

**Civil Procedure**  
**Fall Term 2024**

**LECTURE NOTES NO. 11**

**DISCOVERY: INTRODUCTION**

... pre-trial discovery is an invasion of a private right to be left alone with your thoughts and papers, however embarrassing, defamatory or scandalous. At least one side in every lawsuit is a reluctant participant. Yet a proper pre-trial discovery is essential to prevent surprise or "litigation by ambush", to encourage settlement once the facts are known, and to narrow issues even where settlement proves unachievable.

[\*Doucette \(Litigation Guardian of\) v. Wee Watch Day Care Systems Inc., 2008 SCC 8 at para. 24 \(S.C.C.\)\*](#) per Binnie J.

Discovery is usually the most productive, most expensive, and most fought over stage in the civil litigation process.

In 2010, the Rules changed in substantial ways in respect of discovery:

- Introduction of the over-arching 'proportionality' principle and 'discovery plans';
- Changes to the standard of relevancy;
- Time limits on oral discovery (7 hours, except for simplified proceedings in respect of claims under \$100,000 per defendant under R.76 in which 2 hours is the limit).

These changes were made in the hope that discovery will be faster, cheaper, and more efficient in future. Time will tell if the reforms have the desired effect.

***The purposes of discovery:***

- Re-enforce your theory of the case;
- Understand your opponent's theory of the case;
- "Discover" where evidence may be available to support your case;

- Assess the quality and quantity of documentary evidence and testimony supporting each side, and what further investigation needs to be done;
- Predict impact of key witnesses for and against your case;
- Obtain admissions respecting facts not in dispute, the content and authenticity of documents, the existence of other documents – this helps to narrow the issues;
- Commit your opponent's witnesses to their evidence;
- Put yourself in a position to make or respond to a settlement offer, to mediate, and to attend a pre-trial hearing with a judge

## **STAGES**

### **1. Discovery Plan (if ordered or counsel makes an agreement)**

#### **Rule 29.2**

29.1.3 (1) Where a party to an action intends to obtain evidence under any of the following Rules, **the parties to the action shall agree to a discovery plan in accordance with this rule:**

1. Rule 30 (Discovery of Documents).
2. Rule 31 (Examination for Discovery).
3. Rule 32 (Inspection of Property).
4. Rule 33 (Medical Examination).
5. Rule 35 (Examination for Discovery by Written Questions).

(2) **The discovery plan shall be agreed to before the earlier of,**

- (a) 60 days after the close of pleadings or such longer period as the parties may agree to; and**
- (b) attempting to obtain the evidence.**

(3) **The discovery plan shall be in writing, and shall include,**

- (a) the intended scope of documentary discovery** under rule 30.02, taking into account relevance, costs and the importance and complexity of the issues in the particular action;
- (b) dates for the service of each party's affidavit of documents** (Form 30A or 30B) under rule 30.03;
- (c) information respecting the timing, costs and manner of the production of documents by the parties and any other**

persons;

(d) **the names of persons intended to be produced for oral examination** for discovery under Rule 31 and information respecting the timing and length of the examinations; and

(e) **any other information intended to result in the expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action.**

(4) In preparing the discovery plan, the parties shall consult and have regard to the document titled “The Sedona Canada Principles Addressing Electronic Discovery” developed by and available from The Sedona Conference.

29.1.4 The parties shall ensure that the discovery plan is updated to reflect any changes in the information listed in subrule 29.1.03 (3).

**29.1.05 On any motion under Rules 30 to 35 relating to discovery, the court may refuse to grant any relief or to award any costs if the parties have failed to agree to or update a discovery plan in accordance with this Rule.**

- The need for a ‘discovery plan’ was introduced in 2010. This directly relates to another important change – limiting the parties to 7 hours of oral examination, except with consent or leave (2 hours for simplified proceedings under R.76); see Rule 31.05.
- The problem in the past has been lengthy and expensive discoveries in simple cases which abused the system; the accent now is on ‘proportionality’

## **2. Documentary Discovery**

30.02 (1) Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document.

Production for Inspection

(2) Every document relevant to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in rules 30.03 to 30.10, unless privilege is claimed in respect of the document.

...

## Party to Serve Affidavit

30.03 (1) A party to an action shall serve on every other party an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power.

### Contents

(2) The affidavit shall list and describe, in separate schedules, all documents relevant to any matter in issue in the action,

(a) that are in the party's possession, control or power and that the party does not object to producing;

(b) that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for the claim; and

(c) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location.

(3) The affidavit shall also contain a statement that the party has never had in the party's possession, control or power any document relevant to any matter in issue in the action other than those listed in the affidavit.

### Lawyer's Certificate

(4) Where the party is represented by a lawyer, the lawyer shall certify on the affidavit that he or she has explained to the deponent,

(a) the necessity of making full disclosure of all documents relevant to any matter in issue in the action; and

(b) what kinds of documents are likely to be relevant to the allegations made in the pleadings.

### Affidavit not to be Filed

(5) An affidavit of documents shall not be filed unless it is relevant to an issue on a pending motion or at trial.

### **3. Oral Examination for Discovery**

31.02 (1) Subject to subrule (2), an examination for discovery may take the form of an oral examination or, at the option of the examining party, an examination by written questions and answers, but the examining party is not entitled to subject a person to both forms of examination except with leave of the court. R.R.O. 1990, Reg. 194, r. 31.02 (1).

(2) Where more than one party is entitled to examine a person, the examination for discovery shall take the form of an oral examination, unless all the parties entitled to examine the person agree otherwise. R.R.O. 1990, Reg. 194, r. 31.02 (2).

#### ***Take a pragmatic approach:***

Effective discovery requires **preparation** and **planning**; don't waste your client's money and your time in proceeding to discovery before you can make the maximum use of the opportunities that you have.

**Understand the law** and what you, and the other side, have to prove to succeed.

**Be conscious of the costs of discovery** - prioritize, and construct a discovery plan that is proportionate to what is at stake in the litigation.

#### ***How Do I Prepare Effectively?***

- Obtain and review the documents in your possession that are central to the litigation – understand how they figure in your case and the other side's case;
  - Seek admissions of authenticity;
  - Seek explanations if there is uncertainty;
  - Understand the 'factual matrix' in which the document was made if the case revolves around interpretation of the contracts;
  - Etc.
- Review the discovery documents.
- Plan your questioning in sections – this way you can read answers into the trial record and the keys answers will be in context:
  - Plan to use both open-ended and directed questioning –
    - 'Did you see anything out of the ordinary before the accident?'
    - 'There was a red signal at the intersection. Is that correct?'
  - Isolate key facts and issues to develop in the examination;

- As questions with precision if intended to garner an admission - below, an admission of failing to pass on a key document:
  - 'You were the staff doctor on duty on May 11, 2012'?
  - 'You were the staff doctor on duty on May 12, 2012'?
  - 'It is standard practice for the staff doctor to be responsible for providing a surgeon with any available up-to-date pathology report before the scheduled surgery'?
  - 'There were two pathologists reports made in respect of my client'?
  - 'One pathology report was made on May 10?' [show witness and ask to confirm authenticity; Productions, Vol. 1, Tab A]
  - 'A second and updated pathology report was made on May 11'? [show witness and ask to confirm authenticity; Productions, Vol. 1, Tab B]
  - 'You received the pathologist's updated report dated May 11 on May 12, 2012 at approximately 12:30am?'
  - 'You knew the operation was scheduled for May 12, 2012 at 5:00am?'
  - 'You yourself did not provide the updated pathologist's report to the surgeon before the scheduled surgery'?
  - 'You yourself did not ask anyone to provide the updated pathologist's report to the surgeon before the scheduled surgery'
  
- Ask open-ended questions to close sections:
  - 'Do you know of anyone that provided the surgeon with the updated report?'
  - 'Is it your belief that the surgeon had the updated report? Why?'

***Prepare your client for discovery:***

Suggested points to explain:

- It's not in a courtroom, but in an office with a court reporter;
- Answer truthfully – lies will come back to haunt you ;
- Answer only the question asked;
- Ask for clarification if unsure of what is being asked;
- Talk slowly and clearly;
- Don't talk at the same time as your lawyer or the other lawyer;

- If given a document to review and answer question, read the document;
- Don't strive to impress, intimidate, or befriend the other lawyer.

### ***Understand Undertakings, 'Taken Under Advisement', and Refusals:***

#### ***Obligation:***

A person examined must answer *relevant* questions.

#### ***No answer, but an undertaking to answer:***

Giving an undertaking is (i) a promise to answer and (ii) an admission that the question is proper and relevant. A lawyer who undertakes to provide the answer at a later time must do so. An undertaking is a promise that can result in discipline if broken. Moreover, the Court may compel the answer to be given, take an adverse inference, etc – up to the lawyer or party in contempt.

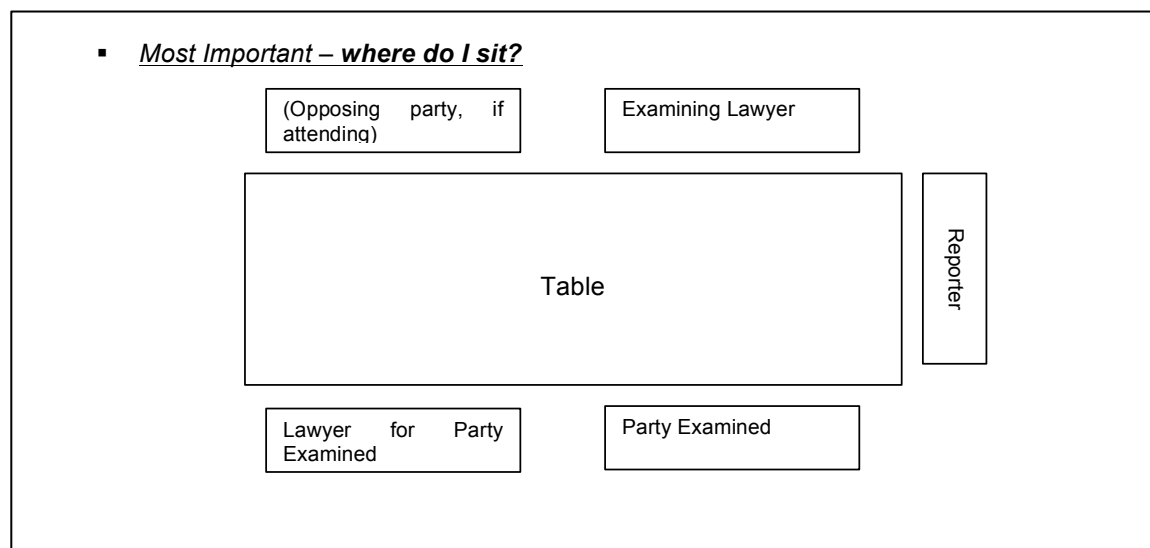
#### ***No answer, 'Taken Under Advisement':***

This means 'we're not sure we know or we have to tell you but we'll get back to you'. If no answer is forthcoming in 60 days, it is deemed a refusal.

#### ***A refusal is just that –***

Counsel may refuse his or her witness to answer on the basis that the evidence sought is irrelevant, immaterial, inadmissible (e.g. privileged), or there is some other valid reason that makes the question improper. A 'refusal motion' is a motion under Rule 37 to compel the person examined to answer.

Lawyers use charts to track undertakings, under advisements, and refusals for themselves. On a refusals motion, one must prepare such a chart from the transcript.



## FORM 37C

*Courts of Justice Act*

## REFUSALS AND UNDERTAKINGS CHART

*(General heading)*

## REFUSALS AND UNDERTAKINGS CHART

<b>REFUSALS</b>					
Refusals to answer questions on the examination of ....., dated .....					
<b>Issue &amp; relationship to pleadings or affidavit</b> <i>(Group the questions by issues.)</i>	<b>Question No.</b>	<b>Page No.</b>	<b>Specific question</b>	<b>Answer or precise basis for refusal</b>	<b>Disposition by the Court</b>
1.					
2.					
3.					
<b>UNDERTAKINGS</b>					
Outstanding undertakings given on the examination of ....., dated .....					
<b>Issue &amp; relationship to pleadings or affidavit</b> <i>(Group the undertakings by issues.)</i>	<b>Question No.</b>	<b>Page No.</b>	<b>Specific undertaking</b>	<b>Date answered or precise reason for not doing so</b>	<b>Disposition by the Court</b>
1.					
2.					
3.					

*(Date)**(Name, address and telephone and fax numbers of the party filing the refusals and undertakings chart)*

RCP-E 37C (November 1, 2005)