CBMU ANNUAL GENERAL MEETING

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Amendments to the Rules of Civil Procedure in Ontario – how will these affect you?

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AMENDMENTS TO THE ONTARIO RULES OF CIVIL PROCEDURE

- Amendments to 25 Rules
- Made with the overall objective of increasing access to justice by ensuring that procedure is proportionate to the issues.

SMALL CLAIMS COURT

- Monetary limit increasing from $10,000 to $25,000
- Purpose: to make litigation more accessible and cost effective for the general public

Practical Implications

- Higher value claims will be litigated by self-represented litigants.
- The average litigant may pursue higher value claims as they no longer need to waive amounts in excess of $10,000 (up to $25,000) in order to take advantage of the Small Claims Court system.
- Claims analysts who routinely handle Small Claims Court matters will be handling cases involving significantly higher sums of money.

Practical Implications

- It may not be cost effective to have lawyers handle the higher value claims due to the cap on costs in the Small Claims Court (15% of value of claim plus disbursements).
- Matters will take longer to be resolved as the case load will increase without a corresponding increase in facilities or staff.
- More complex cases will be heard by judges and deputy judges who may not be experienced in these matters – including marine and transportation issues.

Practical Implications

- Check limitation periods carefully – plaintiffs may wait until January 1, 2010 to take advantage of litigating claims up to $25,000 (which may time-barred).

- Claims filed in Superior Court prior to January 1, 2010 for $25,000 or less will not automatically be transferred to Small Claims Court.
  - Can be transferred by Registrar on consent of all parties
  - Bring motion to have file transferred

Transfer to Small Claims Court

- Insurers need to consider whether actions should be transferred to Small Claims Court
- Advantages
  - Award capped at $25,000
    - Reduced risk
    - Easier to set reserves
    - Lowering of reserves has business advantages
  - New rule for summary judgment motion applies to Small claims Court as well (previously not cost effective to bring motions in Small Claims Court, but chance for success s now greater)
  - Can reduce legal costs by having claims analyst or paralegal conduct the litigation

Transfer to Small Claims Court

- Disadvantages
  - Small Claims Court is traditionally plaintiff friendly
  - More likely to have self-represented litigants
  - No Affidavits of Documents – litigants only required to produce documents on which they intend to rely at trial
  - No examinations for discovery
  - More relaxed rules of evidence
  - Maximum costs awarded generally will be $3,750 plus disbursements
  - May need to educate the judge in marine or transportation law
  - Cases may take longer to resolve than in Superior Court – files open longer, need to maintain reserves

SIMPLIFIED PROCEDURE – RULE 76

- Simplified procedure was created in 1996 in response to concerns that individuals were discouraged from pursuing smaller yet meritorious claims because of the disproportionately high cost of litigation.

- Rule 76 procedures offer significant cost and time-saving mechanisms:
  - early disclosure of documents and witness names
  - ability to bring motions without filing full motion records and affidavits
  - summary trials

Simplified Procedure

- Monetary jurisdiction increasing January 1, 2010 from $50,000 to $100,000
- Result: more complex cases will be brought into this procedure

- Affidavit of Documents are required to disclose every document ***relevant to*** (previously ***relating to***) any matter in issue

- Each party now has up to two hours of examination for discovery regardless of how many parties are involved in the litigation

Simplified Procedure

- Additional time to complete investigation and discoveries – notice of readiness for pre-trial conference to be filed within 180 days of first defence (previously 90 days)
- Expert reports are to be filed prior to pre-trial
- In a summary trial, parties are entitled to cross-examine deponent of affidavit for not more than 10 minutes

EXAMINATION FOR DISCOVERY

Purpose of amendments

- Discovery process expected to be completed more quickly in a manner that is proportional to the claim
- Narrow issues early in the litigation thereby promoting early resolution of claims
- Reduce costs by limiting scope of discovery

Discovery Plan

- Agreement regarding scope of discovery early on in the litigation
- Reduce or eliminate discovery related problems later in the litigation

Discovery Plan

Contents of plan

- Date for service of Affidavit of Documents
- Date by which Schedule A documents are to be produced
- List of documents required in addition to those in Schedule A; e.g. clinical notes and records, decoded OHIP, business records
- Dates by which documents are to be produced
- Agreement re payment of costs for production of documents
- Contact information for witnesses or other individuals identified in productions
- Names of persons to be produced for examination for discovery
- Location and dates for examinations for discovery
- Additional agreements to expedite discovery e.g. agreement to provide summary of evidence in statements, provide witness list before trial, provide will say statements etc.
- Acknowledgment between parties that failure by a party to agree to a plan may result in cost consequences on any motion relating to discovery

Discovery Plan

Advantages

- Forces counsel to communicate early on
- Prevents situations where Schedule “A” productions are given shortly before the discovery
- Gives counsel the opportunity to specifically ask for certain productions early on rather than waiting until the discovery to get the productions by way of undertaking
- Prevents disagreements at the examination for discovery

Discovery Plan

Disadvantages

- Costs (more paper work, more time, some counsel are difficult to reach)
- May take several communications between counsel to agree on the discovery plan
- Not needed in situations where there are no discovery problems (both sides have a mutual understanding about what productions are needed, both sides want to move the action forward)
- Potential for more motions on the “front end” before the examination for discovery

Time Limit – One Day Rule

- Each party has a total of 7 hours in which to conduct all discoveries, regardless of the number of parties or persons to be examined, except with consent of the parties or leave of the court.

- Court uses principle of proportionality
- Factors considered by court on a motion for additional time:
  - Value of the claim
  - Complexity of the issues
  - Reasonable time required
  - Financial position of each party
  - Conduct of any party
  - Party's denials or refusals which should have been answered

One Day Rule

Advantages

- Promotes preparation before discovery
- Prevents fishing expeditions
- Prevents repetitive questions
- Prevents irrelevant questions

One Day Rule

Disadvantages

- High potential for motions seeking more than one day of discovery
- Lawyers may advise their clients to be as slow as possible when answering questions
- Not clear how time will be tracked

Relevance Test

- "***relating*** to any matter at issue" changed to "***relevant*** to any matter at issue"
- "semblance of relevance" test no longer used

- Will reduce the scope of discovery
- Encourages restraint in discovery process
- Reduces cost and increases efficiency
- Prevents questioning which is unreasonable but previously would be acceptable under the "semblance of relevance" test
- Less information may be obtained from the witness

Principle of Proportionality

This principle is used to determine whether a question should be answered or a document produced

- Time required would be unreasonable
- Expense would be unjustified
- Undue prejudice would result
- Would cause undue interference with the orderly progress of the action
- Information is readily available from another source

Principle of Proportionality

Practical Implications

- Increased efficiency
- Takes into consideration the expenses associated with producing certain documents
- Rule provides guidance to court on motion for undertakings and refusals

Mandatory Mediation

Purpose

- Reduce costs
- Minimize delay
- Facilitate the early and fair resolution of disputes

Mandatory Mediation

- Required for all actions which are commenced in Toronto, Ottawa and Essex county after January 1, 2010.

- Previously applied only to actions which were case managed or under the simplified procedure rules.

Exemptions

- Claims pertaining to estates, trusts, substitute decisions, mortgages, construction liens, bankruptcy, certain proceedings against the Crown.
- Actions on Commercial List in Toronto, class actions.
- Actions mediated under s. 258.6 of the *Insurance Act* if the mediation took place less than one year after the first defence was filed.
- As in the past, a party may seek an order from the court exempting it from a mandatory mediation.

Timing

- Mediation must take place within 180 days after the first defence has been filed, unless the court orders otherwise (previously within 90 days).
- For existing actions under case management or simplified rules, the new 180 day period begins to run on January 1, 2010.
- Mediation may be postponed to a later date if the parties consent to the date in writing and the consent is filed with the mediation coordinator.
- Previously, mediation could be postponed only up to 60 days.

Timing

- A party may seek an order from the court to postpone mediation.
- Factors considered include:
  - number of parties
  - state of the pleadings
  - complexity of the issues
  - whether a party intends to bring a summary judgment motion, a motion to determine an issue before trial, or a special case motion
  - whether mediation will be more likely to succeed if the180 day period is extended to permit the parties to obtain evidence

Timing

- Before setting the action down for trial, one of the parties must file a notice providing the mediator's name and the date of the mediation session; or the mediator's report indicating that the mediation has been concluded.

- Previously, this was required 30 days after filing the first defence

Assignment of a Mediator by the Mediation Coordinator

- The mediator may be chosen on consent of the parties or will be assigned by the coordinator.
- If an extension to mediation has been agreed upon or is ordered, one of the parties is required to notify the mediation coordinator of this extension within 180 days of the filing of the first defence, otherwise a mediator will be assigned.
- Once a mediator has been assigned, the mediator sets the date for mediation which is to be held within the next 90 days.

Assignment of a Mediator by the Mediation Coordinator

- If the action is set down for trial, and the mediation coordinator does not receive notification of the name of the mediator and the date within the time provided for mediation to take place, the mediation coordinator will assign a mediator.

Attendance at Mediation

- Only the insurer is required to attend mediation.
- Previously, both the insurer and the insured were required to attend.

Practical Implications

- More costs up front
- Need to obtain information from adjusters or others early in the litigation
- Need to be organized in order to be able to select mediator

- Some cases are not suited to early mediation (or mediation at all).

SUMMARY JUDGMENT

Purpose

- Prevent claims with no chance of success from proceeding to trial
- Litigate a specific issue
- Reduces legal costs

Summary Judgment

Presently

- Threshold Test – genuine issue for trial
- If there are facts in dispute, judge will refer the matter on to trial
- Judge will not make a finding of fact, weigh the evidence, or assess credibility of witnesses
- Large cost consequences against unsuccessful party that brings a summary judgment motion

Summary Judgment

Amendment

- Threshold Test - genuine issue requiring a trial
- Judge may now weigh the evidence, evaluate credibility of witness, and make findings of fact
- Judge may order a mini-trial and permit oral evidence to be presented by one or more parties, with or without time limits on its presentation
- No longer presumption of substantial indemnity for costs
- Where trial is found to be necessary, judge can specify what material facts are not in dispute and define the issues to be tried

Summary Judgment

Practical Implications

- Easier to obtain summary judgment
- Reduced cost consequences if unsuccessful
- More claims resolved earlier in the litigation
- Litigants must ensure that their claims or defences have merit and that there is evidence in support

EXPERT EVIDENCE

Presently

- A party who intends to call an expert witness at trial must serve the report 90 days before trial. The report is to include the expert's name, address, qualifications and the substance of the expert's testimony.

Expert Evidence

Amendments

- 60 days before setting action down for trial, parties must agree to a timetable for service of expert reports
- Expert reports must be served 90 days before pre-trial

Expert Evidence

- Much more disclosure is required
  - Expert's name, address and area of expertise
  - Expert's qualifications, education and employment
  - Instructions provided to the expert in relation to the proceeding
  - An acknowledgement by the expert of his/her duty of impartiality to the court
  - The nature of the opinion being sought and each issue in the proceeding to which the opinion relates
  - The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range

Expert Evidence

- The expert's reason for his or her opinion, including
  - a description of the factual assumptions on which the opinion is based
  - a description of any research conducted by the expert that led him or her to form the opinion, and
  - a list of every document, if any, relied on by the expert in forming the opinion.

Expert Evidence

Practical Implications

- Courts will be much more active in monitoring experts' evidence
- A more balanced and level playing field in parties' expert opinions
- Need to assess, retain and pay for experts earlier in the litigation
- Possibly earlier settlements – at Pre-trial

Pre-trial Conference

Purpose

- To promote settlement of some or all of the issues in dispute without the need for a hearing.

- For any issues not settled, to make orders or directions which will ensure that the hearing is expeditious, orderly, cost effective and efficient.

Pre-trial Conference

- Pre-trials are now mandatory.
- Previously, a pretrial was held at the request of a party or on the initiative of a judge. In certain jurisdictions, pre-trials therefore were not mandatory.
- A pre-trial conference is to be scheduled by a registrar within 90 days after the action is set down for trial.

Pre-trial Brief

- To be served and filed at least 5 days before pre-trial.
- Brief is to address:
  - the nature of the proceeding
  - the issues raised and the party's position
  - the names of the witnesses and length of time that the evidence of each is estimated to take
  - the steps that need to be completed before the action is ready for trial and the length of time for each of these steps to be completed.
- Previously, there were no formal requirements to file a pre-trial brief (except under case management or simplified procedure).

Attendance

- The parties are required to participate in person, or by telephone or video conference if personal attendance would require undue amounts of travel time or expense, unless ordered otherwise.

- Telephone access to person with settlement authority is required.

Pre-trial Conference Report

- If a trial date is fixed, the judge or master will complete a report stating:
  - what steps must be completed before the action is ready for trial and the time required for each step
  - anticipated length of the trial
  - any other matter relevant to trial scheduling.
- Each party, or the party's lawyer, is required to certify that he or she understands the contents of the report and their obligation to proceed on the date fixed for trial.
- A copy of the report is placed in the trial record.

Pre-trial Conference Report

- On consent of the parties, a pre-trial judge may preside at the trial.
- As before, the trial judge can hold another conference either before, or during the trial.

Practical Implications

- Need to be organized for trial prior to attending pre-trial e.g. names of witnesses, so more costs
- Greater opportunity for settlement
- Cannot easily change trial dates
- Option to have pre-trial judge as trial judge minimizes need to educate trial judge in specialized areas of law (e.g. marine or transportation)
- Requirement that insured participate in pre-trial may be problematic
- Person with settlement authority needs to be available throughout the pre-trial therefore more time commitment

PROPOSED AMENDMENTS TO FEDERAL COURT RULES
Summary Judgment and Summary Trial

- Published in Canada Gazette January 24, 2009
- A party can bring a motion for summary trial where in the party's opinion there are genuine issues that could be determined without a full trial.
- The Court can determine an issue by way of summary trial when it becomes clear while adjudicating a motion for summary judgment that there is conflicting evidence or issues of credibility which would otherwise require a full trial.

PROPOSED AMENDMENTS TO FEDERAL COURT RULES
Expert Witnesses

- To assist the Court through the provision of an independent and objective opinion which overrides the obligations of the witness to the party on whose behalf he or she is called to testify.

- Proposed amendments were published in Canada Gazette on October 17, 2009
  - Recognize duty of experts to court – Code of Conduct
  - Streamline process of qualifying an expert
  - Require experts to confer prior to trial
  - Permit parties to use single joint expert
  - Exclude treating physicians from new rules
  - Discretion to require expert to testify at trial
  - Experts may be required to testify as a panel
  - Limiting the number of experts to 5 per party
  - Cost consequences for unnecessarily requiring expert to testify