse inference to be drawn. This amendment will eliminate the need for parties to bring refusals motions for the sole purpose of avoiding being prejudiced for not having brought the motion.

[3] See, e.g., *Bank of Montreal v. Faibish*, 2013 ONSC 2801, at para. 5.
[4] See e.g., *Stewart v. Lattanzio*, 2022 ONSC 1770, at paras. 31-34, for an example of a case where this argument was made but not acceded to by the Court.

Recommendation #3: Allow the Parties to Set Trial Dates Earlier in the Litigation Process

Proposed Amendment:

Repeal and replace rule 48.04(1) as follows:

> **Consequences of Setting down**
> **48.04** (1) The Court may limit a party's rights to initiate or continue any motion or form of discovery where:
> (a) an action has been set down for trial;
> (b) a trial date has been set; and
> (c) permitting the party to initiate or continue the motion or form of discovery would make it unlikely the trial date can proceed.
> (1.1) Subrule (1) shall not be applicable at any time that is more than 12 months prior to the scheduled trial date.

Rationale for the Amendment:

Rule 48.04(1) currently provides that once a party serves a trial record and sets an action down for trial, that party cannot initiate or continue any motions or form of discovery without leave of the court. Only specific steps can be taken in the time between setting down an action for trial and trial, including providing answers to undertakings, finalizing and serving expert reports, making or responding to requests to admit, and conducting a pre-trial conference.[5]

We understand that the purpose of this rule is to ensure that actions are ready for trial before they are placed on the trial list. This is an important objective, but in practice there are typically significant delays (often measured in years) between setting a matter down for trial and the trial date, which time could be used to complete pre-trial procedures.

The proposed amendments still allow the court to control its process to ensure that matters are ready for trial before their trial dates are reached. We believe that the amendments would also help reduce delay by allowing parties to fix a trial date early in the litigation process. Having a fixed trial date early on would encourage parties to focus on the issues that matter, and only bring motions or engage in discoveries to the extent they are necessary. Further, it is common for parties to only begin to seriously consider settlement and engage in settlement discussions once the trial date approaches. Having early, fixed trial dates will also promote earlier settlements and remove cases from the court's docket sooner via resolution.

[5] See Rule 48.04(2).

Recommendation #4: Abolish the Mandatory Discovery Plan Required by Rule 29.1

Proposed Amendments:

RULE 29.1 DISCOVERY PLAN

Non-application of Rule

29.1.01 This Rule does not apply to parties who are subject to a discovery plan established by the court under these rules.

Definition

29.1.02 In this Rule,

"document" has the same meaning as in clause 30.01 (1) (a).

Discovery Plan

Requirement for Plan

29.1.03 (1) Where a party to an action intends to obtain evidence under any of the following Rules, the parties to the action ~~shall~~ may agree to a discovery plan in accordance with this rule:

1. Rule 30 (Discovery of Documents).
2. Rule 31 (Examination for Discovery).
3. Rule 32 (Inspection of Property).
4. Rule 33 (Medical Examination).
5. Rule 35 (Examination for Discovery by Written Questions).

~~***Timing***~~

~~(2) The discovery plan shall be agreed to before the earlier of,~~

~~(a) 60 days after the close of pleadings or such longer period as the parties may agree to; and~~

~~(b) attempting to obtain the evidence. O. Reg. 438/08, s. 25.~~

Contents

(3) The discovery plan shall be in writing, and ~~shall~~ may include,

(a) the intended scope of documentary discovery under rule 30.02, taking into account relevance, costs and the importance and complexity of the issues in the particular action;

(b) dates for the service of each party's affidavit of documents (Form 30A or 30B) under rule 30.03;

(c) information respecting the timing, costs and manner of the production of documents by the parties and any other persons;

(d) the names of persons intended to be produced for oral examination for discovery under Rule 31 and information respecting the timing and length of the examinations; and

(e) any other information intended to result in the expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action.

Principles re Electronic Discovery

(4) In preparing the discovery plan, the parties ~~shall~~ may consult and have regard to the document titled "The Sedona Canada Principles Addressing Electronic Discovery" developed by and available from The Sedona Conference.

~~**Duty to Update Plan**~~

~~**29.1.04** The parties shall ensure that the discovery plan is updated to reflect any changes in the information listed in subrule 29.1.03 (3). O. Reg. 438/08, s. 25.~~

Failure to Agree to Plan

29.1.05 (1) On any motion under Rules 30 to 35 relating to discovery, the court ~~may refuse to grant any relief or to award any costs if the parties have failed to agree to or update a discovery plan in accordance with this Rule~~ may consider any discovery plan to which the parties have agreed.

Court may Impose Discovery Plan

(2) ~~If the parties fail to agree to a discovery plan in accordance with this Rule~~ On motion by any party, the court may order that documentary discovery proceed or examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for documentary discovery or examinations and impose such limits on the right of discovery as are just.

Rationale for the Proposed Amendments:

The proposed amendments make Rule 29.1 voluntary instead of mandatory unless the court orders otherwise. In The Advocates' Society's view, mandating discovery plans does not expedite the discovery process and does not decrease parties' reliance on the courts to address discovery-related issues by way of case conference or motion.

In fact, the requirement for a discovery plan can often cause unnecessary delays and inflate parties' costs. In many cases, parties simply ignore Rule 29.1. In many other cases, the discovery plan is a rote document that is completed for the purpose of "checking a box" and is subsequently disregarded by parties. It is not uncommon for parties to use the requirement for a discovery plan to delay the commencement of the discovery process instead of to facilitate it.

The Advocates' Society recognizes that there are situations in which a discovery plan may be useful, and situations where the court should have power to impose limits or provide guidance about the discovery process. The proposed amendments preserve this power, while reducing the delays and costs caused by requiring a discovery plan in every case.

Recommendation #5: Simplify and Communicate Practice Directions

Rule 1.07 addresses the process for issuing and publishing practice directions. In recent years, especially since the COVID-19 pandemic hit, there has been significant proliferation of practice directions. In practice, there are now different procedural rules and different forms across different regions, and even in different courthouses across the same region. Many of The Advocates' Society's members report experiencing difficulties in locating the most up-to-date, comprehensive practice directions and forms on the Ontario Courts website, and reconciling the at times contradictory guidance in practice directions. That difficulty is no doubt compounded for self-represented litigants. The proliferation of different rules between regions increases the complexity and difficulty—and therefore time and cost—of procedural matters, and often results in the court being frustrated when the parties have not adhered to the local practices of which they were not aware.

Although this is not a recommended change to the Rules, The Advocates' Society recommends that the Ontario Courts website be revised to make it easy to locate all current regional and local practice directions and all applicable local forms. We also recommend that, where possible, practice directions be amended and consolidated, instead of issuing new practice directions, so that multiple practice directions do not have to be consulted for guidance on a particular point.

To ensure that all parties are aware when changes are made to practice directions, we also recommend that additional methods for communicating these changes be considered, such as establishing an email listserv for practice direction changes (which could also be used to notify parties of changes to the Rules and other important information), to which lawyers and self-represented litigants could subscribe for updates.

Thank you for soliciting The Advocates' Society's input as to how to amend the *Rules of Civil Procedure* to decrease delay in civil proceedings. I invite you to contact us with any questions about our recommendations above.

Yours sincerely,

Dominique T. Hussey
President

Attachments:

1. Letter to The Advocates' Society from Chief Justice Michael Tulloch and Justice Kathryn Feldman (August 2, 2023)

CC: The Honourable Justice R. Cary Boswell, Co-Chair, Civil Rules Review Working Group
Allison J. Speigel, Co-Chair, Civil Rules Review Working Group
Vicki White, Chief Executive Officer, The Advocates' Society

The Advocates Society's Rules of Civil Procedure Task Force

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More about The Advocates' Society

Established in 1963, The Advocates' Society is a not-for-profit organization representing approximately 5,500 diverse lawyers and students across the country—unified in their calling as advocates. As the leading national association of litigation counsel in Canada, The Advocates' Society aims to create a community of advocates who aspire to excellence in all aspects of the profession. We do so by providing skills-based professional development, publishing best practices, and fostering mentorship and collegiality among advocates. As the voice of advocates in the justice system, we are also dedicated to promoting a fair and accessible system of justice and a strong, independent, and courageous bar. The Advocates' Society intervenes in court cases that impact the profession, and makes submissions to governments, regulators, and other organizations on legislation and policy that impact access to justice, the administration of justice, the independence of the bar and the judiciary, the practice of law by advocates, and equity, diversity, inclusion, and reconciliation with Indigenous peoples in the justice system and legal profession. For more information about The Advocates' Society, please visit our website at https://www.advocates.ca/.