

Significant Changes to Rule 76 Simplified Procedure Actions Are Here

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By Jeff Cowan

Amendments to Rule 76 of the *Rules of Civil Procedure* were filed on October 23, 2019. These amendments, effective January 1, 2020, will see major changes to how litigation is conducted for many actions, particularly personal injury matters not involving threshold issues. Related amendments to section 108 of the *Courts of Justice Act* came into force earlier this year.

In an effort to streamline and reduce the costs of litigation, jury trials will no longer be permitted in Rule 76 actions and the monetary jurisdiction will be increased to \$200,000. Jury trials will be permitted for actions below \$200,000 only for slander, libel, malicious arrest or prosecution, and false imprisonment, but they must proceed or continue as an ordinary action. If the jury notice is subsequently struck out, then the action is to be continued under Rule 76.

Pursuant to the amendments, Rule 76 trials are not to exceed 5 days and, except for the costs consequences of rule 76.13 or another Act, no party may recover costs exceeding \$50,000 or disbursements exceeding \$25,000, exclusive of HST.

As a result of the increase in monetary jurisdiction, the time limit for oral discovery by any party is increased from two to three hours. Pre-trial conferences are to be scheduled in accordance with rule 50.02, i.e., 180 days after the action is set down for trial (the action is to be set down for trial no later than 180 days from the first defence or notice of intent to defend). At least 30 days before the pre-trial conference, the parties are to agree on a trial management plan that contains a list of all witnesses (including experts) and a division of time, not to exceed 5 days in total, between opening statements, evidence in chief by way of affidavits or discovery transcripts, cross-examination, re-examination and oral argument.

For the pre-trial conference, despite rule 50.04, the parties are to file at least 5 days in advance a copy of the proposed trial management plan, the affidavits of documents and documents relied upon, any expert reports that must be appended to an expert's affidavit, and a three-page statement of the issues and the party's position with respect to them. At the pre-trial conference, the judge or master may fix the number of witnesses, other than experts, whose evidence may be adduced; fix dates for the delivery of witness affidavits, including outstanding expert affidavits; fix a trial date, subject to the direction of the regional senior judge; and approve or modify the trial management plan, except for the 5-day trial limit. The trial record delivered thereafter will now also contain the approved trial management plan and expert affidavits in addition to the other contents of the trial record.

There will no longer be any distinction between ordinary and summary trials. All Rule 76 trials will proceed essentially as did summary trials, but without the specified time limits now contained in rule 76.12, and subject to the trial management plan, the purpose of which is to fix these times. Parties may: make opening statements; adduce evidence by affidavit (although the parties are not required to); cross-examine if adverse in interest; re-examine any witness cross-examined; with leave of the trial judge, adduce proper reply evidence to a defendant's case; and make oral argument. The trial judge may vary any of the times set out in the trial management plan for these components of the trial, except for the 5-day trial limit.

As indicated above, these provisions come into effect January 1, 2020. The no-jury provisions do not apply to an action in which a jury notice is delivered before that date. 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.

The amendments have been the subject of discussion with stakeholders, primarily in the realm of personal injury actions, with the aim of encouraging more efficient litigation and settlement wherever possible. All lawyers engaged in litigation that encompasses the expanded monetary jurisdiction, which can be significant to many people and businesses outside of (and even including) major urban centres, will need to assess their current cases, and particularly those that are commenced in the next few months with a view to life after January 1, 2020. Counsel must be prepared to manage an action, and potential trial, within the 5-day trial limit, and the \$50,000 and \$25,000 costs and disbursements limits, and manage client and experts' expectations accordingly.

In a separate related amendment, the regulation establishing the monetary jurisdiction of the Small Claims Court and the minimum appeal amount was amended to increase the jurisdiction to \$35,000 and the appeal minimum to \$3,500, effective January 1, 2020.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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