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Expediting Justice: Pre-Litigation Protocol in the Proposed Changes to the Rules of Civil Procedure in Ontario

The 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 Phase 2 Consultation Paper. The proposed changes are aimed at creating 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.

1. Pre-Litigation Protocol

The proposed *Rules* contemplate that personal injury claims, debt collection claims, and disputes about the validity of a testamentary instrument follow PLP before litigation is formally started. PLP would otherwise be optional.

PLP mandates early exchange of information and specific documents, before litigation starts, and requires parties to make a “genuine effort” to resolve the dispute. The proposed *Rules* contemplate having a set standard for the content and quality of letters of claim and response exchanged under PLP, a process and timetable for the exchange of limited documents, and a specific framework for exploring early resolution of the dispute. Given the time required to engage in PLP, the Working Group suggests extending the basic limitation period in Ontario from two to three years.

2. Mandatory Mediation & Limitation of Judicial Settlement Conferences

The proposed *Rules* make mediation mandatory across Ontario with the goal of outsourcing the settlement portion of pre-trial conferences to third party mediators. The Court retains discretion to exempt parties from mandatory mediation or to order a judicial settlement conference where appropriate in the circumstances. Pre-trial conferences are limited to trial management issues only.

Takeaways for In-House Counsel

PLP is a significant change in the litigation process. For in-

house counsel teams dealing with personal injury cases and other litigation where PLP applies, swift access to relevant documents and decision-making about how instructions will be sought and obtained will be crucial to making the most of the opportunity for pre-litigation settlement. It may also be prudent to review insurance policies now so that there is a process in place for putting insurers on notice of PLP claims quickly if necessary, and to identify certain law firms preferred specifically for PLP claims so they can be retained with the speed necessary to respond to the tight timeframes in PLP process.

The move to mandatory mediation and away from judicial mediation at pre-trial conferences is consistent with what many in-house counsel have already seen in their litigation files in Toronto, Ottawa, and Windsor. This change may bring a welcome increase in the number of cases that can be settled early. To the extent in-house counsel teams have business clients who have historically preferred to have the views of a judge at the pre-trial conference over those of a mediator, it may be prudent to begin socializing the importance and helpfulness of third-party mediators now so that expectations are tempered if judicial “mediations” at pre-trial conferences are eliminated.

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
- 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
- Trials on Trial: A New Vision for Adjudication in Ontario
- The Digital Shift in Ontario Courts: Proposed *Rules* for a Tech-Driven Future