

the rules, they are a changin'

upcoming amendments to the Ontario Rules of Civil Procedure

January 1, 2010 will mark the implementation of the most extensive amendments to the Ontario *Rules of Civil Procedure*¹ since they were first adopted in 1985. Of particular practical significance for litigants are the changes to the rules governing summary judgment, simplified procedure and discovery.

The amendments follow the Ontario Government's desire to explore means of making justice more accessible and affordable to Ontarians. To develop recommendations, the Attorney General for Ontario asked the Honourable Mr. Justice Osborne, Q.C. to chair the Civil Justice Reform Project.² The project's report was released in November of 2007 and forms the basis of the upcoming changes.

summary judgment³

The major change to the rule governing summary judgment is that motions judges can now weigh evidence and draw inferences, evaluate deponent credibility and even hold a "mini trial" at the motion (i.e. require oral evidence).⁴

The current rule requires judges to take at face value the evidence contained in the pleadings, affidavits and cross examination transcripts. Summary judgment will not be granted if the judge finds that a material issue can only be decided by assessing credibility, weighing conflicting evidence or drawing factual inferences.

While it remains to be determined by the cases, the changes to this rule may bring more utility to summary judgment motions, eliminating a higher percentage of unmeritorious claims at an earlier stage. Judges now have the power to dispense with a wider range of cases before the time and expense associated with a full blown trial is required.

The changes to the summary judgment rules also entail less onerous cost consequences on unsuccessful moving parties. The presumption of substantial indemnity has been replaced with permissive language, allowing the court more freedom to choose the cost scale that is appropriate in the circumstances. This

¹ *Rules of Civil Procedure*, R.R.O 1990, Reg. 194, [Rules].

² Honourable Coulter A. Osborne, Q.C., "Civil Justice Reform Project: Summary of Findings and Recommendations" (November, 2007), <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>>.

³ *Rules*, rule 20.

⁴ Masters are still limited to the powers conferred by the old rule.

brings the costs rationale for summary judgment in line with the general approach towards costs on motions.

discovery⁵

There are a number of significant changes to the rules governing discovery. In particular, the new rules impress time limits on examination for discovery, require the preparation of a discovery plan and codify the law on proportionality regarding productions and scope of discovery.

Litigants will now be limited to fitting all of their examinations for discovery into seven hours, unless the court orders, or the parties agree that they may go longer. Parties must also agree to (and update) a written discovery plan and in doing so, consult the Sedona Canada Principles Addressing Electronic Discovery.⁶ Failure to do so means that the court may refuse to grant relief or award costs on discovery related motions.

The changes to the Rules also effectively codify the common law principle of proportionality regarding disclosure of information and documents. In deciding whether to direct a party to answer a question or produce a document, courts must now consider a list of factors, including the time, expense and prejudice that a party would undergo if required to disclose.

simplified procedure⁷

An increased number of cases will now fit under simplified procedure as the upper limit for these matters is doubled from \$50,000 to \$100,000. Whereas under the current rule, no discovery of any sort is allowed, the new rule gives litigants under simplified procedure a limited ability to engage in oral discovery - up to two hours regardless of the number of parties or persons to be discovered. Finally, the special rule for summary judgment that applied to simplified procedure matters has now been abolished, and the summary judgment procedure discussed above will apply to all matters.

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⁵ *Rules*, rules 29 -31.

⁶ The Sedona Conference, "Sedona Canada Principles Addressing Electronic Discovery" (January 2008) <http://www.thesedonaconference.org/dltForm?did=canada_pincpls_FINAL_108.pdf>.

⁷ *Rules*, rule 76.

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a cautionary note

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