



2010: A LITIGATION ODYSSEY

THURSDAY, SEPTEMBER 24, 2009

REGISTRATION: 7:15 AM

BREAKFAST AND NETWORKING: 7:15 – 8:00 AM

SEMINAR: 8:00 – 9:30 AM

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FRASER MILNER CASGRAIN LLP
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**Ontario Civil Justice Reform 2010:
A Revolution? You be the Judge.**



Presented by:
Michael D. Schaffer, Fraser Milner Casgrain LLP
Tiffany D. Soucy, Fraser Milner Casgrain LLP
Lori Cornwall, General Counsel, Enbridge Gas
Distribution Inc.



An Overview

- The Civil Justice Reform Project
- The Greatest Rules Changes in 25 years
- Effective January 1, 2010

Overview Continued

- Guiding Principles:
 - Access to Justice
 - Proportionality
 - One size does not fit all
 - Culture of Litigation

Overview Continued

- The Civil Justice Reform Project:

“...Straightforward, lower value cases should not take as long or cost as much as large, complex cases”

Agenda

- Proportionality in litigation (15 minutes)
- Monetary limits for small claims, simplified procedure (10 minutes)
- Discovery: plans required and new time limits (15 minutes)
- Summary Judgment: more remedies at the motion level (20 minutes)
- Experts: now agents of the Court (5 minutes)
- Timing for motions, applications and appeals (5 minutes)
- Questions & Answers – welcome throughout

Proportionality Principle – Rule 1.04

- General principle of proportionality:

Rule 1.04(1.1):
In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding

- Mandatory application
- Particular impact on discovery, costs

Monetary Jurisdiction in Small Claims and Simplified Procedure Actions

- Small Claims court (a.k.a. the “people’s court”) limit becomes \$25,000, from \$10,000
- Simplified Procedure limit become \$100,000 per plaintiff, from \$50,000

Other Changes to Simplified Procedure

- Each party now has a maximum 2 hours for oral examinations (Rule 76.04(2))
- At summary trial, each party may examine a deponent of an affidavit for not more than 10 minutes (Rule 76.12(1))
- For cost consequences, actions commenced before January 1, 2010 will be subject to the old \$50,000 threshold, rather than the new \$100,000 threshold (Rule 76.13(11))

Strategic Considerations

- Volume of new cases in the Small Claims Court
- New rights of discovery in Simplified Procedure

Discovery Plan – Rule 29.1

- Rule 29.1.03(1): Where a party to an action intends to obtain evidence under any of Rules 30 to 35, the parties to the action shall agree to a discovery plan in accordance with this rule

- Rule 29.1.03(2): The discovery plan shall be agreed to before the earlier of 60 days after the close of pleadings or such longer period as the parties may agree to and attempting to obtain the evidence

The Discovery Plan - Rule 29.1

- Rule 29.1.03: The discovery plan shall be in writing and include:
 - the intended scope of documentary discovery, taking into account relevance, costs and the importance and complexity of the issues
 - dates for the service of affidavits of documents
 - the timing, costs and manner of production

The Discovery Plan - Rule 29.1 (Continued)

- Rule 29.1.03 - The discovery plan shall be in writing and include:
 - the persons intended to be produced and the timing and length of the examinations; and
 - "any other information intended to result in the expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action"

The Discovery Plan - Rule 29.1 (Continued)

- No mandated electronic discovery:

(4) In preparing the discovery plan, the parties shall consult and have regard to the document titled "The Sedona Canada Principles Addressing Electronic Discovery"

Proportionality in Discovery – Rule 29.2

- Applies to:
 - document discovery
 - examination for discovery
 - procedure on oral examinations, and
 - interrogatories (Rule 29.2.02)

Proportionality in Discovery – Rule 29.2

- Rule 29.2.03(1):

In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether...

(a) the time required to answer the question or produce the document would be unreasonable

(b) the expense associated with answering the question or producing the document would be unjustified

Proportionality in Discovery – Rule 29.2

(c) requiring the party to answer the question or produce the document would cause undue prejudice

(d) requiring the party to answer the question or produce the document would unduly interfere with the orderly progress of the action; and

(e) the information or the document is readily available to the party requesting it from another source

Proportionality in Discovery – Rule 29.2

(2) ...in determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person

Scope of Documentary Discovery - Rule 30.02

Rule 30.02(1): Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document

Scope of Documentary Discovery - Rule 30.02

- “Relating to any matter in issue” becomes “Relevant to any matter in issue”
- The concern: Under the existing regime, preventing “trial by ambush” has become “trial by avalanche”
- “Relevance” or “Simple Relevance” vs. “Semblance of Relevance”
- What does this mean?

Discovery Limits – Rule 31.05.1

Rule 31.05.1(1):

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

Discovery Limits – Rule 31.05.1

In determining whether leave should be granted under subrule (1), the court shall consider:

- (a) the amount of money in issue
- (b) the complexity of the issues of fact or law
- (c) the amount of time that ought reasonably to be required in the action for oral examinations
- (d) the financial position of each party

Discovery Limits – Rule 31.05.1

In determining whether leave should be granted under subrule (1), the court shall consider:

(e) the conduct of any party, including a party's unresponsiveness in any examinations for discovery held previously in the action, such as failure to answer questions on grounds other than privilege or the questions being obviously irrelevant, failure to provide complete answers to questions, or providing answers that are evasive, irrelevant, unresponsive or unduly lengthy

Discovery Limits – Rule 31.05.1

In determining whether leave should be granted under subrule (1), the court shall consider:

(f) a party's denial or refusal to admit anything that should have been admitted; and

(g) any other reason that should be considered in the interest of justice

Summary Judgment– Rule 20.04

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence,

“no genuine issue for trial” becomes “no genuine issue requiring trial”

Summary Judgment– Rule 20.04

- From the Civil Justice Reform Project:

“...rule 20 is not working as intended”

“...the Court of Appeal’s view of the scope of motion judges’ authority is too narrow”

Summary Judgment– Rule 20.04

- From the Civil Justice Reform Project:

“The cost consequences from a failed summary judgment motion have also been said to be too onerous, deterring many litigants and their counsel from using rule 20”

Summary Judgment– Rule 20.04

- From the Civil Justice Reform Project:

“...responding parties to a summary judgment motion may put facts in dispute if only to present the motion judge with an issue of credibility and to argue that, as a result, a trial is required”

Summary Judgment – Rule 20.04

(2.1) In determining... whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and...the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

Summary Judgment – Rule 20.04

1. Weighing the evidence
2. Evaluating the credibility of a deponent
3. Drawing any reasonable inference from the evidence

Summary Judgment – Rule 20.04

- Enter the mini-trial:

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation

Where a Trial is Necessary – Rule 20.05

(1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously

Where a Trial is Necessary – Rule 20.05

(2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order...

Where a Trial is Necessary – Rule 20.05

The court may order:

- (a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions
- (b) that any motions be brought within a specified time
- (c) that a statement setting out what material facts are not in dispute be filed within a specified time

Where a Trial is Necessary – Rule 20.05

(d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them

Where a Trial is Necessary – Rule 20.05

- (e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended
- (f) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery
- (g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit
- (h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness

Where a Trial is Necessary – Rule 20.05

- (i) that any oral examination of a witness at trial be subject to a time limit
- (j) that the evidence of a witness be given in whole or in part by affidavit
- (k) that any experts meet on a without prejudice basis in order to identify the issues on which they agree and disagree, and to prepare a joint statement setting out those issues and the reasons for agreement and disagreement...

Where a Trial is Necessary – Rule 20.05

(l) that each of the parties deliver a concise summary of his or her opening statement

(m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule

(n) that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the regional senior judge

(o) payment into court of all or part of the claim

(p) security for costs

New Summary Judgment Remedies

- Orders respecting discovery
- Define issues for trial
- Require parties to summarize evidence and openings
- Require experts to meet and refine issues in dispute
- Pay amount of claim, security for costs

Implications of New Summary Judgment Rule

- What do the changes mean?
- How would leading cases be decided under new rules?

Implications of New Summary Judgment Rule

- The Ontario Court of Appeal in *Aguonie v. Galion Sold Waste Material Inc.* (1998) said:

“...In ruling on a motion for summary judgment, the court will never assess credibility, weigh the evidence, or find the facts. Instead, the court’s role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact. In this appeal, the factual issues... are genuine issues which require resolution at trial.”

New Summary Judgment Costs – Rule 20.06

- The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if,
 - (a) the party acted unreasonably by making or responding to the motion; or
 - (b) the party acted in bad faith for the purpose of delay

New Summary Judgment Costs – Rule 20.06

- No more automatic costs orders
- Court to consider reasonableness, bad faith

Duty of Expert – Rule 4.1.01

(1) It is the duty of every expert engaged by or on behalf of a party to provide...

(a) opinion evidence that is fair, objective and non-partisan

(b) opinion evidence that is related only to matters that are within the expert's area of expertise; and

(c) such additional assistance as the court may reasonably require to determine a matter in issue

Duty of Expert – Rule 4.1.01

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged

Timing for Expert Reports Rule 53.03

(1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference required under Rule 50, serve on every other party to the action a report, signed by the expert...

Timing for Expert Reports Rule 53.03

- Previous 90-60-30 day from trial rule now begins to run from date of pre-trial (Rule 53.03(2))
- Parties to agree to schedule for service of expert reports within 60 days of setting down for trial (Rule 53.03(2.2))
- Rule for supplementary expert reports is unchanged: 30 days before trial (Rule 53.03(3)(b))

Contents of Expert Report – Rule 53.03

(2.1) An expert report shall include:

- The expert's qualifications, employment and education
- The instructions provided to the expert
- The nature of the opinion being sought and each issue to which the opinion relates
- A description of factual assumptions, research conducted, and every document relied on
- Form 53 - Acknowledgement of Expert's Duty

New Timelines for Actions

- All steps in discovery now part of Discovery Plan; to be agreed to 60 days from close of pleadings
- Mediation to take place within 180 days, instead of 90, from defence being filed
- Filing of trial record triggers scheduling of pre-trial conference and delivery of expert reports

New Timelines for Motions, Application and Appeals

- Notice of Motion now to be served and filed 7 days prior to motion, instead of 4 and 3, respectively
- Responding party to serve and file responding record 4 days prior to motion, instead of 2
- Moving party's factum to be served 7 days prior to motion
- Responding party's factum to be served 4 days prior
- Hearing to be confirmed 3 days prior, instead of 2

Thank you!
Please consult detailed materials at
www.fmc-law.com/MichaelSchafler or
www.fmc-law.com/TiffanySoucy under
"News & Events"



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Since his call to the Ontario Bar in 1997, following a distinguished career as a Naval Officer, Mike has been involved in some of the biggest and influential auditor's liability and securities law cases in Canada. Mike is a sophisticated litigator with extensive international and domestic arbitration expertise in a number of industry segments including mining, aviation, energy, forestry and financial services.

Mike is Co-chair of FMC's Student Committee and an active leader in the firm. He has written numerous papers, taught courses and given presentations.

Mike is particularly proud of spearheading FMC's goal of becoming the first law firm to partner with the Toronto Region Immigrant Employment Council (TRIEC) Mentorship Program, which in part led to FMC being named one of Canada's Best Employers for New Canadians for 2009.

Michael was elected as an executive member of the ADR section of the Canadian Bar Association for the year 2009-2010.

AREAS OF EXPERTISE

- Alternative Dispute Resolution
- Aviation
- Class Action
- Energy

EDUCATION

- Year of call to the Bar: 1997 (Ontario), partner in 2003
- Dalhousie Law School, LL.B., 1995
- Queen's University, B.A.(Hons.), 1987
- Naval Officer, 1983-1992

REPRESENTATIVE WORK

- Counsel to Gold Eagle Mines Ltd. in its \$1.5 billion friendly acquisition by Goldcorp Inc.
- Acting as counsel on an arbitration relating to the correct calculation of a mining royalty
- Acting as counsel on an ICC arbitration involving the sale and operation of specialized manufacturing machinery in Europe
- Acting as counsel for a major forest products company in a domestic arbitration with respect to a share valuation dispute
- Acting as counsel for a major forest products company in a domestic arbitration concerning a contractual dispute
- Represented Rio Narcea Gold Mines, Ltd. in Lundin Mining Corporation's \$956 million take-over bid for Rio Narcea
- Acting for a major UK manufacturer in an international (ICC) arbitration with respect to a products liability claim
- Acting for a major forest products company in a domestic arbitration concerning a contractual dispute
- Acting for a major forest products company in a domestic arbitration with respect to a share valuation dispute
- Represented Enbridge Gas Distribution Inc., which was an intervener in the landmark Supreme Court of Canada case *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4. The Supreme Court found for ATCO, which had successfully argued in the Alberta Court of Appeal that its regulator, the Alberta Energy and Utilities Board, did not have jurisdiction over distribution of the proceeds from a sale of some of the utility's assets. The decision has implications for utilities across the country, including Enbridge
- Acting for major accounting firms in auditor's liability and class actions
- Acting for major utilities in regulatory and appellate court proceedings
- Acting for major wood forest products company in products liability case
- Acting for major airline in Anton Piller case
- Acting on several "Poison Pill" or Shareholder Rights Plan cases

PUBLICATIONS

- Co-author with Annie Na, "Court Approves Restructuring Plan For Failed Asset-Backed Commercial Paper", *National Banking Law Review*, September 2008
- Co-author with Marina Sampson, "No Contract? No Problem. Where Quantum Meruit Pays Off," *Canadian Corporate Counsel*, July 2008
- Co-author with Annie Na, "Court Approves Restructuring Plan for Failed Asset-Backed Commercial Paper," *International Law Office*, June 17, 2008
- Co-author with Annie Na, "Supreme Court of Canada Rewrites Law on Standard of Review in Administrative Law," *International Law Office*, April 8, 2008
- Co-author with Timothy Banks, "Judicial Willingness to Enforce Standstill Provisions," *International Law Office*, November 13, 2007
- Co-author with Matthew Fleming, "Takeover Battles: New Limits on Maximizing Shareholder Value?," in *International Law Office*, May 1, 2007
- Co-author with Meghan Thomas, "Letters of Request: Court Upholds Public Policy Limits on Enforcement," *International Law Office*, March 2007
- Co-author with Brianna Davies, "Supreme Court Declares Foreign Non-monetary Judgments Enforceable," *International Law Office*, January 2007
- Co-author with Alexandria Tomasovic, "Supreme Court Decision Distinguishes Types of Privilege," *International Law Office*, November 2006

- Co-author with Marina Sampson, “Anton Piller Orders Must Protect Privileged Information,” International Law Office, September 2006
- Co-author with J.L. McDougall and Meghan Thomas, “Country Q & A - Global Dispute Resolution,” FMC’s Contribution (Canada), July 2006
- Co-author, “Letters of Request from a Private Arbitral Tribunal,” International Law Office, April 2005
- Co-author with Frank Bowman, Peter Cavanagh, Eric Hoffstein and Meghan Thomas, “Waman v. Waxman - Auditor Liability for Economic Negligence Remains Limited; The End of Foreign Judgements? - The Effect of Beals v. Saldanha; Curing The Illegal Contract in Court - Transport North American Express Inc. v. New Solutions Financial Corp.,” Focus on Litigation, Issue No. 2, October 2004
- Co-author with J.L. McDougall, “Interpretation and Enforcement: Arbitration Clauses, Expert Determination Clauses and Mediation Clauses: The Canadian Experience,” January 2003
- Co-author with J.L. McDougall, “The Role of the Forensic Accountant in International Commercial Arbitration,” September 2002
- “The Rule in Wabi Iron Works: Recent Development”, September 2002
- Co-author with J.L. McDougall, “What Happens to the Rights of Canadian Creditors in Cross-Border Insolvencies? A Case Comment on Re. Philip Services Corp. and Deloitte & Touche,” North American Corporate Lawyer, January 2000
- Co-author with David Bristow, “Recent Developments in the Law of Attorney Client Conflict,” Construction Law Reports, January 1999

TEACHING ROLES

- Osgoode Hall Intensive Trial Advocacy, Teacher and “Judge” since 2003
- Professional Development Program (Litigation Department)
- Instructor, Expert Witness Workshop (2004, 2006, 2008)

PRIOR SPEAKING ENGAGEMENTS

- Speaker, “ Letters Rogatory - Essential Strategies,” Insight 4th Annual Commercial and Civil Litigation Series, June 13, 2007
- Panelist, Professional Roundtable re: Discussion of Networking and Business Development Strategies for Accountants and Lawyers at the Second Annual Commercial Litigation Seminar, A LexisNexis Seminar Series, February 4, 2005

RECOGNITION

- Mike was invited to join the partnership after only 6 years as an associate

PROFESSIONAL AFFILIATIONS

- Executive Member, ADR section, Canadian Bar Association
- Canadian Bar Association
- Advocates’ Society
- Toronto Lawyers Association

MEDIA COVERAGE

- Quoted in the article “ Best Employers for New Canadians Law firm offers a hand up” published by The Star on April 2nd, 2009
- Quoted in TRIEC E-lert Newsletter on Mentoring Partnership, April 2009
- Quoted in Robert Todd’s “FMC leads the way in immigrant mentoring program”, appearing in The Law Times on December 29, 2008

PRO BONO

- Worked for parent of autistic child in their battle for equal government funding

COMMUNITY INVOLVEMENT

- Mentor, Soccer coach, Wanless Park Soccer Association, active “Cub” parent

CURRENT FIRM ACTIVITIES

- In 2006, Mike became Chair of FMC’s Student Committee which among other things, is responsible for student recruitment



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As an associate in the firm's Litigation and ADR Department, Tiffany assists clients with a variety of disputes and related legal issues. Tiffany has experience in a wide variety of corporate and commercial matters including shareholders disputes, professional negligence (particularly auditors' liability) and class actions.

Tiffany has appeared before various levels of Court in Ontario, including the Ontario Court of Appeal, the Tax Court of Canada and professional discipline and administrative tribunals.

AREAS OF EXPERTISE

- Litigation & Dispute Resolution
- Class Actions

EDUCATION

- Year of call to the Bar: 2004 (Ontario)
- Queen's University, LL.B., 2003
- University of Western Ontario, M.A., 2000
- University of Western Ontario, B.A. (Hons.), 1999

REPRESENTATIVE WORK

- Commercial litigation, including shareholders disputes
- Real Estate Disputes
- Select Tax Disputes

PRIOR SPEAKING ENGAGEMENTS

- Workshop on "Preventing and Defending Class Action Litigation", The Canadian Institute Conference on Class Action Litigation, September 2008

PROFESSIONAL AFFILIATIONS

- Member, Canadian Bar Association
- Member, Ontario Bar Association
- Member, The Advocates' Society
- Associate Member, The American Bar Association

CURRENT FIRM ACTIVITIES

- Member, Gale Cup Moot Committee
- Member, Associates' Advisory Committee
- Member, Diversity Committee

COMMUNITY INVOLVEMENT

- Member of the Royal Ontario Museum's YPC (Young Patrons Circle) and a supporter of the Canadian Women's Foundation - Women Moving Women Campaign.