



# The Advocates' Society La Société des plaideurs

July 30, 2020

VIA EMAIL: [Victoria.Anderson@ontario.ca](mailto:Victoria.Anderson@ontario.ca)

Falguni Debnath, Senior Legal Officer  
Secretary  
Civil Rules Committee  
Court of Appeal for Ontario  
130 Queen Street West  
Toronto, Ontario M5H 2N5

Dear Ms. Debnath,

## **RE: Report to the Civil Rules Committee on Rules 53.09 and 53.10**

The Advocates' Society (the "Society") is in receipt of the report of the Discount Rate Subcommittee (the "Subcommittee") entitled *Report to the Civil Rules Committee on Rules 53.09 and 53.10*, dated April 27, 2020 (the "Report"). We would like to commend the Subcommittee for a thorough and comprehensive review of the issues in the Report, which are of considerable importance to advocates and others in the civil justice system.

As you may know, the Society, established in 1963, is a not-for-profit association of more than 6,000 members throughout Canada, including approximately 5,000 in Ontario. The mandate of the Society includes, among other things, making submissions to governments and others on matters that affect access to justice, the administration of justice, and the practice of law by advocates.

The Society struck a Task Force composed of both plaintiff-side and defence-side civil advocates to review the Report closely, discuss its recommendations, and develop input for the Civil Rules Committee's consideration when contemplating amendments to the relevant *Rules of Civil Procedure*.<sup>1</sup> The Society's mandate, described above, has limited the issues in the Report on which we have commented to those that do not touch on substantive law; in particular, we do not comment on the issues of the appropriate discount rate or prejudgment interest rate.

### **Judicial Discretion Should Be Retained**

For the laudable objectives of reducing court time, and thus preserving judicial resources, the Subcommittee recommends eliminating judicial discretion to set a discount rate on the basis of evidence.<sup>2</sup>

The majority of the Society's Task Force was strongly in favour of maintaining some level of judicial discretion to depart from Rule 53.09(1). The volatile nature of the economic marketplace; the importance of the discount rate to a plaintiff's overall award; the unpredictability of the issue, as reflected in the difficulties experienced by previous rule committees in setting an appropriate discount rate; and the lack

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<sup>1</sup> R.R.O. 1990, Reg. 194 [*Rules*].

<sup>2</sup> Report, paras. 415, 416(f).

of evidence which accompanied the Report, as acknowledged by the Subcommittee, all militate in favour of retaining judicial discretion. If the discretion to depart from the rule is reserved for exceptional circumstances, it is hoped that the additional time spent in the rare, appropriate case would not significantly impact trial length or the scarcity of judicial resources.

The discount rate should not shackle the final assessment to the point where the final award is not fair. While the *Rules* do lend perhaps the best approximation of the appropriate discount rate to be applied based on data available to the Subcommittee, ultimately, it is the judge who is in the best position to determine what is fair in a particular case.

Further, given the other recommendations of the Subcommittee to move to a one-tier approach,<sup>3</sup> and not have different discount rates for different goods and services,<sup>4</sup> retaining judicial discretion to address the exceptional case seems even more important so as to be able to avoid potential unfairness.

### **Removal of the Floor in Rule 53.09 – Carefully, and On Notice**

The Subcommittee recommends removing the prohibition against negative discount rates.<sup>5</sup> While the Society does not necessarily disagree with the Subcommittee’s recommendation in this regard, we caution that any such change should be undertaken thoughtfully, and on notice, given its potential impact.

Further, any retrospective or retroactive effect of the change in the *Rules* should be carefully considered. The removal of the 0% floor may well have profound implications on insurers’ reserves, with a consequent impact on the legal and financial marketplace. For this reason, the Society recommends a measure of caution and advance notice for insurers and others in the legal marketplace to prepare for, and respond to, these changes and their anticipated impact.

### **The Prejudgment Interest Rate – The Approach in Rules 53.09 and 53.10 Should Be Consistent<sup>6</sup>**

The Society notes that changes to the current default 5% prejudgment interest rate for non-pecuniary damages (non-auto) can have a *significant* impact on the valuation of a plaintiff’s claim for damages. As such, any change of the nature contemplated should also be done carefully, and on notice. Further, any retrospective or retroactive effect of the change in the *Rules* should be similarly seriously considered.

Moreover, the Society strongly urges the Civil Rules Committee to adopt a consistent approach between the rules addressing the discount rate and the prejudgment interest rate. The policy rationale underpinning the Civil Rules Committee’s approach to setting the discount rate and the prejudgment interest rate (the level of risk and the aims of the system in setting the rate) should be consistent. This should include, in particular, the retention of a measure of judicial discretion to depart from the rate set out in the *Rules*, where fairness or the interests of justice require it.

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<sup>3</sup> Report, paras. 357, 416(a).

<sup>4</sup> Report, paras. 395, 416(e).

<sup>5</sup> Report, paras. 391-392, 416(c).

<sup>6</sup> The Report discusses the prejudgment interest rate in section 3, starting at para. 450.

## **Committee Reports and Activities – Full Disclosure Should Be the Norm and More Frequent Reviews Should Be Considered**

The Report notes that certain previous committee reports were, for some reason, no longer available. This is most unfortunate. The Society strongly encourages that this and prior reports be retained and made available to the public, if requested, and certainly, for the use and due consideration by subsequent committees and subcommittees. Efficiency and transparency require no less.

Further, given the proposed mandatory nature of the rule, the elimination of the two-tier approach, the use of one discount rate for all goods and services, coupled with the difficulties and uncertainty associated with predicting future rates of return and inflation (as noted in the Report), the Society encourages the Civil Rules Committee to consider the frequency and timing of future reviews. It may be advisable, in some future circumstances, to review the discount rate (and the other matters set out in s. 66(4) of the *Courts of Justice Act*<sup>7</sup>) sooner than the “at least once in every four-year period” prescribed by s. 66(4). In this regard, however, the Society also acknowledges the benefit of having the discount rate formula not change too frequently, which could be weighed as a factor in deciding whether to undertake a more frequent review.

Thank you for providing the Society with the opportunity to make these submissions. I would be pleased to discuss these submissions with you at your convenience.

Yours sincerely,



Guy J. Pratte  
President

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

### **Members of the Society's Task Force:**

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<sup>7</sup> R.S.O. 1990, c. C.43.