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AMENDMENTS TO THE RULES

(A) Introduction and background

The amendments to the rules brought about by O.Reg 438/08 (in force January 1, 2010) are the most extensive amendments to the Rules of Civil Procedure since they were first adopted in 1985 and are a result of the Civil Rules Committees (CRC) consideration of the Osborne report. A companion regulation to raise the jurisdiction of the Small Claims Court to $25,000 was filed as O.Reg. 439/08. (See the next section for a summary of the major changes.)

The background is as follows. In June 2006, then Attorney General Michael Bryant asked the Honourable Coulter Osborne, former Associate Chief Justice of Ontario, to lead the Civil Justice Reform Project (CJRP). Justice Osborne was asked to propose options to reform the civil justice system to make it more accessible and affordable for Ontarians. Justice Osborne submitted his *Summary of Findings and Recommendations of the Civil Justice Reform Project* to the present Attorney General, Chris Bentley, in November 2007. (A full report was said to be forthcoming, but it was apparently never prepared/delivered and the CRC undertook its task with only the *Summary* to work with.) The *Summary* may be viewed at:

http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf

In March 2008 the Civil Rules Committee commenced work on considering the recommendations and completed its work in December 2008 approving the amendments contained in the new regulation. As was anticipated in last year's Annual Survey, the CRC gave great weight to the Osborne rule amendment recommendations and implemented many, though not all of them. (Many of Osborne's recommendations involved matters that did not fall within the jurisdiction of the CRC and these have been referred to other authorities e.g. the Ministry of the Attorney General, the judiciary or the Law Society). Osborne recommendations not accepted by the CRC (and therefore not in the new regulation) are generally not discussed here. In a few instances the regulation adopts rule changes that were not part of the Osborne recommendations.

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The CRC carried out its work by establishing an Advisory Committee which met on numerous occasions to consider the Osborne Report, and to review the recommendations contained in the report, and then provided its advice to the Civil Rules Committee regarding each of those recommendations. The Advisory Committee was comprised of Justice Ian Nordheimer, Justice Gladys Pardu, Derry Millar and John Callaghan.

The in force date for O.Reg. 438/08 is January 1, 2010 for most of the rule changes, although there are a few provisions (all to do with changing sunset clauses) which came into force on December 10, 2008

Below (after the Summary of major changes) is a rule by rule commentary on the new changes. Note that because of the extensive nature of the changes brought about by the new Regulation, only a summary of the changes can be provided here; readers are advised to read individual new rules in detail.

(B) Summary of the major changes

The very lengthy regulation (37 pages) brings about a multitude of changes (all analyzed in detail below), but the following are the significant changes.

Summary Judgment -- Rule 20

The revisions to Rule 20 are potentially the most significant of all the new amendments. The court's powers on the motion are expanded to permit a judge (though not a master) to weigh evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence. A new mini-trial power 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. The substantially revised rule on "where trial is necessary" gives the court much greater powers and effectively permits such cases to enter a form of case management. The presumption of substantial indemnity costs against an unsuccessful moving

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party in a summary judgment motion in rule 20.06 has been eliminated and replaced with a rule conferring permissive authority on the court to impose substantial indemnity costs.

Mandatory mediation – Rule 24.1

The application of this rule is expanded to include all cases commenced in Ottawa, Toronto or Essex and is no longer limited to case managed or simplified procedure cases. Now mediation is to take place within 120 days after the first defence has been filed (rather than 90 days as under the previous regime) and 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.

Discovery Reform – Rules 29.1, 29.2, 30 & 31

Here the changes are numerous and significant

(i) Redefinition of the concept of relevance - the phrase "relating to any matter in issue in the action" is replaced with "relevant to any matter in issue in the action" in all rules relating to discovery. The intent of this change is to discard the "semblance of relevance" test and replace it with a simple relevance test.

(ii) Time limits on examination for discovery: this change has been implemented by the addition of a new “one day” rule -- “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”.

(iii) Discovery plan. There is a requirement that parties agree to (and to update) a written discovery plan. If the parties fail to agree a plan then on “any motion under Rules 30 to 35 relating to discovery, the court may refuse to grant any relief or to award any costs”. Moreover, in preparing the discovery plan, the parties shall consult and have regard to the document titled “The Sedona Canada Principles Addressing Electronic Discovery”

(iv) Proportionality in discovery. This requirement is imposed by Rule 29.2 and the key provision (rule 29.2.03) directs the court, in making a determination as to whether a party or other person must answer a question or produce a document, to consider a list of factors.

Motions, Applications Appeals from Interlocutory Orders

Rule 37 (motions), Rule 38 (applications) and Rules 61 (appeals from interlocutory orders) have been amended setting earlier deadlines for the service and filing of materials so as to give the parties a greater lead time between the filing of materials and the hearing

Experts -- Rules 4.1, 50.06 and 53

A new rule 4.01 establishes that the duty of an expert is ultimately to the court not the parties. Other changes give the court power to make orders limiting the number of expert witnesses and establishing the timing of the serving of expert reports and specifying their content.

Simplified Procedure: Rule 76

The monetary jurisdiction of rule 76 is increased to $100,000 and each party is permitted to engage in up to two hours of oral examination for discovery but the examination is not to exceed a total of two hours of examination, 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 witness on a motion remain in place. At a summary trial each party may examine the deponent of any affidavit the party has served for not more than 10 minutes.

Civil Case Management: Rule 77

(i) Removal of the two rules regime. The complex and confusing situation of having two rules on case management has been removed. Former rules, Rule 77 Civil Case Management and Rule 78 Toronto Civil Case Management have been revoked, and a new Rule 77 Civil Case Management creates a single case management rule. This new Rule incorporates much of what was in the revoked rules and also adds some new elements.

(ii) Statement of purpose and general principles. The Rule contains a statement of its purpose and general principles -- case management is to be used only when necessary and only to the extent necessary, and the greater share of the responsibility for managing the proceeding and moving it along expeditiously remains with the parties. The rule also provides a foundation for tailoring the case management regime to the different regions (and for the possible retention of local practices already developed).

*(iii) Applicability of the Rule***.** The new Rule applies only to proceedings in Ottawa, Toronto and Essex which have been *assigned to case management by a court order*. The new rule does not automatically apply to any proceeding -- it only applies if the court determines that the proceeding should come under the rule – and detailed criteria to be applied by the court in considering whether to assign a proceeding for case management are set out. Orders assigning cases to case management may be made by a judge or case management master and the case management may be conducted by a judge or by a case management master.

The Rule provides for the usual features of case management: e.g. a broad range of powers to the judge or case management master, how motions are to be heard, case conferences and the setting of timetables. Provision is made for how transition is to be handled for existing cases when the new rule comes into effect.