

THE DISCOVERY PROCESS

This summary is designed to provide you with an overview of the discovery process and to supplement your preparation for oral discovery and trial. The discovery process encompasses two aspects:

1. production of documents, and
2. oral examination of each party under oath

Both aspects are governed by the Rules of Civil Procedure (the "Rules"). This summary draws on these Rules and my practical experience.

The main purposes of the discovery process are as follows:

- (a) To ascertain in advance of trial the evidence to be presented by the opposite party to support its allegations made in the pleadings (whether the Statement of Claim, Statement of Defence or Reply);
- (b) To obtain admissions from the opposite party that support your own case;
- (c) To generate a written record (transcript) which provides the basis for cross-examination at trial with respect to credibility.
- (d) To assess the demeanour of the opposite party, and the ability of the opposite party to withstand cross-examination.

1. PRODUCTION OF DOCUMENTS

Once the exchange of pleadings has occurred, and prior to the oral examination, each party is under a strict duty to produce all "documents" in its possession, power or control relating to the issues in the action. A "document" is defined very broadly to include photographs, and tape or video recordings. Ideally, each side is allowed an ample opportunity to review the other party's documents

with a view to preparing for the questions to be posed by opposing counsel at the oral examination.

Documents, "in the possession, power or control" of a party is a phrase that is construed very liberally according to the philosophy of the Rules. Therefore, consideration should be given to any relevant documents which are in the hands of third parties (e.g. bank officials or accountants). It is your obligation to identify all such documents.

The Plaintiff employee will likely produce such documents as a hiring letter, performance reviews, pay stubs, termination letter, job search documents and receipts for job search expenses. The Defendant employer usually produces such documents as payroll records, warning letters, record of employment, benefits booklet and policy manuals. There will likely be a certain amount of duplication between the productions of each party; however, this does not relieve either party of the obligation of producing all relevant documents.

It is very important that you forward the originals of all such documents to my attention as soon as possible after the Statement of Defence is filed with the court. Technically, the Rules do not allow the oral examination to be scheduled until documents are produced. You should deliver these originals to my secretary either personally, through registered mail, or by taxi or courier. Furthermore, you would be well advised to retain copies of all such originals for your own file. These originals will then be duplicated and copies forwarded to opposing counsel and his or her client. Similarly, opposing counsel will forward copies of his or her productions, which in turn will be forwarded to you.

Prior to the oral examination, we shall have a "preparatory" meeting in order to review the documents produced by both sides, and to prepare you for the questions you will be asked. My secretary shall finalize the date of the "preparatory" with you.

It is very important that you provide me with your documents in advance of the "preparatory meeting" in that an affidavit of documents must be prepared. That affidavit sets out a list of all of the relevant documents that you must produce, as well as a list of documents that you object to produce ("solicitor/client privilege"), and a list of misplaced documents. (Opposing counsel prepares a similar affidavit). You will be required to swear under oath that the three lists set out in your affidavit constitute a complete listing of all relevant documents. Given the serious nature of this matter, it is very important that you produce every document which you may suspect in any way relates to the issues in the proceeding. Ultimately, the relevance and importance of a document must be decided by the court; accordingly, if there is any doubt in your mind with respect to the relevance or importance of a certain document, please produce that document for my inspection nonetheless.

When you assemble the relevant documents, there is no need to include correspondence passing between this office and yourself. Such documents are generally protected by "solicitor/client privilege".

CONSEQUENCES OF FAILURE TO PRODUCE DOCUMENTS

If you are in possession of a document which is not produced to opposing counsel, then opposing counsel can insist on a further oral examination once that document is produced. Because this creates further expense for you and delays in the process, production on a timely basis is very important.

A document is generally not admissible at trial unless provided previously to opposing counsel, along with the opportunity to conduct oral discovery. As the Rules are designed to discourage

"trial by ambush", failure to produce a document could delay the trial, or more importantly, if the document is favourable to your case, then the Judge may deem the document to be inadmissible at trial. Beyond that, the Judge also has the power to penalize a party for the non-production of documents by an award of legal costs against that party.

2. ORAL EXAMINATION FOR DISCOVERY

Each party has the right to conduct through its lawyer an oral examination of the opposite party named in the lawsuit. This examination is conducted under oath (on a Bible), and generally at the offices of an "Official Examiner" (an individual commissioned to administer these examinations).

When your examination is conducted, no Judge or Officer of the court will be present. In attendance will generally be a court reporter, the person being examined, and both lawyers. In other words, you shall be questioned in the absence of the opposite party, and similarly, you shall not be present when I examine the opposite party. In general, I am not permitted to advise you of the evidence of the opposite party until your discovery is complete.

The oral examination, although an important step in the process, is usually somewhat casual and informal. Smoking is no longer permitted in the examination room, but you may drink coffee during the course of the examination. Notwithstanding the informality of the process, you should be very careful to keep the following points in mind:

- (a) Answer questions in a concise and brief manner remembering to answer only the specific question that has been put to you. Do not make the task of opposing counsel any easier by volunteering information that has not been requested;
- (b) Opposing counsel is entitled to cross-examine you or to put words in your mouth;
- (c) Do not hazard any guesses or speculative responses. Think before you speak;
- (d) Take as much time as you require to answer the question. Once the oral examination is complete, a transcript will be prepared. This generally does not

reveal the length of time taken to respond to a particular question;

- (e) The transcript of your evidence may be used against you in the event that this matter proceeds to trial. The answers given at discovery will effectively bind your position; thus, despite the informal and friendly atmosphere, the discovery will play a significant role if the action goes to trial;

- (f) At all times, tell the truth.

WHO IS DISCOVERED?

The Plaintiff employee is obviously discovered under oath in a personal capacity. The Defendant employer must produce its most qualified representative for discovery. In general, the Plaintiff has the right to select that representative, provided the Plaintiff's selection is reasonable. In the event of a dispute, the lawyers will attend at court on a "motion" so as to have a Judge determine which representative should attend.

If the Plaintiff selects a representative, and the Defendant agrees to that selection, the Plaintiff is generally bound to accept the evidence of that representative, notwithstanding an insufficient knowledge of the case. It would be very helpful if you would provide me as soon as possible with the name of the Defendant's representative who you feel is most qualified to answer questions at discovery. The choice is usually obvious, and is most often the Plaintiff's direct supervisor.

OBLIGATION TO INFORM

It is the responsibility of the Defendant's representative to inform himself or herself of all relevant evidence prior to the discovery. Hearsay evidence is admissible at discovery. For example, if the Plaintiff had a discussion with the Vice-President of Personnel concerning the

dismissal, the Defendant's representative must inform himself or herself of the Vice-President's recollection of that discussion and provide this information on discovery. Any such important discussions should be reviewed with me at the "preparatory" meeting.

THE CONTENT OF THE DISCOVERY OF THE PLAINTIFF

The discovery itself, as with the trial, is restricted to evidence that is relevant to the pleadings. Defendant's counsel will question the Plaintiff on the following general areas:

1. Employment history and educational background;
2. Circumstances surrounding the hiring (e.g. was initial contact made through an advertisement or was there a direct solicitation to give up previous employment?);
3. Employment history with the Defendant;
4. Specific allegations of cause;
5. Financial remuneration, including bonus and fringe benefits (e.g. were fringe benefits replaced by purchasing alternate plans, and if so, what is the replacement cost?);
6. Circumstances surrounding the dismissal, (e.g. who said what to whom on the day of dismissal);
7. Evidence of job search following termination;
8. Where mental distress is alleged, particulars of distress, including medical attention, drugs prescribed, insomnia, embarrassment, physical manifestations;
9. Particulars of any expenses incurred in the search for new employment, including

receipts.

THE CONTENT OF THE DISCOVERY OF THE DEFENDANT

Plaintiff's counsel usually examines in detail the facts relied upon to support any allegation of cause as contained in the Statement of Defence.

REFUSALS

If I object to a specific question put to you, I shall so state on the record and instruct you not to answer. Equally, opposing counsel may object to questions that I put to the opposing party. Once the transcript of evidence is prepared, either party may then go to court to determine the propriety of the refusal; the Judge may order the question be answered by way of a re-attendance at oral discovery. Unless the question is clearly material, I generally prefer to avoid this procedure in that it involves considerable expense and delay, and could well result in an unsatisfactory answer in any event; it is usually preferable to have the action moving on to trial.

UNDERTAKINGS

Where during the course of the discovery, a question arises for which no answer is available at that time an undertaking is given. An undertaking is simply a promise to obtain information or to produce a document at a later date. A further oral discovery may be required to deal with any outstanding undertakings. Because undertakings have a legal significance, allow me to state the specific undertaking on the record. Do not undertake to do or provide anything; this is a lawyer's decision and is best left to me.

REVIEW OF TRANSCRIPTS AND OBLIGATION TO CORRECT

Transcripts of discovery are prepared within approximately 6 weeks after being ordered; I shall forward a copy of the transcript of your own evidence and that of the opposite party. I would appreciate receiving as soon as possible any written comments that you may have with respect to the opposite party's evidence.

With respect to your own evidence, I would ask that you review the transcript with a view to:

- (a) identifying all questions that I instructed you not to answer, and providing me with written answers to same;
- (b) identifying all undertakings to provide further information or documents, and providing me with same;
- (c) providing me with a written explanation of any of your answers that you identify as either incomplete or incorrect.

The Rules impose a strict duty to advise opposing counsel of any new information that comes to light after your discovery which in any way alters or supplements the evidence you gave at discovery. Please be prompt in advising me of any such new information.

USE OF TRANSCRIPTS AT TRIAL

If the action proceeds to trial, the Judge does not review the transcripts. However, it is very important for you to be thoroughly familiar with the contents of your discovery transcript since either lawyer can refer the trial Judge to the transcripts if the evidence at trial is inconsistent with the evidence at discovery. For example, if one party asserts at discovery that the reason given for dismissal was personality conflict, and then says at trial that dismissal was due to theft, then

opposing counsel may at trial read to the Judge that portion of the transcript which reveals the inconsistency; this inconsistency would severely affect the credibility of the party tendering the evidence in question.

STATUS OF ACTION

Once discovery is completed, either counsel may set the action down for trial. The filing of this document is significant, it means that preparatory work for trial is complete on behalf of the party filing the Trial Record. The filing of the Trial Record precludes that party from going to court for court orders relating to questions refused, or documents not produced at discovery; however, counsel can still seek a court order compelling answers to outstanding undertakings given at discovery.

Once the Trial Record is filed with the court office, the action comes before a judge in Trial Scheduling Court. This takes roughly 4-5 months. At Trial Scheduling Court a date is then set for a pre-trial conference and trial. The length of time between Trial Scheduling Court and the trial date depends upon the availability of court dates. Normally speaking if the action is intended to be longer than 2 weeks there is a very considerable delay in setting a date for trial.

THE COST OF DISCOVERY

Generally out of pocket costs of the opposite party's discovery is a disbursement that is added to your account which is delivered to you shortly after completion of discovery. This cost includes room rental, the swearing of the oath, the court reporter's time and the cost of the preparation of the transcript and generally is in the range of \$2,000 - \$2,500.

SUMMARY

I trust the foregoing information may be of some assistance to you, I look forward to discussing the action and answering your questions at our "preparatory meeting".

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