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/.

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August 2, 2023

Dominique T. Hussey
President
The Advocates' Society
250 Yonge Street, Suite 2700
Toronto, ON M5B 2L7

Dear Ms. Hussey:

Thank you for sharing The Advocates' Society's report, *Delay No Longer: The Time to Act is Now: A Call for Action on Delay in the Civil Justice System.* The Court of Appeal for Ontario and the Civil Rules Committee are carefully considering the report and are committed to taking steps to reduce delay in the civil justice system.

Last year, following a unanimous and enthusiastic vote of the Civil Rules Committee in September 2022, Justice Feldman, as Committee Chair, wrote to the Attorney General to request that he strike an independent committee to undertake a comprehensive review of the *Rules of Civil Procedure* to enhance access to justice and to modernize the civil justice system. This request was supported by both the Court of Appeal for Ontario and the Superior Court of Justice and, as you know, Chief Justice Morawetz also addressed the importance of a comprehensive *Rules* review in his remarks at the 2022 Opening of Courts Ceremony. It is our shared hope that this review will soon be up and running.

The Civil Rules Committee, in collaboration with the Court of Appeal for Ontario, has recently launched a new webpage, which provides updates on the work of the Committee, and details about how members of the legal community and the public can make proposals for *Rule* changes: https://www.ontariocourts.ca/coa/about-the-court/civil-rules-committee/. Most recently, the Civil Rules Committee has struck a subcommittee to consider refusals motions which, as you know, consume significant court resources, to be chaired by Justice Darla Wilson. The subcommittee will be seeking input from stakeholders including The Advocates' Society in the Fall.

We would also like to formally invite The Advocates' Society to provide its views as to the most pressing areas of civil practice that could benefit from potential *Rule* changes to reduce delay and promote timely access to justice. Perhaps, as a first step, The Advocates' Society might identify 5 proposed *Rule* amendments that it considers the most imperative for the Committee's review. Proposals can be directed to the Secretary of the Rules Committee, Shannon Chace, at crc.secretary@ontario.ca.

We look forward to continued collaboration as we work to address the critical issue of delay in the civil justice system.

Sincerely,

The Honourable Michael H. Tulloch
Chief Justice of Ontario
Court of Appeal for Ontario

The Honourable Kathryn N. Feldman
Chair, Civil Rules Committee
Court of Appeal for Ontario

cc: Shannon Chace, Secretary of the Civil Rules Committee, Court of Appeal for Ontario
Vicki White, Chief Executive Officer, The Advocates' Society