

## 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>

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<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.*

Resistance to pre-trial discovery was based on the theory that parties might perjure themselves if they learned of the evidence they would face at trial.<sup>42</sup> In order to obtain discovery, common law litigants were required to bring a bill of discovery in the Court of Chancery.<sup>43</sup>

Legislation introduced in the 1850s recognized a limited right to documentary discovery and written interrogatories. *Lord Brougham's Act* (1851) authorized common law courts to order inspection of “all documents in the custody or under the control of the opposite party.”<sup>44</sup> A few years later, the *Common Law Procedure Act* (1854) permitted common law litigants to deliver written interrogatories “upon any matter as to which discovery might be sought.”<sup>45</sup> However, litigants could obtain discovery only of facts in support of their own case and not of facts on which the opposing parties would rely.<sup>46</sup>

## (ii) Ontario

Until the *Administration of Justice Act* was passed in 1873, provision for discovery in Ontario was similar to that in England.<sup>47</sup> In 1837, discovery was available in Ontario's Court of Chancery only by way of bill of discovery.<sup>48</sup> By 1850, however, oral discovery of a party “adverse in point of interest” was permitted in the Court of Chancery, and by 1856, provisions of England's *Common Law Procedure Act* (1854) allowing for written interrogatories in the common law courts had been extended to Ontario.<sup>49</sup> Discovery was obtained in Ontario's Court of Chancery through oral examination, and at common law, through written interrogatories.<sup>50</sup> Common law litigants were also permitted to seek additional discovery by bringing a bill in the Court of Chancery.<sup>51</sup>

The *Administration of Justice Act* of 1873 extended the availability of oral discovery to the common law courts, and amendments in 1877 permitted litigants to examine “...any party adverse in point of interest...touching the matters in question in the action.”<sup>52</sup> Unlike in the Court of Chancery, common law litigants were required to seek an order to obtain oral discovery, but such orders were “issued as of course.”<sup>53</sup>

Ontario's *Judicature Act* was passed in 1881, and by 1888 a set of consolidated rules combining equity and common law procedures was introduced.<sup>54</sup> These included a provision expressly

<sup>42</sup> Cudmore, *supra* note 39 at 1-1 to 1-2.

<sup>43</sup> Cudmore, *ibid.* at 1-2; Fraser, *supra* note 34 at 19.

<sup>44</sup> Gale, *supra* note 41.

<sup>45</sup> Cudmore, *supra* note 39 at 1-2 to 1-3; Fraser, *supra* note 34 at 21; Gale, *ibid.*; White, *supra* note 39 at 10 to 11.

<sup>46</sup> Cudmore, *ibid.* at 1-3.

<sup>47</sup> White, *supra* note 39 at 11.

<sup>48</sup> Cudmore, *supra* note 39 at 1-4; Gale, *supra* note 41 at 1693 to 1694.

<sup>49</sup> Cudmore, *ibid.*; Fraser, *supra* note 34 at 37; Gale, *ibid.* at 1694; *Menzies v. McLeod* (1915), 34 O.L.R. 572 at 573.

<sup>50</sup> Cudmore, *ibid.*; Fraser, *ibid.* at 37 to 38; Gale, *ibid.*

<sup>51</sup> Cudmore, *ibid.*; Gale, *ibid.*

<sup>52</sup> Cudmore, *ibid.* at 1-4 to 1-5; Fraser, *supra* note 34 at 38 to 39; Gale, *ibid.*; *Menzies*, *supra* note 49 at 573; White, *supra* note 39 at 11.

<sup>53</sup> Cudmore, *ibid.*; *Menzies*, *ibid.* at 573.

<sup>54</sup> Gale, *supra* note 41 at 1694; Fraser, *supra* note 34 at 41; *Menzies*, *ibid.* at 573.

permitting a party to conduct an oral examination of an adverse party without a court order. A party could be examined on any matter “touching the matters in question in the action.”<sup>55</sup>

Ontario’s Rules of Practice and Procedure, which were introduced later and remained in effect until 1985, provided for the following discovery procedures:

- Examination of an adverse party, and where the adverse party was a corporation, by examination of its officers or servants (rules 326-327);
- Production for inspection of documents in the possession of an adverse party (rules 347-352);
- Medical examination of an injured person in a personal injury action (*Judicature Act*, s. 77); and
- Inspection of real or personal property by a party and his or her witnesses (rule 372).<sup>56</sup>

## 2. 1985 RULES OF CIVIL PROCEDURE

Prior to the introduction of the Rules of Civil Procedure in 1985, Ontario’s rules had not undergone comprehensive revision for approximately 70 years.<sup>57</sup> A key objective of the reforms was to ensure full, early disclosure of facts and evidence in order to identify the contentious issues in a lawsuit and to promote settlement.<sup>58</sup> The new rules were designed to broaden the scope of discovery and improve its overall effectiveness.<sup>59</sup> In the following sections, the key changes to Ontario’s discovery rules in 1985 are discussed.

### Automatic and Continuing Discovery Obligations

The duty to disclose documents became automatic. Prior to 1985, a party had to first serve notice requiring the other party to disclose by affidavit, and produce documents “relating to any matters in question in the action.”<sup>60</sup> After the 1985 reforms, an obligation was imposed on parties to serve an affidavit of documents, and a party’s right to examination for discovery would not crystallize until an affidavit was delivered, unless the parties agreed otherwise.<sup>61</sup> A new ongoing

<sup>55</sup> Fraser, *ibid.* at 41.

<sup>56</sup> Gale, *supra* note 41 at 1692.

<sup>57</sup> A.F. Rodger, Q.C., Senior Master, S.C.O., “Foreword” in Garry D. Watson and Michael McGowan, *Ontario Supreme and District Court Practice 1985* (Toronto: The Carswell Company Limited, 1984) at v.

<sup>58</sup> *Ibid.* at vi.

<sup>59</sup> The Honourable Mr. Justice J.W. Morden, The Supreme Court of Ontario, “An Overview of the Rules of Civil Procedure” in *An Introduction to the New Rules of Civil Procedure for Solicitors* (The Canadian Bar Association - Ontario, Continuing Legal Education, January 14, 1985) at 18.

<sup>60</sup> Supreme Court of Ontario Rules of Practice, R.R. O. 1980, Reg. 540, as amended to March 1, 1984, rule 347 [hereinafter Ontario’s Rules of Practice].

<sup>61</sup> Lyndon A.J. Barnes, “Pleadings, Discoveries, etc. from the Corporate Perspective” in *An Introduction to the New Rules of Civil Procedure for Solicitors* (The Canadian Bar Association - Ontario, Continuing Legal Education, January 14, 1985) at 6; W.A. Derry Millar, “Discovery of Documents, Examination for Discovery and Examinations” in *New Rules of Civil Procedure* (The Law Society of Upper Canada, The Canadian Bar Association-Ontario and The Advocates’ Society, Continuing Legal Education Program, November 9 and 10, 1984) at 5-2 and 5-4; Morden, *ibid.* at 19; Garry D. Watson and Michael McGowan, *Ontario Supreme and District Court Practice 1985* (Toronto: The Carswell Company Limited, 1984) at 325.

duty of disclosure required parties to correct and supplement information provided in affidavits of documents or given during examinations for discovery.<sup>62</sup>

### **Expanded Scope of Documentary Discovery**

“Document” was defined to include a “videotape” and “information recorded or stored by means of any device,” thereby extending the reach of documentary discovery to information stored electronically.<sup>63</sup> Where the court so ordered, documentary discovery could also be obtained from a party’s subsidiary or affiliated corporations, or from corporations otherwise controlled by a party.<sup>64</sup> Insurance policies were expressly prescribed as discoverable documents.<sup>65</sup>

### **Discovery by Written Questions and Answers**

Whereas the former rules provided only for oral discovery, examination for discovery by written questions and answers was re-introduced as an alternative, and the timeline and procedure for submitting answers to questions were prescribed.<sup>66</sup>

### **Scope of Permissible Questions at Oral and Written Examinations for Discovery**

The permissible scope of oral and written questions was extended to permit discovery of evidence and cross-examination of deponents (except as to credibility).<sup>67</sup> Questions seeking the names and addresses of potential witnesses and experts, and information about experts’ findings, opinions and conclusions were expressly permitted.<sup>68</sup> The criteria for production of documents from, and examination of, non-parties were also prescribed.<sup>69</sup>

Special provision was made for discovery of medical evidence within the Rules of Civil Procedure, rather than under separate legislation (i.e. *Judicature Act*). The availability of a medical examination as a discovery tool was expanded and rules providing for the exchange of medical information prior to an examination were introduced.<sup>70</sup>

### **Sanctions**

New sanctions were introduced to restrict the use at trial of information that was not disclosed and where privilege was claimed.<sup>71</sup>

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<sup>62</sup> Barnes, *ibid.* at 6 and 8; Millar, *ibid.* at 5-3 and 5-6; Morden, *ibid.* at 18 and 20; Watson, *ibid.* at 325 to 326, 340.

<sup>63</sup> Millar, *ibid.* at 5-1; Morden, *ibid.* at 18.

<sup>64</sup> Barnes, *supra* note 61 at 6 to 7, 8; Millar, *ibid.* at 5-2; Morden, *ibid.* at 18; Watson, *supra* note 61 at 325 and 340.

<sup>65</sup> Barnes, *ibid.* at 6 to 7; Millar, *ibid.* at 5-1 and 5-5; Morden, *ibid.* at 18 and 20; Rodger, *supra* note 57 at vi; Watson, *ibid.* at 325 and 340.

<sup>66</sup> Barnes, *ibid.* at 8; Millar, *ibid.* at 5-4; Morden, *ibid.* at 20; Watson, *ibid.* at 340 and 380.

<sup>67</sup> Barnes, *ibid.* at 8; Millar, *ibid.* at 5-5; Morden, *ibid.* at 20; Rodger, *ibid.* at vi; Watson, *ibid.* at 340.

<sup>68</sup> Barnes, *ibid.* at 8; Millar, *ibid.* at 5-5; Morden, *ibid.* at 20; Rodger, *ibid.* at vi.; Watson, *ibid.* at 340.

<sup>69</sup> Barnes, *ibid.* at 7, 8 to 9; Millar, *ibid.* at 5-4 and 5-6; Morden, *ibid.* at 18 to 19, 20; Watson, *ibid.* at 326 and 340.

<sup>70</sup> Barnes, *ibid.* at 10; Millar, *ibid.* at 5-7 to 5-8; Morden, *ibid.* at 21; Watson, *ibid.* at 363.

<sup>71</sup> Barnes, *ibid.* at 7 and 9; Millar, *ibid.* at 5-3 to 5-4; Morden, *ibid.* at 19 to 20; Watson, *ibid.* at 326 and 341.

### 3. OVERVIEW OF CURRENT DISCOVERY RULES

Rules 30 to 35 are the primary discovery-related rules. These will be discussed in greater detail in Part VI of the Report, which explores options for reform. However, to provide some context for that discussion and for the cross-jurisdictional comparison of the discovery process presented in Part III, a summary of these rules follows.

#### Documentary Discovery

Rule 30 prescribes the documentary discovery process. Each party to an action must serve a sworn affidavit of documents within ten days after all pleadings have been exchanged (or the time for their delivery has expired). The affidavit must list all documents “relating to any matter in issue in the action.” The documents must be listed in three separate schedules, as follows:

- (A) Documents in a party’s possession, power or control that the party does not object to producing;
- (B) Documents that are privileged and will not be produced, with the grounds for the claim of privilege identified; and
- (C) Documents no longer in a party’s possession, power or control, and a statement indicating when and how the party lost possession, power or control.

Within the affidavit, the lawyer for a party must certify that he or she has explained to the swearing party the necessity of making full disclosure and the types of documents that are likely to be relevant to the matters in issue.<sup>72</sup> Rule 30 prescribes the process whereby a party may request to inspect and copy documents listed in another party’s affidavit of documents.<sup>73</sup> In practice, most lawyers simply request that copies of all listed producible documents be provided. Where a party has evidence that another party’s affidavit of documents is incomplete, it may bring a motion to obtain an order for the production of a further and better affidavit of documents, or to cross-examine the person who swore the affidavit.<sup>74</sup>

There is an ongoing obligation to disclose any newly discovered documents that are relevant, by way of a supplementary affidavit of documents.<sup>75</sup> A party who fails to disclose a relevant document that is favourable to its case may not rely on it at trial, unless leave of the trial judge is obtained. Where a party who fails to disclose a relevant document that is not favourable to its case, the court has discretion to make such order as is just.<sup>76</sup>

Finally, the rule permits a party to bring a motion for production of documents from a non-party. The moving party must show that the document is relevant to a matter in issue, and that it would be unfair to proceed to trial without having access to that document.<sup>77</sup>

<sup>72</sup> Ontario, Rules of Civil Procedure [hereinafter “Ont. Rules”], rule 30.03.

<sup>73</sup> Ont. Rules, rule 30.04.

<sup>74</sup> Ont. Rules, rule 30.06.

<sup>75</sup> Ont. Rules, rule 30.07.

<sup>76</sup> Ont. Rules, rule 30.08.

<sup>77</sup> Ont. Rules, rule 30.10.

## Examination for Discovery

Rule 31 prescribes who may be examined for discovery, the scope of permissible questioning, and when an examination may be conducted orally or by written questions and answers. It applies to civil actions where the monetary claim is in excess of \$50,000.<sup>78</sup>

A party may examine a party adverse in interest by way of oral examination, or written questions and answers, but not both, unless leave of the court is obtained. Where a person is to be examined by more than one party, the examination must be conducted orally, unless all parties who are entitled to examine the person agree otherwise.<sup>79</sup>

In the case of a corporate party, the examining party may examine any one officer, director or employee on behalf of the corporation. Leave of the court is required to examine more than one representative.<sup>80</sup>

Non-parties may be examined only with leave of the court. To obtain leave to examine a non-party, a party must show that it has been unable to obtain the required information from other persons, that it would be unfair for the moving party to proceed to trial without examining the non-party, and that the examination will not unduly delay the trial, entail unreasonable expense, or result in unfairness to the non-party.<sup>81</sup>

To initiate an examination, a party may serve a notice of examination or written questions, depending on the form of examination chosen and only after the party has served an affidavit of documents, unless the parties agree otherwise. The party who first serves a notice of examination or written questions has the right to complete the examination before the other party may begin its examination.<sup>82</sup>

A person who is being examined must answer “any proper question relating to any matter in issue” and no question may be objected to on the ground that the information sought is evidence, or that the question constitutes cross-examination. However, objection may be made to cross-examination solely directed to the credibility of a witness.<sup>83</sup> Where a party refuses to answer a proper question within 60 days before trial, the party may not rely on that information unless leave of the trial judge is obtained.<sup>84</sup>

A party may seek an order to divide discovery where certain information will only become relevant after a preliminary issue is determined.<sup>85</sup> As with documentary discovery, there is an obligation to update or correct any answers that are given in a written or oral examination for

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<sup>78</sup> Pursuant to the simplified procedures in rule 76, actions under \$50,000 are not permitted to have oral or written discovery. Ont. Rules, rules 76.02, 76.04.

<sup>79</sup> Ont. Rules, rule 31.02.

<sup>80</sup> Ont. Rules, rule 31.03.

<sup>81</sup> Ont. Rules, rule 31.10.

<sup>82</sup> Ont. Rules, rule 31.04.

<sup>83</sup> Ont. Rules, rule 31.06.

<sup>84</sup> Ont. Rules, rule 31.07.

<sup>85</sup> Ont. Rules, rule 31.06.

discovery.<sup>86</sup> Information given at an examination for discovery may be read into trial as evidence, and to impeach a witness.<sup>87</sup>

### **Inspection of Property and Medical Examination of a Party**

Rule 32 provides the court with authority to order the inspection of real or personal property where it appears necessary for the determination of an issue in a proceeding. Rule 33 permits the court to order a mental or physical examination of a party where the party's mental or physical condition is in question.

### **Procedure on Oral Examinations**

Rule 34 prescribes the procedure for oral examination for discovery. The examination must occur in the county where the person to be examined resides, unless the court orders or the parties agree otherwise.<sup>88</sup> The notice of examination, which is served on the person to be examined or his or her lawyer, sets out the date, time and place of the examination.<sup>89</sup> The person being examined must be sworn,<sup>90</sup> and must answer all proper questions relating to matters in issue in the action.<sup>91</sup> The reason for any objection to a question must be stated and recorded.<sup>92</sup>

Where the person being examined does not produce all relevant documents listed in his or her affidavit of documents at the examination, the documents must be produced within two days after the examination.<sup>93</sup> If represented, the person being examined may be re-examined by counsel and by any party who is adverse in interest to the examining party.<sup>94</sup>

A party may adjourn an examination and obtain directions from the court where the right to examination is being abused by an excess of improper questions or objections, the examination is being conducted in bad faith, answers are evasive or unresponsive, or there is a failure to produce relevant documents. The court has discretion to impose a range of cost sanctions and make any other order as is just.<sup>95</sup> Where there has been default or misconduct by the person being examined (e.g. improper refusals or failure to produce required documents), the court may order costs, require re-attendance at the person's own cost, strike out some or all of the person's evidence, strike a party's claim or defence, or make any other order as is just.<sup>96</sup>

Oral examinations must be recorded, and transcripts provided within four weeks of a request.<sup>97</sup>

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<sup>86</sup> Ont. Rules, rule 31.09

<sup>87</sup> Ont. Rules, rule 31.11.

<sup>88</sup> Ont. Rules, rule 34.03.

<sup>89</sup> Ont. Rules, rule 34.04.

<sup>90</sup> Ont. Rules, rule 34.08.

<sup>91</sup> Ont. Rules, rule 31.06.

<sup>92</sup> Ont. Rules, rule 34.12.

<sup>93</sup> Ont. Rules, rule 34.10.

<sup>94</sup> Ont. Rules, rule 34.11.

<sup>95</sup> Ont. Rules, rule 34.14.

<sup>96</sup> Ont. Rules, rule 34.15.

<sup>97</sup> Ont. Rules, rule 34.16 and 34.17.

### **Procedure on Examination for Discovery by Written Questions and Answers**

Rule 35 governs discovery by written questions and answers. A list of written questions in a prescribed form is served on the person to be examined and all other parties.<sup>98</sup> The questions must be answered within 15 days by affidavit in a prescribed form. Any objection to a question must be recorded, with a reason for the objection, in the affidavit.<sup>99</sup> Where the examining party is not satisfied with an answer, or where an answer suggests a new line of questioning, a further list of questions may be served within ten days.<sup>100</sup>

Where the person being examined refuses to answer a proper question or provides an insufficient answer, the court may order the person to answer the question by affidavit or submit to an oral examination. Other possible sanctions for improper refusals or failure to produce required documents include an order to strike a party's claim or defence, an order to strike some or all of the person's evidence, or such other order as is just.<sup>101</sup> A party may also move to terminate a written examination or limit its scope where it is being abused by an excess of improper questions or conducted in bad faith.<sup>102</sup>

### **Expert Evidence**

Discovery of expert evidence is largely restricted to the exchange of expert reports. Rule 53.03 requires a party who plans to call an expert witness at trial to serve all parties with a copy of the expert's report not less than 90 days before the trial.<sup>103</sup> A party who intends to call an expert to testify in response must serve the responding report not less than 60 days before trial,<sup>104</sup> and any supplementary expert report must be served not less than 30 days before trial.<sup>105</sup> These time periods may be extended or abridged by the court.<sup>106</sup> Where expert reports are not filed within the prescribed times, the expert may not testify at trial without leave of the trial judge.<sup>107</sup>

In addition, a party being examined for discovery may be questioned on an expert's findings, opinions and conclusions, as well as the name and address of any expert the party has engaged. However, a party need not disclose such information where the expert's views were obtained in preparation for litigation and the party undertakes not to call the expert at trial.<sup>108</sup>

Generally, experts may not be examined for discovery. Rule 31.10(1) prohibits the discovery of experts engaged by a party in preparation for contemplated or pending litigation. However, an expert who is to be called as a witness at trial may be examined for discovery for the purpose of having the testimony available as evidence at trial, but only with leave of the court or agreement

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<sup>98</sup> Ont. Rules, rule 35.01.

<sup>99</sup> Ont. Rules, rules 35.02, 35.03.

<sup>100</sup> Ont. Rules, rule 35.04.

<sup>101</sup> Ont. Rules, rule 35.04.

<sup>102</sup> Ont. Rules, rule 35.05.

<sup>103</sup> Ont. Rules 53.03(1).

<sup>104</sup> Ont. Rules 53.03(2).

<sup>105</sup> Ont. Rules 53.03(3).

<sup>106</sup> Ont. Rules 53.03(4).

<sup>107</sup> Ont. Rules 53.03(3).

<sup>108</sup> Ont. Rules 31.06(3).

of the parties, and only after the moving party has served the expert's report on all other parties.<sup>109</sup> This rule is primarily intended to allow evidence to be taken before trial where there is significant cost or inconvenience in having the expert testify at trial.

Finally, section 12 of the *Evidence Act* limits the number of experts a party may call to three, unless leave of the court is obtained.<sup>110</sup> There is conflicting Canadian case law on whether this should be interpreted as three experts per issue in a case or three experts per case.<sup>111</sup> The leading Ontario case suggests that this is to be interpreted as permitting each side in a trial to call "a total of three expert witnesses *on all aspects* unless leave is granted to call more."<sup>112</sup>

### Special Rules That Impact Discovery

As stated earlier, cases under \$50,000 that are subject to the simplified procedure under rule 76 are not permitted to have oral or written discovery. Parties are, however, required to exchange affidavits of documents (including a list of witnesses) and to produce relevant documents.

Rule 77, which establishes case management for civil proceedings in Ottawa, Toronto and Windsor also has an impact on discovery obligations. Every plaintiff in a case managed action in Toronto and Windsor must file a timetable within prescribed timelines.<sup>113</sup> The timetable must include a schedule for delivery of affidavits of documents, examinations for discovery, and any related motions.<sup>114</sup>

### Discovery Disputes

Where discovery disputes arise, they are usually dealt with by way of motion. Rule 37 sets out the procedure for bringing motions, and generally requires that a moving party serve and file a notice of motion, setting out the relief sought and grounds for the motion.<sup>115</sup> In addition, the moving party must serve and file a motion record containing all affidavits and other supporting material to be used at the motion.<sup>116</sup> Depending on the relief sought, motions may be heard by judges or masters,<sup>117</sup> and certain motions that are on consent or in writing may be disposed of by the registrar.<sup>118</sup> The notice of motion must be served at least four days before the motion,<sup>119</sup> and filed

<sup>109</sup> Ont. Rules 36.01(3).

<sup>110</sup> *Evidence Act*, RSO 1990, c. E.23, s. 12, which reads: "Where it is intended by a party to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon by either side without the leave of the judge or other person presiding."

<sup>111</sup> See *Eli Lilly and Co. v. Novopharm Ltd.*, [1997] F.C.J. No. 488 (QL) at para. 118, for example, where the Federal Court – Trial Division interpreted s. 7 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 to limit expert opinion evidence to five witnesses per subject matter or factual issue, not to five witnesses in total.

<sup>112</sup> *Bank of America Canada v. Mutual Trust Co.* (1998), 39 O.R. (3d) 134 (Ont. Gen. Div. [Commercial List]) at 138.

<sup>113</sup> Ont. Rules, rule 77.10. Note that the requirement to file a timetable applies in Toronto and Windsor, but does not apply in Ottawa. See, Ont. Rules, rule 77.10(4).

<sup>114</sup> Ont. Rules, rule 77.03.

<sup>115</sup> Ont. Rules, rule 37.06

<sup>116</sup> Ont. Rules, rule 37.10.

<sup>117</sup> Ont. Rules, rule 37.02 sets out the jurisdiction of a judge and a master to hear motions. Note that a case management master has the jurisdiction of a master conferred by the rules of court. See Courts of Justice Act, R.S.O. 1990, c. C.43, s. 86.1(4).

<sup>118</sup> Ont. Rules, rules 37.02(3), 76.05(4), 77.12(5).

at least three days before the hearing.<sup>120</sup> Motions may be heard by telephone or video conference,<sup>121</sup> or in writing without oral argument.<sup>122</sup>

For cases subject to case management or the simplified procedure, there are special rules that streamline motions procedures. Parties file a specialized motion form that allows motions to be dealt with quickly and on a less formal basis, without the need to submit supporting material or a motion record. The presiding judicial officer must record the disposition on the motion form, and no formal order is required.<sup>123</sup>

In case managed courts, many discovery-related matters are dealt with at case conferences. At a case conference, a case management judge or case management master may create a timetable for the proceeding or make a procedural order.<sup>124</sup> Often, discovery schedules are established and discovery disputes are resolved in this informal manner.

### **Sanctions**

The rules authorize the court to impose a wide variety of sanctions for breach of discovery obligations. These include a range of cost orders, suspension of a party's right of examination or use of evidence at trial, dismissal of an action, striking of a defence, or any other order the court considers just. The chart attached at **Appendix I** outlines the sanctions and discovery enforcement powers that are currently available to the court.

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<sup>119</sup> Ont. Rules, rule 37.07(6).

<sup>120</sup> Ont. Rules, rule 37.08(1).

<sup>121</sup> Ont. Rules, rule 1.08.

<sup>122</sup> Ont. Rules, rule 37.12.1.

<sup>123</sup> Ont. Rules, rules 76.05(6)(7), 77.12(6)(7).

<sup>124</sup> Ont. Rules, rule 77.13(3)(5)(6).