



## Amendments to Rules of Civil Procedure

by Gordon Marsden

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Effective on January 1, 2010, several amendments to the *Rules of Civil Procedure* will be implemented. These amendments follow the many recommendations made by former Ontario Associate Chief Justice Coulter Osborne in his report on the province's civil justice system, which was shaped by four guiding principles:

1. access to justice;
2. proportionality;
3. one size does not fit all; and
4. the culture of litigation.

These four guiding principles will provide the interpretative framework for the *Rules of Civil Procedure*. Pursuant to the new Rule 1.04(1.1), "the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding." This new approach will effect all pre-existing actions and newly commenced actions.

The amendments will transform several aspects of civil litigation. This article will focus on three significant aspects, namely, motions for summary judgment, examinations for discovery, and simplified procedure.

### Motions for Summary Judgment

By broadening the powers of the presiding judge, the amendments intend to increase the efficacy of motions for summary judgment. Essentially, motions for summary judgment will become a mini-trial. Unless it is in the interest of justice that such powers be exercised at trial, the presiding judge will be able to

- weigh evidence;
- evaluate the credibility of a deponent; and
- draw any reasonable inference from the evidence.

In addition to affidavit evidence, the presiding judge may order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

Finally, to encourage parties to bring a motion in the appropriate circumstances, the cost consequences will be reduced. The presiding judge may fix costs on a substantial indemnity basis if

- the party acted unreasonably by making or responding to the motion; or
- the party acted in bad faith for the purpose of delay.

Given this broadening of the powers of the presiding judge, this should result in a greater number of summary judgement motions being brought and brought successfully.

### **Examinations for Discovery**

The amendments restrict both the scope and length of examinations for discovery. The result is that examinations for discovery will have to become more focused. What follows are the most salient amendments made to the discovery process:

- (1) The scope of the documentary discovery and oral examination for discovery will be narrowed from “**relating to any matter in issue**” (which had been interpreted as “a semblance of relevance”) to “**relevant to any matter in issue.**”
- (2) In conducting oral examinations for discovery, no party shall exceed a total of **seven hours** of examination, regardless of the number of parties or other persons to be examined, except with the consent of the parties or with leave of the court. Leave will be granted subject to the following considerations of proportionality:
  - (a) the amount of money at issue;
  - (b) the complexity of the issues of fact and/or law;
  - (c) the amount of time that ought reasonably to be required for oral examinations;
  - (d) the financial position of each party;
  - (e) the conduct of the parties;
  - (f) a party’s denial or refusal to admit anything that should have been admitted; and
  - (g) any other reason that should be considered in the interest of justice.
- (3) Before conducting an examination for discovery, parties must agree to a written discovery plan that sets out
  - (a) the intended scope of the documentary discovery, taking into account relevance, costs, and the importance and complexity of the issues in the particular action;
  - (b) dates for service of Affidavit of Documents;
  - (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; and
  - (e) any other information that is 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.

If the parties fail to agree or update a discovery plan, the court may refuse to grant relief or to award any costs on any subsequent motion arising from the discovery process.

### **Simplified Procedure**

The amendments to this procedure will likely increase the number of actions brought under simplified procedure for two reasons:

- (i) the monetary jurisdiction will be substantially increased from \$50,000.00 to \$100,000.00; and
- (ii) oral examinations for discovery are now permitted, but no party shall exceed a total of two hours of examination, regardless of the number of parties or other persons to be examined.

By adhering to the four guiding principles, the amendments intend to make actions move more expeditiously to their own unique resolution. ■