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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Insurance Observer

AMENDMENTS TO *RULES OF CIVIL PROCEDURE*

Gordon Marsden

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**

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Gordon has a varied civil litigation practice with a primary emphasis on insurance defence matters. He has advised and represented clients in a broad range of tort litigation matters, including personal injury (such as, motor vehicle accidents, medical malpractice and occupiers' liability), professional negligence, defamation, commercial litigation, including contract disputes, product liability, and directors' and officers' liability.

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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. ■

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"The Limitations Act, 2002 established a standard two-year limitation period in Ontario, with some notable exceptions. In the process, it abolished section 8 of the Negligence Act and made the basic two-year limitation period applicable to contribution and indemnity claims."

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COURT OF APPEAL RULES ON CONTRIBUTION CLAIMS UNDER THE *LIMITATIONS ACT, 2002*

Jay Stolberg

The *Limitations Act, 2002* changed the way defendants approach claims for contribution and indemnity. Prior to January 1, 2004, a defendant had one year from the date of judgment or settlement to commence a claim for contribution or indemnity based on section 8 of the *Negligence Act*, R.S.O. 1990 c. N.I. This gave insurers ample opportunity to investigate and attempt to resolve claims long after a statement of claim had been issued.

The *Limitations Act, 2002* established a standard two-year limitation period in Ontario, with some notable exceptions. In the process, it abolished section 8 of the *Negligence Act* and made the basic two-year limitation period applicable to contribution and indemnity claims. This is achieved through section 4 of the new Act which establishes a two-year limitation period which begins to run from the date the "claim was discovered". For contribution and indemnity claims, section 18(1) deems the discovery date to be the date the defendant is served with the statement of claim.

For losses arising **after** January 1, 2004, the application of the new Act is straightforward. The plaintiff has two years to commence an action once the cause of action is discovered. The defendant has two years after service of the statement of claim to pursue a claim for contribution or indemnity, either by way of a crossclaim against an existing co-defendant, or through a third party claim.

The application of the new Act to losses which occurred **prior** to January 1, 2004 has been less clear. Section 24 of the new Act contains "transition" provisions which apply to "claims based on acts or omissions" that took place prior to January 1, 2004. Where the previous limitation period did not expire and the claim was discovered before January 1, 2004, the old limitation period continues to apply.

Where the loss occurred **prior** to January 1, 2004 and the defendant was aware of the other party's potential liability, the transition priorities are less clear. Where the Statement of Claim was issued after January 1, 2004, the issue is whether the defendant has two years to commence a contribution claim, or whether the old limitation period under section 8 of the *Negligence Act* continues to apply?

The issue has now been clarified by the Ontario Court of Appeal in its recent decision *Placzek v. Green* (January 28, 2009). *Placzek v. Green* involved a rear-end collision which occurred on March 4, 2003. The driver and passenger of the plaintiff vehicle sued the defendant. A Statement of Claim was issued on February 8, 2005, after the new Act came into force. The claim was served on June 8, 2005.

In August 2007, more than two years later, the defendant brought a motion to amend its

"The Court of Appeal's decision in Placzek is consistent with its other recent decisions interpreting the Limitations Act, 2002 which tend to favour a more restrictive approach to the limitation periods under the new regime."

Statement of Defence to add a counterclaim against the plaintiff driver for contribution and indemnity and to add two owners of the plaintiff vehicle as third parties.

The motions judge held that the defendant's claims were deemed to have been "discovered" on the date the Statement of Claim was served and that the two-year limitation under the new Act applied. As more than two years had lapsed since service of the claim, the court found that the contribution claims were statute-barred.

The defendant argued on appeal that the contribution claim had been "discovered" at the time of the accident and pursuant to the transition provisions under section 24 of the new Act, the limitation period under section 8 of the *Negligence Act* continued to apply.

The Court of Appeal examined the qualifying words in section 24(2) which indicate that the section applies to claims based on "*acts or omissions*" which took place prior to January 1, 2004. The Court found that a claim for contribution and indemnity is a claim for unjust enrichment. It is based on one defendant paying more than its fair share of the plaintiff's damages. The "acts or omissions", the Court reasoned, is not the tortfeasor's conduct vis-à-vis the plaintiff, but rather the tortfeasor's failure to pay its fair share of damages **to the defendant**. This only arises after there has been a payment by the defendant following a judgment or settlement.

As there had been no judgment or settlement prior to January 1, 2004, the Court held that there had been no "act or omission" which occurred prior to January 1, 2004 to trigger the transition provisions. The two-year limitation period in *Limitations Act, 2002* therefore applied.

With respect to the defendant's discoverability argument, the Court held that, in the absence of a settlement or judgment, the defendant had no cause of action against the tortfeasors for contribution and therefore could not have "discovered" the claim prior to January 1, 2004.

The Court of Appeal's decision in *Placzek* is consistent with its other recent decisions interpreting the *Limitations Act, 2002* which tend to favour a more restrictive approach to the limitation periods under the new regime. ■

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Blaneys Victories

Tim Alexander & Gordon Marsden

Tim Alexander

Gordon Marsden

Tim Alexander and Gordon Marsden were successful at trial in obtaining the dismissal of an action against the Alcohol and Gaming Commission of Ontario brought by a 22 year old women who was rendered a quadriplegic in a motor vehicle accident following an evening of drinking. The trial judge accepted the AGCO's argument that, as a statutory regulator of licensed establishments, it did not owe a duty of care to individual patrons such as the plaintiff. The dismissal was obtained after four days of trial, following which, the remaining parties to the action agreed to damages of $12,000,000 and continued the trial on the remaining liability issues. ■

Eugene Mazzuca

Eugene Mazzuca was successful at trial before Madam Justice Kelly in having an action against the Peel Regional Police dismissed.

Eugene Mazzuca

The action involved allegations of negligent investigation. After eight days at trial, Madam Justice Kelly concluded that no evidence had been adduced to establish that the police investigation had been conducted negligently. Her Honour found that the Officers of the Peel Regional Police acted reasonably and met the standard of care of an investigating officer. The action was dismissed in its entirety. ■

EXPECT THE BEST

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