Discovery: Principles and Practice in Canadian Common Law

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2nd Edition

The Honourable Mr. Justice
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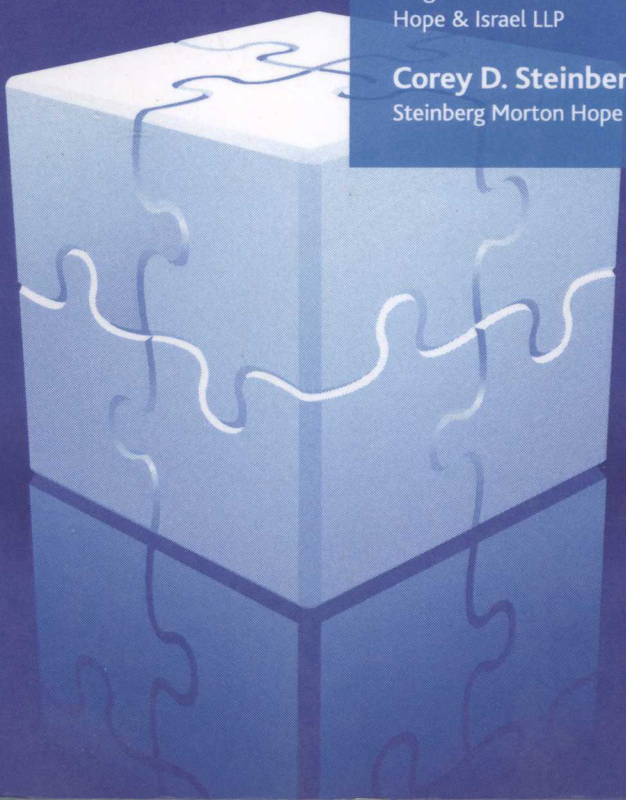

Published by CCH Canadian Limited

Edited by:
Kathleen Jones-Lepidas, B.A.

Library and Archives Canada Cataloguing in Publication

Archibald, Todd L.
Discovery: principles and practice in Canadian common law / Todd L. Archibald, James C. Morton, Corey D. Steinberg. — 2nd ed.

Includes Index.
ISBN 978-1-55367-920-2

1. Discovery (Law) — Canada. 2. Evidence (Law) — Canada. 3. Actions and defenses — Canada.
I. Morton, James C. (James Cooper), 1960-
II. Steinberg, Corey D.
III. Title.

KE8408.A78 2009 347.71'072 C2008-907535-8 KF8900.A78 2009

Typeset by CCH Canadian Limited.
Printed in Canada.

ACKNOWLEDGEMENTS

The preparation of a book is seldom possible without extensive help, and this volume is, in that respect, not unusual.

The authors have benefited from numerous counsel and judges who, by example, served as the best teachers possible. The insights developed in this book have come, in large part, from those nameless teachers.

On a more concrete level, the authors must thank all of the staff at CCH, especially Kathleen Jones-Lepidas, for their tremendous assistance in organizing and producing an attractive volume from a sheaf of manuscript pages. Also in that regard, the authors must thank Rosalie Antman for preparing the manuscript and turning it into something that could reasonably be submitted to a publisher; Rosalie's efforts and patience have no known bounds.

Corey Steinberg would like to thank his wife Karina for her exceptional tolerance of his mood and demeanour on days he is scheduled to conduct discoveries, and his daughter Vanessa for providing much-needed hugs at the end of those days. The remaining authors would also like to thank their families for their support, encouragement, and assistance; without it, this book would never have been completed.

The importance of the discovery process was emphasized by changes that were announced to the Ontario system at the end of 2008. Parties will now be required, early in the litigation process, to agree on a discovery plan that sets out the scope, the manner in which documents will be produced, and the date that the pre-trial Examination for Discovery will take place. The objective of these changes is to reduce or eliminate problems by encouraging parties to reach an understanding early in the litigation process so that

the discovery process can be completed quickly and in a manner that is proportionate to the needs of the action. Each party will be limited to a total of seven hours of pre-trial Examination for Discovery unless the parties consent otherwise or the court orders otherwise. Similar changes may be made in the other common law provinces of Canada.

T.A., J.M., and C.S.
Toronto
January 2009

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CHAPTER 1

INTRODUCTION — PRINCIPLES FOR A PRODUCTIVE DISCOVERY

Discovery in Canada

Throughout the common law jurisdictions of Canada, discovery is a central element of civil litigation. Present in almost every civil file, discovery is, arguably, more important than trial; virtually every case settles without trial, but most cases are not resolved without at least some discovery. This book will explore discovery across the country with a view to setting out its principles as they are applied everywhere.

Ordinary Discovery

In far too many cases, the discovery mechanism is a lengthy and costly process that is not used successfully to any substantial degree at trial. Virtually all experienced litigators can point to cases where discovery transcripts have extended over many volumes, productions briefs were voluminous, and yet, at trial, no reference was made to the discovery. On the brighter side, this result could have been reached because the discovery had narrowed the issues so that counsel were not required to turn to the transcripts or productions. However, the likelihood is that the discovery was conducted without any major consideration of the strengths and weaknesses of the case and, as a result, was an expensive waste of time.

In most jurisdictions in Canada, the right of discovery is so broad that matters even tangentially relevant can be examined in minute detail, and as a result, important issues can be lost in a plethora of irrelevancies. To avoid this problem, it is important for counsel to consider the nature of the case and the issues of fact and law that need to be proven prior to conducting the discovery. Such consideration will shorten the discovery, make it relevant, and avoid needless interlocutory motions arising from misperceived complexity. As noted by the *Task Force on the Discovery Process in Ontario*:

> Discovery related problems do not arise in the majority of cases, but primarily in larger "complex" cases, or where there is a lack of cooperation between opposing counsel.[1]

Benefits of Discovery

The *Task Force on the Discovery Process in Ontario* elaborated upon a number of key benefits of the discovery process that had been identified by trial counsel.[2] General benefits identified in the large majority of cases included the preparation of the client for trial, the reduction in court time if the case went to trial, and the obtaining of a better understanding of the issues. In some cases, other benefits included the identification of new documents, the identification of a new legal basis for a claim, and even new heads of damage. In many cases,[3] discovery led directly to the settlement of the claim. Those benefits are of great value but can only arise if the discovery process is properly approached.

Beyond the benefits set out above, discovery, and the requirement that the parties focus on the litigation, often have the effect of bringing the seriousness and the dangers of litigation home to the parties, thereby encouraging them to settle.

Consistent with these goals, the Osborne Report,[4] which was released in late 2007, made certain proposals that are likely to be adopted in Ontario and that will prove influential across the country:

— The phrase "relating to any matter in issue in the action" should be replaced with the phrase "relevant to any matter in issue in the action" in all rules relating to discovery. The effect of this recommendation is to discard the "semblance of relevance" test and replace it with a simple relevance test.

— Amend Rule 31 to provide that each party has up to a maximum of one day (seven hours) to examine parties adverse in interest, subject to a different agreement or to a court order.

— As a best practice, encourage parties to voluntarily answer questions at an examination for discovery that are objected to on the basis of relevance, as permitted under Rule 34.12(2). In addition, encourage

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[1] Ontario, Ministry of Attorney General, *Task Force on the Discovery Process in Ontario* (Toronto: Task Force on the Discovery Process in Ontario, November 2003) ["Task Force Report"] at 54.

[2] Task Force Report, Appendix L

[3] Between 50% and 65% of cases reported.

[4] See http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/

the court to consider the availability of the process in Rule 34.12(2) when it is making the appropriate cost awards on refusals motions.

If these proposals are adopted, they will have the effect of speeding up discovery without unduly limiting its value.

How to Approach Discovery

In terms of documentary production, it is clear that a party must make full disclosure of all relevant documents, failing which that party will be subject to sanctions before or at trial. Counsel would be wise to hold the opposite party to its full disclosure obligations in almost every case, even to the point of insisting upon a listing of privileged materials. The documentary productions form the basis for sound preparation for the discovery. Pleadings are often boilerplate general assertions with little basis in reality; the documents usually tell a far more accurate tale than the pleadings.

At trial, most cases do not require the production of a large number of documents or extensive evidence on many issues. Most cases hinge on one or two issues and two or three documents. Apart from the main issues, an agreed statement of fact can usually be arrived at.[5] Once counsel has had an opportunity to review both the pleadings and the documentary productions, counsel will be in a position to determine, at least in general terms, what the real issues of the case are likely to be and to set out a preliminary list of good and bad facts to be discovered. It is upon these facts that the examination for discovery must focus.

Ideally, counsel should be able to reach the point where they can conduct an entire trial based upon the discovery transcripts. At first blush, it would seem arguable that such extensive preparation for discovery is excessive because most cases do not go to trial, and to prepare for discovery in this fashion, it is almost necessary to conduct trial preparation before discovery. In fact, however, the cost-savings of a shorter and more focussed discovery usually balance out the extended costs of preparation. In addition, the sharpened focus of the discovery transcript is a major asset at trial and often, in itself, leads to an enriched settlement before trial.[6]

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[5] Thus, for example, in a wrongful dismissal case, facts such as start date, salary and benefits, and termination can and should be agreed upon.

[6] One of the authors recalls an interesting anecdote shared with him by very senior counsel. When that senior counsel was a first-year associate, he was approached by the firm's senior partner, who declared that he would conduct the examination for discovery but would leave the trial to the associate. The associate felt very important, given that he was being entrusted with the trial, while the senior partner was merely conducting discoveries. By the time he realized that the file was ripe for settlement immediately following discoveries, he had a whole new respect for the importance of an effective, thorough examination.

The Preparation

As a general rule, preparation for discovery should be based on the premise that counsel should work backwards from the judgment being sought at trial. Put otherwise, it is helpful to conceptualize what amounts to almost a "draft closing" argument that sets out both the facts and applicable law while preparing for discovery.

In that way, counsel will not lose sight of any of the essential elements upon which to discover.

Remember that in drafting a closing, counsel should try to keep the issues as simple as possible. This does not mean triviliazing a case or its issues, but rarely does a civil matter have more than a few significant issues. A meandering discovery will not be useful at trial. The "draft closing" will certainly change before trial, so that elegance in form is not needed; but the analysis in the closing will form a basis for the rest of the case, so care should be taken in defining and synthesizing the issues.

In preparing a draft closing, begin by setting out the significant issues. Then analyse each issue, in detail, with specific reference to the facts in support of each position. Deal with every fact that is relevant, whether it is helpful or not. Attempt to explain away unhelpful facts. One of the key goals at discovery is to address the weaknesses in the case. At the end of the discovery, counsel should be in an optimal position to assist in educating their client about the probabilities of success or failure at trial.

Review the closing again and list every fact referred to, even obliquely. The facts can be listed in a table for further information under columns entitled "How to Prove," "Contested," and "Fact Unfavourable/Favourable?". These columns should be completed. The column dealing with "Fact Unfavourable/Favourable" is important because, even if a fact *can* be proven, it should not be proven at trial if it does not help your case. Sometimes, counsel fail to prove helpful facts or will inadvertently prove the other side's case. But at discovery, you must attempt to discover the strengths of the other side's case so that you are in the best position to judge how strong your own case is. Accordingly, even unhelpful facts ought to be explored at discovery, even if they will not be proven at trial. A few typical entries on a fact table might look like this:

Fact	*Contested*	*Fact Favourable*	*Fact Unfavourable*
P and S were equal partners	No	Yes	No
S opened competing office while still a partner of P	Yes	Yes	No
P locked S out of their business offices	No	No	Yes

Based on the fact table, a list of discovery questions can quickly be set out and pursued at the examination. Facts that are unlikely to be contested should be made the subject of requests to admit prior to trial.

Good Facts and Bad Facts

One of the key characteristics of discovery is that it can be used against the adverse party. One of the authors recalls learning in law school about examinations for discovery from a very experienced litigator, who asked, "First, what is the purpose of discovery? It is not just to learn information. It's to shout to the other side how weak their case is (or concomitantly, how strong your case is)."

Put somewhat differently, discovery is a fact-finding proceeding that provides for the obtaining of admissions. These admissions may be enough to demolish your opponent's case. In conducting an examination, it is not a mistake to uncover information that is harmful to your case. On the obverse side, the disclosure of harmful information cannot be avoided if it is properly asked for by your opponent. In preparing for discovery, it is essential to consider the good facts and the bad facts.

Every case has good facts and bad facts. Bringing out the good facts is an important part of discovery: for example, obtaining admissions that contracts were signed, that parties received independent legal advice, that an injury has fully healed. But the framing of bad facts is even more important. Examining counsel will want the opposing side's bad facts to be elicited in the worst light possible, while counsel for the party who is answering the questions will attempt to have the facts framed in as neutral a light as possible. That being said, where a fact is bad and cannot be attenuated, it should be admitted squarely and dealt with accordingly. The concession of harmful facts is usually not a negative strategy. On the other hand, an attempt to cover them up or to improperly hinder the other side's ability to uncover the facts is never a successful strategy. If the facts truly undercut the strength of the case, then real thought should be given to settling the case.

The following is an example of a bad fact that cannot be softened. It is used to point out the strategy of conceding the negative fact with an explanation. It arose in a restaurant/franchise case. The franchiser was keen to terminate the franchise. The franchisee obtained a report that concluded that the restaurant was generally clean but had a problem with cockroaches. Attempting to mitigate the fact of the existence of cockroaches by suggesting that the roaches were few in number[7] would simply draw stark attention to the health issue. The better approach was to admit, directly, that there were cockroaches but to establish that pest control procedures were being implemented.

More generally, counsel should consider how the disclosure of a fact is to be made. The choice of language can be important. Suppose the disclosure of background facts about a witness is necessary. The witness has a criminal record, a drinking problem, is married with two children, and has a full time job as a shipper/receiver. If the witness is described as "a man with a criminal record and a drinking problem who works as a shipper/receiver and who has a wife and two children," the first reaction to the admission may well be extremely negative. If, by contrast, he is described as "a married man with two children who has a full time job as a shipper/receiver; he has an issue with alcohol and does have a criminal record," then the first impression created may be of a responsible citizen who has some difficulties. When preparing to disclose bad facts, consider the most advantageous way to frame the bad facts, but do not mislead or dissemble.

Regardless, in seeking disclosure, ensure that all of the facts, both good and bad, are brought out at discovery. Otherwise, counsel will never be able to gauge the true strength of their case. You will not be providing your clients with appropriate advice if you are not in a position to properly assess whether to settle the case or to proceed to trial.

Short or Long

Discovery, once you have narrowed the facts of the case, need not be extensive or very time-consuming. A certain elicitation of background evidence is helpful, but a concentrated examination of the issues that matter can usually be completed in a half day or less. Focus on what matters, and the length of the examination for discovery will follow.

Certain exceptions to the rule of "shorter is better" exist. Construction cases often involve dozens of small trials within one large trial. In such cases, the details of each alleged fact must be reviewed, and discovery can be

[7] This is a real case and that option was considered.

lengthy. Similarly, when numerous specific events are alleged, such as in a fraud case against an employee where dozens of small frauds are alleged to have taken place over an extended period of time, each fraud must be reviewed in detail.

Another situation where discovery may be appropriately long arises when electronic documents and their production are in issue. In order to ensure that full production has been made, it may be necessary for every e-mail to be reviewed; questions involving "meta-data" could be included.[8] Such examinations can be lengthy.

[8] Data about data; such as the time and date a document was created, modified, or printed.