Amendments to Rules on Readiness for Trial

Brian Sunohara
January 2022

Upcoming amendments to the Rules of Civil Procedure are anticipated to increase compliance with the deadlines for expert reports and decrease late requests for adjournments of trials. Trial judges will have more discretion to refuse to admit evidence when there is non-compliance with the Rules. The amendments will also likely lead to more productive pre-trial conferences.

The amendments are contained in Ontario Regulation 18/22, which comes into force on March 31, 2022.

Certificate of Readiness

Under subrule 50.03.1(1), all parties will be required to serve and file a **certificate of readiness** at least 30 days prior to the pre-trial conference. There is a specific form (Form 50A).

The parties will need to indicate in the form whether they intend to call expert evidence at trial and, if so, whether the experts' reports, other than supplementary reports, were served within the required time.

The time for serving expert reports is not being amended. Subrules 53.03(1) and (2) require originating expert reports to be served at least 90 days before the pre-trial conference and responding expert reports to be served at least 60 days before the pre-trial conference.

If an expert report is not served within these timeframes, the amendments will require the party to provide an explanation in the certificate of readiness. This will likely cause parties to pay greater attention to the deadlines to serve expert reports, which in turn will cause fewer adjournments of trials due to late-served expert reports.

Currently, the deadline for serving expert reports may be extended or abridged at a pre-trial conference or case management conference, or on a motion. These mechanisms will remain in place, but under clause 53.03(4)(c), the parties will also be permitted to consent to an extension as long as it does not affect the trial date.

The certificate of readiness must be filed regardless of whether a party has already obtained an extension of time to serve an expert report.

Leave to Admit Evidence

Subrule 53.08(1) provides that evidence is only admissible with leave of the trial judge in the following circumstances outlined in subrule 53.08(2):

1. Subrule 30.08 (1) (failure to disclose document).
2. Rule 30.09 (failure to abandon claim of privilege).
3. Rule 31.07 (failure to answer on discovery).
4. Subrule 31.09 (3) (failure to correct answers on discovery).
5. Subrule 53.03 (3) (failure to serve expert's report).
6. Subrule 76.03 (3) (failure to disclose witness).

Under the amendments, the words "failure to serve expert's report" in paragraph 5 of subrule 53.08(2) will be changed to "failure to comply with requirements re experts' reports".

Currently, "leave **shall** be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial [emphasis added]".

This test is being modified. The amendments will require the party seeking leave to satisfy the trial judge that there is a **reasonable explanation for the failure to comply** with the Rules.

Subrule 53.08(1) will read:

> (1) If evidence is admissible only with leave of the trial judge under a provision listed in subrule (2), leave **may** be granted if the party responsible for the applicable failure satisfies the judge that,
>
> (a) there is a reasonable explanation for the failure; and
>
> (b) granting the leave would not,

> (i) cause prejudice to the opposing party that could not be compensated for by costs or an adjournment, or
>
> (ii) cause undue delay in the conduct of the trial [emphasis added].

Notably, along with requiring an explanation for the failure to comply with the Rules, the word "shall" is being replaced by the word "may" in regards to granting leave.

Therefore, the trial judge will have more discretion to refuse to admit evidence where there is non-compliance with the Rules, including late-served expert reports. This should cause parties to take greater care in complying with disclosure and production requirements in the Rules.

Pre-Trial Conferences

Rule 50.02 will be amended to require the pre-trial conference to take place approximately one to four months prior to the trial.

As it presently stands, parties are supposed to schedule a pre-trial conference within 180 days of setting an action down for trial. However, there is no specified timeframe as to when the pre-trial conference has to take place. In some cases, pre-trial conferences are being held one to two years prior to the trial. This is not ideal since a lot can happen during the interim period. The complexion of the case can greatly change by the time of trial.

Under the amendments, the parties will still have to schedule a pre-trial conference within 180 days of setting an action down for trial, but the pre-trial conference must be held **30 to 120 days** prior to the trial, with limited exceptions.

Specifically, subrule 50.02(2.1) will state:

> (2.1) Unless otherwise provided by a court order or applicable practice direction, a pre-trial conference shall be scheduled for a date that is not more than 120 days and not less than 30 days before the later of the following dates:
>
> 1. The first day fixed for the trial.
>
> 2. The first day of the sitting during which the trial is expected to be held.

This change will apply to actions set down for trial on or after March 31, 2022.

By having a pre-trial conference close in time to the trial date, the parties should be "trial ready" at the pre-trial conference. In most cases, all evidence on which the parties intend to rely at trial should be available by the time of the pre-trial conference. This should make the pre-trial conference more productive. Moreover, knowing that the trial is imminent, the parties may be more amenable to settlement at the pre-trial conference.

Presently, in some regions, a trial date is scheduled after the pre-trial conference. This will likely have to change because, due to the amendments, the trial date will have to be known before the pre-trial conference can be scheduled. That being said, it remains to be seen how regional practice directions may impact this process.

Clause 50.07(1)(a.1) will permit the presiding judge or associate judge at a pre-trial conference to adjourn the trial if necessary. This is subject to the direction of the regional senior justice or his or her designate.

Rule 50.12 currently provides that a judge or associate judge may order costs of a pre-trial conference. This power is more specifically outlined in the amendments. Subrule 50.12(2) will state:

> If the judge or associate judge determines that a pre-trial conference over which the judge or associate judge presided was unproductive for reasons relating to a party's conduct, an order made under subrule (1) may require that the costs be paid immediately.

This seems to be a clear signal that parties must be fully prepared for pre-trial conferences, or else they may be ordered to pay costs.

Summary of Amendments

- Each party must serve and file a certificate of readiness regarding expert reports at least 30 days prior to the pre-trial conference.

- Parties can consent to extend the time to serve expert reports as long as it does not affect the trial date.

- If evidence is only admissible with leave due to a party's failure to comply with the Rules, the party seeking leave must provide a reasonable explanation for the failure.

- The amendments will give the trial judge greater discretion to refuse to admit evidence in situations of non-compliance with the Rules. This includes late-served expert reports.

- Pre-trial conferences will take place 30 to 120 days (approximately one to four months) prior to the trial, unless a court order or applicable practice direction provides otherwise.

- If a pre-trial conference is unproductive due to a party's conduct, costs may be ordered to be paid immediately.