

THE DISCOVERY PROCESS IN LITIGATION

Introduction – The Place of Discovery in the Litigation Process

Newcomers to civil litigation are often surprised to learn how much of the time and money spent in a lawsuit is tied up in the process known as “discovery”. It has often been said that a civil lawsuit involves three separate stages: pleadings, discovery and trial. Since the preparation of a pleading (a statement of claim in the case of a plaintiff and a statement of defence in the case of a defendant) simply involves the drafting of a single document, usually no more than ten pages in length, the pleadings stage of an action is normally over quite quickly and involves comparatively little expense. At the other end of the process, since most litigation is resolved by some form of out of court settlement, the actual trial of a lawsuit, although it can be very time consuming, expensive and stress-inducing, in the vast majority of lawsuits does not happen at all. However the interim phase of discovery, between pleadings and trial, is where the majority of the expense and time involved in the average lawsuit is to be found.

What is Discovery?

Discovery is the process by which the parties, having stated their legal positions in their pleadings, are given an opportunity to fully explore all of the evidence that exists relating to those issues before they are obliged to present their case in a formal trial to a judge or jury. Discovery takes two broad forms: documentary discovery and oral examinations under oath. In Ontario, the parties to every civil lawsuit have an obligation to make their knowledge and their documents available for full disclosure to the opposition prior to trial. In respect of documents in particular, the *Ontario Rules of Civil Procedure* impose a positive obligation on all parties to produce for inspection by every other party all documents in their possession, control or power that relate in any way to the matters that have been raised in the litigation. Parties who embark on litigation either as a plaintiff or a defendant should thus be aware of the practical necessity to very quickly put into their enemy’s hands every document in their own files that relates to the case - not just those that are helpful to their own position, but also those that are harmful.

Documentary Discovery

The scope of documentary discovery in Ontario is very broad and encompasses not only paper documentation but also all forms of electronic documentation. The test for relevancy is also very low, much lower than the test that is used to determine whether or not a document would be admissible as an exhibit at trial. It has been said that any document that has a “semblance of relevancy” to the issues in the lawsuit must be voluntarily produced for inspection by the other side. In the typical commercial case, this often leads to parties having to produce an immense mass of documentation to one another. Needless to say the process by which lawyers review and prepare their own client’s documentation for presentation to the other side, and then carefully examine all

of the documents produced by the other parties to the litigation is very time-consuming (and thus expensive to the client).

Oral Discovery

Typically once the documentary production process has finally ended and the parties are reasonably content that they have had all of documents in one another's possession produced and have had an opportunity to review those documents, the parties will schedule oral examinations for discovery, similar to what U.S. lawyers call "deposition". These examinations take place in either the lawyers' offices or in a court reporter's office. It does not take place in court and there is no judge or other officer of the court present to direct witnesses or to make rulings about questions. The witness is asked questions by lawyers for opposing parties and is obliged to answer those questions under oath or affirmation. A transcript is kept by a court reporter of all of the questions and answers given. If counsel for the party being examined believes that a question is improper, he or she is entitled to state so, and to instruct the witness not to answer the question.

In Ontario, unlike most U.S. jurisdictions, parties are limited to conducting one examination for discovery of each opposing party and in the case of a corporate party, the examining party must select a representative of that corporation who will answer all of the questions on behalf of the corporation. A person who is a representative at an examination for discovery on behalf of a corporation has an obligation to inform himself or herself ahead of time by reviewing documents and asking other employees of the corporation about the issues.

Undertakings and Disputes Arising out of Discovery

Typically, a witness will often have to indicate during the examination that he or she does not personally know the answer to a question asked. In that case the party is typically required to provide an undertaking to try to obtain information on the question from other sources available within the corporation and provide an answer at a later date (usually in writing and sent through counsel) to opposing parties.

Disputes over whether questions are proper or improper and whether undertakings have been promptly and properly answered are resolved in subsequent court proceedings by way of motion, normally called motions for "undertakings and refusals".

Completion of Discovery

The discovery process itself thus breaks into three separate components: the production of documents, the conduct of the oral examinations for discovery and the follow up process of resolving disputes over refusals and obtaining answers to undertakings. While a party may set an action down for trial at any stage, the *Rules of Civil Procedure* prevent a party who does so from continuing any further form of discovery thereafter. As a result, it is normally imperative that a plaintiff at least complete the entire discovery process before they set the action down for trial, a step which formally advises the court that in the plaintiff's opinion, the matter is ready to proceed to trial.

The Importance of Discovery and Settlement of the Litigation

While the process of discovery may appear to be very frustrating and expensive, it does lead to a very beneficial result. The fact that discovery necessarily requires each party to fully explore their own case and the case that the other side presents, allows the parties to come to a very clear understanding of exactly “what happened?” and what the evidence about those happenings is likely to be. This process permits the parties to make informed decisions after the discovery about whether they wish to continue to trial. For that reason serious, and often successful, settlement discussions usually follow the completion of discovery. These post-discovery settlement discussions often lead to the parties agreeing about how to resolve the proceeding, without the expense, the aggravation and the uncertainty that is involved in a full trial of the action.

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