



New Rules Aim to Make Court Faster, Cheaper, More Accessible

by Todd Robinson

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Sweeping changes to the rules of court in Ontario (the *Rules of Civil Procedure*), which just took effect January 1, aim to make justice more accessible and make the time and cost involved in litigation more proportional to the issues at stake.

By requiring Ontario lawyers to work together *outside* the courtroom, the revised *Rules* also seek to minimize the culture of litigation that has been quickly taking over those courtrooms.

Although many of the changes are procedural, several are quite substantive and promise to have a dramatic impact on the conduct of litigation. Although a number of the amendments will add costs at the front end of a case, the payoff should be a more streamlined litigation process and thereby reduced client costs for the case as a whole.

The new *Rules* apply to all new and existing actions, with some minor exceptions. Here is an overview of some of the major changes:

Scope and Conduct of Discovery

Previously, documents and information that “relate” to a matter in issue have had to be produced in litigation. The amended rule requires that documents and information that are “*relevant*” to a matter in issue must be produced. The goal is to force parties to focus on the important documents and issues and to

minimize, if not avoid, time-consuming, delay-producing and cost-generating practices such as “document dumping” (where boxes of documents are produced, most of which are connected to the matters at issue but are not relevant to them) or “fishing expeditions” (where parties seek extensive discovery on less important issues).

Also, a new “discovery plan” is required for all actions. This is basically a written plan made through consultation by all parties addressing the intended scope of discovery (documentary and oral), document production dates, timing and costs, the names of individuals to be presented for oral discovery, and “any other information promoting an expeditious and cost-effective discovery process.”

Discovery plans are intended to help expedite the litigation by obliging counsel to discuss and deliberate on the conduct and course of the action before it ever gets to court.

In addition, a time limit on oral discoveries is being introduced for ordinary actions (a maximum of seven hours per party), which will force counsel to focus in on the key issues of the litigation when asking questions on discovery.

Summary Judgment

The *Rules* allow litigants to ask a judge to decide a matter (or an issue in the matter) without holding a full-blown trial in court with live-witness testimony. This is called summary judgment. Separate requirements previously existed for summary judgment under ordinary actions and summary judgment under simplified procedure actions. The distinction has been removed and now a single “test” for summary judgment applies to all actions governed by the *Rules*.

Under the former *Rules*, it was difficult to obtain summary judgment in an ordinary action. Also, a party that brought a summary judgment motion and was not successful was obliged to pay substantially all the costs of the opposite party/parties (known as “substantial indemnity costs”). Such a strict and adverse costs sanction, coupled with the stringent requirements to obtain summary judgment, caused great reluctance among counsel and clients to bring summary judgment motions.

The new rule aims to make it easier to obtain summary judgment, giving judges greater discretion to decide matters short of a trial. In addition, the costs sanction has been revised dramatically. Now, substantial indemnity costs *may* be awarded by the court, but only if a party has acted “unreasonably” or “in bad faith for the purpose of delay.” Judges also now have discretion to order a mini-trial for any issue on which they need further clarification before deciding the summary judgment motion. These changes should lead to more summary judgment motions, which are an excellent way to resolve issues, or at least narrow them, quickly and cost-effectively.

Experts

Expert witnesses are used in cases with the intention that the court’s deliberations will be informed by independent, professional opinion evidence and analysis. There has been a long-standing concern, however, that not all expert witnesses are, in fact, truly impartial. Under the amended *Rules*, experts now have a “duty” to provide fair, objective and non-partisan opinion evidence, and will be required to acknowledge that duty to the court, in writing, in their reports. Expert reports must also include instructions from counsel and full explanations of the expert’s opinions with supporting reasons. When retaining and instructing experts, it is now very important for counsel and clients to be cautious and ensure that the objectivity of those experts is not, and does not appear, compromised.

Timeline Changes

There are a number of timeline changes under the new *Rules* that will see materials prepared, served, and filed much earlier. Notably, expert reports now need to be prepared and served *much* earlier (in advance of pre-trial). This will help make pre-trials more meaningful and give parties an opportunity to properly canvas settlement options with full knowledge of the issues. Also, the *Rules* provide further powers to the court to dismiss actions that linger in the judicial system for too long, which will encourage plaintiffs to move their actions forward in a timely manner.

Simplified Procedure

The *Rules of Civil Procedure* provide a more streamlined and cost-effective process known as simplified procedure. With the amendments made to the simplified rules, a greater number of actions will be brought under this procedure. Formerly, the simplified procedure was restricted to claims of \$10,001 to \$50,000 in value. The monetary jurisdiction is now claims of \$25,001 to \$100,000.

Among the features of the former simplified procedure were no oral discoveries, stricter timelines for the proceeding, and the availability of an abbreviated trial that uses affidavit evidence and only cross-examination for live evidence at trial (a “summary trial”).

Now, some limited direct examination on affidavit evidence has been introduced for summary trials (*i.e.*, a lawyer can now examine her/his own witnesses instead of just cross-examining opposing witnesses). Also, limited oral discoveries (two hours per party) have been introduced to the simplified procedure, which will allow counsel and clients to better learn the positions of other parties prior to trial.

Small Claims Court

Because of the relatively small monetary jurisdiction of the Small Claims Court and the very limited costs recoverable at trial, litigants have often represented themselves in small claims cases or have been represented primarily by paralegals and law students. The monetary jurisdiction of the Small Claims Court has now increased from \$10,000 to \$25,000 in damages. This, inevitably, will lead to more represented parties in the courtroom, which, in turn, will invariably mean more lawyers. (Amendments to the *Rules of the Small Claims Court* are now in effect as well, but these are largely procedural, dealing predominantly with enforcement after a judgment is obtained.)

Overall, the amended *Rules* are intended to promote a more timely and cost-effective litigation process. We look forward to monitoring the impact of these changes and seeing whether they produce the desired outcome. ■