

Superior
Court of
Justice



Ministry of
the Attorney
General



REPORT OF THE
TASK FORCE ON THE
DISCOVERY PROCESS IN
ONTARIO

NOVEMBER 2003

Members of the Discovery Task Force

The Honourable Mr. Justice Colin Campbell (Chair)
Superior Court of Justice
Toronto Region

Debra Paulseth (Associate Chair)
Assistant Deputy Attorney General, Court Services
Division
Ministry of the Attorney General

The Honourable Madam Justice Catherine Aitken
Superior Court of Justice
East Region

Ann Merritt
Director, Civil/Family Policy and Programs Branch,
Court Services Division
Ministry of the Attorney General

Kristopher H. Knutsen, Q. C.
Carrell & Partners
Thunder Bay

Susan Wortzman
Lerner & Associates, LLP
Toronto

TABLE OF CONTENTS

Introduction to the Report	1
1. Background	1
2. Terms of Reference	1
3. Composition of the Task Force	1
4. Organization of the Report.....	2
Guiding Principles	3
Summary of Recommendations.....	4
Part I: Methodology of the Review	10
1. Focus Groups.....	10
2. Consultation Paper	10
3. Submissions.....	11
4. Consultations with Bench and Bar.....	11
5. Motions Activity Study	11
6. Case Specific Questionnaires	12
7. Cross-Jurisdictional Research and Literature Review	14
8. Previous Studies	15
Part II: The Discovery Process in Ontario	19
1. History of the Discovery Process Prior to 1985.....	19
(i) England.....	19
(ii) Ontario.....	20
2. 1985 Rules of Civil Procedure	21
3. Overview of Current Discovery Rules	23
Part III: Cross-Jurisdictional Comparison of Discovery Processes	29
1. Canada	29
2. United States	35
(i) Federal Court	36
(ii) Arizona.....	38
(iii) California.....	40
(iv) New York.....	42
(v) Texas.....	44
3. Other Commonwealth Countries.....	46
(i) United Kingdom.....	46
(ii) Australia Federal Court.....	49
(iii) New Zealand High Court	50
Part IV: Characteristics of Cases Surveyed in Case Specific Questionnaires	51
1. Description Of Cases	51
2. Progress Of Cases	52
3. Amount Of Claims and Awards	53
4. Discovery Activity	53

Part V: Task Force Findings	54
1. Introduction	54
2. Key Objectives and Benefits of the Discovery Process	55
3. Perceived Discovery Problems and Impact of Potential Reforms	55
4. Costs of Discovery	57
5. Scope of Discovery.....	59
6. Adequacy and Timing of Documentary Disclosure/Production	60
7. Production of Documents in the Possession of Non-Parties	63
8. Discovery of Electronic Documents.....	64
9. Oral Discovery	65
10. Written Discovery	70
11. Examination of Corporate Representatives and Partners	71
12. Examination of Non-Parties.....	71
13. Discovery of Expert Evidence.....	71
14. Undertakings and Refusals.....	74
15. Discovery Disputes	76
16. Enforcement of Discovery Obligations	79
17. Legal Culture	80
Part VI: Reform Options and Recommendations	81
1. Introduction	81
2. Discovery Management	83
3. Scope of Discovery.....	90
4. Adequacy and Timing of Documentary Disclosure and Production.....	93
5. Production of Documents in the Possession of Non-Parties	101
6. Discovery of Electronic Documents.....	103
7. Oral Discovery	111
8. Written Discovery	120
9. Examination of Corporate Representatives and Partners	124
10. Examination of Non-Parties.....	126
11. Discovery of Expert Evidence.....	128
12. Undertakings and Refusals.....	136
13. Discovery Disputes	141
14. Enforcement of Discovery Obligations	144
15. Principles of Efficiency and Professionalism	146
16. Best Practices Manual.....	149
17. Other Matters	153
Part VII: Conclusion	155
Appendices	156