

## CONSULTATION DOCUMENT

### The Use of Juries in Actions under Rule 76 of the *Rules of Civil Procedure*

#### A. BACKGROUND AND ISSUE

##### The Civil Rules Committee:

The Civil Rules Committee makes rules for the Court of Appeal of Ontario and the Ontario Superior Court of Justice in relation to the practice and procedure of those courts in all civil proceedings (see the *Rules of Civil Procedure*). The *Rules of Civil Procedure* (RCP) is a regulation under the *Courts of Justice Act* (CJA). The Civil Rules Committee may also make recommendations to the Attorney General of Ontario on amendments to the CJA. The Committee is composed of members from the judiciary, the bar and the Ministry of the Attorney General (MAG).

Note: The CRC is not part of MAG. This consultation paper has been prepared by a subcommittee of the CRC, and the consultation is not being led by the ministry.

##### Issue for Consultation:

The Civil Rules Committee is interested in receiving the views of stakeholders as to whether to recommend legislative changes to limit the availability of jury trials in actions under the simplified procedure of Rule 76. The simplified procedure of Rule 76 is mandatory for actions where the amount at issue is above the Small Claims Court limit of \$25,000 but less than or equal to \$100,000, and optional for actions above \$100,000.

Currently in Ontario, jury trials are prohibited in Small Claims Court matters and thus are not available for claims for \$25,000 or less. Other jurisdictions in Canada also place limits on the availability of jury trials based on the monetary value of the claim. The Northwest Territories and the Yukon both require a plaintiff to claim at least \$1,000 to trigger the right to a jury trial, though there are no monetary limits for certain actions, for example actions for libel, slander or malicious prosecution. The corresponding amounts for Saskatchewan and Alberta are \$10,000 and \$75,000, respectively, and are also not applicable to certain types of actions. British Columbia prohibits juries for actions under \$100,000 except where a judge orders that an action be tried outside the Fast Track Litigation procedure (which is akin to Ontario's Simplified Procedure under Rule 76). See Appendices B through F for relevant provisions for these other jurisdictions.

In Ontario, over the last five years, an average of 943 jury notices have been filed each year under Rule 76, of which an average of only 30 cases per year actually proceeded to a jury trial. More than 75% of these cases involved either motor vehicle accident claims or other, non-vehicle related personal injury claims.

## **Relevant Statutory and Rule Provisions**

Section 108 of the CJA sets out the right to a civil jury trial in Ontario. It provides that a party to an action in the Superior Court of Justice may require a jury trial, except where the action is in the Small Claims Court or the law expressly prohibits jury trials for the relief claimed (e.g. equitable relief, partnership dissolution, relief against a municipality). A jury trial can be set aside on motion.

The procedures for requesting a jury trial are set out in Rule 47 of the RCP. The party requesting a jury must file a Form 47A (Jury Notice) before the close of pleadings. A party may bring a motion to strike the jury notice on the basis that a statute requires trial without a jury or the jury notice was not delivered in accordance with rule 47.01. The judge retains discretion to order trial without a jury at any time.

See Appendix A for the relevant provisions of section 108 and rule 47.

## **Concerns**

Following the Supreme Court of Canada's emphasis in *Hryniak v Mauldin* [2014] 1 SCR 87, 2014 SCC 7, on the importance of proportionate procedure, concern has been raised that the practice of serving jury notices in Rule 76 actions results in unnecessary cost and delay, and is at odds with the Rule's purpose of providing a streamlined and proportionate procedure for modest claims. Further, jury notices can place considerable strain on court resources. Although an average of only 30 of the more than 900 yearly **Rule 76** actions in which a jury notice is filed actually proceed to jury trial, anecdotal evidence from Superior Court judges suggests that many more than 30 per year proceed to a pre-trial conference. Limiting the availability of jury trials in Rule 76 actions would free up the judicial resources currently devoted to such pre-trials, making more judicial resources available to other pressing tasks. Finally, it has also been suggested that actions within the Rule 76 monetary limit are too small to justify the substantial inconvenience to jurors of missed work, lost income and other factors.

## **B. CONSULTATION QUESTIONS**

The Civil Rules Committee would be pleased to receive your organization's view's on the following questions by December 15, 2016.

### **Question 1:**

**Should the availability of jury trials in Rule 76 actions be limited in any way?**

Please identify the reasons that speak for or against limiting jury trials under Rule 76.

**Question 2:****If so, how should the availability of jury trials in Rule 76 actions be limited?**

The following examples of how the availability of jury trial might be limited are not exhaustive and are provided only to assist stakeholders in their consideration of the issue. The CRC welcomes other suggestions from stakeholders.

***Example 1: no jury trials for Rule 76 actions***

One potential course of action is to preclude jury trials altogether under Rule 76, similar to what British Columbia has done with actions under its Fast Track Litigation (Rule 66) procedure. The B.C. Fast Track procedure applies to actions where the only claims are for one or more of money, real property, a builder's lien and personal property, and the total monetary relief claimed is \$100,000 or less; if the action can be tried in three days or less; the parties consent; or a judge on his or her own motion or at the request of any party, so orders. Jury trials are not available under the B.C. procedure.<sup>1</sup>

***Example 2: jury trial by court order only***

Another option is to allow jury trials in Rule 76 actions only by court order, whether on motion or on the judge's own initiative (or both).

Saskatchewan allows a judge to have a matter tried by a jury, even if it falls below that province's monetary limit, if "the ends of justice will be best served if findings of fact are made by representatives of the community" or "the outcome of the litigation is likely to affect a significant number of persons who are not party to the proceedings." No party is required to pay jury fees, costs or expenses in trials where the judge orders a jury.<sup>2</sup>

***Example 3: set a no-jury threshold under the Rule 76 monetary limit***

Another possibility is to eliminate jury trials in Rule 76 actions where the amount claimed is less than a specified amount.

For example, the RCP might be amended to provide that a jury trial is not available for claims of between \$25,000 and \$50,000, but is available (whether as of right or by court order) in cases above \$50,000 and within the \$100,000 limit.

***Example 4: restrict jury trials in Rule 76 actions to specified causes of action***

Jury trials could also be prohibited in Rule 76 actions except for specified causes of action.

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<sup>1</sup> British Columbia *Supreme Court Civil Rules*, Rule 15-1(1) (See Appendix c).

<sup>2</sup> Saskatchewan *Jury Act*, s 19 (See Appendix E).

In certain causes of action, the predominant factual issues concern community values or a person's character. These include defamation, malicious prosecution and false imprisonment. Jury trials could be available in those causes of action either as of right or by court order.

Saskatchewan, the Northwest Territories and the Yukon provide a jury as of right, if requested, for such causes of action under those jurisdictions' respective monetary limits (for example, a defamation action for \$500).<sup>3</sup> In Alberta, the judge may direct that a trial for such causes of action be tried summarily by a judge alone.<sup>4</sup>

***Example 5: make the party requesting jury trial bear the related costs***

Another potential course of action may be to require a party requesting a jury in a Rule 76 action to pay the costs of the jury. This could be done through a fee, a deposit or some other means.

Having the requesting party bear the costs of the jury in a Rule 76 action may promote fairness by helping ensure that jury notices are not served frivolously. The amount payable would also need to take into account financial inequalities between parties.

The Northwest Territories and the Yukon allow the requesting party to pay a partial deposit at the time of the request and the remainder at the conclusion of the trial.<sup>5</sup> If the requesting party obtains judgment in its favour, it may 'tax' the cost of the jury against the unsuccessful party unless the judge orders otherwise. Meanwhile, Alberta and Saskatchewan require the requesting party to pay the full cost of the jury.<sup>6</sup> Both of those provinces have regulations establishing the amounts payable to jurors.<sup>7</sup> Saskatchewan allows the judge to apportion that cost between the parties in certain cases.<sup>8</sup>

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<sup>3</sup> Saskatchewan *Jury Act*, s 18(1)(a) 9See Appendix E) ; NWT *Jury Act*, s 2(1)(a), (c) (see Appendix D); Yukon *Jury Act*, s 2(1) (See Appendix F).

<sup>4</sup> Alberta *Jury Act*, s 17(1), (1.1) (See Appendix B).

<sup>5</sup> Northwest Territories *Jury Act*, s 3 (See Appendix E); Yukon *Jury Act*, s 3 (See Appendix F).

<sup>6</sup> Alberta *Jury Act*, s 18 (see Appendix B); Saskatchewan *Jury Act*, s 18(2)(a) (See Appendix D).

<sup>7</sup> Alberta *Jury Act Regulation*, Alta Reg 68/1983 s 4 (see Appendix B); Saskatchewan *The Jury Regulations, 2000*, Reg 1, s 3-4 (see Appendix D).

<sup>8</sup> Saskatchewan *Jury Act*, s 18(3) (See Appendix D).

## APPENDIX A: ONTARIO LEGISLATIVE PROVISIONS

### Courts of Justice Act, RSO 1990, c C.43, ss 108(1)-(3)

#### *Jury trials*

[108\(1\)](#) In an action in the Superior Court of Justice that is not in the Small Claims Court, a party may require that the issues of fact be tried or the damages assessed, or both, by a jury, unless otherwise provided.

[\(2\)](#) The issues of fact and the assessment of damages in an action shall be tried without a jury in respect of a claim for any of the following kinds of relief:

1. Injunction or mandatory order.
2. Partition or sale of real property.
3. Relief in proceedings referred to in the Schedule to section 21.8.
4. Dissolution of a partnership or taking of partnership or other accounts.
5. Foreclosure or redemption of a mortgage.
6. Sale and distribution of the proceeds of property subject to any lien or charge.
7. Execution of a trust.
8. Rectification, setting aside or cancellation of a deed or other written instrument.
9. Specific performance of a contract.
10. Declaratory relief.
11. Other equitable relief.
12. Relief against a municipality.

[\(3\)](#) On motion, the court may order that issues of fact be tried or damages assessed, or both, without a jury.

**Rules of Civil Procedure, RRO 1990, Reg 194, r 47**

*Actions to be tried with a jury*

[47.01](#) A party to an action may require that the issues of fact be tried or the damages be assessed, or both, by a jury, by delivering a jury notice (Form 47A) at any time before the close of pleadings, unless section 108 of the Courts of Justice Act or another statute requires that the action be tried without a jury.

*Striking a jury notice*

**Where Jury Notice not in Accordance with Statute or Rules**

[47.02\(1\)](#) A motion may be made to the court to strike out a jury notice on the ground that,

- (a) a statute requires a trial without a jury; or
- (b) the jury notice was not delivered in accordance with rule 47.01.

**Where Jury Trial Inappropriate**

[\(2\)](#) A motion to strike out a jury notice on the ground that the action ought to be tried without a jury shall be made to a judge.

**Discretion of Trial Judge**

[\(3\)](#) Where an order striking out a jury notice is refused, the refusal does not affect the discretion of the trial judge, in a proper case, to try the action without a jury.

## APPENDIX B: ALBERTA LEGISLATIVE PROVISIONS

### Jury Act, RSA 2000, c J-3

#### **17. Right to jury in civil proceeding**

**17(1)** Subject to subsections (1.1) and (2), on application by a party to the proceeding, the following shall be tried by a jury:

- (a) an action for defamation, false imprisonment, malicious prosecution, seduction or breach of promise for marriage,
- (b) an action founded on any tort or contract in which the amount claimed exceeds an amount prescribed by regulation, or
- (c) an action for the recovery of property the value of which exceeds an amount prescribed by regulation.

**17(1.1)** If, on an application made under subsection (1) or on a subsequent application, a judge considers it appropriate, the judge may direct that the proceeding be tried by judge alone pursuant to the summary trial procedure set out in the *Alberta Rules of Court*.

**17(2)** If, on an application for directions or on a subsequent application, it appears that the trial might involve

- (a) a prolonged examination of documents or accounts, or
- (b) a scientific or long investigation,

that in the opinion of a judge cannot conveniently be made by a jury, the judge may, notwithstanding that the proceeding has been directed to be tried by a jury, direct that the proceeding be tried without a jury.

**17(3)** In this section, "proceeding" includes a counterclaim.

#### **18. Deposit of money for expenses with clerk**

**18(1)** When a judge orders that a proceeding be tried by a jury, the party at whose request the order is made shall, unless otherwise ordered, deposit with the clerk within 10 days from the order being made a sum of money that the clerk considers sufficient to pay the expenses of conducting the trial by a jury, and if the sum is insufficient, the party shall on demand by the clerk pay any further sum that the clerk requires.

**18(2)** Any surplus money remaining after payment of the expenses shall be returned to the party who made the deposit.

**Jury Act Regulation, Alta Reg 68/1983**

**4(1)** The following fees and allowances shall be paid to jurors:

**(a)** [Repealed Alta. Reg. 310/93, s. 2.]

**(b)** to a person serving as a juror at a trial, \$50 for each day or part of a day on which the person serves;

**(c)** to a person summoned for selection as a prospective juror or to a person serving as a juror at a trial

**(i)** the actual fare paid in going to or returning from the place of trial or proceedings by railway, bus or other public carrier;

**(ii)** if travel by railway, bus or public carrier is inconvenient and the person travels by private automobile, the amount set out in section 15 of the *Public Service Subsistence, Travel and Moving Expenses Regulation* made under the *Public Service Act* for each kilometre travelled to and from the place of trial or proceedings;

**(iii)** if the person is not resident in the vicinity of the place of trial or proceedings and is required to remain overnight, reasonable accommodation expenses actually incurred in an amount determined by the sheriff;

**(iv)** if the person

**(A)** is not resident in the vicinity of the place of trial or proceedings, or

**(B)** is resident in the vicinity of the place of trial or proceedings but is required to go to a restaurant for meals,

reasonable meal expenses actually incurred, in an amount determined by the sheriff.

**4(2)** A claim for any of the allowances set out in subsection (1)(c) shall be supported by receipts or other proof of expenses incurred.

**4(3)** If the claim is not supported by receipts or other proof required by subsection (2), it shall be paid in accordance with the *Public Service Subsistence, Travel and Moving Expenses Regulation* made under the *Public Service Act*.



**4(4)** If the Minister of Justice and Attorney General, the Deputy Minister of Justice and Deputy Attorney General or a person designated by either of them, having regard to the circumstances, is of the opinion that the allowances authorized by subsection (1)(c) are insufficient, he may authorize payment to the claimant of such higher allowance as he considers just.

**4(5)** In the case of criminal jury proceedings the amount payable under this section shall be paid by the sheriff from money appropriated by the Legislature, and in the case of civil jury proceedings it shall be paid by the clerk from money paid to him under section 18 of the Act.

**4.1** The amount that is prescribed for the purposes of section 17(1)(b) and (c) of the Act is

**(a)** \$10 000 if the action was commenced in the Court before March 1, 2003,  
and

**(b)** \$75 000 if the action was commenced in the Court on or after March 1,  
2003.

## APPENDIX C: BRITISH COLUMBIA LEGISLATIVE PROVISIONS

### Supreme Court Civil Rules, BC Reg 168/2009

#### Rule 12-6: Jury Trials

##### Trial without jury generally

(1) Subject to subrule (3), a trial must be heard by the court without a jury.

##### Trial without jury in certain proceedings

(2) A trial must be heard by the court without a jury if the trial relates to

- (a) the administration of the estate of a deceased person,
- (b) the dissolution of a partnership or the taking of partnership or other accounts,
- (c) the redemption or foreclosure of a mortgage,
- (d) the sale and distribution of the proceeds of property subject to any lien or charge,
- (e) the execution of trusts,
- (f) the rectification, setting aside or cancellation of a deed or other written instrument,
- (g) the specific performance of a contract,
- (h) the partition or sale of real estate,
- (i) the custody or guardianship of an infant or the care of an infant's estate, or
- (j) a proceeding referred to in Rule 2-1 (2).

##### Notice requiring jury trial

(3) Subject to Rule 15-1 (10) and subrules (2) and (4) of this rule, a party may require that the trial of an action be heard by the court with a jury by doing the following:

- (a) within 21 days after service of the notice of trial but at least 45 days before trial,
  - (i) filing a notice in Form 47, and
  - (ii) serving a copy of the filed notice on all parties of record;

**(b)** at least 45 days before trial, paying to the sheriff a sum sufficient to pay for the jury and the jury process.

...

### **Court may refuse jury trial**

**(5)** Except in cases of defamation, false imprisonment and malicious prosecution, a party on whom a notice under subrule (3) has been served may apply

**(a)** within 7 days after service for an order that the trial or part of it be heard by the court without a jury on the ground that

(i) the issues require prolonged examination of documents or accounts or a scientific or local investigation that cannot be made conveniently with a jury,

(ii) the issues are of an intricate or complex character, or

(iii) the extra time and cost involved in requiring that the trial be heard by the court with a jury would be disproportionate to the amount involved in the action, or

**(b)** at any time for an order that the trial be heard by the court without a jury on the ground that the trial relates to a fast track action or to one of the proceedings referred to in subrule (2).

### **Rule 15-1: Fast Track Litigation**

#### **When rule applies**

**(1)** Subject to subrule (4) and unless the court otherwise orders, this rule applies to an action if

**(a)** the only claims in the action are for one or more of money, real property, a builder's lien and personal property and the total of the following amounts is \$100,000 or less, exclusive of interest and costs:

**(i)** the amount of any money claimed in the action by the plaintiff for pecuniary loss;

**(ii)** the amount of any money to be claimed in the action by the plaintiff for non-pecuniary loss;

**(iii)** the fair market value, as at the date the action is commenced, of

(A) all real property and all interests in real property,  
and

(B) all personal property and all interests in personal  
property

claimed in the action by the plaintiff,

(b) the trial of the action can be completed within 3 days,

(c) the parties to the action consent, or

(d) the court, on its own motion or on the application of any party, so orders.

...

#### **Rule does not apply to class proceedings**

(4) This rule does not apply to a class proceeding within the meaning of the Class Proceedings Act.

...

#### **Trial to be without jury**

(10) A trial of a fast track action must be heard by the court without a jury.

## APPENDIX D: NORTHWEST TERRITORIES LEGISLATIVE PROVISIONS

### Jury Act, RSNWT 1988, c J-2

#### **2(1) Right to jury**

Where, in any action

(a) of libel, slander, false imprisonment, malicious prosecution or breach of promise of marriage,

(b) founded on a tort or contract in which the amount claimed exceeds \$1,000, or

(c) for the recovery of real property,

either party to the action applies to the Court, not less than two weeks before the time fixed for the trial of the action before a jury, the action shall, subject to subsection (2) and section 3, be tried before a jury, but in no other case shall an action be tried before a jury.

#### **2(2) Dispensing with jury**

Where, in any action of a class specified in subsection (1), application is made for the trial of that action before a jury and it appears to a judge, either before or after the commencement of the trial, that the trial will involve any prolonged examination of documents or accounts or any scientific investigation that, in the opinion of the judge, cannot conveniently be made by a jury, the judge may direct that the action be tried without a jury or that the jury be dismissed, in which case the action shall be tried or the trial continued, as the case may be, without a jury.

#### **3(1) Definition of "cost of the jury"**

In this section, "cost of the jury" means

(a) the total cost of the jury for the sittings of the Court at which the action is tried, including the cost of summoning the panel, jurors' fees and allowances, and all other lawful expenses in connection with that, as certified by the Clerk; or

(b) in any case where a jury is used for the trial of more than one action or proceeding at the same sittings of the Court, a portion of the total cost specified in paragraph (a), which shall be determined at the conclusion of the sittings in accordance with the Rules of the Supreme Court, or, if there are no such rules applicable, in accordance with an order to be made by the presiding judge.

### **3(2) Security for jury costs**

Where, in accordance with subsection 2(1), application is made for the trial of an action before a jury, the party making the application shall deposit with the Clerk a sum by way of security for payment of the cost of the jury that to the Clerk appears sufficient under the circumstances.

### **3(3) Payment of costs**

On the conclusion of the sittings at which the action is tried, the party making the application shall pay to the Clerk any amount by which the cost of the jury exceeds the amount of the security deposited by the party in accordance with subsection (2), and is entitled to have returned to him or her any amount by which the amount of the security deposited exceeds the cost of the jury.

### **3(4) Taxation of costs**

If the party making the application obtains judgment in his or her favour, the party shall, unless the judge otherwise orders, be allowed to and may tax against the unsuccessful party to the action the cost of the jury.

## APPENDIX E: SASKATCHEWAN LEGISLATIVE PROVISIONS

### The Jury Act, 1998, SS 1998, c J-4.2

#### 18. Right to jury

**18(1)** Any party may demand a jury in accordance with The Queen's Bench Rules in an action:

(a) for libel, slander, malicious arrest, malicious prosecution or false imprisonment; or

(b) where the amount claimed exceeds \$10,000.

**18(2)** The party demanding a jury:

(a) shall deposit with the local registrar in advance of the trial any sum that the local registrar considers sufficient for the fees and expenses of the jury for the estimated length of the trial; and

(b) subject to subsection (3), is responsible for the full cost of the jury and is not entitled to recover any part of the cost of the jury from the opposing party in the event of success at trial.

**18(3)** The judge presiding at the trial may make any order as between the parties regarding the cost of the jury that the judge considers appropriate where a party is successful in an action:

(a) for libel, slander, malicious arrest, malicious prosecution or false imprisonment; or

(b) with respect to personal injury or death where the amount claimed exceeds \$10,000.

#### 19. Judge may direct trial by jury

**19(1)** Notwithstanding section 18, a judge, on application by a party to an action, may order that the action be tried by a jury where:

(a) the ends of justice will be best served if findings of fact are made by representatives of the community; or

(b) the outcome of the litigation is likely to affect a significant number of persons who are not party to the proceedings.

**19(2)** Where an order is made pursuant to subsection (1), the judge may order that:

(a) no deposit for the fees and expenses of the jury is required; and

(b) no order as to the costs of the jury is to be made at trial.

**19(3)** Where no order is made pursuant to subsection (2), section 18 applies with respect to the cost of the jury.

**The Jury Regulations, 2000, RRS, c J-4.2, Reg 1**

**3. Fees payable**

**3(1)** The fee payable to a person:

(a) who is summoned to attend as a juror for the purposes of civil jury selection is \$15 for each day or part of a day that the person attends; and

(b) who is sworn to serve as a juror in a civil trial is \$25 for each day or part of a day that the person serves as a juror.

**3(2)** Subject to subsection (3), the fee payable to a person who is sworn to serve as a juror in a criminal proceeding is \$80 for each day or part of a day that the person serves as a juror.

**3(3)** No fee is payable to a person serving as a juror in a criminal proceeding if that person is receiving income from his or her employer while serving as a juror.



## APPENDIX F: YUKON LEGISLATIVE PROVISIONS

### Jury Act, RSY 2002, c 129

#### 2. Right to jury in civil matters

**2(1)** If, in any action for libel, slander, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, or in any action founded on a tort or contract in which the amount claimed exceeds \$1000, or in any action for the recovery of real property, either party to the action applies to the Supreme Court, not less than 90 days before the time set for the trial of the action before a jury, the action shall, subject to subsection (2) and to section 3, be tried before a jury, but in no other case shall an action be tried before a jury.

**2(2)** If, in any action of a class specified in subsection (1), application is made for the trial of that action before a jury and it is the opinion of a judge, at any time that the trial will involve any prolonged examination of documents or accounts or any scientific investigation that, in the opinion of the judge, cannot conveniently be made by a jury, the judge may direct that the action be tried without a jury or that the jury be dismissed, in which case the action shall be tried or the trial continued, as the case may be, without a jury.

#### 3. Jury costs

**3(1)** If, in accordance with subsection 2(1), application is made for the trial of an action before a jury, the party making the application shall deposit with the clerk security for payment of the cost of the jury.

**3(2)** On the conclusion of the sittings at which the action is tried, the party making the application shall pay to the clerk any amount by which the cost of the jury exceeds the amount of the security deposited by them in accordance with subsection (1), and is entitled to have returned to them any amount by which the amount of the security so deposited exceeds the cost of the jury.

**3(3)** If the party making the application obtains judgment in their favour, they shall, unless the judge otherwise orders, be allowed and may tax against the unsuccessful party to the action the cost of the jury.

**3(4)** In this section, "cost of the jury" means

(a) the total cost of the jury for the sittings of the Supreme Court at which the action is tried, including the cost of summoning the panel, jurors' fees and allowances, and all other lawful expenses in connection therewith, as certified by the sheriff; or

**(b)** in any case where a jury is used for the trial of more than one action or proceeding at the same sittings of the Supreme Court, a portion of the total cost specified in paragraph (a), that portion to be determined at the conclusion of the sittings in accordance with the Rules of Court, or, if there are no such rules applicable, in accordance with an order to be made by the presiding judge.