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Oral and Documentary Discovery Under the New Supreme Court Rules

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ORAL AND DOCUMENTARY DISCOVERY UNDER THE NEW SUPREME COURT RULES

I. Introduction

This paper is intended to be a brief introduction to the oral and documentary disclosure process under the new Supreme Court Rules which come into effect on July 1, 2010. The new Rules represent a radical change from the way we have practiced although, ultimately, what will come into effect on July 1, 2010 is nowhere near as drastic as was first proposed. So come next summer, we must abandon our well leafed White Books by the side of the lake and take the plunge; although we know how to swim, these are very different waters.

The new Rules have grown from a recognition that our legal system was becoming less user friendly and too costly, a phenomenon recognized by many other common law jurisdictions. Apparently, the time had come for our civil process to be streamlined so that cases can be settled quickly and affordably and matters that needed to get to trial can do so quickly and affordably. Thus, the *Rules of Court* were rewritten to achieve the objective of "proportionality" which is set out in subrule 1-3(2) as follows:

> (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the process in ways that are proportionate to
>
> (a) the amount involved in the proceeding,
>
> (b) the importance of the issues in dispute, and
>
> (c) the complexity of the proceeding.

As defence counsel we have been taught to obtain every possibly relevant clinical and employment record, engage a plethora experts to conduct independent medical examinations, carry out thorough discoveries and interview any and all possible witnesses; to leave no stone unturned. The Civil Justice Reform Working Group's report, which paved the way for the new *Rules*, recognized that it will be difficult to change the legal culture under which we have operated for such a long time. Counsel will have to learn to back away from the role of advocate and to adopt a conciliatory approach at times; become more actively involved in assisting our clients to reach a resolution where possible. It means as defence counsel, we may need to resist our default position to: look everywhere to for information; maintain confidentiality over information as long as possible; be driven by trial dates; and, be ready to champion our client's cause at every moment. We need to start doing a cost/benefit analysis approach on each case.

I will review some of the changes between the old and new Rules as they relate to the discovery process and then offer a few suggestions as to how defence counsel can embrace the new Rules and, in particular, the concept of proportionality in the discovery process.

II. The New Rules as they Relate to Examinations for Discovery and Production of Documents

The new Rules are divided into 24 parts. Our present Rule 26 (Discovery and Inspection of Documents), Rule 27 (Examination for Discovery) and Rule 29 (Discovery by Interrogatories) are contained in Part 7 which is entitled "Procedures for Ascertaining Facts." Part 7 also addresses the requirement for witness lists, pre-trial examination of witnesses, physical examination, admissions, and depositions.

III. Rule 7-1—Discovery and Inspection of Documents

There are significant changes to the Discovery and Inspection of Document rules. The most notable differences between Rule 26 and Rule 7-1 are as follows:

- The obligation to prepare a list of documents is triggered by the end of the "pleading period" and not by service of a demand: subrule (1).
- The list must be produced within 35 days of the pleading period (which is defined as the time limited for filing a responsive pleading to the pleading that was most recently filed in the action): subrule (1).
- The most significant change is in respect of the documents which must be listed as set out in subrule (1)(a). They are as follows:
  - all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact, and
  - all other documents to which the party intends to refer at trial.

  Thus, the traditional *Peruvian Guano* test of the broad view of relevance has been eliminated in favour of the Rule 68 approach to document production in respect of the first category. It is unclear as to whether it is intended that only admissible documents are required to be produced under the first category (i.e., that could be used at trial). It is not clear what is meant by "refer" in the second category. Is it intended that only those documents to which counsel will refer in open court be produced?
- The list must include a brief description of each document: subrule (2).
- Subrule (10) provides that if a party believes they have received a deficient list they may make a written demand for a supplementary list of documents.
- Subrule (11) provides that if a party believes a list of documents should include documents or classes of documents that "relate to any or all matters in question in the action" but that are additional to those required to be disclosed under subrule (1)(a) or subrule (9) requiring supplementary list of documents, that party can by written demand identifying the additional documents and why they should be disclosed, require that they be listed and produced.
- A party receiving a demand under subrule (11) must respond within 35 days by either complying with the demand or explaining why the documents are not being listed or produced: subrule (12).

- An application can be made to court requiring a party to comply with a written demand for a supplementary list under subrules (10) and (11). On such application the court can order the party be excused from compliance or order the party prepare the supplementary list: subrules (13) and (14).
- A party that fails to make discovery of a document or fails to produce for inspection or copying is precluded from putting that document into evidence or using it in cross-examination: subrule (12).
- Form 22 identifies the form for the List of Documents. It is now divided into three parts:
  - Part 1: Documents that are or have been in the listing party's possession or control and that could be used by any party at trial to prove or disprove a material fact;
  - Part 2: Other documents to which the listing party intends to refer at trial; and
  - Part 3: Documents for which privilege from production is claimed.

IV. Rule 7-2—Examinations for Discovery

The differences are not as dramatic as they relate to the Examination for Discovery Rule. The most notable differences between Rule 27 and Rule 7-2 are as follows:

- There remains the right to examine a party who is adverse in interest: subrule (1).
- Discoveries are limited to seven hours unless the person who is being examined agrees to a greater period: subrule (2).
- The seven hours includes:
  - any re-examination conducted on behalf of the party or on behalf of a party of record not adverse in interest: subrule (17); and
  - further discovery in respect of written answers given in response to questions upon with the witness had to inform themselves: subrule (24).
- On application under subrule (3), a court may extend the discovery time based on considerations which include:
  - the conduct of the witness (e.g., unresponsiveness, failure to complete answers, provision of answers which are evasive, irrelevant, unresponsive or unduly lengthy);
  - unreasonable denial or refusal to make an admission;
  - conduct of the examiner;
  - whether it was reasonably practicable to complete the discovery within the seven hours; and
  - the number of parties and discoveries and the proximity of the various interests of the parties.
- The court may also limit the duration of any further examination arising from an order that the witness attend to answer questions to which objections were previously taken: subrule (25)(b).
- If a person is required to inform himself or herself in order to respond to a question, the examining party may now request the responses be provided in a letter: subrule (23):

- The answers are now deemed to be questions asked and answers given under oath in the discovery: subrule (24)(a); and
- The examining party may still continue the discovery: subrule (24)(b).

- Rule 27(21) provided that after any re-examination, the witness could be further examined by the examining party. Rule 7-2 does not contain the same right.
- Unless the court otherwise orders or the parties agree, the discovery is to take place within 10 kilometres (Rule 27(14) provided for 30 kilometres) of the registry nearest to where the person to be examined resides: subrule (14).
- The appointment (with appropriate witness fees) must now be served at least 7 days before the discovery including on all of the parties of record (previously, personally served unrepresented parties and the other parties of record were only entitled to two days notice): subrule (13).
- Subrule (14) is new and states that a person must attend and submit to the examination if the examining party has complied with subrule (13).

V. Rule 7-3—Interrogatories

The use of interrogatories is now significantly restricted. Interrogatories can only be used if the party consents or if the court grants leave: subrule (1).

VI. Discovery and the Fast Track Rule

Under the new Rules, Rule 66 and 68 have been collapsed into one rule: Rule 15-1. It applies to all actions for money, real property, builders liens and personal property in which the total claim is for $100,000 (excluding interest and costs) or less, the trial can be completed within three days, the parties consent or the court so orders. If your claim falls within these categories it must proceed under the Fast Track Rule.

As was the case under Rule 66, subrule 15-1(1) restricts examinations for discovery to two hours, unless the person being examined consents to longer. Discoveries must be completed at least 14 days prior to trial, unless otherwise ordered by the court or the parties agree: subrule (12).

VII. Proportionality and Discovery

Most discoveries in complicated personal injury claims are conducted in less than seven hours of questioning and so the new seven hour time restriction on discovery in non-fast track litigation is really of no consequence.

The limited right of discovery has existed for some time under our current Rules 66 and 68. I confess I have limited experience with either Rule 66 or 68, but understand for the most part the simpler cases that have been pursued under these rules (i.e., the more straight ahead soft tissue injury claims and not so many of the serious chronic pain/psychological claims). I am told that, generally, there has been good cooperation between counsel in the exchange of information and the conduct of discovery, where necessary, allowing the objective of a more streamlined and speedy process to be achieved. Unfortunately, that is not always true. Sometimes plaintiff's counsel fails to provide meaningful "will say" statements, refuses to produce a client for discovery and 60 days prior to trial dumps a wealth of unanticipated medical opinions which dramatically change the complexion of the case. At that point, defence counsel will find himself of herself in the difficult position of having to decide whether to adjourn the trial to muster further evidence or to proceed to trial with what they have. An

adjournment is not in the best in interests either of the parties. So for this new system to work, both sides need to embrace the new rules and engage in an open and frank disclosure of the respective cases early in the process. That means, as defence counsel, we are also going to have to reciprocate and make disclosure of information and documentation earlier than we have been accustomed.

In specific terms of the approach to discovery and document production, under the new Rules, the following are some suggestions for how defence counsel can embrace proportionality:

- As litigation counsel we have to recognize that although we may not think so, the general consensus is that the world thinks litigation is too costly and the wheels of justice grind too slowly. Each of us has a duty to be part of the solution.
- Talk to plaintiff's counsel. Pick up the phone and ask what the case is about. The more discussion you have with opposing counsel about their case, the better your understanding will be so that you can hopefully narrow the issues upon which you will need to discover.
- Canvass settlement early—that is what proportionality is all about. A settlement is a great way to avoid the expense of a discovery.
- Consider mediation or an informal settlement meeting instead of a discovery. In the worst case scenario and a resolution is not achieved, you have learned more about the case that the plaintiff is going to present.
- Timing of the discovery is more of an issue. Generally speaking, the defence should not conduct discovery until there has been appropriate documentary disclosure. That will allow you to identify and narrow the issues. You will also want to ensure the plaintiff has reached an appropriate level of recovery. The previous practice of reconvening discovery following further document disclosure or to update a plaintiff's condition should be avoided.
- Demand those documents which are only necessary to assess the claim, not just because they exist in the world. For example, consider whether you really need all of the pre-accident clinical records on a file in which the plaintiff has fully recovered. Consider whether you really need a raft of tax returns where the income loss claim is limited to six months from one particular job and disability is not in issue.
- Know the case before you go to the discovery. Pay attention to the information contained in the documents and make a chronology so that you can and do know what truly is in issue.
- On discovery, start questioning on a topic by asking a general question designed to elicit an understanding of the plaintiff's allegation rather than launch in on cross-examination based on your theory of their case. For example, ask questions like "What are your problems?", "What income have you lost?" or "Tell me about what it is you can no longer do around the house?"
- It is often helpful to canvass the plaintiff's current complaints early in the discovery rather than start by asking about the injuries on a month by month basis (or some other timeline) from the accident forward. If you know that a plaintiff fully recovered from knee complaints by the fourth month; do you really need to know all of the details of the knee complaints in the preceding four months?
- Don't sweat the little stuff—focus your discovery on what really is in issue.
- Don't ask questions about what you already know from the clinical records. There are times that you want to elicit an admission based on a medical entry; otherwise, I have never understood the usefulness of asking a plaintiff to confirm, entry by entry, what they told their doctor.

- At the end of a discovery, take the time to canvass whether the plaintiff is interested in trying to resolve the claim at that point.
- Where credibility is in issue, after you have conducted discovery and addressed those issues, disclose the evidence that you have which impeaches the plaintiff's credibility.