

# **CIVIL JUSTICE REVIEW PROJECT FALL OUT: CHANGES IN LEGISLATION, THE RULES AND THE IMPACT ON PRACTITIONERS AND THEIR CLIENTS IN ONTARIO**

## **DISCOVERY CHANGES**

### **"Relating to" is replaced with "Relevant to" any matter in issue**

Under Rule 30.02 and 31.06 the scope of documentary and oral Examinations for Discovery had a test indicating that discovery answers had to "*relate* to any matter in issue". Case law developed a test commonly known as the 'Semblance of Relevance' test which suggested that virtually any document or question that could be remotely tied to the issues raised in the pleadings must be produced or answered. The words of these Rules have now been changed to read "*relevant* to any matter in issue".

### **Discovery Plans**

For the first time in Canada, Rule 29.01 imposes a requirement on the parties to attempt to agree at an early stage on all aspects of discovery through the preparation of a written discovery plan. The plan must include:

1. The intended scope of documentary discovery;
2. The dates for the service of Affidavits of Documents;
3. Information respecting the timing, costs and manner of production of documents;
4. Having regard to the Sedona Canada Principals prepared in January 2008 – addressing electronic discovery the parties need to identify, preserve, collect, review and produce electronically stored information; [This has particular application for any electronic storage of handwritten memos, letters, emails and social networking sites such as MySpace and Facebook, etc. The Sedona Principals establish that electronically stored information is discoverable and that parties must consider their obligation to take reasonable and good faith steps to preserve potentially relevant electronically stored information as soon as litigation is reasonably anticipated];
5. The names of persons intended to be produced for oral discovery, and;
6. Information respecting the timing and length of the examinations.

If you need to bring a Motion relating to discoveries and do not have a plan, the withholding of relief or costs is the penalty.

### **Proportionality in Discovery**

Rule 29.2 expressly adopts the principle of proportionality in discovery. In deciding whether to order a party to produce documents or answer a question, the Court must consider the time and expense required to answer the question or produce the document. Further, if answering the question or producing the document would cause that party "undue prejudice" or would "unduly interfere with the orderly progress of the action", the court may refuse to make such an order. As well, the Court must consider whether an order would "result in an excessive volume of documents".

### **The Seven Hour Time Limit**

Regardless of the number of parties to be examined under oath, a maximum of seven hours only is permitted by each party: Rule 31.05.1(1). Consent of the parties or leave of the Court will permit longer time lines.

Again, proportionality is the hallmark of the Court's consideration in an application for leave. The Court must consider the amount of money at stake, the complexity of the issues, the conduct of a party during discoveries that have already been held, the financial position of the parties, the amount of time that "ought reasonably to be required" and any other reason that should be considered "in the interest of justice".

### **Impact on Practitioners and their Clients**

The change from the "relating to" to the "relevant to" test will undoubtedly have the most significant impact on practitioners and their clients in terms of additional costs. One need only look at the body of case law developed around the "relating to" wording and the number of years and Appellant Court decisions to reach an understanding of the meaning of those terms to realize that there will be a similar expenditure of time and money trying to figure out what "relevant to" means and why and how it is different from "relating to".

The next most challenging and expensive item for practitioners and their clients is the mandatory nature of discovery plans. Although these can be as informal as an email, the failure to actually have an agreement between the two sides can and will result in considerable expenditure of time and money in preparing motion materials. In fact, it is virtually impossible to see how the imposition of a plan could in any way, shape or form, reduce the amount of time, effort and expense of the parties.

The seven hour time limit on oral Discoveries, while on the surface appearing sensible and a cost effective measure, is in reality, given the requirement of a discovery plan, superfluous. As well, the focus seems wrong: instead of indicating that each party may be examined for a specified length of time, the Rule requires that a party examine all other parties within a specified period of time.

