

IMPORTANT CHANGES TO THE ONTARIO RULES OF CIVIL PROCEDURE

On January 1, 2010, a number of important changes to the Ontario Rules of Civil Procedure are to come into effect.

Small Claims Court

As of January 1, 2010, the upper limit for actions commenced in Small Claims court will increase from \$10,000.00 to \$25,000.00.

Simplified Procedure -Rule 76

As of January 1, 2010, Rule 76 will be mandatory for all claims of \$100,000.00 or less, instead of the previous limited of \$50,000.00. Limited examinations for discovery are also being introduced with parties being allowed a maximum of two (2) hours of discovery with the caveat that this limit is irrespective of the number of parties to the action.

Reduction of the Scope of the Discovery Process

The "One Day" Rule—Reduced Duration of Examinations for Discovery

The length of examinations for discovery will be limited to seven hours of examinations for discovery each, unless the parties consent to longer examinations or there is a court order. Parties can exceed the seven (7) hour limited, as well as allow for multiple examinations of parties, either on consent or by seeking leave of the Court.

Proportionality in Discovery

The "proportionality" rule is being applied to documentary productions and examinations for productions where the costs of responding to such demands is out of proportion to the amount in dispute in the litigation. In making such determinations, the court will consider the following: whether the time required for the party or person to answer the question or produce the document would be unreasonable or whether the expense would be unjustified; whether requiring the party or other person to answer the question or disclose the document would cause undue prejudice or unduly interfere with the "orderly progress of the action"; and whether the information or document is readily available to the party requesting it from another source.

Summary Judgment

The current rules regarding motions for summary judgment have been very strictly interpreted by the Court of Appeal. A party cannot currently obtain summary judgment unless it can essentially be shown that the other side lacks any possible chance of success.

Court's Powers on a Motion

A judge hearing a summary judgment motion will be permitted to make assessments of credibility, i.e. based on affidavit material without hearing witnesses, and weigh the evidence in determining the matter as opposed to the current system where a judge must take the evidence of the party resisting summary judgment at face value, unless it is incapable of being true.

Mini-Trial

While summary judgment motions will still be conducted based on affidavit material rather than based on testimony in open court, a judge hearing the motion can require a "mini-trial" involving oral evidence.

Summary Trials

Where it is deemed necessary, broad discretion will be given to the Court in exercising its power to direct every aspect of such trials including issues to be tried, the delivery of affidavit evidence, conduct of discoveries, setting parameters for evidence and requiring parties to submit concise statements of fact.

Costs

The cost consequences for bringing an unsuccessful summary judgment motion will be less harsh, as costs will now be awarded on a "partial indemnity" basis, unless the motion was brought unreasonably or in bad faith.

As a result of these changes, it is expected that summary judgment motions will become more commonplace given the greater likelihood that a matter will be decided on such a motion and the softening of the potential negative cost consequences.

Ontario Municipal Board Applies Incorrect Test in Considering the Provincial Policy Statement 2005

In *Toronto (City) v R&G Realty Management Inc.*, the City appealed a decision of the Ontario Municipal Board (OMB) which permitted the respondent to convert an affordable rental apartment building to a condominium. The decision of the OMB had reversed the City's decision which denied the respondent's application for condominium conversion. Based on the vacancy rate, the OMB concluded that the proposed conversion would not have an adverse impact on the supply of rental accommodations in the City.

In allowing the City's appeal, the Divisional Court held that the OMB applied the wrong legal test in considering the Provincial Policy Statement 2005 which required planning authorities to provide for an appropriate range of housing types and densities required to meet projected requirements for current and future residents of the City and failed to properly

consider the specific provisions of the City's Official Plan dealing with condominium conversions. The OMB was required to decide this case in a manner consistent with the 2005 Policy, not merely to have regard to it and was obligated to carefully consider the Official Plan within the context of the Official Plan's overall policy objections. The OMB neglected to properly consider and therefore ignored the specific provisions of the Official Plan dealing with condominium conversions and the limited situations in which they would be approved. The Official Plan and Policy were interconnected in a manner that reinforced the OMB's responsibility to give serious consideration to the Official Plan. The Divisional Court held that given the extent to which the OMB had ignored and seriously departed from crucial provisions of the Official Plan without stating any reasons for doing so, the OMB's decision was unreasonable and was reversed.

Privilege Clauses in Tender Documents Permitted the Halifax Regional Municipality to Reject all Tenders and to Re-Tender at a Later Date

In *Amber Contracting Ltd. v. Halifax (Regional Municipality)*, the Halifax Regional Municipality appealed a decision rendered in favour of Amber Contracting. The Municipality issued a call for tenders for a contract related to construction and upgrade of a sanitary pumping station. Amber submitted the lowest bid, but the Municipality cancelled the tender. Several months later, the contract was re-tendered on substantially the same terms, and a company won the contract with the lowest bid, even though it had exceeded Amber's bid submitted for the original tender. Amber sued, contending that the Municipality breached a duty of fairness by re-tendering to obtain a better price and by not following its usual practice of negotiating with the lowest bidder.

The trial judge found the Municipality engaged in bid shopping and awarded Amber damages for loss of profit based on

a breach of an implied duty of fairness flowing from the Municipality's abandonment of its usual practice. The Municipality could not rely on privilege and non-recourse clauses in the tender document as a basis for finding that Amber had waived its right to make claim.

In granting the Municipality's appeal, however, the Nova Scotia Court of Appeal found that the judge erred by failing to regard the contractual terms of the tender. The judge did not conduct examinations of the tender documents or of the privilege clauses, which expressly reserved the right to reject all tenders if none were considered satisfactory. As a result, the Municipality's decision to re-tender did not constitute improper bid shopping, and no breach of the duty of fairness had arisen.

Ontario Court of Appeal Upholds Judge's Decision in Finding an Oral Agreement for the Sale of Land and Awarding Specific Performance

In *Erie Sand and Gravel Ltd. v. Seres' Farms Ltd.*, Tri-B Acres, one of the co-defendants with Seres' Farms Ltd., appealed the decision awarding Erie Sand and Gravel, the respondent, specific performance of an agreement of purchase and sale of farmland. Erie Sand had purchased land from Seres' Farms on the north side of a road and now wanted to buy Seres' Farms' lands south of the road. Erie Sand knew that the south lands were subject to a right of first refusal in favour of Tri-B Acres. Seres' Farms and Erie Sand agreed that Erie Sand could purchase the south lands for a specified price and agreed on a closing date. Seres' Farms requested from Erie Sand a written offer reflecting their agreement and said that Erie Sand would get the south side property unless Tri-B Acres matched its offer. Erie Sand prepared an offer in accordance with the agreed-on terms and delivered it to Seres' Farms, who took the offer to Tri-B Acres, which did not match the offer. Despite Seres' Farms promise to Erie Sand, it accepted Tri-B Acres' lesser offer.

In ordering Tri-B Acres to transfer the property to Erie Sand, the trial judge found that the parties had reached an oral

agreement on the terms contained in the offer. He further found that the offer was a sufficient note or memorandum and a statement of the essential terms of the contract, sufficient to satisfy the Statute of Frauds. Since Tri-B Acres did not match Erie Sand's offer as required by the right of first refusal, Seres' Farms breached its agreement with Erie Sand by accepting Tri-B Acres' offer.

In dismissing Tri-B Acres' appeal, the Ontario Court of Appeal held that the judge did not err in finding an oral agreement for the purchase and sale of the south lands. The agreement was more than an agreement to agree. The fact that a formal written document was to be prepared and signed did not alter the binding validity of the original contract. There were sufficient acts of part performance to take the agreement outside the Statute of Frauds. Seres' Farms was precluded from relying on section 4 of the Statute of Frauds to excuse it from performance of its obligations under the agreement.