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Trials on Trial: A New Vision for Adjudication in Ontario

If the Civil Rules Review Working Group's proposals for reforms to the *Rules of Civil Procedure* (summarized here) are adopted, trial practice in Ontario will undergo significant changes. Key aspects of those proposed reforms include:

1. **Dispositive Summary Judgment Motions:** These motions will provide a final resolution of the case, one way or another.
2. **More Paper Evidence at Trial:** Most evidence will be presented through witness statements or expert reports by default, though not all evidence will follow this format.
3. **Less Oral Evidence in Chief:** This will be restricted to what is outlined in the witness statements rather than being explored through oral examination.
4. **A New Expert Evidence Model**: There will be more comprehensive pre-trial procedures, including the use of standard form expert reports and an increased reliance on joint experts.

The laudable goal of these proposals is to get cases to trial faster and reduce trial time. Their impact on actual efficiency for litigants – including the cost of taking cases to a "Dispositive Hearing" – remains to be seen.

Ontario lawyers and litigants are used to two distinct types of proceedings: actions, which drive toward a trial with live evidence, and applications, which generally result in a hearing on a paper record. Hybrid or bifurcated modes of hearing under the existing *Rules* are possible but are not particularly common.

If the proposals are adopted, every civil proceeding will feature the early exchange of witness statements.

But the mode of hearing of the so-called "Dispositive Hearing" (i.e., a hearing which will determine all the substantive issues in the matter) will be determined at a "Directions Conference", with those proceedings now being dealt with on a paper application record being 'presumptively' set for hearing on a paper record in a "Summary Hearing".

How these principles work in practice will depend in large part on how judges resolve disputes over the mode of hearing under any proposed rules, and what criteria are applied to determine

those disputes.

It is also significant that the Working Group did not adopt the model in place in England and Wales, in which (presumptively) all evidence in chief at trial is adduced by way of witness statement. That jurisdiction has used that default mode of evidence for all civil trials since 1999.

Instead, the Working Group suggests that all non-party and expert evidence be presented by default through witness statements. However, party evidence would still be given orally. Since there is no examination for discovery, opposing counsel and the Court will need to ensure that this oral evidence aligns with prior witness statements.

Some Ontario judges have adopted similar approaches to 'hybrid' proceedings, or trials of an issue (e.g., *SS&C Technologies v The Bank of New York*). But handling disputes over whether a witness' statement aligns with prior written evidence exchanged by the parties often extends beyond the usual impeachment process at trial. In some cases, this issue has consumed significant resources from both the parties and the court, which may not fully align with the goals of the proposed reforms.

The newly proposed "trial management conference" may provide an opportunity for addressing some of these issues. Unlike current pre-trial conferences, these sessions will be led by the trial judge and held in the weeks leading up to the trial. The primary focus will be on ensuring trial readiness, including the preparation of joint books of documents and chronologies. Additionally, these conferences will serve as a platform to identify and manage potential disputes regarding the scope of anticipated evidence. It will be interesting to see whether the consultation process results in any changes to the proposals – including, for instance, adoption of a process closer to the English model. In any case, Ontario trial lawyers will have to significantly alter their practice if the proposed reforms related to witness statements are adopted.

Implications for In-House Counsel

The proposed changes to adjudicative processes will not only impact external counsel and their conduct of trials, but will have some apparent implications for in-house counsel:

1. **Early Witness and Narrative Identification**. If the new reforms are adopted, gone will be the days of in-house and external counsel working to identify an examination for discovery representative, or other key witnesses in the weeks or months leading up to discovery or trial. With early deadlines for delivery of witness

statements by plaintiffs (6 months) and defendants (9 months), in-house counsel will need to be ready to work with external counsel to identify and develop the whole "story" to tell at trial, including the witnesses through whom that evidence will be led, very early in every case.

2. More and Shorter Trials? The effect of the upfront evidence model means that much of the costs of trial preparation will be moved up into the first 12 months of any given case. This is likely to make the actual conduct of trials more efficient or at least take up less court time. In-house counsel and their clients may need to re-calibrate their expectations for trial risk if the incremental resource cost of trials is significantly reduced.

3. Or More and Early Settlement? While trials may be more efficient, the effect of the proposed *Rules* reforms may be to reduce the need for dispositive hearings. This is so given the resource pressure that the upfront evidence model will place on parties and counsel. In-house counsel should consider being prepared to assess cases and litigation costs early, and early resolution in appropriate cases if the unavoidable costs justify it.

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 the *Rules of Civil Procedure* in Ontario
- Preparing for Proposed Changes to the *Rules of Civil Procedure* in Ontario: Strategic Insights & Practical Steps for In-House Counsel
- 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
- Motions Practice Transformed: What the Proposed Civil Justice Reform in Ontario Means for Litigants
- The Digital Shift in Ontario Courts: Proposed *Rules* for a Tech-Driven Future