The Role of Discovery in Civil Litigation

THE PRIMARY PURPOSE of civil litigation is to resolve disputes that arise between parties with conflicting interests. Rule-makers have determined that well-informed parties make rational decisions, and rational decisions rarely include a trip to the courtroom.

The discovery process has its basis in the disclosure of facts and full disclosure should lead to informed settlements. The orderly settlement of cases improves harmony among citizens, who have recourse to the courts instead of lethal weapons. It reduces the demand for trial judges and the costs associated with the administration of justice — at least, that is the theory.

In defence of their clients, experienced counsel use the discovery rules to withhold what they can; then they disclose as favourably as they are able what they cannot withhold. They use those same rules to learn what they can of the case of the opposition. It is a fact of life that there exists a great disparity in the resources of competing parties, and it is also true that unequal talent of their counsel causes an impact in the management and conclusion of cases. This disparity and inequality play out in the

discovery process, both documentary and oral. Litigators should constantly consider how the case is best presented, and this consideration should extend to all components of the discovery process.

This handbook makes the central point that the discovery process is an opportunity for litigators to better serve their clients. The rules of civil procedure have become more complex. Experienced litigators can use their expertise as a weapon to outgun their junior counterparts, but through preparation and practice, less experienced counsel can level the playing field. Without a solid appreciation for the best discovery practices, novices put the interests of their clients at risk.

Virtually everything that a lawyer does is directed to accomplish one of two objectives: to gather information and to accomplish the best result for the client in light of that information. The discovery process plays a fundamental role with respect to both of these objectives. First, through the proper use of discovery, a party should learn everything of substance that is known to the opposing party. Second, by appropriate disclosure, and by exposure of weaknesses in the case of the opposition, a party can persuade the opposition about the merits of a position.

Trials are adversarial processes. Without formal rules, one party would rarely disclose information to the other; with formal rules, disclosure ceases to be voluntary. A party who discloses information under threat of sanction will disclose only as little as that party can get away with; however, through the discovery process, the other party has weapons to compel full disclosure. One of these weapons, the examination for discovery, is free-form. The

second weapon, documentary disclosure, tends to be more tightly regimented.

At trial, judges assume that the lawyers know their cases—such an assumption is often incorrect. Through the proper exploitation of the discovery rules, counsel should be well-informed, and trial by ambush is the result of a lack of proper preparation, as is an increased risk of a negligence claim against the lawyer.

Inexperienced counsel can exploit one major advantage: where the experienced, successful lawyer is very busy and very expensive, inexperienced counsel may have more time. Their time may be less expensive, which translates into greater preparation time. Preparation can be a great leveller of uneven playing fields. If you find yourself up against more experienced counsel, you may have to spend far more time than does your opponent in preparation. This will allow you to overcome the gap in skill or credibility that you face.

Consider that litigation typically breaks down into four components.

- THE PLEADINGS STAGE: The parties declare their positions. They state both facts and legal propositions that support those positions.
- THE DISCOVERY STAGE: The parties disclose information in their possession and seek out information in the possession of the opposition.
- THE NEGOTIATION STAGE: While mandatory or voluntary mediation may take place prior to discovery, it requires a certain level of disclosure to enable the parties to make informed decisions. Often, parties

must complete the discovery stage before they have enough information to resolve the dispute with the confidence derived from full disclosure.

- THE TRIAL: It involves extensive preparation aimed specifically at the evidence to be called at trial. Parties who have not yet completed the discovery stage, or who have done so without skill, face an opposition case they cannot properly anticipate. Counsel may have to ask questions or take positions without certainty as to the outcome; accomplishing objectives therefore becomes less predictable.

It has often been said by senior litigators that trial preparation begins with the initial interview, making interview skills vitally important to litigators. In the discovery stage, however, trial preparation really takes off: the theories advanced by opposite parties are now tested and disclosure of documents is made under threat of judicial sanction. Examination of opposing parties or, in American jurisdictions, of witnesses on trial disclosure lists, occurs under that same threat of judicial sanction. That said, discoveries are not mini-trials. The tactics used in the discovery process can be entirely different than those used at trial. Counsel can use discovery as a "trial run" in which they advance a line of questions or a theory to determine whether these will succeed.

Discovery can be more exhaustive than trial, in that relevance at that stage of the process tends to be a much broader concept than at trial. Counsel may later make concessions or stipulations that reduce the issues from those initially pleaded, and the determination of

whether to make such concessions or stipulations may well originate from evidence learned at discovery. If a theory seems unlikely to succeed, counsel may choose to abandon it.

While most of the discovery activity appears to take place during the oral discovery portion, the documentary disclosure, which should occur prior to the oral discovery, can be more important in many cases. Many, if not most, of the questions asked in oral discovery will find their foundation in documents produced by one party or the other beforehand.

Documentary disclosure should not be a tactical exercise. Its governing principle is that all relevant documents must be disclosed unless they are privileged; nevertheless, issues arise around relevance, privilege, and the level of effort required for them to be found, compiled, and disclosed. The role of discovery is therefore to inform the parties of the facts and evidence before trial. If properly implemented, it should increase the likelihood of a fair settlement; failing this, it should ensure a fair trial.

Within the documentary disclosure phase of discovery, the following questions arise:

- What documents are relevant?
- How should they be grouped and described?
- What documents are relevant but should nevertheless be withheld, and on what basis?
- How do the documents prove or contradict components of the theory of the case?
- What should counsel do with the information learned from documentary production?

Within the context of examinations for discovery or pre-trial depositions, the following questions arise:

- What witnesses are most appropriate, and why?
- How should witnesses be prepared for their examinations?
- How should counsel be prepared to conduct the examinations?
- What tactics apply during the course of the oral examinations?
- What should one do after the examinations, especially with the undertakings to provide further evidence and the refusals given to controversial questions?