

**DISCUSSION OF THE CHANGES TO RULE 76,
SIMPLIFIED PROCEDURE, EFFECTIVE JANUARY 1, 2020**

Presented by Mr. Rick Aucoin

December 11, 2019

Beard Winter LLP



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1. Rule 76 of the *Rules of Civil Procedure* provides Plaintiffs with an avenue to pursue their claims when the value of the claim is between \$25,000.00 and \$100,000.00. However, since the last Amendments made to Rule 76 in 2010, the Simplified Procedure has been under-utilized. It does not appear to have addressed the concerns related to the cost, delay and access to justice that lead to the 2010 Amendments in the first place.
2. As a result, a new wave of amendments to Simplified Procedure, under Rule 76, will become effective on January 1, 2020. These amendments come from a lengthy exchange with all stakeholders in the litigation procedure.
3. These amendments will impact the monetary jurisdiction, costs awards, mode of and length of trial, and other pre-trial and trial procedures.
4. Ontario Regulation 344/19 is attached as Appendix A.
5. The monetary jurisdiction of the Small Claims Court is increasing from \$25,000.00 to \$35,000.00.
6. The monetary jurisdiction of Simplified Procedure is being increased from \$100,000.00 to \$200,000.00. In accordance with Rul 76.02 (1) the \$200,000.00 ceiling is exclusive of interest and costs. The amount of costs that can awarded will be limited to \$50,000.00 and disbursements will be limited to \$25,000.00, excluding HST. These limits to not apply if the action was commenced prior to January 1, 2020.
7. Jury trials will no longer be available for claims brought under Simplified Procedure. However, if a claim is for less than \$200,000.00 but arises from allegations of slander, libel, malicious arrest, malicious prosecution, or false imprisonment, the claim will proceed under ordinary procedure and therefore a jury trial will be available.
8. Where parties were previously permitted two (2) hours for examinations for discovery, they will now be given three (3) hours. The Rule will now provide that no party shall, in conducting oral examinations for discovery in relation to an action proceeding under the Simplified Rule, exceed a total of three hours of examination regardless of the number of parties or other persons to be examined. So, Plaintiffs must be ready to examine all defendants in 3 hours. Each defendant will have 3 hours in total to examine plaintiffs and co-defendants.

9. There are also changes to the trial and pre-trial procedures. A pre-trial conference will be scheduled within 180 days of the action being set down for trial. Previously parties were given forty-five (45) days' notice in advance of the pre-trial conference.
10. A party who intends to call expert evidence at the trial of the action is still required to comply with rule 53.03. Any expert reports served under rule 53.03 shall now be appended to an affidavit of the expert in which the expert adopts the report for the purpose of giving it as evidence in the action.
11. At least thirty (30) days prior to the scheduled pre-trial conference, a trial management plan, agreed on by all parties, will be required. This trial management plan must include a list of every witness and an outline of how much time each party will take to examine witnesses and to present opening statements and argument.
12. Five (5) days prior to the pre-trial conference, parties must file the proposed trial management plan, a copy of their Affidavit of Documents, copies of any expert affidavits, and copies of the documents relied on for the party's claim or defence.
13. Additionally, five (5) days prior to the pre-trial conference, a statement, not exceeding three pages, setting out the issues and the party's position must also be filed.
14. At the pre-trial conference, the judge or case management master will fix the number of witnesses for each party, fix the dates for the delivery of any witness affidavits, fix a date for trial and approve the proposed trial management plan. The trial judge may vary a time set out in the approved trial management plan, subject to the requirement that the duration of the trial not exceed five days.
15. Trials under Simplified Procedure will be restricted to a total length of five (5) days. The parties to a Simplified Rules Trial will continue to make opening statements, adduce evidence by affidavit, cross examine witnesses if adverse in interest, re-examine witnesses cross-examined, make oral argument, and (if leave is provided by the trial judge) to adduce proper reply evidence in a defendant's case.
16. It remains to be seen whether or not the increase in monetary jurisdiction for Simplified Procedure will simply increase the number of claims that are plead over \$200,000.00 to avoid the limitations of proceeding under Simplified Procedure or vice versa. The increase in monetary jurisdiction may not be enough to persuade Plaintiff's Counsel to limit the claims of their clients from the outset. Instructions will be very important.
17. Additionally, limiting expert evidence to affidavits, with only \$25,000.00 available in disbursements, and limiting the trial to only five (5) days may not permit a complicated matter to proceed under Simplified Procedure and will likely significantly curtail the number of experts involved.
18. The restrictions placed on jury trials, coupled with the limit of five (5) days for the trial in its entirety, has potential to reduce the backlog of cases where the value of the claim is under \$200,000.00. However, in order for this to occur there has to be motivation on the part of Plaintiff's Counsel to limit the claims being brought by their clients from the

outset. Perhaps the lack of availability of jury trials, which tend to be favoured by defence counsel, will serve as this motivation for specific claims.

19. The effect on day to day practice from the amendments to Rule 76 remains to be seen. Insurers should be ready for the potential of claims being advanced under this procedure and what this means in terms their counsel and the nature of the legal assistance:

- Obviously, there will be less opportunity to secure Examination for Discovery evidence so productions by way of Affidavit of Document evidence becomes paramount.
- Examinations for Discovery should be very targeted in terms of the evidence being obtained.
- There will be more substantial work up of an Action proceeding into a Pre-Trial thereby increasing expense budgets to that point in the litigation. Insurers should be ready for such expenses on their files. All witnesses will have to be identified as of the Pre-Trial process.

20. The amendments to Rule 76 may bring about a useful procedure for insurers pursuing subrogation matters where the claim pursued is a set amount that falls within the monetary jurisdiction of Simplified Procedure. Even in instances where the matter falls slightly outside of the monetary jurisdiction, it may be worthwhile to limit the claim to \$200,000.00 in order to secure a more expeditious and economical judgment. Particularly if the Amendments serve to reduce the court backlog as intended and result in a more expeditious and, as such, a less expensive process.

21. The no-jury provisions do not apply to an Action in which a Jury Notice is delivered before January 2020. It is understood that certain counsel have commenced motions at this early stage and for return dates post January 1, 2020 seeking Orders to limit existing claims to the new simplified limit and to strike the Jury Notices from existing Actions. With the current amendment it is anticipated that such motions will fail if opposed.

22. The costs consequences of rule 76.13 for non-compliant actions within the \$200,000 monetary jurisdiction, and the new limit on costs and disbursements will not apply to actions commenced before January 1, 2020.



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Appendix A

ONTARIO REGULATION 344/19

made under the

COURTS OF JUSTICE ACT

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AMENDING REG. 194 OF R.R.O. 1990

(RULES OF CIVIL PROCEDURE)

1. The French version of clause 47.02 (1) (b) of Regulation 194 of the Revised Regulations of Ontario, 1990 is amended by striking out “signifiée” and substituting “remise”.

2. Clause 76.01 (1) (c) of the Regulation is revoked and the following substituted:

(c) actions commenced or continued under the simplified procedure set out in this Rule that are subsequently assigned for case management under rule 77.05;

(d) actions in respect of which a jury notice is delivered in accordance with subrule 76.02.1 (2).

3. (1) Paragraph 2 of subrule 76.02 (1) of the Regulation is amended by striking out “\$100,000” in the portion before subparagraph i and substituting “\$200,000”.

(2) Subrule 76.02 (5) of the Regulation is amended by striking out “or” at the end of clause (b) and by adding the following clauses:

(d) the action is assigned for case management under rule 77.05; or

(e) any party to the action delivers a jury notice in accordance with subrule 76.02.1 (2).

(3) Subrule 76.02 (7) of the Regulation is amended by striking out “or” at the end of clause (a), by adding “or” at the end of clause (b) and by adding the following clause:

(c) a jury notice delivered in accordance with subrule 76.02.1 (2) is struck out.

4. The Regulation is amended by adding the following rule:

JURY TRIAL NOT AVAILABLE

76.02.1 (1) An action that is proceeding under this Rule shall not be tried with a jury and, subject to subrule (2), no party to the action may deliver a jury notice under rule 47.01.

(2) A party to an action that is proceeding under this Rule may deliver a jury notice under rule 47.01 if the action involves a claim for relief arising from one of the following:

1. Slander.
2. Libel.
3. Malicious arrest.
4. Malicious prosecution.
5. False imprisonment.

(3) If a jury notice is delivered in accordance with subrule (2), the action may no longer proceed under this Rule and the party delivering the jury notice shall deliver a notice (Form 76A) stating that the action and any related proceedings are continued as an ordinary action.

5. Subrule 76.04 (2) of the Regulation is amended by striking out “two hours” and substituting “three hours”.

6. The Regulation is amended by adding the following rule:

EXPERT AFFIDAVITS

76.09.1 (1) A party who intends to call expert evidence at the trial of the action shall comply with rule 53.03.

(2) An expert report served under rule 53.03 shall be appended to an affidavit of the expert in which the expert adopts the report for the purpose of giving it as evidence in the action.

7. (1) Subrule 76.10 (1) of the Regulation is revoked and the following substituted:

Notice

(1) A pre-trial conference shall be scheduled in accordance with rule 50.02.

(2) Rule 76.10 of the Regulation is amended by adding the following subrule:

Parties’ Proposed Trial Management Plan

(2) At least 30 days before the pre-trial conference, the parties shall agree to a proposed trial management plan that contains the following:

1. A list of every witness, including every expert witness, whose evidence a party intends to adduce at trial.
2. A division of time between the parties, the total of which shall not exceed five days, that sets out the allotted times for each party for,
 - i. opening statement,
 - ii. the presentation of evidence in chief by affidavit and under rule 31.11,

- iii. cross-examination of deponents,
- iv. re-examination of any deponents who are cross-examined, and
- v. oral argument.

(3) Clause 76.10 (4) (a) of the Regulation is amended by adding the following subclause:

(0.i) a copy of the parties' proposed trial management plan,

(4) Subclause 76.10 (4) (a) (ii) of the Regulation is amended by striking out "expert report" and substituting "expert affidavit, other than a supplementary expert affidavit".

(5) Subclause 76.10 (4) (b) (i) of the Regulation is amended by striking out "a two-page statement setting out" at the beginning and substituting "a statement, not exceeding three pages, setting out".

(6) Subrule 76.10 (5) of the Regulation is revoked and the following substituted:

Trial Planning

(5) The pre-trial conference judge or case management master shall,

- (a) fix the number of witnesses, other than expert witnesses, whose evidence each party may adduce at trial;
- (b) fix dates for the delivery of any witness affidavits, including any outstanding expert affidavits;
- (c) fix a date for trial, subject to the direction of the regional senior judge; and
- (d) approve the parties' proposed trial management plan, with any changes to the order or time of presentation, or any other changes, that the pre-trial conference judge or case management master may specify, subject to the requirement that the duration of the trial not exceed five days.

(7) Subrules 76.10 (6) and (7) of the Regulation are revoked.

8. (1) Subrule 76.11 (3) of the Regulation is revoked.

(2) Subrule 76.11 (4) of the Regulation is amended by striking out "In the case of a summary trial under rule 76.12, the trial record shall contain" at the beginning of the portion before clause (a) and substituting "The trial record shall contain".

(3) Clauses 76.11 (4) (d), (e) and (f) of the Regulation are revoked and the following substituted:

- (d) a copy of any order respecting the trial, including a copy of the trial management plan approved by the pre-trial conference judge or case management master;

- (e) a copy of all the affidavits, including any expert affidavits, served by all the parties for use at trial; and
- (f) a certificate stating that the trial record contains the documents described in clauses (a) to (e) signed by,
 - (i) the lawyer of the party filing the trial record, or
 - (ii) if the party filing the trial record is acting in person, the party.

9. (1) Subrules 76.12 (1) and (2) of the Regulation are revoked and the following substituted:

Procedure

(1) A trial of an action under this Rule shall proceed as follows, subject to the trial management plan approved under clause 76.10 (5) (d):

1. Before the presentation of evidence, each party may make an opening statement.
2. The plaintiff may adduce evidence, including any expert evidence, by affidavit and under rule 31.11.
3. A party who is adverse in interest may cross-examine the deponent of any affidavit served by the plaintiff.
4. The plaintiff may conduct a re-examination of any deponent who is cross-examined under this subrule.
5. When any cross-examinations and re-examinations of the plaintiff's deponents are concluded, the defendant may adduce evidence, including any expert evidence, by affidavit and under rule 31.11.
6. A party who is adverse in interest may cross-examine the deponent of any affidavit served by a defendant.
7. A defendant may conduct a re-examination of any deponent who is cross-examined under this subrule.
8. When any cross-examinations and re-examinations of the defendant's deponents are concluded, the plaintiff may, with leave of the trial judge, adduce any proper reply evidence.
9. After the presentation of evidence, each party may make oral argument.

(2) The trial judge may vary a time set out in the approved trial management plan, subject to the requirement that the duration of the trial not exceed five days.

(2) Subrule 76.12 (3) of the Regulation is amended by striking out "summary trial" and substituting "trial".

(3) Subrule 76.12 (4) of the Regulation is revoked and the following substituted:

Judgment after Trial

(4) The judge shall grant judgment after the conclusion of the trial.

10. The Regulation is amended by adding the following rule:

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).

Transition

(2) Subrule (1) does not apply in the case of an action that was commenced before January 1, 2020.

11. (1) Paragraph 2 of subrule 76.13 (2) of the Regulation is amended by striking out “\$100,000” in the portion before subparagraph i and substituting “\$200,000”.

(2) Subrule 76.13 (7) of the Regulation is amended by striking out “\$100,000” and substituting “\$200,000”.

(3) Subrule 76.13 (8) of the Regulation is amended by striking out “\$100,000” and substituting “\$200,000”.

(4) Subrules 76.13 (10) and (11) of the Regulation are revoked and the following substituted:

Transition

(10) In the case of an action that was commenced on or after January 1, 2002 and before January 1, 2010, subrules (2), (7) and (8) apply as if “\$200,000” read “\$50,000”.

(11) In the case of an action that was commenced on or after January 1, 2010 and before January 1, 2020, subrules (2), (7) and (8) apply as if “\$200,000” read “\$100,000”.

12. The Regulation is amended by adding the following rule:

TRANSITION — JURY TRIALS

76.14 Clauses 76.01 (1) (d), 76.02 (5) (e) and 76.02 (7) (c) and rule 76.02.1 do not apply to an action in respect of which a jury notice has been delivered before January 1, 2020.

13. (1) The row for Form 14F in the Table of Forms to the Regulation is amended by striking out “September 1, 2018” in the column titled “Date of Form” and substituting “May 1, 2019”.

(2) The rows for Forms 60H, 60H.1 and 76D in the Table of Forms to the Regulation are amended by striking out “November 1, 2005” wherever it appears in the column titled “Date of Form” and substituting in each case “May 1, 2019”.

Commencement

14. (1) Subject to subsection (2), this Regulation comes into force on the later of January 1, 2020 and the day it is filed.

(2) Section 13 and this section come into force on the later of August 1, 2019 and the day this Regulation is filed.

Made by:

Pris par :

CIVIL RULES COMMITTEE:
LE COMITÉ DES RÈGLES EN MATIÈRE CIVILE :

FALGUNI DEBNATH

*Senior Legal Officer /
Avocate Principale*

Date made: May 28, 2019

Pris le : 28 mai 2019