**FTR Now**

# New Rules of Civil Procedure

**Date:** October 16, 2009

Effective January 1, 2010, the *Rules of Civil Procedure* governing all civil litigation matters brought in the Superior Court of Ontario will come into force. This *FTR Now* highlights some of the key changes that will impact the manner in which employment-related actions are litigated, including wrongful dismissal claims, constructive dismissal claims, and claims for breach of fiduciary duty or breach of restrictive covenants.

## THE NEW *RULES*

As a result of recommendations made by the Honourable Justice Coulter Osborne as part of the Civil Justice Reform Project, the Ontario government filed a number of significant Regulations that amend the *Rules of Civil Procedure* (the "*Rules*"). The changes to the *Rules* represent a focused attempt to simplify the litigation process and to increase access to the justice system by reducing the legal costs and time involved in litigating an action.

The *Rules* govern the procedure for all civil litigation matters brought in the Superior Court of Ontario, including employment-related actions such as wrongful dismissal claims, constructive dismissal claims, and claims for breach of fiduciary duty or breach of restrictive covenants. The amendments will come into effect for existing court actions on January 1, 2010 and will apply to any new actions brought after that date.

Set out below are some of the key changes that will be of particular interest to employers.

## CHANGES TO JURISDICTION

Currently, actions for $50,000 or less may be brought under the Simplified Procedure. The Simplified Procedure has fewer procedural steps and was an attempt to streamline the litigation process for claims of smaller monetary value. Effective January 1, 2010, the Simplified Procedure will be mandatory for claims of $100,000 or less.

There has been a corresponding amendment made to the jurisdiction of the Small Claims Court. Currently, only claims for $10,000 or less may be brought in Small Claims Court. This will be increased to $25,000 in January 2010.

## CHANGES TO THE DISCOVERY PROCESS

As noted above, the Simplified Procedure was implemented to lower the costs of going to trial by eliminating several procedural steps, the most notable of which is examinations for discovery. Examinations are, other than the trial, often the most expensive part of a litigation action. However, as of January 1, 2010, parties in a Simplified Procedure action will have a right to examine the other party for discovery for a maximum of two hours.

For litigants with actions that are in the regular procedure (those with claims of $100,000 or more as of January 1, 2010), examinations for discovery will be limited to seven hours of examination per party, unless the parties consent to longer examinations, or obtain a court order. This may significantly reduce the cost of litigation in many employment-related matters.

In addition, the amendments also introduce the concept of “proportionality” to the discovery process. It is anticipated that judges will utilize this concept of proportionality to place boundaries on questions from counsel and requests for production of documents. The new Rule 29.2 stipulates that in determining whether a question must be answered or a document produced, the court must consider whether: a) the time required would be unreasonable; b) the expense would be unjustified; c) it would cause undue prejudice; d) it would unduly interfere with the orderly progress of the action; and, e) the information is available elsewhere. The court is also directed to consider whether an order for production would result in an “excessive volume of documents” being produced. This change is particularly important with respect to electronic documents such as e-mails, given that tens of thousands of documents are often involved.

Litigants will also be required to agree upon a Discovery Plan, which will, among other things, require the parties to set out in writing key dates by which certain steps in the discovery process are to occur, including the service of affidavits of documents and oral or written examinations. The Rules specifically incorporate “The Sedona Canada Principles Addressing Electronic Discovery” into discovery plans.

The current requirement in the *Rules* that parties disclose all documents “related to any matter in issue” will be changed to “*relevant* to any matter in issue”. The intent of this change, according to the Summary of Findings and Recommendations of Justice Osborne, is to discard the broad “semblance of relevance” test and replace it with a simple relevance test. This new wording, combined with the other changes limiting the length and scope of the discovery process, may result in parties being required to produce fewer documents.

## CHANGES TO SUMMARY JUDGMENT MOTIONS

The purpose of a summary judgment motion is to obtain judgment on one or all of the issues in dispute, without the necessity of a trial. The amendments will result in the following changes to the rules governing summary judgment motions, and appear to be designed to increase the number of

actions that can be disposed of through a summary judgment motion rather than a full-fledged trial:

Judges conducting summary judgment motions will be able to:

- conduct “mini-trials”, and order that oral evidence be presented, with or without time limits on its presentation;
- Weigh the evidence;
- Evaluate credibility; and
- Draw any reasonable inference from the evidence.

Further, the cost consequences of bringing an unsuccessful summary judgment motion have been lessened. Whereas the presumption in the current *Rules* is that a party who brings an unsuccessful summary judgment motion should pay the other party’s costs on a substantial indemnity basis, this presumption is eliminated under the amended *Rules.* The amended Rule 20.06 now indicates that cost sanctions on a substantial indemnity scale are available if a party “acted unreasonably” by making or responding to the motion, or a party “acted in bad faith for the purpose of delay”.

## CONCLUSION

In summary, the amendments to the *Rules* are a serious attempt to increase access to justice by making the civil litigation process cheaper and faster. Only time will tell whether or not the amendments achieve these goals in practice.

The amendments to the Rules are comprehensive and we have only outlined some of the more major changes. Should you wish any further information, please contact Kathryn L. Meehan (Waterloo) at 519.883.3120 or your regular Hicks Morley lawyer.

---