



Task Force on the Discovery Process in Ontario

Chair: Justice Colin Campbell, Superior Court of Justice

Associate Chair: Debra Paulseth, Assistant Deputy Attorney General, Court Services Division

Consultation Paper

Task Force Mandate

The Government of Ontario and the Superior Court of Justice, in co-operation with the bar, have appointed a Task Force to review all aspects of the discovery process in Ontario, identify problems with the existing process and make recommendations for reform. The Task Force will engage in province-wide consultation, conduct empirical research and consider the discovery processes in other jurisdictions. A final report is anticipated in late 2002.

The Task Force is comprised of two judicial representatives, two Ministry of the Attorney General representatives, and two bar representatives.

Comments & Suggestions Sought

This consultation paper describes some of the problems that have been identified in certain regions of the province, as well as reform options. The Task Force invites comments on these issues, and welcomes any other suggestions for improving the discovery process.

Please take the time to respond by May 6, 2002.

The views of judicial officials, lawyers and litigants from all parts of the province are very important to the Task Force.

You may send your response to Susan Charendoff, Project Director

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Background

In 1995, the Civil Justice Review identified problems with Ontario's discovery process; it proposed that consideration be given to methods for achieving a more efficient discovery process to reduce costs and delay in the resolution of civil proceedings, while preserving essential elements of disclosure principles. Since that time, other professional organizations, such as the Canadian Bar Association and the Ontario Advocates' Society have noted similar problems and have proposed reform options. To date, no comprehensive review of the discovery process in Ontario has been undertaken.

The Civil Justice Review acknowledged that the examination for discovery of any party adverse in interest is considered to be a critical feature in the conduct of litigation, and that the discovery and disclosure process performs an important function in preparing cases for trial or settlement. However, it questioned whether the process had become too cost-prohibitive and delay-engendering to continue in the present fashion. In particular, the Civil Justice Review noted the increase in time spent in relation to oral examinations (e.g. preparing witnesses, travelling to and from examinations, attendance at examinations and re-examinations, responding to undertakings, and reporting to clients.) It also noted the proliferation of motions relating to discovery, whether substantive or procedural in nature. These motions are time-consuming and expensive.

When the Rules of Civil Procedure were revised in 1985, the scope of pre-trial disclosure and discovery was broadened. The current rules allow: cross-examination of the person being examined (except as to credibility); discovery of evidence; cross-

examination on the affidavit of documents; discovery of the names and addresses of potential witnesses and persons having knowledge of the matters in issue; discovery of the findings, opinions and conclusions of experts retained by the party; and discovery of the existence and contents of any relevant insurance policy.

The theory behind this concept seemed very sound: the more complete the pre-trial disclosure, the more likely it was that settlements would occur.

The Civil Justice Review reported that this broadened scope of discovery is a source of concern. These revisions may have led to unnecessarily sweeping requests for information having little to do with the matters raised by the claims or defences of the parties, which may intentionally or unintentionally exhaust the financial resources of the opposing party.

In addition, the explosion of information sources and available data as a result of the growth in technology has led to an enormous increase in the material available for discovery purposes. This development, combined with the broadened discovery rules, has made it increasingly difficult to cope economically with the scope of discovery.

Current Discovery Rules

The rules are predominantly captured in Rules 30 to 35 of the *Rules of Civil Procedure*. Rule 30 requires parties to disclose all documents relating to any matter in issue in the action, whether or not privilege is claimed. Documents are defined broadly. The court has various powers to make orders where an Affidavit of Documents is incomplete or where privilege is improperly claimed. The duty to disclose documents is continuing and all parties must correct any inaccuracies by a supplementary affidavit.

Rule 31 permits written and oral examinations, but not both. In current practice, it appears that few litigants rely on written examinations, and that most rely on oral examinations.

A person examined for discovery must answer “any proper question relating to any matter in issue

in the action.” A party may also obtain disclosure of the names and addresses of witnesses, the existence and content of an insurance policy, and the findings, opinions and conclusions of an expert that relate to any matter in issue. The duty to disclose is a continuing one. At trial, any party may read into evidence any part of the examination of an adverse party, if otherwise admissible.

Rule 34 sets out the procedure for oral examinations. The examination is conducted under oath, and a transcript is to be prepared if requested by a party. Where a question is objected to, the objector must state on the record the reason for the objection. The question may be answered with the objector’s consent, but a court ruling must be obtained on motion before the evidence is used at the hearing. An examination may be adjourned by any party to seek directions where there is improper conduct. The court may impose cost sanctions where the right to examine is being abused by improper questions or interruptions, or is being conducted in bad faith or in an unreasonable manner.

Examinations by written questions are addressed in Rule 35. A party may serve a list of questions to be answered on the person to be examined and every other party. The written questions must be answered (or objected to) by way of affidavit within 15 days after service of the questions. Within 10 days of receiving the answers, the examining party may serve a further list of written questions that must be answered within 15 days.

The court may order that answers to questions be given, and may impose sanctions, including the dismissal of an action or striking out a defence, where a person refuses or fails to answer a proper question.

Under Rule 53, a party who intends to call an expert witness at trial must disclose the expert’s report within 90 days before commencement of the trial. A party who intends to call an expert witness in response must disclose the responding report within 60 days of the trial.

Issues for Consultation

1. What are the key objectives of documentary and oral discovery?

It is generally agreed that the primary goal of discovery is to ensure open and full disclosure prior to trial to facilitate settlement or to make the trial process more efficient and fair.

In your opinion, what are the key objectives of discovery?

Is this a key objective of discovery?	
a. To enable parties to assess strengths & weaknesses of each side's case prior to trial	<input type="checkbox"/> yes <input type="checkbox"/> no
b. To identify new avenues for discovery	<input type="checkbox"/> yes <input type="checkbox"/> no
c. To identify new litigation strategies not known prior to discovery	<input type="checkbox"/> yes <input type="checkbox"/> no
d. To identify parties to be added	<input type="checkbox"/> yes <input type="checkbox"/> no
e. To strengthen case (action or defence) in specific ways	<input type="checkbox"/> yes <input type="checkbox"/> no
f. To narrow issues for trial	<input type="checkbox"/> yes <input type="checkbox"/> no
g. To identify new damages	<input type="checkbox"/> yes <input type="checkbox"/> no
h. To identify new legal basis for claim or defence	<input type="checkbox"/> yes <input type="checkbox"/> no
i. To identify new documents that may affect outcome of proceedings	<input type="checkbox"/> yes <input type="checkbox"/> no
j. To facilitate settlement	<input type="checkbox"/> yes <input type="checkbox"/> no
k. To assist in bringing summary judgment motions	<input type="checkbox"/> yes <input type="checkbox"/> no
l. To dispense with the time and expense of proof at trial	<input type="checkbox"/> yes <input type="checkbox"/> no
m. To prepare client for trial	<input type="checkbox"/> yes <input type="checkbox"/> no
n. To assess credibility of person being examined as a witness	<input type="checkbox"/> yes <input type="checkbox"/> no
o. To obtain admissions	<input type="checkbox"/> yes <input type="checkbox"/> no
p. To get a recorded version of a witness' memory prior to trial, which may be used to impeach opponent or expert witnesses	<input type="checkbox"/> yes <input type="checkbox"/> no
q. To verify authenticity of documents	<input type="checkbox"/> yes <input type="checkbox"/> no
r. To confirm parties' continuing disclosure obligation	<input type="checkbox"/> yes <input type="checkbox"/> no

s. Are there any other objectives?

2. What are the key problems with discovery?

Civil justice studies and bar associations have identified perceived problems with the discovery process in parts of Ontario. In your experience, do the problems listed below have a significant impact on (1) increasing the cost of discovery to litigants and/or (2) increasing the number of delays or disputes in the discovery process?

Is this a key problem?	Does it have a significant impact on:	
	(1) Increasing cost of discovery to litigants	(2) Increasing delays or disputes in the discovery process
SCOPE OF DISCOVERY		
a. Scope of discovery is too broad	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
DISCLOSURE/PRODUCTION OF DOCUMENTS		
b. Vague requests for information & documents	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
c. Excessive requests for information & documents	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
d. Insufficient or incomplete disclosure/production	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
e. Excessive disclosure/production; production of irrelevant documents	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
f. Untimely disclosure/production; the withholding of material information until late in the process	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
g. Disorderly disclosure/production (e.g. documents not clearly identified or poorly organized)	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
h. Untimely production of expert reports	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
i. Disclosure occurred only after motion to compel	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
ORAL DISCOVERY		
j. Cost of oral discovery is disproportionate to value of claim	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
k. Difficulty/delay in scheduling examinations	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
l. Length of examinations	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
ATTITUDE/BEHAVIOUR OF OPPOSING COUNSEL		
m. Disrespectful/unprofessional attitude	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
n. Harassment/abuse of witnesses	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
o. Lawyer unprepared or incompetent	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
p. Lawyer inexperienced or inefficient	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
q. Lawyer unfamiliar with the specific issues in a case	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
r. Refusals based on privilege improperly claimed	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
s. Refusals based on relevance improperly claimed	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
t. Excessive discovery-related motions arising from abuses or lack of cooperation	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
u. Non-compliance with continuous obligation to disclose	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
v. Abuse of discovery process to intentionally delay case	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
ATTITUDE/BEHAVIOUR OF CLIENTS		
w. Contentious relationship among parties	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
x. Clients insisted on overly extensive discovery	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
y. Inadequate knowledge of case by client representatives at discovery	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>
z. Inappropriate attitude/ behaviour of other parties	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> <input type="checkbox"/>

3. What factors contribute to increased cost of discovery or delays in the discovery process?

Based on your experience, please indicate whether the following factors have (1) no impact, (2) a significant impact on increasing the cost of discovery to litigants and/or (3) a significant impact on increasing the number of delays or disputes in the discovery process.

What impact does this factor have?	(1) No Impact	(2) Significant increase in cost to litigants	(3) Significant increase in delays or disputes
a. Multiple parties	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Multiple lawyers representing different parties	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. All or part of discovery conducted by junior rather than lead counsel	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Parties located outside county where action was commenced	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. Lawyers located outside county where action was commenced	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f. Parallel or concurrent litigation (e.g. 3 rd party claims)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
g. Need to audit financial statements	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
h. Need to obtain medical records	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
i. Need to obtain records in possession of a third party	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
j. Need for expert testimony or expert report	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
k. Case involves issues relating to confidential information (e.g. breach of fiduciary duty)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
l. Large volume of discoverable documents	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
m. Discovery of electronic documents	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
n. Complex legal issues	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
o. Complex factual issues	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
p. Disagreement regarding responsibility & cost of producing documents	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

q. Have you experienced any other problems with the discovery process?

r. In your experience, is the discovery process working? Why?

s. It has been said that there are more discovery problems in large urban centres than in smaller communities. Do you agree with this? If so, what reasons account for such differences?

4. What approaches to reform should be considered?

The following are approaches to discovery adopted in other jurisdictions and potential reform directions for Ontario. Please indicate what impact you think each option would have on the discovery process in Ontario.

What impact would each of the following reforms have in the discovery process?	(1) Positive impact	(2) No impact	(3) Negative impact
SCOPE OF DISCOVERY (ORAL & DOCUMENTARY)			
a. Narrow scope of discovery; narrower definition of relevance, e.g. “relevant & material”	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Bifurcated discovery (liability first, then other issues, such as punitive damages, future loss of income, bad faith claims)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Regulating access to documents of non-parties	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
DOCUMENTARY DISCOVERY			
d. Mandatory production of “Schedule A” documents with pleadings	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. Require greater specificity in “Schedule B” about basis of privilege for each document	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f. Guidelines for orderly production (e.g. duty to label & catalogue documents)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
g. Serious sanctions for untimely or disorderly production or production of excessive documents	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
WRITTEN DISCOVERY			
h. Mandatory early disclosure of certain aspects of claim with pleadings (e.g. list of witnesses & summary of their evidence; calculation of damages)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
h. Standard disclosure protocols for certain case types (e.g. personal injury, employment)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
i. Limit number of interrogatories	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
j. Create standard interrogatories	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
ORAL DISCOVERY			
k. Require parties to agree upon discovery plan (fixing dates & time needed) prior to discovery	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
l. Eliminate automatic right to oral discovery	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
m. Time limits on oral discovery, based on value of claim	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
n. Permit oral discovery only after completion of written discovery	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
o. Eliminate right to cross-examine at oral discovery	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
p. Have parties agree to list of undertakings & refusals at end of discovery	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
q. Immediate rulings on discovery disputes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
r. Eliminate right to object to any question; trial judge to decide admissibility	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
s. Restrict objections on matters of privilege	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
t. Time limits on completion of undertakings & sanctions for failure to comply	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
u. Deem questions taken under advisement to be refusals if not answered within a fixed time period	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
v. Video record oral discovery to reduce transcript costs	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
w. Require lawyers with lead on file to attend discovery	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
SANCTIONS			
x. Tougher cost sanctions for unnecessary discovery-related motions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
y. Stricter enforcement of sanctions by judiciary	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
z. Immediate contempt order for failing to comply with discovery-related orders	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

LAWYER CONDUCT			
aa. Civility code for lawyers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
bb. Stricter professional misconduct sanctions for improper behaviour during discovery	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
cc. Explicit communication by lawyer to client of anticipated discovery costs	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
LAWYER EDUCATION & TRAINING			
dd. Better training of lawyers - at law school	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
- at bar admission course	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
- through mentoring	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
- through continuing legal education	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

ee. Do you have any comments on the above reform options?

ff. What else do you think can be done to reduce the time and cost of discovery?

gg. What else can be done to reduce disputes relating to refusals and undertakings?

hh. How can interrogatories and requests to admit be made more useful and effective?

5. Please assist the Task Force by answering the following questions.

Your answers to these questions will assist the Task Force in determining whether the experience with discovery varies in different parts of the province or in different types of legal practice.

1. Are you a: a. Lawyer b. Litigant c. Member of the judiciary

If you are a lawyer:

2. How many years have you been engaged in litigation: _____ years

3. What types of clients do you most often represent:

- a. Plaintiffs b. Defendants c. Both plaintiffs and defendants equally
d. Other (*specify*) _____

4. With what types of cases are you most often involved? Please check all that apply:

- | | | |
|--|---|--|
| a. <input type="checkbox"/> Collection | f. <input type="checkbox"/> Estates | k. <input type="checkbox"/> Trust / fiduciary duty |
| b. <input type="checkbox"/> Motor vehicle | g. <input type="checkbox"/> Bankruptcy | l. <input type="checkbox"/> Medical malpractice |
| c. <input type="checkbox"/> Real property | h. <input type="checkbox"/> Construction lien | m. <input type="checkbox"/> Other professional malpractice |
| d. <input type="checkbox"/> Contract /commercial | i. <input type="checkbox"/> Negligence | n. <input type="checkbox"/> Personal injury |
| e. <input type="checkbox"/> Wrongful dismissal | j. <input type="checkbox"/> Landlord/tenant | o. <input type="checkbox"/> Class action |
| | | p. <input type="checkbox"/> Other (specify):
_____ |

5. Would you describe your type of practice as:

- | | |
|--|--|
| a. <input type="checkbox"/> Sole Practitioner | b. <input type="checkbox"/> Private firm (under 5 lawyers) |
| c. <input type="checkbox"/> Private firm (5-30 lawyers) | d. <input type="checkbox"/> Private firm (over 30 lawyers) |
| e. <input type="checkbox"/> Government | f. <input type="checkbox"/> Legal staff of for-profit entity |
| g. <input type="checkbox"/> Legal staff of not-for-profit entity | |

6. In what court location or region do you conduct the majority of your practice? _____

If you are a member of the judiciary

7. What types of cases do you most often hear? Please check all that apply:

- | | | |
|--|---|--|
| a. <input type="checkbox"/> Collection | f. <input type="checkbox"/> Estates | k. <input type="checkbox"/> Trust / fiduciary duty |
| b. <input type="checkbox"/> Motor vehicle | g. <input type="checkbox"/> Bankruptcy | l. <input type="checkbox"/> Medical malpractice |
| c. <input type="checkbox"/> Real property | h. <input type="checkbox"/> Construction lien | m. <input type="checkbox"/> Other professional malpractice |
| d. <input type="checkbox"/> Contract /commercial | i. <input type="checkbox"/> Negligence | n. <input type="checkbox"/> Personal injury |
| e. <input type="checkbox"/> Wrongful dismissal | j. <input type="checkbox"/> Landlord/tenant | o. <input type="checkbox"/> Class action |
| | | p. <input type="checkbox"/> Other (specify): |

8. In what court location or region do you sit? _____

**Thank you for taking the time to respond to this consultation paper.
Your contribution is extremely valuable to the work of the Task Force.**