

## **PART I: METHODOLOGY OF THE REVIEW**

The Task Force employed a variety of techniques to gather both qualitative and quantitative data, as described below. To assist in the collection and analysis of quantitative data, Robert Hann and Carl Baar of Robert Hann & Associates Limited were retained.

In addition, a comprehensive review was undertaken of approaches to discovery in other jurisdictions. Previous studies on the discovery process in Ontario were also considered.

### **1. FOCUS GROUPS**

Shortly after the Task Force was appointed, it convened a series of three focus groups with case management masters, leading members of the bar, and representatives of a number of bar associations, to assist in the identification of priority areas for review and to obtain input on the consultation process. Focus groups were also held prior to the release of the Task Force's report to obtain feedback on proposed reform directions. A list of focus groups and participants is attached at **Appendix A**.

### **2. CONSULTATION PAPER**

A consultation paper containing a survey was developed with input from members of the bench and bar to seek feedback about the objectives of discovery, key problems with the discovery process, factors contributing to increased cost of discovery or delays in the discovery process, and possible approaches to reform. The consultation paper is reproduced at **Appendix B**.

The consultation paper was posted on the Ontario Courts' website for province-wide access. Respondents were encouraged to submit their completed surveys either electronically or by other means. The consultation paper was also distributed widely to judges, major bar associations, key client organizations and academics throughout the province. See **Appendix C** for a list of groups that were invited to review and respond to the consultation paper.

A total of 372 responses were submitted to the Task Force. Responses came almost exclusively from lawyers. Of the 346 respondents who indicated their role in the discovery process, 339 were lawyers and 7 were members of the judiciary; no respondents identified themselves as litigants. Of the 240 lawyers who indicated the location of their practice, 140 (58%) practised exclusively in Toronto, 74 (31%) practised exclusively outside Toronto and the Greater Toronto Area, and the remaining 26 (11%) practised in Toronto and the GTA, along with other areas of the province.<sup>1</sup>

The results of the consultation paper were used to gauge whether general perceptions about the discovery process were consistent with findings in the case specific questionnaires (discussed below).

---

<sup>1</sup> Through the special outreach efforts of the Advocates' Society, 154 consultation surveys were completed and returned by its members.

### **3. SUBMISSIONS**

Requests for written submissions were made through the website and by letter to the groups outlined above. Thirty-three submissions were received from organizations, lawyers and other individuals. **Appendix D** contains a complete list of submissions.

### **4. CONSULTATIONS WITH BENCH AND BAR**

The Task Force held consultation meetings in each court region and met with representatives of the following organizations to obtain input on the issues raised in the consultation paper:

- County of Carleton Law Association
- Algoma Law Association
- Sudbury District Law Association
- Hamilton Law Association
- York Region Law Association
- Essex Law Association
- Waterloo Law Association
- Metropolitan Toronto Lawyers Association
- Toronto Bench and Bar
- County and District Law Association Presidents
- Ontario Bar Association (Civil Litigation Section, Insurance Law Section, Construction Section and Young Lawyers Division)
- Crown Law Office – Civil, Ministry of the Attorney General
- Ontario Trial Lawyers Association
- Medico-Legal Society
- International Arbitrators
- Law firms (Blake, Cassels & Graydon LLP; Fasken Martineau DuMoulin LLP; Lenczner Slaght Royce Smith Griffin; McCarthy Tétrault LLP; Osler, Hoskin & Harcourt LLP; Stikeman Elliott)
- LawPro (Lawyers' Professional Indemnity Company)

The Task Force co-chairs also met on several occasions with members of the judiciary.

### **5. MOTIONS ACTIVITY STUDY**

A three-month study of motions activity was conducted in six courts, each in a different region: Toronto, Ottawa, Thunder Bay, London, Peterborough and Brantford. These locations were chosen to permit a comparison of small, medium and large courts, and of case managed and non-case managed courts. The study took place from September until December 2002 (except in Ottawa, where it was conducted from October 2002 until January 2003).

The purpose of the motions activity study was to assess the types and volume of discovery-related motions in comparison to other motions. Data was captured through a specially designed two-part "Motions Data Collection Form," reproduced at **Appendix E**.

Part A of the form, which was to be completed by moving parties, contained questions to determine whether the motion was related to documentary, oral or written discovery, or cross-examination on an affidavit. Respondents were also asked to indicate the type of case, the type of discovery issue giving rise to the motion, the method of hearing, and the type of order sought. Part B, which was to be completed by the presiding judicial official, asked respondents to indicate the disposition of the motion, the cost award, if any, and the duration of the motion.

The forms were distributed to all moving parties by the motions registrar of participating courts, either in advance of or at the commencement of Motions Court, and then collected by the registrar and submitted to Task Force staff. A total of 3,660 completed forms were received and analyzed by the Task Force's consultants.

## **6. CASE SPECIFIC QUESTIONNAIRES**

### **Content of Questionnaires**

The Task Force developed a detailed questionnaire to elicit information about respondents' experience with the discovery process in specific cases in which they were involved. The questionnaire was designed in consultation with members of the bench and bar, and with reference to similar surveys conducted in other jurisdictions.

The questionnaire, reproduced at **Appendix F**, canvassed a wide range of matters including case type, value of claim, number of parties, case activities and outcomes, discovery activities, motions activities, perceived benefits and problems with each method of discovery, impact of discovery on cost and length of proceedings, impact of case management and/or mandatory mediation, and options for reforming the discovery process.

### **Sampling Cases**

Questionnaires were distributed to lawyers and unrepresented parties in a random sample of civil cases in Toronto, Ottawa, Thunder Bay and London. These locations were chosen to enable a comparison between small, medium and large courts, as well as case managed and non-case managed courts.

In setting parameters for the sample of cases to be included in this study, several criteria were established. First, it was important that there be enough cases from each court location to ensure a representative sample. Because of the varying sizes and caseloads of each court, the sample size had to be different for each court. Second, in order to explore issues related to case type, sufficient numbers of each type of case had to be captured in the study. As a result, a "stratified random sampling method" was employed to select cases. Third, a sufficient number of cases in the sample must have either commenced or completed discovery. Finally, the cases were to be relatively recent, so that respondents could answer the detailed questionnaires on the basis of their recollections or records.

Based on these considerations, and using data available from court records in each location, questionnaires were mailed to a representative of one plaintiff and one defendant (where possible) in each of:

- 1,007 cases defended in Toronto in 1999;
- 790 cases defended in Ottawa in 1999;
- 471 cases defended in Thunder Bay in 1999 and 2000 (in order to obtain a sufficient number of cases); and
- 486 cases commenced in London in 1999 (London's data management system did not permit identification of defended cases).

### **Response Rates**

A total of 1,240 completed questionnaires were received and analyzed by the Task Force's consultants, broken down as follows: Toronto – 503; Ottawa – 293; Thunder Bay – 232; and London – 212.

These response rates were considered to be satisfactory and representative of the original sample selected. At least one questionnaire per case was completed for:

- 44% of Toronto cases sampled;
- 35% of Ottawa cases sampled;
- 45% of Thunder Bay cases sampled; and
- 38% of London cases sampled.

Response rates were calculated after removing questionnaires identified as simplified procedures (rule 76) cases (which were not included in this study)<sup>2</sup> and a number of blank questionnaires that were returned.<sup>3</sup>

### **Characteristics of Respondents**

Virtually all responses were from counsel, as opposed to unrepresented litigants, with only a very few exceptions. The response rate from defendants in each location was generally higher than from plaintiffs.

Most of the respondents had considerable experience practising litigation: 61% had between six and 20 years experience and an additional 28% had more than 20 years experience. When asked what types of clients they most often represented, close to half of respondents indicated that they represented both plaintiffs and defendants.

---

<sup>2</sup> Although not identified by the court records as simplified procedure cases when originally included in the sample to be studied, a number of cases were identified as such by respondents on completed questionnaires. These cases were excluded from the returns.

<sup>3</sup> A number of blank questionnaires were returned (79 from Toronto, 75 from Ottawa, 36 from Thunder Bay, and 43 from London), accompanied by such explanations as "lawyer no longer with firm", "on maternity leave", "no recollection of file or can't locate file", "file closed", "no discovery". Some blank questionnaires were returned without an explanation.

Respondents represented many different types of practice. Approximately 42% were in a firm of five to 30 lawyers; 25% were in a firm of over 31 lawyers; 17% were in a firm of less than five lawyers; 11% were sole practitioners; 3% were in-house counsel; and 2% represented government.

Respondents were asked to identify the types of cases in which they were most often involved. In each of the four court locations, the case types most frequently identified (33% or more) were motor vehicle, contract commercial, negligence, and personal injury. For Ottawa and Toronto, 33% or more of the respondents were also most likely to be involved in wrongful dismissal cases.

As noted earlier, to ensure that the Task Force obtained data on a sufficient number of cases of different types, either higher percentages of certain case types were sampled, or the period of time from which cases were sampled was longer. These percentages and periods also varied from court to court. This meant that for some types of analysis, the sample of cases was not “representative” of the actual full population of cases and the results might therefore be misleading. To address this situation, cases were “weighted” to correct for the different sampling rules used. The weighted numbers of cases differed from the unweighted numbers. Specifically, weighting by case type and period sampled yielded the following total weighted numbers of cases (unweighted numbers shown in parentheses): Toronto, 2,862 (503); Ottawa, 381 (293); Thunder Bay, 230 (232); and London, 205 (212).

## **7. CROSS-JURISDICTIONAL RESEARCH AND LITERATURE REVIEW**

The Task Force undertook comprehensive research on the approach to discovery in other jurisdictions to gain insights into the types of problems experienced elsewhere, approaches to reform that have been developed to address those problems, and the impact of such reforms.

Academic articles and papers on discovery were reviewed to provide a basis for analyzing the theoretical objectives of discovery, and how these objectives fit within an adversarial civil justice system. Articles comparing how discovery procedures vary among common law and civil law jurisdictions were also considered.

The Task Force conducted a comparative review of the rules of civil procedure for all Canadian jurisdictions, England, Ireland, Australia, New Zealand, and selected American jurisdictions, including contact with practitioners and judges. Where rules had undergone recent reforms, studies or commentary on the effectiveness of the reforms were examined.

Of particular interest was the introduction of specialized discovery rules in certain jurisdictions, such as discovery rules in Alberta for “very long trial actions,”<sup>4</sup> and the fast track litigation pilot project in British Columbia.<sup>5</sup> Many American states have also implemented specific reforms to curb discovery abuse,<sup>6</sup> and numerous scholarly articles have been written on these reforms.

---

<sup>4</sup> Alberta, Rules of Court, A.Reg. 390/68, Part 15.1, rules 218.2 – 218.91.

<sup>5</sup> British Columbia, Supreme Court Rules, B.C. Reg. 221/90, rule 66.

<sup>6</sup> See, e.g., the discussion of Texas, Arizona and Arkansas in Part III of this Report.

In some jurisdictions, the rules of civil procedure have been completely overhauled. The amendments to the United Kingdom Civil Procedure Rules following Lord Woolf's Final Report on civil justice reform,<sup>7</sup> the study of the federal civil justice system in Australia by its Law Reform Commission,<sup>8</sup> and the amendments to the Federal Rules of Civil Procedure in the United States<sup>9</sup> are examples of some large scale procedural reforms that have had an impact on the discovery process.

Please see **Appendix G** for a bibliography and **Appendix H** for a Canadian cross-jurisdictional comparison chart.

## 8. PREVIOUS STUDIES

The Task Force also benefited from a review of recent civil justice studies that have commented on the discovery process and made reform recommendations.

### Civil Justice Review

The Civil Justice Review was established by the Government of Ontario and the Ontario Court of Justice (General Division) to conduct a broad review of the civil justice system. In its first report,<sup>10</sup> the Civil Justice Review noted growing concerns with oral discovery, and asked whether it had become “too cost-prohibitive and delay-engendering to continue in the present fashion without the imposition of some form of curb.”<sup>11</sup> Anecdotes of increasing amounts of time spent in connection with oral examinations (e.g. preparing witnesses, travelling to and from examinations, attendance at examinations and re-examinations, responding to undertakings, and reporting to clients) and a significant number of discovery-related motions were cited.<sup>12</sup>

The Civil Justice Review expressed concern that broadening the scope of discovery in 1985, which had been designed to further the intent of eliminating “trial by ambush,” may have resulted in “trial by information landslide,”<sup>13</sup> and unnecessarily sweeping requests for information having little to do with the matters raised by the claims or defences of the parties. This development, tied with “the explosion of information sources and available data” from increased technology, was seen as making it increasingly difficult to cope economically with the scope of discovery.<sup>14</sup>

<sup>7</sup> Lord Woolf, *Access to Justice Final Report* (London: Lord Chancellor's Department, July 1996).

<sup>8</sup> Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report 89 (December, 1999) <http://www.austlii.edu.au/au/other/alrc/publications/reports/89>

<sup>9</sup> United States, Federal Rules of Civil Procedure (2001), rules 26 – 37.

<sup>10</sup> *First Report of the Civil Justice Review* (Toronto: Ontario Civil Justice Review, March 1995) [hereinafter “*First Report*”].

<sup>11</sup> *Ibid.* at 233

<sup>12</sup> *Ibid.* at 234. At the time, Toronto Masters estimated that 25% of all motions before them involved discovery issues. *Ibid.* at 235.

<sup>13</sup> *Ibid.* at 236.

<sup>14</sup> *Ibid.* at 237.

The Civil Justice Review recommended (and later re-iterated this recommendation in its 1996 *Supplemental and Final Report*<sup>15</sup>) that a working group be established to recommend ways to improve the economic effectiveness of the discovery rules, while preserving essential disclosure principles. Areas proposed for consideration included the possible re-entrenchment of the scope of discovery to pre-1985 limits, removal of the right to cross-examine at discovery, and time parameters for the conduct of oral examinations.<sup>16</sup>

In addition, the Civil Justice Review supported the implementation of the simplified procedure rules for claims not exceeding \$40,000, under which oral examinations for discovery would be eliminated.<sup>17</sup>

### **Canadian Bar Association Task Force**

In 1996, a Canadian Bar Association (CBA) Task Force completed its *Report of the Task Force on Systems of Civil Justice*. Its mandate, which was national in scope, was “to inquire into the state of the civil justice system and develop strategies and mechanisms to assist in the continued modernization of the system.”<sup>18</sup>

The CBA Task Force made several recommendations with respect to disclosure and oral discovery. It was the opinion of the Task Force that mandatory early disclosure through the exchange of “will-say” statements, as soon as possible after the close of pleadings, would curtail the need for much oral discovery.<sup>19</sup> It recommended that selected jurisdictions implement will-say pilot project procedures to test whether will-say documents are useful and fair, and to assess the impact of such a requirement on cost and delay.<sup>20</sup>

The CBA Task Force also recommended that expert reports be disclosed early, and that the exchange of expert critique reports occur in a timely fashion before a trial or hearing.<sup>21</sup> In response to the increased use of experts at trial, the Task Force recommended that judges play a more active role in assisting parties to limit the costs and delay associated with the use of experts.<sup>22</sup>

Finally, oral discovery was seen as an expensive and sometimes wasteful exercise, resulting in much dissatisfaction with the litigation process.<sup>23</sup> Through its consultations, the CBA Task Force noted that reforms to enhance the efficient and timely use of discovery were required.<sup>24</sup> Accordingly, it recommended that jurisdictions limit the scope, number, and duration of oral

---

<sup>15</sup> *Supplemental and Final Report of the Civil Justice Review* (Toronto: Ontario Civil Justice Review, November 1996) at 133.

<sup>16</sup> *Ibid.* at 238.

<sup>17</sup> *Ibid.* at 263.

<sup>18</sup> *Report of the Task Force on Systems of Civil Justice* (Ottawa: Canadian Bar Association National Task Force on Systems of Civil Justice, August, 1996).

<sup>19</sup> *Ibid.* at 42.

<sup>20</sup> *Ibid.* at 43.

<sup>21</sup> *Ibid.* at 44.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.* at 43.

<sup>24</sup> *Ibid.*

examinations for discovery, and that means to assist parties in scheduling discoveries and resolving discovery disputes be devised.<sup>25</sup>

### **Advocates' Society Long Civil Trials Task Force**

The Long Civil Trials Task Force of the Advocates' Society was formed to address the perceived concern that long civil trials continued to be backlogged, despite improvements in the timely resolution of other civil disputes. Among the issues examined was whether amendments to rules relating to documentary and oral discovery might assist in reducing trial time.<sup>26</sup> The Task Force surveyed Advocates' Society members on specific issues relating to lengthy civil trials (longer than two weeks), and published its report in 1998.<sup>27</sup>

The Task Force reported that for some respondents, the most important factor contributing to lengthy trials was the lack of pre-trial management of cases.<sup>28</sup> One respondent noted that “the effective lack of control over the length and scope of discovery is unduly delaying the start of trials and unduly lengthening them once they begin.”<sup>29</sup> While no single discovery factor was identified by a majority of respondents as a “very serious problem,” most found the listed discovery practices to be a problem in some way.<sup>30</sup> The problem most frequently identified (by about two-thirds of respondents) as “very” or “moderately” serious was “evasive responses, withholding information, or non-compliance.”<sup>31</sup> Two-thirds of respondents indicated that limits on discovery by restricting the relevancy standard would shorten trial length.<sup>32</sup> There was also a clear trend in favour of more judicial involvement in the discovery process as a means to reduce trial length, and for the exchange of summaries of evidence to be given by witnesses.<sup>33</sup>

### **Advocates' Society Rules Committee Proposal**

In 1999, the Advocates' Society's Rules Committee submitted a proposal to the Civil Rules Committee recommending the adoption of a rule that would eliminate a party's right to refuse to answer a question at oral examination on the basis of relevance. The Advocates' Society argued that excessive objections to questions at oral examinations had led to unnecessary interruption, delay, gamesmanship and cost, resulting further in unnecessary motions to compel answers to questions. Under the proposed rule, which was similar to that adopted in the American federal jurisdiction, the person being examined would be permitted to refuse to answer a question only on specified grounds, such as protection of a privilege and enforcement of a court-ordered limit on the scope of discovery. Even where a party felt the questions were irrelevant, the party would

---

<sup>25</sup> *Ibid.*

<sup>26</sup> *Report of the Long Civil Trials Task Force of the Advocates' Society* (Toronto: The Advocates' Society, August, 1998)

<sup>27</sup> See, R. Dinovitzer, *Attitudes Towards Long Civil Trials: A Survey of the Members of the Advocates' Society* (Toronto: The Advocates' Society, August 1998).

<sup>28</sup> *Ibid.* at 46-47.

<sup>29</sup> *Ibid.* at 47.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.* at 60.

<sup>33</sup> *Ibid.* at 70, 72.

be obliged to answer. The relevance of the question and the admissibility of the answer would be determined by the trial judge.

The proposal was rejected by the Civil Rules Committee on the grounds that removing the right to refuse would lead to unduly long examinations, and would permit “fishing expeditions.” Any savings from reduced motions activity would be lost by the additional time and money spent on lengthier examinations. It was further noted that the assumption on which the proposal was based – namely that discovery problems were caused only by the party being examined – was not supported by any empirical evidence.

## PART II: THE DISCOVERY PROCESS IN ONTARIO

### 1. HISTORY OF THE DISCOVERY PROCESS PRIOR TO 1985

This section discusses the evolution of Ontario's discovery process prior to 1985, when significant reforms were introduced. Ontario's early discovery process was based on the English system, which is briefly described below.

#### (i) England

Discovery mechanisms may be traced back to the procedures of ecclesiastical courts,<sup>34</sup> in which litigants delivered pleadings and obtained answers from adversaries by means of examination under oath.<sup>35</sup> The questions asked during the examination were referred to as "positions," and the responses were recorded in writing as the "answers."<sup>36</sup>

Witnesses were examined prior to trial by means of questions (the "articles"). Their testimony, recorded by an examiner as a written "deposition," was to be kept secret until all witnesses had been examined. The adversary, who was given advance notice of witness' names and provided with a copy of the articles, could prepare written interrogatories for the purpose of cross-examination. This was the only use of interrogatories permitted in the ecclesiastical courts.<sup>37</sup>

The pleadings, positions and articles were eventually included in one document. This change, along with a number of other procedural reforms, is thought to be the foundation of "modern" discovery procedures.<sup>38</sup>

In the fifteenth century, a limited form of pre-trial discovery was achieved in England's Court of Chancery through the delivery of the plaintiff's bill of complaint, containing allegations of fact (the "stating part") together with a statement of evidence supporting the claim (the "charging part.") The defendant would then admit, deny or explain the plaintiff's allegations in the "answer."<sup>39</sup> By the eighteenth century, written interrogatories (the "interrogating part") were included with the plaintiff's bill of complaint and limited documentary discovery was permitted.<sup>40</sup>

Until the middle of the nineteenth century, common law courts in England could, in certain cases, order inspection of documents, but could not exercise a general power to compel discovery.<sup>41</sup>

---

<sup>34</sup> Peter Fraser, *Discovery of Fact in Ontario and British Columbia* (LL.M. Thesis, University of Toronto, 1970) at 7; Paul Matthews and Hodge M. Malek, *Discovery* (London: Sweet & Maxwell, 1992) at 6.

<sup>35</sup> Fraser, *ibid.* at 4 to 7.

<sup>36</sup> *Ibid.* at 6.

<sup>37</sup> *Ibid.* at 4 to 8.

<sup>38</sup> *Ibid.* at 8 to 9.

<sup>39</sup> Gordon D. Cudmore, *Choate on Discovery*, 2d ed. (Toronto: Carswell, 1993) at 1-2; Fraser, *supra* note 34 at 15-16; Matthews, *supra* note 34 at 7; Robert W. White, QC, *The Art of Discovery* (Aurora: Canada Law Book Inc., 1990) at 10.

<sup>40</sup> Cudmore, *ibid.*; Fraser, *ibid.* at 15 to 16; Matthews, *ibid.*

<sup>41</sup> The Honourable George Alexander Gale and Marie E. Ferguson, eds., *Holmestead and Gale on The Judicature Act of Ontario and Rules of Practice (Annotated)*, vol. 2 (Carswell, 1983) at 1692 to 1693; Matthews, *ibid.*