What Real Estate Lawyers Need to Know About the New Civil Procedure Rules

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Introduction - History of the Legislative Changes and Organization of the Paper:

On January 1, 2010, the most substantive changes to the Ontario *Rules of Civil Procedure*[1] (the "Rules") came into force since the Rules were first adopted in 1985.[2] The amendments to the Rules were brought about by Ontario Regulation 438/08[3] (the "New Rules").

The New Rules are based upon the recommendations of the Hon. Coulter A. Osborne in his report of the findings of the Civil Rules Committee entitled: *Civil Justice Reform Project: A Summary of Findings and Recommendations*.[4] However, major changes to the Rules have been contemplated since at least 2003, when Justice Colin Campbell issued a far ranging report on the Rules as part of his role with the Discovery Task Force on the Discovery Process in Ontario.[5] Even earlier, in July of 1996, changes to the Rules of Civil Procedure in England and Wales

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1 *Rules of Civil Procedure (Ontario)*, R.R.O. 1990, Reg. 194.

2 G.D. Watson & M. McGowan, *Ontario Civil Practice Transition Guide 2009/2010*, (Toronto: Carswell, 2009) at [Watson and McGowan].

3 O. Reg. 438/08.

4 C.A. Osborne, *Civil Justice Reform Project: A Summary of Findings and Recommendations* (Toronto, Ontario Attorney General, 2007) [*Osborne Report*].

5 C. Campbell, *Report of the Ontario Task Force on the Discovery Process* (November, 2003).

were discussed by the Right Honourable Lord Woolf who delivered a final report entitled "*Access to Justice*" to which some new Ontario jurisprudence refers.[6]

Although the topics discussed in this paper are not necessarily specific to real estate law, the amendments and the New Rules will affect real estate lawyers in the same way that they affect all lawyers practising law in Ontario – they will fundamentally change the manner of trial preparation, and the strategic and procedural aspects in which matters are litigated. Even if litigation is not a major part of your real estate practice, I am sure each participant has some familiarity with a real estate situation that has resulted in litigation. Litigation always involves risks and costs to a client – and these amendments will likely affect both. For that reason, it is important to become aware of the changes ushered in on January 1, 2010.

In an effort to keep the presentation of the New Rules succinct, this paper discusses some of the more important changes to the Rules. By way of a summary, the outline of which will be followed in this paper, the changes discussed include:

TOP 10 CHANGES IN THE NEW RULES OF CIVIL PROCEDURE

10. Greater lead in times for the filing of court materials;

9. Potential for experts found to be biased has been expanded;

8. Case Management under the New Rules;

7. Mandatory mediation under the New Rules;

6. Small claims court jurisdiction shift: $10k à $25k;

5. Change in threshold for the Simplified Procedure: $50K à $100K;

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[6] Right Honourable the Lord Woolf, *"Access to Justice Final Report"* (The Master of the Rolls, July 1996, Final Report to the Lord Chancellor on the civil justice system in England and Wales [Woolf].

4.	Two hours of discovery allowed for Simplified Procedure claims;
3.	Proportionality and relevancy of documents and questions in discovery;
2.	Discovery plans and the "one day" limit on discovery; and
1.	New powers of the motion judge on a motion for summary judgment.

Top Ten Countdown:

Ten: Greater Lead in Times for Filings and Technical Changes in the New Rules

To begin, a quick note regarding matters commenced in the courts *before* January 1, 2010. Generally, the New Rules are to be applied to any motions or claims that were filed before January 1, 2010, but which will not be heard until after January 1, 2010. For the most part, the New Rules do not provide a transition period or a grandfathering-out of the old Rules. The courts have already decided that the New Rules generally apply retroactively.[7]

The lead in times for filing court materials under the New Rules have increased by several days, or longer in some cases. On the whole, the New Rules require longer periods for filing court materials and for completing pre-trial procedures – not shorter – therefore, when acting on behalf of a client in litigation, it is important to ensure compliance with the increased filing time limits under the New Rules when submitting documents to the court. Additionally, a new practice direction outlining the requirements for filing long and short motions exists in the Toronto region.[8]

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[7] *Onex Corp. v. American Home Assurance*, 2009 CanLII 72052 (Ont. S.C.) [*Onex*], followed in *Alymer v. HMQ and AGC*, 2010 ONSC 649 (CanLII) [*Alymer*].

[8] See: http://www.ontariocourts.on.ca/scj/en/notices/pd/toronto/civil.htm.

Further, the court has now made it clear that in all instances where a Rule prescribes "a period of seven days or less...holidays shall not be counted." Under the old Rules, holidays were not to be counted for periods of "less than seven days." Effectively, a seven day advance filing requirement under the New Rules really means nine calendar days. In cases where a statutory holiday falls within the seven days advance filing period, the filing must occur even further in advance.

Since the changes are numerous and technical, they go beyond the scope of this paper. All of the information regarding the technical changes and the new time periods for filing is available through transition guides on the Ministry of the Attorney General's website.[9]

Nine: Experts and the New Rules

The first major substantive addition to the New Rules to be discussed is the new emphasis placed on the duty of an expert to the court. Rule 4.1.01 states:

> **Duty of Expert**
> 4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,
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> > (a) to provide opinion evidence that is fair, objective and non-partisan;
> > (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
> > (c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.
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> **Duty Prevails**
> (2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

It is well accepted that an expert owes a foremost duty to the court. The expert's role in a hearing is to assist judges and juries in understanding scientific or technical issues and to make

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[9] See: http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/changes_to_rules_of_civil_procedure.asp.

accurate findings of fact. A UK judgment, which has been cited often in Canadian jurisprudence, found that expert evidence "should be, and should be seen to be, the independent product of experts uninfluenced as to form or content by the exigencies of litigation."[10] Thus, the amendment to the Rules is intended to codify and strengthen the common law regarding the duty of experts to the court.

One consequence of the statement on an expert's duty in the New Rules is that Form 53 now requires that an expert sign a certificate acknowledging the accuracy and independence of his or her report before it can be filed with the court.[11]

A second consequence may be an increase in the number of challenges alleging bias against an expert and his or her expert report. The adversarial system can sometimes foster certain beliefs in expert witnesses that his/her side is right and his/her opinion should advance the case of the party retaining the expert. Some expert witnesses genuinely believe that their proper role is to advocate for the position of the party who has retained him or her. The New Rule clearly prohibits such expert advocacy. At common law, the courts will entertain argument that the expert or his or her report has been compromised by such bias.

The usual remedy for a biased expert is either the disqualification of the expert or, in less extreme cases, the courts have found that expert advocacy should be determined as a matter of weight being accorded to his or her evidence. However, there is little judicial guidance about the degree of bias necessary to rule expert testimony as inadmissible or to assign it little to no

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[10] *National Justice Compania Naviera S.A. v. Prudential Assurance Co., Ltd. ("The Ikarian Reefer")*, [1993] 2 Lloyd's Rep. 68 at 81-82 (Q.B. Com. Ct.) and G.R. Anderson, *Expert Evidence, 2nd Ed.* (LexisNexis Canada: Markham, 2009).

[11] See: http://www.ontariocourtforms.on.ca/forms/civil/53/RCP-E-53-1108.pdf.

weight. Thus, it should be interesting to see how the new duty of an expert to the court as set out in the New Rules plays into such challenges, as more actions are brought under the new regime.

Eight: Case Management under the New Rules

The case management rules under the old regime were somewhat confusing and differed depending upon the region in which the action was commenced. The New Rules have created a single case management rule by revoking both Rule 77 and Rule 78 under the old regime, and combining aspects of each into a single Rule 77. The new Rule 77 now applies in Toronto, Ottawa and county of Essex and generally adopts the "case management light" approach of former Rule 78 which described case management in Toronto.

Such approach suggests that case management is to be used only when necessary and only to the extent necessary, and that the greater share of the responsibility for managing the proceeding and moving it along expeditiously remains with the parties. The Rule's statement of its purpose and general principles makes this abundantly clear. Rule 77.01(1) reads:

> 77.01 (1) The purpose of this Rule is to establish a case management system that provides case management only of those proceedings for which a need for the court's intervention is demonstrated and only to the degree that is appropriate, as determined in reliance on the criteria set out in this Rule.[12]

Rule 77 continues to provide for the usual features of case management. For example, Rule 77 provides a judge or master a broad range of powers including the hearing of motions and case conferences and the setting of timetables.

The purpose of case management is to reduce unnecessary costs and delay in civil litigation, to facilitate early and just settlements and to bring actions to a just determination while allowing

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[12] Rule 77.01(1).

sufficient time to conduct the proceedings.[13] Under the new regime, cases can only get into case management pursuant to a court order. The order for case management may be made upon the parties' consent, on the request of a party or by the court's own initiative.[14] A party might want to request case management in actions with multiple parties or where the other party is unsophisticated or unrepresented. The Rule lists detailed criteria to be applied by the court in considering whether to assign a proceeding for case management. Some of the criteria include: the general onus on the parties to manage their own case, the complexity of the issue at trial, the public importance of the action, the number of parties and the amount of intervention the action is likely to require, among others. [15]

A judge or case management master may make the order to assign a case to case management and the case management may be conducted by a judge or by a case management master. Rule 77 also makes provision for the assignment of a case (but only by a judge) to a particular judge for case management.[16] Moreover, the power in Rule 37.15 in complicated cases to direct that all motions in the proceeding be heard by a particular judge has been retained, with only some minor amendments. In addition to this authority, it is now provided that where a particular judge case manages under the New Rules, that same judge may preside at the trial, though the written consent of all parties to the case managed action is necessary in order for this to occur.[17]

Similar powers, although not entitled "case management," are granted under the substantially revised summary judgment Rule, which are discussed below. It is important to note that Rule

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[13] See: http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/fact_sheet_civil_case_management.pdf

[14] Rules 77.05(1)–(3).

[15] Rule 77.05(4).

[16] Rule 77.06.

[17] Rules 77.06(2) and 37.15(2).

20.05 gives the court much greater powers on a motion for summary judgment and effectively permits such cases to enter into a form of quasi-case management.[18] The court can give very extensive directions and impose certain terms which regulate the pre-trial procedures and the trial itself.[19]

Seven: Mandatory Mediation under the New Rules

As of January 1, 2010, many minor changes occurred to the Rule describing mandatory mediation. However, the most significant change is that mandatory mediation no longer only applies to case managed or Simplified Procedure cases. Mandatory mediation now applies to all actions that were governed by the Rule prior to January 1, 2010 and to all actions commenced on or after January 1, 2010 in Toronto, Ottawa or Essex County.[20] At a minimum, the mediation should last for 3 hours. However, the exceptions to the Rule of mandatory mediation has been somewhat expanded. Matters on the Commercial List, mortgage actions, construction lien actions and bankruptcy and insolvency actions are all excluded from the Rule requiring mandatory mediation.

The time period for mediation has been expanded as well. Mediation must take place within 120 days after the first defence has been filed, rather than the 90 days under the old Rules. This date can be pushed back with the consent of both parties and filing the consent with the mediation coordinator. But where a mediator has to be assigned by the mediation coordinator, the date

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[18] P. Perell, *"On the Horizon of Civil Procedure: "The Osborne Amendments"* in C.R. Carter, ed., *The six-minute real estate lawyer 2009* (Toronto: Law Society of Upper Canada, Department of Continuing Legal Education, 2009) [Perell] at 1-2.

[19] For the terms that may be imposed see: Rules 20.05(2)–(7).

[20] Watson and McGowan, *supra* note 2 at 7.

fixed for mediation must be within 90 days after the appointment of the mediator, unless the court orders otherwise.[21]

Six: Jurisdiction of the Small Claims Court

Two major jurisdictional changes form part of the amendments to the Rules. The first is the shift in quantum for claims which are able to be brought into the Small Claims Court. The second, discussed below, is the corresponding increase in quantum for claims which must be brought under the Simplified Procedure. The general jurisdictional increase should allow individuals and businesses to resolve small claims in a simple and inexpensive way – thus, in theory, increasing the general public's access to quick and efficient justice.

For these reasons, the jurisdiction of the Small Claims Court has increased from claims for $10,000 or less to include all claims for $25,000 or less. If a party had initiated a claim before January 1, 2010 in the Superior Court for an amount between $10,000 and $25,000, that party may transfer the claim to the Small Claims Court, but this does not occur automatically. If all parties agree to transfer the case to the Small Claims Court, the local Registrar of the Superior Court of Justice may transfer the action. Otherwise, a party would be required to bring a motion to obtain permission to transfer the case to Small Claims Court.[22]

Five: Simplified Procedure under the New Rules

The Simplified Procedure is governed by Rule 76 of the Rules. This Rule was initially introduced in 1996 in an attempt to reduce the cost of litigating claims for modest amounts by

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[21] *Ibid.*

[22] See: http://www.attorneygeneral.jus.gov.on.ca/english/courts/scc/Guide_to_transferring_a_claim_from_SCJ_to_SCC-EN.pdf.

limiting the pre-trial procedures available in such cases.[23] The Simplified Procedure Rules offer significant cost and time saving mechanisms. For instance, they allow for a "summary trial", where the majority of the evidence is adduced by affidavit and strict time limits are imposed on the litigating parties.

Similar to the jurisdictional shift in the Small Claims Court, the Simplified Procedure is now mandatory where the claim being advanced is $100,000.00 or less, and optional for claims exceeding $100,000.00 – under the old regime this amount was set at $50,000. The shift in quantum for the Simplified Procedure to claims that are $100,000 or less supports the goal of the New Rules to provide easier access to the courts and faster justice.

Although the New Rules do not generally provide for transition provisions, a limited transitional provision exists under the new Simplified Procedure Rule. The transitional provision avoids any concern with respect to the cost consequences which might occur because of the shift in quantum of claims to $100,000. The cost sanctions in Rule 76 penalize a plaintiff for bringing an action outside of the Simplified Procedure when it should have been brought under the Simplified Procedure. The transitional provision provides that actions commenced before December 31, 2009 should be treated as if the $50,000 limit still applied for cost purposes only.[24] Otherwise, a plaintiff receiving an award of damages for a matter commenced before December 31, 2009 in an amount between $50,000 and $100,000 and not taking place under the Simplified Procedure, would not be entitled to any costs.

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[23] Watson and McGowan, *Ontario Civil Practice, 2010* (Toronto: Carswell, 2009) at 1432.

[24] Rule 76.13(11)

Four: Two Hours of Discovery for Claims Brought under the Simplified Procedure

One of the most controversial amendments in the New Rules is the provision of two hours of examination for discovery under the Simplified Procedure.[25] Each party is permitted to engage in up to two hours of oral examination for discovery under the Simplified Procedure. Prior to the amendments, no oral discovery was allowed in actions proceeding under the Simplified Procedure. However, discovery under the New Rules may not exceed a total of two hours, regardless of the number of parties or other persons to be examined. The ban on examination for discovery by written questions, cross-examination on affidavits and examination of a witness on a motion from the old regime remains in place.

The allowance of two hours of oral discovery was only included in the Osborne Report after a vigorous debate. Many lawyers, particularly those from outside of Toronto, favoured the reform but members of the review committee who had helped to design the Simplified Procedure in its initial form, remained convinced that such cases could not afford the costs associated with examination for discovery. The Advisory Committee wrote in opposition of the discovery proposal and said:

> ... the Advisory Committee believes that the fundamental principles that underlay the original recommendation and adoption of a simplified procedure for claims involving more modest amounts should be maintained. First and foremost among those fundamental principles was the removal of any right to the normal discovery process. The Advisory Committee believes that it is inconsistent with a simplified procedure to permit discoveries which is the single most expensive step in a proceeding save and except for the ultimate hearing. If even limited discoveries are permitted, the Advisory Committee believes that parties will feel a compulsion to conduct discoveries in all cases thereby increasing the costs of each simplified procedure. There will also be the attendant costs of undertakings, refusal motions, re-attendances and the like. Consequently, the Advisory Committee does not favour the adoption of discoveries in the simplified procedure. This does not mean, of course, that parties cannot conduct

[25] Rule 76.04(2)

> discoveries by way of agreement in any case where counsel mutually agree that they would be helpful.[26]

The Civil Rules Committee, chaired by the Hon. Coulter Osborne, initially accepted the advice of the Advisory Committee and did not include the proposal for minimal discovery with respect to the Simplified Procedure in its recommendations. However, the decision caused much dissatisfaction and prompted letters from the Attorney General and the Chief Justice of the Superior Court asking for reconsideration of the matter.[27] In the end, the Osborne Report recommended allowing minimal discovery under the Simplified Procedure and it is now in place in the New Rules.

It will be interesting to see how strictly the courts hold a party proceeding under the Simplified Procedure to the two hour limit, or whether the two hours will be subject to extension in a similar manner as in cases not under the Simplified Procedure. Further, only time will tell if the addition of discovery to the Simplified Procedure will be beneficial and lead to the narrowing of issues for trial, or just a broadening of the pre-trial matters to be dealt with by lawyers. However, it is sure to lead to additional evidence, additional motions including refusals and undertakings, and additional out-of-court procedure which could increase the time and costs of matters proceeding under the Simplified Procedure.

Finally, Rule 76.12(1) has been amended to provide that at a summary trial under the Simplified Procedure, each party may examine in chief the deponent of any affidavit the party has served for not more than 10 minutes. A party wishing to examine an affiant under this Rule must give

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[26] Watson and McGowan, *supra*, note 2 at 12.

[27] *Ibid.*

notice to the court of its intention to conduct such an examination.[28] Prior to the New Rules, no examination in chief was allowed on evidence adduced by affidavit at a summary trial. Again, this broadens pre-trial procedure and may affect costs and time of actions under the Simplified Procedure.

Three: Relevancy and Proportionality in the New Rules for Discovery

Redefinition of the concept of relevance

The former Rules had been interpreted to impose a wide disclosure obligation on all parties to an action. Any document or other evidence which had a semblance of relevance to an issue in dispute was "discoverable" – this low threshold often made discovery a very onerous pre-trial process. Under the New Rules, the phrase "relating to any matter in issue in the action" is replaced with "relevant to any matter in issue in the action".

The intent of this change is to discard the "semblance of relevance" test and replace it with a simpler and narrower relevance test. Justice Perell notes that "whether this semantic elevation of the threshold of the test will make any difference in practice remains to be seen... [but] this approach undoubtedly reflects the acceleration and the proliferation of electronic documents that can be generated by modern communications technology.[29] The New Rules aim to make only those documents which are truly relevant to the matters in issue producible through discovery.

Although the New Rules are to apply retroactively, there has been some inconsistency with applying the New Rules at hearings for undertakings and refusals motions in the new year. In

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[28] Rule 76.12(3).

[29] Perell, *supra* note 18 at 1-3.

the decision of *Noble v. York University Foundation*,[30] released on February 17, 2010, Master Muir found that notwithstanding that the examinations for discovery took place in May of 2008 and the motion to compel the re-attendance of two defendants to answer questions refused at discovery was originally scheduled in December 2009, because the motion was heard after the new rules came into force, the appropriate test to be applied ought to be a stricter test of "relevance", rather than the previous test of "semblance of relevance".[31]

In contrast, on February 25, 2010, Master Graham, in the decision of *Wood v. 156 Kingston Residences Corp. et al.*,[32] found that:

> [b]oth counsel at the examination would have made their decisions as to which questions to ask and answer based on the test in effect at the time. Therefore, despite the change in the wording of rule 31.06(1) effective January 1, 2010, the test for determining the propriety of questions at examinations for discovery held prior to the amendment taking effect is, absent the agreement of counsel, still the "semblance of relevancy" test.[33]

The finding of *Wood* that the semblance of relevance test should apply to refusals and undertakings motions arising from discoveries which occurred prior to January 1, 2010 has been followed in several cases.[34]

However, these cases are merely interpreting the relevance test during the transition period between the old regime and the New Rules. Until the test for relevance under the New Rules has been interpreted by the court and the new threshold judicially defined, it is difficult to gauge the real significance of the change.

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30 *Noble v. York University Foundation*, [2010] O.J. No. 794 (Ont. Sup. Ct. J.).

31 *Ibid.* at para. 14.

32 *Wood v. 156 Kingston Residences Corp. et al*., 2010 ONSC 1250 (CanLII) [*Wood*].

33 *Ibid.* at para. 8.

34 See: *1588143 Ontario Inc. v. Lantic Inc.*, 2010 ONSC 1613 (CanLII) [*Lantic*] at paras. 21-28; and *Brand Name Marketing v. Rogers*, 2010 ONSC 1159 (CanLII) at paras. 84-85.

Proportionality

The New Rules have amended the general principles, set out at Rule 1, which define the purpose and interpretation of the *Rules of Civil Procedure*. New Rule 1.04 (1.1) states:

> In applying these rules, 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.

As such, the concept of proportionality has become a general interpretation principle to be considered in all actions proceeding under the New Rules. Prior to January 1, 2010, the concept of proportionality did not form part of the general principles of interpretation to be applied to the Rules. Thus, the three general principles of predictability, fairness and efficiency have been expanded under the amended Rules to include proportionality as the fourth principle of general Rule interpretation.[35] The courts have already identified the new concept and have sought to further define the idea of proportionality when applying the New Rules generally. In the case *Moosa v. Hill Property Management Group Inc.*,[36] Master Short defined the concept of proportionality by adopting Lord Woolf's idea of establishing an "equality of arms" between parties involved in civil cases.[37] The concept of proportionality as discussed by *Moosa* has been applied in subsequent decisions.[38]

In addition to the general proportionality rule, the New Rules explicitly incorporate the concept of proportionality into all matters dealing with discovery.[39] The key provision directs the court

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35 Rules 1.04(1) and 1.04(1.1.).

36 *Moosa v. Hill Property Management Group Inc.*, 2010 ONSC 13 (CanLII)

37 *Ibid.* at 110-111; and Woolf, *supra* note 6 at Chapter 5.

38 See: *Rohit v. Nuri*, 2010 ONSC 17 (CanLII) at para. 34; *Green v. Mirtech International Security Inc.*, 2010 ONSC 1240 (CanLII) at paras. 29-33; and *1588143 Ontario Inc. v. Lantic Inc.*, 2010 ONSC 1613 (CanLII) at paras. 36-37.

39 Rule 29.2.

to consider a list of factors when making a determination as to whether a party or other person must answer a question or produce a document.[40] Some of the factors the court will consider on a refusals motion or a motion to produce include: (a) the time, expense and prejudice to a party being asked to answer a question or produce documents, (b) the interference of the request with the progress of the action, (c) whether the information or document is readily available from another source, and (d) whether the request would result in an excessive volume of documents being produced.[41]

Two: Discovery Plans and the "One Day" Limit on Discovery

Discovery plans

One of the most novel changes under the New Rules is a requirement that parties to an action must agree upon a written discovery plan to govern the pre-trial discovery procedures – this includes an obligation to update the discovery plan as the action progresses.[42] The discovery plan must set out the intended scope of discovery. As such, parties must consider the issues in dispute at an early stage of the proceeding to determine what might be relevant. Further, the discovery plan must set out a timetable for the discovery process,[43] the dates for the service of affidavits of documents, describe the timing, costs and the manner of production, and address

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[40] Rule 29.2.03.

[41] Rule 29.2.03(1) and (2).

[42] Rule 29.1.04

[43] As described in the new definition of timetable under Rule 1.03(1)

who is to be examined for discovery, the place of discovery, and the timing and length of the examinations.[44]

The discovery plan is mandatory but is intended to be a flexible tool which allows the parties to litigation to set their own pace for the pre-trial procedures and to keep the parties on track towards eventual trial of the action. The discovery plan must be set within 60 days after the close of pleadings, or before attempting to obtain evidence from the other party, whichever comes first. The consequences of not agreeing to a discovery plan can be significant. If the parties fail to agree on a discovery plan, then on "any motion under Rules 30 to 35 relating to discovery, the court may refuse to grant any relief [on the motion] or to award any costs."[45]

In *Robert S. Trimbee v. The National Broadcast Reading Service et al.,*[46] Master Graham held that a discovery plan must be agreed upon by the parties to the action despite difficulties with agreeing to the proper procedure amongst the parties. There, Master Graham dismissed the plaintiff's motion for relief for the delivery of an affidavit of documents, stating that the parties have *a collective obligation under Rule 29.1.03 to agree to a discovery plan*.

In contrast to Master Graham's deference to the discovery plan, Justice Perell, in *Sharma v. Timminco*,[47] ordered the production of certain insurance policies, notwithstanding the fact that the parties were still required to agree on a discovery plan.[48] Therefore, although it seems that the court has suggested the setting of a discovery plan by the parties is to be paramount to other

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44 Rule 29.1.03(3)

45 Rule 29.1.05

46 *Robert S. Trimbee v. The National Broadcast Reading Service et al.,* (1 February, 2010), Toronto, CV-09-377288 (Ont. Sup. Ct. J.).

47 *Sharma v. Timminco*, 2010 ONSC 790 (CanLII).

48 *Ibid.* at paras. 18, 36.

concerns with respect to the pre-trial discovery process, it is not clear where the courts will draw the line between providing pre-trial motion relief and dismissing a motion for relief when a discovery plan has not yet been agreed upon by the parties.

Interestingly, the Rules do not set out any specific procedure or sanctions where one party to an action is being difficult or refusing to agree to a discovery plan. Combined with the ruling of the court in *Trimbee,* such a situation could become problematic where one party is attempting to delay the litigation by not cooperating with the formation of a discovery plan.

Time limits on examination for discovery

Rule 31.05.1, also referred to as the "one day" rule, limits a party's oral examinations for discovery to 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 other parties or with leave of the court. Obviously, this amendment seriously curtails the ability of a party to perform extensive oral examination for discovery. In the past, discoveries could last several days or, in complex cases, much longer. The Ministry of the Attorney General suggests that the time limit has been imposed to avoid situations where a litigant abandons a claim or accepts a less than adequate settlement for fear of the costs associated with discovery.[49]

In an effort to ensure fairness, the New Rules contain an accompanying amendment, Rule 31.03, which broadens the circumstances in which a party may seek multiple examinations of a party from the court. This is accomplished by including a test for permitting more than one examination where the court finds that satisfactory answers respecting all issues raised cannot be

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[49] See: http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/changes_to_rules_of_civil_procedure.asp

obtained through one person and that additional examinations would expedite the progress of the proceeding.

Further criteria the court will consider on a request for additional time or multiple examinations for discovery include:

- the amount of money at issue;
- the complexity of the issues of fact or law;
- the amount of time that ought reasonably to be required in the action for oral examination;
- the financial position of each party;
- the conduct of any party, including one party's refusals to answer questions at oral examinations;
- a party's denial or refusal to admit anything that should be admitted; and
- any other reason in the interests of justice.

If additional time for discovery is required, the parties may consent to the adjustment and amend the discovery plan as filed with the Court. If consent is not possible, a court order is necessary and a motion must be brought. The Court will consider proportionality and the criteria listed above when deciding whether to allow additional discovery on such motions.

One ambiguity in the Rule could be the cause of some contention in cases where one side of a dispute has multiple parties. Currently, the Rule restricting examination to seven hours reads:

> 31.05.1(1) no party shall, in conducting oral examinations for discovery, 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.

Therefore, although the Rule does limit a party to 7 hours of examination no matter how many parties are adverse in interest, it does not necessarily limit the collective of adverse parties to a total of seven hours of discovery. For example, consider a situation in which one plaintiff sues four different defendants. The Rule clearly limits the plaintiff to seven hours of discovery notwithstanding the fact that there are four defendants; however, the inverse does not necessarily follow. The Rule does not appear to limit the four defendants to seven hours of total examination of the plaintiff. Rather, on its face, it seems to suggest that each defendant (i.e. a "party") is entitled to seven hours of oral examination of the plaintiff.

However, it may be that the combined effect of Rule 31.05, which continues from the old Rules, and new Rule 31.05.1(1) restricts examination of the singular plaintiff by the collective defendants to 7 hours. Rule 31.05 states:

> 31.05 Unless the court orders otherwise, where more than one party is entitled to examine a party or other person for discovery without leave, there shall be only one oral examination, which may be initiated by any party adverse to the party, (a) who is to be examined, or (b) on behalf or in place of whom, or in addition to whom, a person is to be examined.

However, Rule 31.05 does not define the time limit for one oral examination which, under the old Rules, often exceeded seven hours. Presumably, most disputes as to the length of discovery by a party will be settled by the required collaboration between the parties to form a discovery plan, failing which, court intervention will be necessary.

One: The Powers of the Court under the New Rules on Motions for Summary Judgment

New powers of the court on a motion for summary judgment

The revisions to Rule 20 are potentially the most significant of all of the new amendments. The court's powers on a motion for summary judgment have been greatly expanded to permit a judge

to weigh evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence before the court. Further, the New Rules provide for a new mini-trial power which permits a judge to order the hearing of oral evidence on a motion for summary judgment where the interests of justice require a brief trial to dispose of the summary judgment motion. These changes greatly expand the scope of issues which may be considered on the motion for summary judgment and the language in Rules 20.04(2.1) and (2.2) is intentionally construed very broadly.[50] These Rules read:

> **Powers**
> (2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
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> 1. Weighing the evidence.
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> 2. Evaluating the credibility of a deponent.
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> 3. Drawing any reasonable inference from the evidence.
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> **Oral Evidence (Mini-Trial)**
> (2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

These new powers are sweeping and will make summary judgment a much more effective remedy. With these new powers, the courts will be much more apt to award summary judgment, or at least decide upon matters at the pre-trial stage which will narrow issues for trial. For instance, in the case *Dr. Thomas Dentistry v. Bank of Nova Scotia*,[51] the court determined that a matter which arose on the motion for summary judgment as to weight and credibility of evidence was deserving of a mini-trial. In that case, one of the co-defendants (the "Mother") had forged her daughter's signature on loan documents and the Mother later defaulted on the loan. The

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[50] Watson and McGowan, *supra* note 2 at 6.

[51] *Dr. Thomas Dentistry v. Bank of Nova Scotia*, 2010 ONSC 1227 (CanLII).

bank brought a motion for summary judgment against the Mother. However, the Mother claimed that another co-defendant, an employee of the bank (the "Employee"), knew of the forgery and had consented to it. The Employee's affidavit contained diametrically opposing facts to those in the Mother's affidavit. Justice Brown found that although the interests of justice did not require sending the matter to a full trial, the credibility of the evidence could not be properly weighted without hearing some *viva voce* evidence on the affidavits.[52] As such, the judge adjourned the motion for summary judgment to provide for a one day "mini-trial" on terms specified in the order.[53]

The new powers in the amended Rules on summary judgment motions are limited to a judge hearing a motion for summary judgment and are not granted to a master. Presumably, if a motion is brought before a master, the master will have only the powers available under the former Rules. Effectively, this limitation on masters will lead to most, if not all, summary judgment motions being brought before a judge.

The court has already overturned previous case law which suggested that motions for summary judgment should be heard by a master instead of a judge.[54] In the case of *Abrams Estate v. Air Canada #1,*[55] Justice Matlow found that "motions for summary judgment [under the New Rules] may now be brought before a judge or before a master at the option of the moving party."[56]

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[52] *Ibid* at para. 5.

[53] *Ibid.* at paras. 5-6.

[54] *Bensusan v. Ali*, [2009] O.J. No. 486 (Ont. Sup. Ct. J.)

[55] *Abrams Estate v. Air Canada #1*, 2010 ONSC 1280 (CanLII).

[56] *Ibid.* at para 2.

The test for summary judgment

The test for summary judgment has also been changed. The former Rule allowed summary judgment where there was "no genuine issue for trial", while the new Rules allow for summary judgment in cases where there is "no genuine issue requiring a trial". Justice Perell wrote that, "[w]hile the change in language is slight, in its effect, the change is substantial."[57] Justice Perell appears to have been referring to the combined effect of the threshold test for summary judgment and the new powers under the New Rules.

In the decision *Onex Corp. v. American Home Assurance*,[58] Justice Belobaba found that the changes to the Rule are mainly procedural, even if they did lower the threshold for granting summary judgment. In footnote 8 to the decision, the court found that the test after the *de facto* change from "needed" to "required" has not been changed from the general test of whether there is a genuine issue for which a trial is needed.[59] The court also stated that the main change to summary judgment under the New Rules is the expanded scope of powers granted to a judge presiding over a summary judgment motion.

Although the test of genuine issue for trial has not changed to any great extent, the expanded powers and mini-trials within a summary judgment motion will effectively do away with many issues which, under the old Rules, would have required a trial. For instance, under the old regime, the court was unable to test the credibility of evidence and thus, in such cases, the court

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[57] Perell, *supra* note 18 at 1-1.

[58] *Onex*, *supra* note 7.

[59] *Ibid.* at para. 20.

was required to dismiss the motion for summary judgment. Under the New Rules, the summary judgment motion judge has the power to determine credibility.

Case management through summary judgment

As set out above, the substantially revised rule outlining the court's powers "where trial is necessary" and summary judgment cannot be granted, gives the court expanded powers to determine procedural matters, similar to the powers of the court under the case management Rule. Under the amended Rule 20, if summary judgment is refused or granted only in part, the court now has the authority to schedule the remainder of the action, to give directions to the parties or the court hearing the action and to impose terms.[60] Although the following list is not exhaustive, if a party moves for summary judgment and the court determines that the action should proceed to trial, the court may order:

- that a statement setting out the undisputed facts be filed;
- that evidence filed on the motion for summary judgment be used in the same manner as an examination for discovery;
- that any experts engaged by the parties should meet on a without prejudice basis in order to narrow issues for trial;
- that each of the parties deliver a concise summary of his or her opening statement; and
- that security for costs be paid.

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[60] Rule 20.05(2).

Costs on a motion for summary judgment

The former rule which presumed that substantial indemnity costs should be ordered against an unsuccessful moving party in a summary judgment motion has been eliminated. The New Rules confer a permissive authority on the court to impose substantial indemnity costs. This change reflects the intention of the legislature to encourage parties to move for summary judgment in appropriate cases. Instead of requiring an automatic penalty of costs, the court now has the discretion to decide to not award costs against the moving party in borderline cases where it appears the motion was brought in good faith and with a reasonable chance of success, or where the summary judgment was allowed in part.

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