Supplemental Discovery Task Force Report

Discovery Task Force Team

The Hon. Colin L. Campbell (Chair)

Debra Paulseth, Court Services Division (Associate Chair)

The Hon. Catherine Aitken

Ann Merritt, Court Services Division

Kristopher H. Knutsen, Q.C.

Susan Wortzman

Susan Charendoff (Project Director)

Mohan Sharma (Research Director)

October 2005

Introduction

The Discovery Task Force (the "DTF") reported in November 2003 and made a number of recommendations for discovery reform. While the general direction of discovery reform was widely accepted, some of the specific proposed rule changes created controversy. As a result, the DTF proceeded only with a few of its proposed rule amendments in the spring of 2004 to permit further consultation with various bar groups.

Proposed amendments submitted for consideration by the Civil Rules Committee in November 2004 were again postponed for two reasons:

1. The proposed Practice Direction (since implemented) for the management of cases in Toronto needed to be understood and applied by the bar before further change was implemented.

2. From the consultation with bar groups, the DTF recognized the need for the bar to have better appreciation of what was intended as "best practices" or "guidelines" before any Rules to implement those practices were passed.

3. Consultation with the judiciary elicited the concern that at this time of scarce judicial resources, significant rule changes (at least in the short term) could give rise to more rather than less motion activity.

One of the misconceptions that further consultation has sought to dispel is that "guidelines" or "best practices" would not as a result of judicial enforcement become rules by another name. The DTF had conceived that "best practices" would be developed by knowledgeable, experienced, specialty groups of the bar, and published and promoted by the bar on an ongoing basis with the assistance of the members of the judiciary.

"Best Practices" are intended to complement, not supplement, the discovery rules by providing before the fact criteria, which counsel and their clients may consider to tailor to meet the specific needs of their case.

Some bar groups have been reluctant to promote the rule changes proposed by the DTF in developing best practices. As a result, the DTF has reconsidered some of its proposed rule amendments and decided to take a leadership role in the development of "best practices," at least in some areas.

Consistent with its earlier recommendations, the DTF has sought to recognize the following six principles in both refinement of its recommendation for rule change and in promoting "best practices:"

The Discovery process should encourage and/or permit:

(a) Development of a discovery plan.

(b) Recognition that NOT all possibly relevant information must be produced in every case.

(c) Some discovery, both documentary and oral, may be staged, so that both cost and time of production are taken into account.

(d) Discovery responses must be anticipated to be made in a timely fashion to have a meaningful settlement conference.

(e) The remaining matters of disclosure tabled should be completed sufficiently before trial so that trials are not adjourned, delayed or made longer & more costly than anticipated.

Different types of cases require different discovery considerations.

The Task Force believes that the foregoing principles can be implemented without specific rule change, utilizing if necessary the inherent jurisdiction of the Court under Rules 1.04 and 77.02.

1. The Discovery Plan

The proposed rule change that would provide express authority for the Court to require or create a discovery plan at a case conference has received critical comment from both the bench and the bar.

Judicial enforcement of a discovery plan was considered by some bar groups as unduly restrictive of the independence and flexibility required by counsel in developing their cases.

In light of the changes made to the case management process in Toronto as a result of the Practice Direction in force as of July 1, 2005, and the comments of the bench and the bar, the DTF has revised its recommendations to provide that counsel are encouraged and obligated only by conduct of good practice to develop a discovery plan that would be understood by the client and exchanged with counsel opposite.

Instead of mandating and imposing a discovery plan in the absence of agreement, the role of the Court would be to impose appropriate directions and sanctions, where discovery-related orders become necessary. Such default orders would in effect mandate "best discovery practices" where the Court was called upon to intervene and the parties had not developed a plan.

It is hoped that the development of standard plans for different types of cases and the dissemination of those plans by web-based communication will assist the process.

2. Scope of Discovery

In its report, the DTF recommended that the current "semblance of relevance" test be narrowed to focus on matters 'relevant' to an issue in the action.

Concern was raised from both the bench and the bar that such a change at this time might give rise to more contentious disputes that would need judicial resolution, leading to more motions and more cost.

On the other hand, support was received for the recommendation to narrow discovery, as many felt that discovery abuse most often arose in circumstances where prolonged and unnecessary documentary or oral discovery demand occurred.

The cost of the discovery process may lead to protracted disputes through motion activity. Instead of narrowing issues and promoting early resolution, over-aggressive discovery activity may be counter-productive to early resolution and result in trials that very few can afford. This becomes an access to justice issue.

The DTF has reconsidered the issue of how to limit unnecessary or prolonged discovery without compromising the opportunity of a party to obtain all the truly relevant information. The DTF has modified its previous recommendation, which it would hope can be accommodated on a consensual basis. Should the Court need to be involved, the DTF is of the view that with the development of discovery guidelines and utilization of existing rules such as Rule 77 (where applicable), the principle of Rule 1.04 can operate to provide effective discovery management. In the event these tools do not prove effective, more formal rule changes may be required.

Where a party is of the opinion that the production of documents in ordinary compliance with the rules would unduly prolong or add to the cost of litigation, that party may propose a "staged" or "proportional" discovery.

"Staged discovery" in this context means a production of documents and oral discovery limited by subject matter, by time period covered by the discovery, or a selective production (some pre-determined portion of the documentation.)

The party proposing a staged discovery should provide the precise "staging" being proposed and the reason for such proposal. If the proposing party and responding party(s) cannot agree on the basis for staging, the proposing party may submit a "staging" proposal for consideration.

If Court is required to consider a "staged" discovery proposal for documentary production, it may see fit to make one or more of the following orders:

(i) rejecting the proposed "staged" discovery;

(ii) accepting a proposal for "staged" discovery by time, subject matter or any other reasonable basis that appropriately balances cost, benefit and need for the documentary information;

(iii) order that some or all of the selective documentary discovery be undertaken by a neutral party to expedite the production process while ensuring the objectivity of the selection;

(iv) order that some or all of the cost of production be borne by the receiving party if just to so provide at the discovery stage;

(v) provide for further review of a "staged" discovery order at intervals when appropriate or necessary;

(vi) make any other order that is consistent with the discovery process in the Rules of Civil Procedure and any discovery plan previously agreed to by the parties;

(vii) make any order with respect to costs that is in the circumstances appropriate.

There are many examples of limited or proportional discovery in other common law jurisdictions. For example, U.S. Federal Rule 26 (b) 2 among other matters provides that discovery may be limited where it is

(i) unreasonably cumulative or duplicative or obtainable from another source less burdensome or expensive;

(ii) the party seeking discovery has had the opportunity to obtain the information;

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources and the importance of the issues.

In the United Kingdom, a draft Practice Direction & Guidelines has been circulated for comment, which focuses on the need for proportional discovery in certain cases.

The DTF proposes to develop, with the leadership of bar groups and the cooperation of masters and judges, guidelines for specific types of cases that can lead to model agreements and where necessary, orders. Mediation of complicated discovery disputes should be considered by competent counsel.

3. Timing of Oral Discovery

Many bar responses have interpreted the DTF recommendation of "up to one day of examination of a party adverse subject to the parties' agreement or court order" as being too constrictive or likely to give rise to further motion activity.

The material on which this recommendation was based included responses that satisfied the DTF that the vast majority of civil cases involve claims of less than $200,000, take less than 5 days to try and require no more than one day of discovery.

It is recognized that there will be many cases where one day per party will not be sufficient. The DTF recommendation was premised on the principle that parties are entitled to have a reasonable expectation of how much time the opposing side intends to take in oral discovery before embarking on that process.

British Columbia has recently introduced a pilot project by a rule that limits oral discovery to two hours in cases involving up to $100,000.00 (unless the parties agree otherwise.) This is a rational extension of the practice noted in the DTF Report that in some regions of Ontario, counsel may agree to a very limited oral discovery in Simplified Rules cases.

Too many cases have a forced settlement rather than a reasoned resolution (whether by informed settlement or trial) simply as a result of the time and cost of the discovery process.

Counsel should reasonably be able to estimate the time necessary for oral discovery on the assumption that reasonable questions will be answered without interruption, unnecessary objection or obfuscation.

Should issues or counsel's preparation point to the likelihood of further and reasonable time being necessary, such estimate should be honoured without objection. Any excess of reasonable time can and should be dealt with as a matter of costs at the appropriate time.

Likewise, abuse by way of interruption, obfuscation or the necessity of a further attendance necessitated by inappropriate undertakings or refusals can and should be dealt with by costs at the appropriate time.

The DTF recognized that its proposal to require an oral discovery estimate would not please some lawyers. The cost savings associated with applying the discipline to keep to estimated time should please clients, however.

The one consistent observation from those originally consulted and those who have responded since the DTF Report, is that the discovery process in too many cases remains too long, too acrimonious and too costly. Some discipline to curtail these abuses when they occur is required.

After careful consideration, the DTF continues to recommend the one-day default time in the "standard" case be considered the "norm" by the bar. Cases outside the "norm" can be dealt with by agreement. Abuse of the process can, as now, be dealt with by costs sanctions where necessary or appropriate.

4. Discovery Agreements

The DTF Report contemplated that parties would be encouraged to enter into agreements that may have the effect of varying the timing or completeness of discovery obligations.

Concern was raised by some that an agreement between parties that would have the effect of changing the time requirements of various discovery times under the Rules of Civil Procedure should only be permitted with specific rule authority.

The purpose of discovery guidelines from the general to the more particular based on the type of case, to the specific adapted to individual cases, is to promote agreement between and among counsel and the parties without the need to resort to the Court for dispute resolution.

The parties should reasonably expect that where they have entered into a discovery agreement, that agreement will be honored by the Court as long as it meets the general spirit of the Rules, rather than specific time periods, which can in most instances be extended in any event on consent.

5. Best Practices

The DTF sent a letter to various bar organizations in October 2004, providing information on the plan for development of best practices. The letter referenced the conference held in June 2004 under the auspices of the Law Society of Upper Canada, a first step in the development of "best practices."

The papers from that conference are listed in Endnote 1 to this Introduction. They represent some important resource material for the development of "best practices" as bar organizations consider specific types of cases. The Law Society has agreed to make this material available for the asking and it will be referenced as a website link.

Consultation with various bar organizations and groups has been initiated and will continue to develop more detailed content and most importantly, the dissemination of guidelines and practices through educational programs and publications.

6. Tailoring the Discovery Plan

Judicial resources, already strained in many areas, could be further overloaded if a new rule-like process were to be introduced, giving rise to the need for more case conferences or motions.

This Supplemental Report contains the DTF's draft of General Discovery Guidelines and Principles. It is not intended that this be regarded as a finished work. Rather, it is the expectation of the DTF that the Bar Organizations, notably the Law Society, the Advocates' Society and the Ontario Bar Association, together with specialty groups, will take the lead in receiving comments, suggestions and further material for update of the Guidelines from time to time.

Judges and Masters are asked to contribute their Directions, Orders and Endorsements that do not always find their way into searchable databases so that internet access to this resource can assist the process.

An example to those who will be involved in developing guidelines for specific areas of practice that will follow is the work of a sub-committee of the DTF [the e-Discovery Committee], which has developed guidelines for a new and rapidly growing area of the discovery process – electronic discovery.[1]

The need for guidelines in the area of production of electronic documents is highlighted in recent developments in the United States, where in particular cases e-mail has been ordered treated like any other "accessible" data to be produced in discovery. This presents problems not just for the large dollar value or document case, but as well the ordinary case where electronic issues become relevant but may not be part of ordinary document retention. The cost of the disclosure and production can exceed the amount in issue in many cases.

Since the cost to corporations may be significant and even greater if such information is routinely "deleted" to backup tapes, an industry has grown up to provide advice on the establishment of pro-active steps to retain, delete or retrieve electronic data.

The e-Discovery sub-committee has drawn upon and been assisted by the work of the Sedona Conference of the United States. The 14 Sedona Principles (at Appendix A to the e-Discovery Guidelines) are a short form introduction to some of the problems.

The Sedona Conference has recognized the significance of e-issues for litigation that extends beyond state/province and even national borders.

Some members of the e-Discovery Sub-Committee will continue to be a liaison between Ontario bar groups and the ongoing work of the Sedona Group to further refine and develop the e-Discovery Guidelines. Like the Discovery Principles, the e-Discovery Guidelines should be regarded as a "work in progress" or proposed guidelines. It is intended that they be disseminated to the bar and the judiciary for comment. A small group will be responsible for keeping the web-based materials up-to-date and useful.

We propose that with the release of this Report there be public dissemination of the proposed Guidelines for a period of 6 months. They will be discussed and commented on at two conferences on the topic, one of which is sponsored by the OBA and Advocates' Society in late November. Once the feedback from the conferences from the bar and the public and major corporations is received, the Guidelines will be reissued with appropriate amendments, hopefully by April 15, 2006.

Concepts such as "proportionality," "quick peek," meet & confer," "claw back" "native documents" and "safe harbour" are terms, largely unknown in Canada, which are being developed in the United States and the United Kingdom and becoming more

---

[1] The Discovery Task Force wishes to thank the members of the e-Discovery Sub-Committee for their excellent work: Sara Blake, Martin Felsky, Michael Fraleigh, Derek Freeman, Karen Groulx, Christopher Leafloor, Daniel Pinnington, Glenn A. Smith, Phil Tunley and Mohan Sharma.

common in discussion with lawyers in Ontario. These terms will need to be defined and refined in discovery practice.

Our rules define a document as including a digital document. The sheer volume of digitally retained material, particularly e-mails, is quickly changing the face of discovery and will continue to do so.

To date, this has largely been a consideration for the large document case, but as lawyers adapt to recognition of sources of data retention, this will be an important feature for what may be regarded as the standard case. Class actions are but one example of specific types of cases for which the discovery obligations need to be "tailored" to meet the needs of the case.

The need to consider and meet the requirements of proportionality will be a feature of discovery management, and underscores the need for specific guidelines for specific kinds of cases.

The neutral balancing of the interests of privacy, intrusion into confidential and proprietary methodology will remain a challenge for all interested parties. The need for early consideration "meet & confer" has yet in Canada to be widely accepted but is necessary to avoid costs being incurred that could and should be minimized.

The DTF recognizes that e-Discovery issues provide an opportunity for a new approach to resolution of discovery issues. The rapid change in technology provides access to much more information than was humanly possible even a few years ago. The preservation and destruction of electronic documentation is a challenge yet to be met. Spoilation as a tort will receive more attention in the field of digital communication.

Relevance for the purpose of disclosure and production, taking into account necessity, cost and timeliness, will have to be carefully considered on an ongoing basis that may not be able to be entirely captured within rules.

Two recent cases from the United States, which by any definition should be regarded as standard employment/wrongful dismissal cases, are examples of the need for companies, clients, lawyers and the judiciary to address issues of disclosure, production and discovery in innovative but yet productive ways. (See Endnote 2.)

The DTF has concluded that guidelines can be flexible so as to be adapted to different applications, predictable for those who have to give advice or decide, but also up-to-date and accessible.

It is our expectation that, with the cooperation of Law Pro and the Law Society of Upper Canada, the dialogue will continue providing ready web-based access to protocols, guidelines, agreements, court orders, and directions from Ontario, Canada, the United States, the U.K. and other jurisdictions. This material, it is anticipated, will keep the Guidelines current.

7. Ongoing Issues

With the cooperation of the above-noted bar organizations and other specialty groups, it is intended that small panels of lawyers, masters and judges will assist in the development of best practices in other areas using the e-Discovery Guidelines as a format.

Some of those topics for future consideration are personal injury/motor vehicle, medical malpractice, construction, employment, general commercial and defamation; others will follow in due course.

The area of expert reports as part of the discovery process remains a significant issue for many kinds of actions and is being considered by a number of groups, including the judiciary. The DTF intends to monitor and cooperate with those developing guidelines in this important area.

The best practices that we expect will develop and evolve over time are founded in a culture change that is driven by the recognition of the need for change. The fundamental premise behind the need for change is the recognition that much of civil litigation is too costly and too time-consuming to provide adequate justice to the litigants.

As that culture develops and changes, there will be a need for reinforcement of some new practices to be reinforced by rules to deal with defined situations. With the initiative and support of bar organizations, it is anticipated that rule changes, when necessary, will be consensually supported by both the legal profession and the judiciary.

Endnote 1

How To Get Co-Operation From The Defence When Acting For The Plaintiff
by Thomas P. Connolly

How To Get Co-Operation From The Plaintiff (When Acting for the Defence)
by James C. Simmons, Q.C.

Reducing the Time and Cost Associated with Performing an Examination for Discovery
by Barry A. Percival, Q.C.

How to Handle Paper: Dealing with the Large Document Cases
by Harvin D. Pitch

Confidentiality and Authenticity
by Wendy Matheson

Preparing the Client
by Matthew P. Gottlieb

Multi-Party Discovery
by V. Ross Morrison

Preparation for Oral Questions
by James C. Morton

Examination for Discovery: How to Handle Difficult Counsel
by Karen B. Groulx

Discovery and the Opinion of Experts
by Darryl Cruz

Information from Non-Parties
by Robyn M. Ryan Bell

How to Deal with and Minimize Refusals and Undertakings
by Paul Tushinski

Motions: Avoidance and Getting the Right Result
by Master Calum U.C. MacLeod

Endnote 2

Zubalake v. USB Warburg LLC No. 2
2004 WL 1620866 (SDNY July 20, 2004)

Calema v. Morgan Stanley
2005 WL 679071 (Fla. Ct. March 1, 2005)