April 28, 2023

VIA EMAIL

Barbara Legate, Chair
Bifurcation Subcommittee
Civil Rules Committee
Legate Law
365 Queens Avenue
London, Ontario N6B 1X5

Laura Craig, Counsel
Office of the Chief Justice
Ontario Superior Court of Justice
361 University Avenue
Toronto, Ontario M5G 1T3

Dear Ms. Legate and Ms. Craig:

RE: Proposed Amendment to Rule 6.1.01 of the *Rules of Civil Procedure*

Thank you for your letter dated March 3, 2023, requesting The Advocates' Society's input on a proposed amendment to Rule 6.1.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, regarding the bifurcation of jury and non-jury trials.

Established in 1963, The Advocates' Society is a not-for-profit organization representing approximately 5,500 diverse lawyers and students across the country, including approximately 4,500 in Ontario—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, and inclusion in the justice system and legal profession.

As requested, we will answer the questions in your letter in the sequence in which they were posed.

1. **Should jury and non-jury trials be treated differently under the Rule:**
    a. **As proposed in the Osborne report, bifurcation could continue to be available to the parties in a jury action if consented to. In all other cases, any party could move for bifurcation; or**
    b. **All cases, jury or non-jury, any party may move for bifurcation.**

The Advocates' Society recommends option 1(a). In our view, jury and non-jury trials should be treated differently for the purposes of bifurcation. Bifurcation of jury trials should only be permitted on the consent of both parties. Bifurcation of judge-alone trials should be available only on motion by either party or consent of both parties.

We identified a number of problems that could arise if a jury trial was bifurcated absent consent of the parties. To achieve the benefits of bifurcation (i.e. reducing the length of trials and promoting settlement after liability is determined), there should be a delay between the decision on liability and the damages

portion of the trial, as the parties will need time to prepare the damages portion of the trial (including the preparation of initial or supplemental expert reports), and to attempt to settle the remaining issues. For jury trials, however, these necessary delays pose practical concerns about the ability to "hold" a jury, possibly over an extended period of time, while counsel prepare for a damages hearing and while resolution discussions take place.

Bifurcating a jury trial may also negatively impact parties' ability to resolve the issue of damages. The absence of reasons for decision from the liability portion of the trial may make the parties' damages discussions less informed, whereas understanding the basis for the finding of liability may influence a party's approach to damages.

These practical concerns do not exist to the same degree in a judge-alone trial. Scheduling the damages portion of a bifurcated judge-alone trial may be challenging, but it does not raise the same issues as trying to hold a jury for an extended period of time. In a judge-alone bifurcated trial in which the plaintiff is partially or completely successful, the parties would still benefit from a delay between the completion of the liability portion of the trial and the start of the damages hearing. However, in a judge-alone trial, the negative effects of that delay are mitigated. The parties would have the benefit of detailed written reasons for the finding of liability in the preparation of their damages case, which may promote resolution. From the perspective of the trial judge, the judge would have the benefit of their analysis when preparing for any damages hearing, to reacquaint themselves with the issues.

In light of these disparate effects of bifurcation, The Advocates' Society recommends different approaches to bifurcating jury trials versus judge-alone trials, with bifurcation in jury trials being limited to cases where both parties consent.

In judge-alone trials, bifurcation should only be available on motion by a party to the court, for a number of reasons. Two are most salient. First, from an efficiency perspective, the evidence of some witnesses (including the plaintiff) may be required for both the liability and the damages portion of the trial. This concern about potential inefficiency is especially pronounced in cases where the issue of causation in the liability analysis is inextricably linked to the quantum of damages. Should a damages hearing ultimately be necessary, recalling the same witnesses would likely result in more court time than if the witness had provided their evidence in a single attendance at a non-bifurcated trial. It is also disruptive to the witness. The party seeking bifurcation should, on motion, be required to address whether bifurcation could result in these inefficiencies and the court should pay particular attention to these issues when considering whether to order bifurcation.

Second, and more importantly, bifurcation must not be used as a tool by a party with deeper pockets as a means to delay or increase the costs of trial. In personal injury matters, for example, if abused, bifurcation could result in delaying an injured party's access to justice. Requiring a party to move for bifurcation before a judge would mitigate this concern, by providing an opportunity to examine the impacts of bifurcation on the parties as weighed against any possible benefits.

2. Should a judge be able to bifurcate an action on their own initiative? Should this be limited to the pretrial judge? Is it too late to bifurcate at trial?

The Advocates' Society is of the view that a judge should not be able to bifurcate any action on their own motion. Rather, at least one of the parties to an action being tried by a judge alone must move to bifurcate the trial. We are concerned that a case management judge, pre-trial judge or trial judge would rarely, if

ever, possess the depth of understanding of the intricacies of the case to bifurcate an action of their own motion without the benefit of argument.

We will answer the question of whether it is too late to bifurcate at trial along with questions 3 and 4 (below).

3. At what point in the litigation ought the motion be brought?

The motion to bifurcate the trial should be brought by a party as soon as there is sufficient information on which to assess whether it is in the interests of justice to proceed with bifurcation. If the motion is brought after the parties have incurred costs in respect of the damages portion of the trial (e.g., for new or supplemental expert reports), this may militate against an order for bifurcation.

4. Should the timing be an issue for determination by a judge on a case-by-case basis? In other words, leave it to the parties to assess when to bring the motion. Permit a motion judge to adjourn it to the pretrial in an appropriate case.

As stated above, The Advocates' Society is of the view that the parties should be encouraged to bring the motion as soon as there is sufficient information on which to assess whether it is in the interests of justice to proceed with bifurcation.

However, there should be no hard-and-fast rule that the motion cannot be brought at or after the pre-trial, or at trial, although these cases would be exceptional. If the motion is brought at or after the pre-trial, The Advocates' Society believes the motion must be on consent of all parties.

5. If bifurcation occurs at the pretrial stage, should the pretrial judge have the jurisdiction to award costs of damages disbursements where they will have to be updated should that part of the action proceed to trial?

The Advocates' Society does not believe that the pre-trial judge should be able to award the costs of damages disbursements in any event of the cause. Costs should remain in the discretion of the trial judge, either after a determination on liability, or at the conclusion of the entire trial.

6. Would new wording in Rule 6 that adopts that contained in Rule 21.01(1) to permit bifurcation where it may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs, be acceptable?

The Advocates' Society does not believe that the wording in Rule 21.01(1)(a) is an appropriate test for whether or not to bifurcate a trial.[1] Bifurcating a trial would always meet this test, insofar as bifurcating

[1] Rule 21 addresses the determination of an issue before trial. Rule 21.01(1)(a) states as follows:

> (1) A party may move before a judge,
>
> > (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; […].

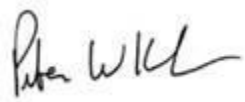
would always dispose of part of the action and shorten the trial. The test for bifurcation should remain as it is at common law, including the various factors for the motion judge to consider.

The Advocates' Society has considered that the goals of bifurcation of trials in appropriate cases – namely, greater efficiency in the use of court resources and judicial economy – may also be achieved by other procedural means, such as summary judgment and partial summary judgment. The Civil Rules Committee may wish to consider next whether and how to amend Rule 20 and Rule 21 to permit greater use of partial summary judgment motions in cases where it is proportionate and just to do so. Some of the risks of partial summary judgment (e.g. credibility findings on an incomplete record, inconsistent findings, inefficiency) may apply equally to bifurcation; if the rules regarding bifurcation are liberalized, it may be prudent to revisit partial summary judgment as well.

The Advocates' Society's comments above have been directed to the specific questions posed by the Bifurcation Subcommittee. On a more general level, we note that bifurcation will only be appropriate in limited circumstances, where it is in the interests of justice. The question of whether bifurcation is in the interests of justice will need to be carefully evaluated in the context of each specific case. There can be no presumption or default in favour of bifurcation. Given its narrow applicability, The Advocates' Society does not see bifurcation as a means to increase the efficiency of the court system on a large scale.

Thank you for the opportunity to make these submissions to the Bifurcation Subcommittee. We would be pleased to answer any questions you may have.

Yours sincerely,



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President

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

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