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Preparing for Proposed Changes to the Rules of Civil Procedure in Ontario: Strategic Insights & Practical Steps for In-House Counsel

Dramatic changes have been proposed for Ontario's *Rules of Civil Procedure*. Now that the final recommendations from the Civil Rules Review Working Group have been released, in-house counsel teams should be thinking about steps that may be needed to ensure their business can transition seamlessly to a new litigation procedure. We have set out some considerations for in-house teams to help prepare for a smooth transition.

Overview of the Proposed Framework

The Civil Rules Review Working Group, established by the Ontario Superior Court of Justice and the Ministry of the Attorney General, has proposed significant reforms to the *Rules of Civil Procedure* in the Civil Rules Review Final Policy Report. The proposed changes aim to create a more efficient and accessible civil justice system. Our overview of the proposed changes and key differences from the existing *Rules* can be found here.

The proposed changes are still under review by the Attorney General. The timing, extent, and specifics as to how the proposed changes will be implemented are not clear. However, if the proposed recommendations are adopted in any fashion, the conduct of litigation in Ontario will fundamentally change for both lawyers and their clients.

While litigants and lawyers await the Attorney General's response, we have compiled steps that in-house legal teams can consider taking now to assist with an eventual transition, particularly in light of three key elements of the proposals.

Key Elements of the Proposed Framework

1. **Mandatory Pre-Litigation Protocols**: The proposed *Rules* mandate the early exchange of information and key documentation and require parties to make a genuine effort to resolve disputes before starting court

proceedings. Specific protocols are proposed for personal injury, medical negligence, and contractual disputes, as well as a general protocol applicable to all remaining civil matters with exceptions for specified claims and parties seeking urgent relief.

2. Fixed Timelines for Case Resolution: The proposed *Rules* aim to ensure most cases reach a substantive hearing within two years, with prescribed judicial check-in points. Hearing dates will be fixed, with adjournments granted only in exceptional circumstances.

3. Up-Front Evidence Model: The proposed *Rules* significantly curtail oral examinations for discovery, replacing them with sworn witness statements exchanged early in litigation. They also replace the traditional relevance-based discovery process with a reliance-based standard, requiring parties to disclose documents they intend to rely on, with a follow-on process for additional document requests.

Strategic Insights & Practical Steps for In-House Counsel

Steps in-house counsel and clients may consider taking now fall into three broad categories: litigation strategy; financial considerations; and people, process, and technology.

Litigation Strategy

1. Clear the Docket of Lagging Cases: Now is the perfect time to assess your current litigation caseload and determine which cases can be expedited or resolved to clear your docket before the proposed *Rules* come into effect. This will create capacity for managing new cases under the proposed *Rules* and help you navigate what will likely be an initial period of uncertainty in the courts. Simplifying your docket and focusing on the most critical cases will ensure your department is well-prepared for the transition and that you can deploy limited legal team resources most efficiently.

2. Consider Relative Advantages of Claims Before or After Transition: To the extent you are aware of a claim your company currently has against another person or entity, consider (or seek an opinion about) whether it is more advantageous to initiate litigation now or wait until the new *Rules* are in place. Evaluate which regime – current or forthcoming – best suits the cases you are considering bringing while keeping limitation periods in mind.

3. Review Insurance Coverage & Confirm Litigation Claims Process: With mandatory pre-litigation protocols and reduced time frames to defend and lead evidence, legal departments must act swiftly to ascertain coverage or insist on a coverage determination. Consider thoroughly reviewing your insurance policies to understand coverage scope and exclusions. Strengthen relationships with insurers by maintaining open communication and regularly updating them on potential claims. Streamline your internal processes for providing timely notice, designating specific team members and using standardized templates.

4. Optimize Process for Hiring Outside Litigators: Reduced timelines will require retaining external counsel quickly. Establish clear criteria and processes for selecting litigation counsel. Review and ensure that your standard terms for engaging external counsel position you well for fast and smooth onboarding. Consider identifying preferred law firms for litigation, or claim types, that you can rely on for swift and effective legal support.

Financial Considerations

1. Review Budgets to Address Potential Front-Loading of Costs: One of the aims of the new *Rules* is to reduce overall costs by condensing litigation timelines. To achieve this, there will likely be increased cost earlier in litigation due to early delivery of sworn witness statements and document disclosure. Consider the specific costs associated with preparing sworn witness statements in budgets and adapt discovery-based costs to the up-front evidence model and two-phase document production process. You can likely significantly reduce expenses related to oral examinations and procedural motions.

2. Consider Impact on Reserves: Review and update your process for setting and managing reserves related to litigation claims to ensure adequate funds are available to cover potential legal costs, including settlements, judgments, and fees. If the *Rules* are amended as proposed, we expect faster resolution of cases through settlement or judgment. On the positive side, shorter litigation timelines should reduce uncertainty in litigation cost projections. Reserves analyses should include consultation with external counsel and financial advisors.

People, Process, & Technology

1. Consider Early Case Assessment Processes: Develop criteria to identify key documents and critical internal witnesses early and easily. Relevant documents must be preserved for review, even if not produced. Streamline processes for early case assessment and management to handle the increased demands of early case preparation, including potential increased demands on the time of businesspeople.

2. Revisit Internal Resources & Roles: Ensure your team is adequately staffed to handle increased demands of early case preparation and active case management under the new proposals. This includes what will likely be a temporary increase in resources needed to manage a period of transition, as some cases proceed under the old *Rules*. Consider the distribution of roles and responsibilities, and the need to hire or train additional personnel.

3. Train Your Team to Understand the Changes: Conduct training sessions to familiarize your team with the proposed *Rules* and procedures once they are finalized. Emphasize the importance of early and thorough preparation of witness statements and document disclosure. Consider leveraging your external litigators for assistance.

4. Enhance Data Storage for Quick Access: Given the importance of rapid access to and disclosure of documents under the proposed *Rules*, review and update your business' data storage and document management systems. The proposed changes will require prompt access to key documents, making organized data management and search systems essential. Consider updating data retention and litigation hold policies to align with a modified reliance-based discovery model.

Conclusion

The proposed changes to Ontario's *Rules of Civil Procedure* represent a significant shift in litigation. By preparing for these changes and adapting your litigation strategies, your in-house counsel team can manage the transition and continue to achieve successful outcomes in your commercial litigation portfolio. Collaborate with your external counsel to ensure a seamless transition and leverage the new framework to enhance your litigation management practices.

This is only one part of our series, A New Vision for Litigation, analyzing the proposed reforms to Ontario's

Rules of Civil Procedure. See our other blogs here:

- Summary of Proposed Changes to Ontario's Rules of Civil Procedure
- Motions Practice Transformed: What the Proposed Civil Justice Reform in Ontario Means for Litigants
- Expediting Justice: Pre-Litigation Protocol in the Proposed Changes to the Rules of Civil Procedure in Ontario
- Up-Front Evidence: A New Era in Discovery Proposed by the Civil Rules Review in Ontario
- Trials on Trial: A New Vision for Adjudication in Ontario
- Proposed Changes to the Rules for Expert Witnesses: Cooperation, Conferencing, & Consequences