

JOURNAL ARTICLE NO. 6
TASK FORCE ON THE DISCOVERY PROCESS
IN ONTARIO: DETERMINING THE FUTURE
OF EXAMINATIONS FOR DISCOVERY
IN ONTARIO

INTRODUCTION:

Every litigator has encountered improper objections made by opposing counsel on an examination for discovery. Further, we all have experienced either excessive requests for information and documents, or alternatively, untimely and disorderly disclosure. One of our seminars in this class was devoted to learning about abuses of examinations for discovery. If only we could redraft the Rules of Civil Procedure to streamline the discovery process and eliminate the abuses. Now we have all been invited to come forward and share our experiences of discovery abuse and our proposal for reform of the discovery process.

In March, 2002, the Ontario Ministry of the Attorney-General announced the appointment of a Task Force to examine the discovery process.¹ The Task Force was provided with a mandate to review all aspects of the discovery process in Ontario, identify problems with the existing process and make recommendations for reform.

The six member Task Force is chaired by Ontario Court Superior Justice Colin Campbell. Other representatives of the Task Force include: Ontario Court Superior Justice Catherine Aitken, two representatives of the Ministry of the Attorney-General, Debra Paulseth and Ann Merritt, and two senior members of the Bar, Kristopher Knutsen of Thunder Bay and Susan Wortzman of Toronto.

The Task Force shall engage in province-wide consultation, conduct empirical research and review the discovery process in other jurisdictions. It is anticipated that the report of the Task Force shall be provided in late 2002.

The recommendations contained in the report of this Task Force may have a great impact on all litigators practicing law in the province of Ontario. It is important that we all consider the role of the discovery process in our practice, and how examinations for discovery may be improved. Our collective experiences and our ideas for the improvement of the discovery process should be provided to the Task Force to assist it in shaping its recommendations to improve the discovery process.

¹ *Law Times*, March 18, 2002 at p.1.

BACKGROUND:

The Civil Justice Review² was established in 1994. The Review's mandate is "to develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure which will maximize utilization of public resources allocated to civil justice."

In March, 1995, the Civil Justice Review released its first report setting out seventy-eight recommendations designed to create a modern civil justice system. As a result of the first report of the Civil Justice Review, a number of important changes were made, most notably the expansion of alternative dispute resolution and the development of civil case management to manage the flow of cases and eliminate the backlog of civil cases. The first report also identified a number of issues which required further development and were deferred to the Review's final report.

The supplemental and final report of the Civil Justice Review contained thirty-six additional recommendations in addition to those made in the first report. The supplemental and final report also updated the implementation of the recommendations of the first report.

The reports of the Civil Justice Review identified examinations for discovery as being a critical component in the conduct of litigation. Notwithstanding this finding, the Civil Justice Review expressed concerns that examinations for discovery have become too time consuming and costly to continue without some controls. The current broad scope of pre-trial disclosure and discovery was identified as a contributing factor to the growing length of examinations and the increase in cost.

The supplemental and final report of the Civil Justice Review suggested a more in-depth study of the problems associated with the discovery process. The report recommended that the Civil Rules Committee constitute a working group to make recommendations concerning the current Rules governing discovery with the objectives of preserving the disclosure principles while improving economic efficiencies.

Since the final report of the Civil Justice Review various professional organizations such as the Canadian Bar Association and the Advocates Society have identified similar problems with the discovery process and proposed reforms. To date, notwithstanding the various proposals for reform, only minor changes have been made to the Rules governing the discovery process in Ontario.

² *The Reports of the Civil Justice Review* are available on the Ministry of the Attorney-General web site at www.attorneygeneral.jus.gov.on.ca.

APPROACH OF THE TASK FORCE ON THE DISCOVERY PROCESS:

The Ontario Court's web site³ contains a consultation paper setting out the mandate of the Task Force and the background to the existing call for reform to the discovery process. The consultation paper states "To date, no comprehensive review of the discovery process in Ontario has been undertaken". The Task Force has been provided with the mandate to undertake this role to identify problems with the existing process and make recommendations for reform.

The consultation paper provides an overview of the current Rules of Civil Procedure which require the production of documents and which govern the procedure for oral and written examinations for discovery. In the consultation paper, the Task Force outlines the purpose for the amendment of the Rules of Civil Procedure in 1985 to broaden the scope of pre-trial disclosure. The consultation paper identifies the concerns of the Civil Justice Review that these amendments to the rules governing discovery may have lead to unnecessarily broad requests for information, which may intentionally or unintentionally exhaust the financial resources of the opposing party. Also identified as a concern in the consultation paper is the impact of the substantial growth of information services and available data as a result of changes in technology greatly increasing the material available for discovery purposes.

The consultation paper also invites the comments of Judges, lawyers and litigants from all parts of Ontario by May 6, 2002.

ISSUES FOR CONSULTATION:

The Task Force has produced a detailed questionnaire which is contained at the Ontario Court's web site. This questionnaire sets out the issues for consultation to include the following:

1. The key objectives of documentary and oral discovery;
2. The key problems with discovery;
3. Factors contributing to increased cost of discovery or delays in the discovery process; and
4. What approaches to reform should be considered.

In my journal article no. 2, I identified a number of the purposes of examinations for discovery.⁴ The consultation paper of the Task Force lists a number of additional considerations and asks the respondents to consider whether each is a key objective of discovery. A review of the factors

³ See www.ontariocourts.on.ca/discoveryreview/consultationpaper.doc.

⁴ In the preparation of my list of the purposes of discovery in my Journal Article No. 2., I referred to R.B. White, *The Art of Discovery*, Canada Law Book, Aurora, Ontario, 1990.

cited by the Task Force in the consultation paper may be of assistance in identifying additional objectives to be kept in mind when planning and conducting examinations for discovery.

The key problems with discovery identified in the issues for consultation serve as a grim reminder of the potential abuses of examinations for discovery. This list may also be helpful as a reminder of conduct which good counsel should seek to avoid.

REFORM OF THE DISCOVERY PROCESS:

In my view, the most important work of the Task Force shall be its recommendations with respect to the reform of the discovery process. In the issues for consultation provided by the Task Force, a number of approaches which have been adopted in other jurisdictions are listed for consideration. The Task Force suggests a number of possible reforms and invites respondents to suggest whether each of the proposed reforms would have a positive or negative impact on the discovery process. Various suggestions include narrowing the scope of discovery, requiring early disclosure of certain aspects of a claim with pleadings, and the imposition of stronger sanctions to deal with issues such as untimely or disorderly production of documents and unnecessary discovery related motions.

With respect to oral discovery, the Task Force identifies various possible reforms used in other jurisdictions, primarily in the United States, many of which we have examined in this course. These possible approaches include eliminating the automatic right to oral discovery and placing limits on oral discoveries. Other possible reforms suggested include immediate rulings on discovery disputes and eliminating rights of objection.

The Task Force has also invited comment on its reform options and invited additional suggestions to reduce the time and cost of discovery and to reduce the disputes relating to refusals and undertakings.

CONCLUSION:

Although the Civil Justice Review has acknowledged the important role of examinations for discovery, it has also identified the overwhelming concerns with respect to cost and delay in the discovery process. The Task Force on the discovery process has now been established to consult with the judiciary, the Bar and litigants and to conduct empirical research with respect to the discovery process.

The Task Force shall also consider the manner in which the discovery process is used in other jurisdictions and the different rules used to govern the process in those jurisdictions. It is anticipated that the report of the Task Force shall recommend changes to address the concerns of the expense and delay which have arisen from the existing process.

I regard examinations for discovery to be a very integral part of the litigation process. I believe that the recommendations of the Task Force, and the changes to the discovery process which may follow, could have a substantial impact on the practices of all litigators. I shall respond to the inquiry of the Task Force by advising of the important role which I believe examinations for discovery play in my practice and shall recommend that stronger sanctions be imposed against parties and/or counsel who abuse the discovery process. Please consider your ideas for reform to improve the discovery process and share those recommendations with the Task Force.