

## Commercial Litigation

August 2009

### New Rules Set to Streamline Litigation, Reduce Costs, and Increase Access to Justice

In many instances the costs of litigation can be such a burden that a potential claimant's access to the justice system is effectively restricted or barred outright. As of January 1, 2010 changes to three main areas of Ontario's *Rules of Civil Procedure* will come into effect. These changes, if implemented successfully, will streamline the litigation process and increase access to justice.

#### Increasing Monetary Jurisdiction of Small Claims Court and the Simplified Procedure

##### Small Claims Court

No lawyers are required in Small Claims Court, costs are reduced and the procedural rules are uncomplicated. Currently the maximum amount that can be claimed is \$10,000.00. Claims exceeding this amount must be commenced in the Superior Court of Justice. Potential litigants with claims between \$10,000.00 and \$25,000.00 are in a difficult position. Their claims exceed the jurisdiction of the Small Claims Court but the legal fees associated with commencing an action in the Superior Court of Justice would be disproportionate to the amount of their claim.

In January, the upper limit for actions commenced in Small Claims Court will increase from \$10,000.00 to \$25,000.00. This is the first monetary increase in the jurisdiction of the Small Claims Court since 2001. Increasing the monetary jurisdiction of this court will allow litigants with mid-level claims the opportunity to advance their lawsuits utilizing the simpler procedures of Small Claims Court without facing prohibitive legal fees.

##### Simplified Procedure Rule

Rule 76 – the “Simplified Procedure” rule - was initially introduced in 1996 in an attempt to reduce the cost of litigating modest claims by eliminating certain procedural steps. Simplified Procedure offers significant cost and time saving mechanisms. The major feature of this rule is that it currently does not permit examination for discovery or cross-examination on affidavits filed on motions. It also allows for a “summary trial” where the majority of the evidence is adduced by affidavit and strict time limits are

imposed. The Simplified Procedure is mandatory where the claim being advanced is \$50,000.00 or less, and optional for claims exceeding \$50,000.00.

In January, the Simplified Procedure will be mandatory for all claims of \$100,000.00 or less. The new changes will result in more focussed documentary discovery. A party will only be required to disclose documents actually relevant to any matter in issue. Currently parties are required to disclose those documents “relating to” any matter in issue. This is a much wider test requiring the disclosure of any documents with a “semblance of relevance,” to the matters in issue. Additionally, *extremely limited* oral examinations will be permitted to a maximum of two hours of discovery regardless of the number of parties to be examined.

##### Limiting Oral and Documentary Discovery

In January there will also be significant changes to the scope of the discovery process in claims exceeding \$100,000.00 and which are outside the jurisdiction of the Simplified Procedure Rules.

- Each party will be limited to seven hours of discovery each unless all parties consent or the court orders otherwise;
- The modified actual relevance test will also apply to oral and documentary discovery;
- Parties will be required to agree to a written “Discovery Plan” wherever a party intends to have discovery by way of documents, oral, or written examination, inspection of property, or medical examination. The Discovery Plan will set out the scope of documentary discovery, taking into account relevance, costs, and importance and complexity of the issues; and

- A requirement of proportionality will be imposed on production and discovery. The court will be able to limit questions and documentary productions where the associated costs are out of proportion to the amount in dispute.

The rationale behind these changes is to promote cooperation and to provide the courts with the flexibility to reduce opportunities for abuse of the discovery process. Under the new rules, the discovery process is expected to be completed more quickly and in a manner more proportionate to the nature of the claim.

## Summary Judgment Motions

Motions for summary judgment are intended to allow a party to obtain judgment in unmeritorious cases without the expense and time required by a full-fledged trial. However, the current rules prevent judges from making findings of credibility or weighing the evidence and a party cannot obtain summary judgment unless the court is satisfied that there is no genuine issue for trial and the claim lacks any real chance of success. There is also a presumption that an unsuccessful moving party pays the costs incurred by the responding party in defending the motion on a “substantial

indemnity” scale. This can amount to recovery of up to 75% of the responding party’s own costs. As a result, this summary procedure, although originally designed to improve procedural justice, has not been a particularly effective tool for early disposition of weak cases.

Under the new rules, a judge’s powers will be substantially expanded and it is expected that the new summary judgment procedures will more efficiently dispose of these matters. Changes to the rules include:

- Judges hearing summary judgment motions will be permitted to make assessments of credibility and weigh evidence;
- Judges hearing summary judgment motions can conduct “mini-trials” and obtain oral evidence;
- Cost consequences have been softened unless the motion is brought unreasonably or in bad faith.

Overall, the new rules will reflect the general principal of proportionality. Simply put, the time and expense devoted to a case must reflect what is actually at stake in the proceedings. In implementing the above changes, the civil justice system should become more accessible and affordable.

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## Pallett Valo LLP Commercial Litigation Practice

Our firm has the largest Commercial Litigation department in Peel Region, with the depth and expertise to provide legal advice and representation in complex litigation matters. Our clients are served with advice that is designed to minimize and avoid risks and business disruption through alternative dispute resolution mechanisms, and decisive and aggressive action in the Courts when necessary.

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This article provides information of a general nature only and should not be relied upon as professional advice in any particular context. For more information about the changes to the Rules of Civil Procedure, contact a member of our Commercial Litigation Practice at **905.273.3300**.

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