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Important Changes to the Ontario Rules of Civil Procedure

On January 1, 2010, a number of important amendments to the Ontario *Rules of Civil Procedure* will come into force. Not since the *Rules* were initially adopted have such sweeping changes been introduced.

These reforms are the result of the Civil Rules Committee's consideration of the Osborne report which outlined recommendations made by the Civil Justice Reform Project, as led by former Associate Chief Justice of Ontario, the Honourable Coulter Osborne.

Below, we highlight and provide comment on some of the more substantive changes.

SIMPLIFIED PROCEDURE – Increase in Monetary Jurisdiction/Limited Discovery

Starting January 1, 2010, the maximum damages that can be claimed for actions commenced under *Rule 76* will **increase to \$100,000.00**, from the previous cap of \$50,000.00.

Another significant change to *Rule 76* is the introduction of limited examinations for discovery. Parties will be allowed **a maximum of 2 hours** of discovery with the caveat that this limit is irrespective of the number of parties to the action. Under the current regime, actions commenced under *Rule 76* do not have the benefit of discoveries. Examinations by written questions and the cross examination of witnesses on affidavit evidence are still not permitted.

Coinciding with the increase in the *Rule 76* monetary jurisdiction, starting January 1, 2010, **Small Claims Court** actions will also see an increase in the amount that can be claimed **to \$25,000.00**, increased from the present \$10,000.00 maximum.

SUMMARY JUDGMENT – Judges Now Permitted to Hear and Weigh Evidence

Ontario counsel, long accustomed to courts' refusal to grant summary judgment in matters that contained even a whiff of contentious issues, leaving such matters to the trial judge, will now find that motion judges (and masters) are to assume a role previously reserved for the trial judge.

Courts Powers on a Motion

Departing from the precedent set by a long line of Ontario Court of Appeal decisions, judges hearing summary judgment motions will now have the power to weigh evidence, assess credibility and draw any reasonable inference from the evidence.

Mini-Trials

The new *Rules* will permit motion judges to conduct so called, “mini-trials” on one or more of the issues in dispute, directing the parties to present oral evidence, with or without time limits.

Summary Trials

Where a trial is deemed necessary, broad discretion is given to the court in exercising its power to direct every aspect of such trials; from directing what issues are to be tried to the delivery of affidavit evidence, the conduct of discoveries, setting parameters for the introduction of expert evidence and requiring parties to submit concise statements of fact; in a manner, these trials are case managed by the court. Moreover, as these powers are granted to the court, masters can direct summary trials where summary judgment motions are brought before a master.

Costs

Marking another significant change, the presumption that substantial indemnity costs will be awarded against the losing party in such motions is removed. In its place, the court is given discretionary authority to award substantial indemnity costs against any party deemed to have acted unreasonably, or in bad faith to create delay, in either bringing or responding to a summary judgment motion.

DISCOVERY REFORM – Relevance, Time Limits and a Plan

Redefining Relevance:

A “**simple relevance**” test will replace the current, semblance of relevance test, in that, the phrase “**relevant** to any matter in issue in the action,” will replace the present phrase, “relating to any matter in issue in the action.”

The “One Day” Rule

Under the new discovery *Rules*, each party will be limited to a maximum of seven (7) hours of oral examination, regardless of the number of parties or other persons to be examined; the latter being an important qualifier to the time limit. Though it remains to be determined how this new restriction will play out, in determining to make best use of the maximum time allotted, we may see counsel pooling resources in the examination of witnesses where there are overlapping interests.

Exceptions to the One Day Rule

Parties can, of course, exceed the seven (7) hour limit, on consent, or with leave of the court. In granting leave, the court will consider the following:

- a) amount of money in issue;
- b) complexity of the issues of fact or law;
- c) amount of time that ought reasonably to be required in the action for oral examinations;
- d) financial position of each party;
- e) conduct of any party (including, unresponsiveness during prior examination, etc.);
- f) a party's denial or refusal to admit anything that should have been admitted;
- g) any other reason that should be considered in the interest of justice.

Parties may also seek leave of the court for the multiple examination of parties under *Rule 31.01*, but parties seeking such exception will be required to prove: 1) that satisfactory answers respecting all issues raised cannot be obtained through one person; and, 2) that additional examinations would expedite the proceeding.

In addition to the above, the requirement in *Rule 30.03(1)* that an affidavit of documents is to be delivered within 10 (ten) days of the close of pleadings will be eliminated as it is to be addressed in the discovery plan, as indicated below.

Discovery Plan

Another important change to the discovery process is the new requirement that all parties agree to and submit (and update as required) a detailed discovery plan. This plan must be submitted within 60 days of the close of pleadings, or a later time as agreed to by the parties, but in any event, **prior** to any attempt to obtain discovery evidence.

The contents of the plan must be **in writing** and must include the following:

- a) the intended scope of documentary discovery under *Rule 30.02* (accounting for the relevance, costs, importance and complexity of issues in the particular action);
- b) dates when each party's affidavit of documents will be served, per *Rule 30.03*;
- c) information as to the timing, costs and manner in which the production of documents is to be carried out;
- d) the names of persons to be presented for oral examination per *Rule 31* and information regarding the timing and length of examinations; and,

- e) any other information that will result in the most expeditious and cost effective completion of the discovery process, proportionate to the complexity of the action.

The court also requires that parties consult and give consideration to the “Sedona Canada Principles Addressing Electronic Discovery” in preparing their discovery plans. These principles were developed by the Sedona Conference and are available at the Conference site at: <http://www.thesedonaconference.org/>

The requirements to agree to and to regularly update a discovery plan are crucial in that parties not abiding by such could find that any discovery related motions that they bring could be denied and cost sanctions ordered against them for non-compliance.

Proportionality in Discovery

Rule 29.2 will be applied to all aspects of discovery and will govern the court’s decisions in determining whether a party or person must produce a document or answer a question. In making such determinations, the court will consider whether:

- a) the time required for the party or person to answer the question or produce the document would be unreasonable;
- b) the expense associated with answering the question or producing the document would be unjustified;
- c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;
- d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and
- e) the information or the document is readily available to the party requesting it from another source.

As to the volume of documents, in addition to the above considerations, the court will determine whether to order a party or person to produce one or more documents by considering whether such an order would result in an excessive volume of documents required to be produced.

As a review of these changes reveals, counsel will have to reconsider the manner in which discovery, both oral and documentary, are conducted after January 1, 2010. In the longer term, it remains to be determined what effect future court decisions will have on how these new discovery rules are shaped and applied.

OTHER CHANGES

In addition to the above, changes will also be made to Mandatory Mediation to include all actions commenced in Ottawa, Toronto and Essex, not just Case Managed Actions or Simplified Procedure cases. Also, mediation of these cases must be conducted within 120 days of the filing of the first defence, instead of the 90 days, previously.

In conjunction with this change, the previously dual Case Management Rules will be combined to form a new Civil Case Management regime under Rule 77, but not all cases commenced in Ottawa, Toronto and Essex that are subject to mandatory mediation will be subject to Case Management. Under the new *Rule 77*, the court will determine, according to a detailed set of criteria, as set out in the Rules, whether an action should be case managed.

New *Rule 4.1* establishes that the duty of an expert is to the court, not the parties and changes to Rule 53 expands the courts' powers to make orders limiting the number of experts allowed to testify, establishing timelines for service of expert reports (initial expert reports now to be served **90 days before pre-trial**) and of governing the content of the reports. Pre-trial dates will now automatically be set by the Registrar within 90 days of an action being set down for trial.

For further details on the changes to the Rules and how they may affect your case, we invite you to contact any of our professionals who would be pleased to assist you.