
I: INTRODUCTION

The importance of civility and professionalism in the discovery process cannot be overstated. This is particularly so with the introduction of amendments to the *Rules of Civil Procedure* in January 2010 (the “new *Rules*”) pursuant to which proportionality has become the rule of the day.

The courts have emphasized that the “equality of arms principle” is embodied in the new *Rules* – a principle that suggests a court should not allow a party to spend its way to an advantage.¹ Counsel are required to co-operate and work together throughout the discovery process in a reasonable and civil manner. If they are unable to do so, the courts will intervene to ensure that litigation is not conducted in an inefficient, inappropriate and costly manner and that cases do not drag on indefinitely.

Proportionality must now be viewed by counsel in all cases as the norm, not the exception. Civility is a fundamental aspect of proportionality. As stated by the Treasurer of the Law Society of Upper Canada shortly after the introduction of the new *Rules*:

The attitudes and behaviour of lawyers have a profound effect not only on how the system operates, but also on the public’s confidence in the system. If we are uncivil or unprofessional, citizens will question whether our institutions deserve their respect, and the system will operate less efficiently and less effectively, resulting in greater costs for clients. The challenge facing all of us is to improve public trust in lawyers and the justice system as a whole.²

¹ *Sears Canada Inc. V. PI Media Ltd.*, [2011] O.J. No. 2545 (Master), at paras. 33-34; *1588143 Ontario Inc. (c.o.b. Upper Canada Malt) v. Lantic Inc.*, [2010] O.J. No. 1191 (Master), at para. 27. The concept of “equality of arms” between parties in litigation emanates from Lord Woolf’s book, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, published in 1995.

² Message from the Treasurer, *Professionalism is Fundamental to the Administration of Justice*, The Law Society of Upper Canada – 2010 Performance Highlights.

If proportionality is accepted by counsel and enforced by the courts, average litigants with limited resources are more likely to obtain a just, speedy and inexpensive determination of their case. The effectiveness of the rule of proportionality depends upon the cooperation of counsel. Observing proportionality and civility will allow access to justice to prevail.

II: Proportionality: An Overview

Since the introduction of the new *Rules*, the principle of “proportionality” has become the new touchstone for counsel in the civil litigation community. It is perhaps the most significant change made to the discovery process in Ontario in the last twenty years. It reflects the basic idea that the time and expense devoted to a proceeding ought to be proportionate or relative to what is at stake between the litigants.

Proportionality incorporates the recommendations made by the Honourable Coulter Osborne in Ontario’s *Civil Justice Reform Project*³, namely that the *Rules of Civil Procedure* “should include, as an overarching principle of interpretation, that the court and the parties must deal with the case in a manner that is proportionate to what is involved, the jurisprudential importance of the case and the complexity of the proceeding.” This principle is now expressly embodied in new Rule 1.04, which informs the court when making determinations regarding the discovery process. That Rule states:

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

In addition, Rule 29.2.03 sets out specific proportionality factors that the courts must consider in determining whether to order a question answered or a document produced.

³ The Honourable Coulter A. Osborne, *Civil Justice Reform Project* (November 2007), p. xxiii, available at http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf.

Consistent with the principle of proportionality is the change in scope of the questions to be answered from those “relating” to any matter in issue to those “relevant” to any matter in issue. Rule 31.06 now states that “a person examined for discovery shall answer, to the best of his or her knowledge, information and belief, any proper question *relevant* to any matter in issue in the action [...]”

Before this change, the scope of civil discovery in Ontario had been expanding over the last thirty years, beginning with the decision of *Kay v. Posluns*⁴ which read the words “semblance of relevance” into the words “relating to” under the old *Rules*. The new test of “relevancy” signals a shift away from the broad and liberal discovery practice that previously existed in Ontario. The courts have determined that the default rule should now start with proportionality and a recognition that not all conceivable relevant facts are discoverable in every case.⁵ “Fishing expeditions” and unreasonable document requests or burdensome document productions are no longer appropriate under Ontario’s new regime of proportionality.

Establishing a balanced and fair means of resolving disputes in a manner that the limited resources available to the courts and to litigants may be used in the most effective manner for the benefit of all parties, while having the dispute resolved at the earliest possible date, is the right approach. As stated by one court, litigants will still be “[...] entitled to their days in court. However, [...] that access needs to be restrained in every regard by all the requirements of proportionality, including the appropriate use of court resources and the limiting of cost, not only to the parties, but to the system.”⁶

III: The Discovery Plan – An Opportunity for Counsel to Work Together

⁴ (1989), 71 O.R. (2d) 238 (H.C.).

⁵ (2011), 103 O.R. (3d) 174 (S.C.J.).

⁶ *Warman v. The National Post Co.* (2010), 103 O.R. (3d) 174 (Master), at para. 198. This decision provides a thorough and insightful review of the jurisprudence of proportionality in Canada, England and the United States, which should be reviewed by counsel for guidance before embarking upon the discovery process.

Counsel can expect to be judged on the efficiency with which they litigate and the reasonableness of the approach they take to the discovery process. Those who plan and manage the discovery process and respect the principle of proportionality embodied in the new *Rules* will be best prepared for judicial scrutiny.

In this respect, the new *Rules* introduced the Discovery Plan, which represents an attempt to encourage parties to consider the scope of the discovery process at an early stage in the litigation to ensure that it is carried out in a professional, expeditious and cost effective manner. It is the first true opportunity for counsel to work together and cooperate in establishing a set of mutually acceptable parameters for fact-finding and discovery of each side's case. While the interests of opposing parties are always adverse, counsel should have a common goal of litigating such interests in a fair, reasonable and proportionate way. As stated in a recent decision released on Valentine's Day 2012:

One could easily rescript what occurred in this case to achieve a better outcome. The exercise of discovery planning should not break off just because counsel disagree on the format of productions. There are very good reasons to cooperate to keep costs down on both sides and to exchange productions electronically in a format that is searchable and easily portable into litigation software in use by each firm. [...]

The rule requiring a discovery plan and requiring consideration of the Sedona Canada guidelines is not designed to impede the progress of actions nor to provide a new weapon to resist production or discovery motions. It is certainly not the intent to unduly complicate simple actions by imposing overly complex discovery and production obligations. Quite the contrary. The expectation is that counsel will work together to tailor the production and discovery to the needs of the litigation (proportionality being a newly articulated guiding principle).⁷

Under the new *Rules*, a Discovery Plan must be agreed to by counsel before the earlier of 60 days after the close of pleadings (or such longer period as the parties may agree) and attempting to obtain evidence. It is questionable how strongly this time requirement will be enforced by the courts and many members have pondered this issue. In a decision released in June 2011, the Court stated "[a]lthough the legal press has reported that a segment of the bar appears to be treating this

⁷ *Kariouk v. Pombo*, [2012] O.J. No. 782 (Master), at para. 57.

requirement with disdain, until the rules committee directs otherwise, it seems to me that the Rule has to be given some teeth.”⁸ In another decision, the Court stated: “[i]t is not appropriate to proceed without a plan and then to launch a motion that implies the other party is in breach of the rules [...] That is the purpose of the limitation in Rule 29.1.05.”⁹

In light of the direction provided by the courts, it is risky to ignore the requirement for a Discovery Plan or engage in unnecessary and protracted disputes with opposing counsel in respect of the Discovery Plan resulting in a breakdown of the relationship between counsel. The failure to agree to a plan has potential cost consequences to the unreasonable party under Rule 25.05.

Counsel are encouraged to cooperate and address discovery issues at the outset. The key to preparing an effective Discovery Plan is recognizing and incorporating the principle of proportionality and remembering Rule 29.2 which requires parties to balance the expense and time associated with producing documents and answering questions against issues of relevance and whether such documents or answers are integral to proving one’s case or defence. Minor issues should be dealt with in a manner that is proportionate to their importance to the case. Counsel should avoid delving into “side-circuses” that do nothing but distract the parties from the main dispute and waste precious resources, particularly for those clients with limited financial means. The key to proportionality is to focus on the big picture and what is required to paint that big picture.

If counsel are unable to agree on a Discovery Plan, it is open to them to seek the court’s assistance to create a Discovery Plan for them.¹⁰ By seeking early assistance from the court, the parties can avoid future issues and motions in the document production and examination phases of litigation. As stated by Master Short in one case: “[...] it seems to me that at least 90 minutes of court time could have been saved for more pressing matters had the parties endeavoured to focus on coming

⁸ *Oakdale Kitchens Inc. v. Williams & Partners Chartered Accountants LLP*, [2011] O.J. No. 2464 (Master), at para. 36.

⁹ *Lecompte Electric Inc. v. Doran (Residential) Contractors Ltd.*, [2010] O.J. No. 4949 (Master), at para. 19.

¹⁰ *TELUS Communications Company v. Sharp*, 2010 ONSC 2878 (Master); *Osprey Capital Partners v. Gennium Pharma Inc.*, [2010] O.J. No. 1721 (Master), at para. 45.

to an agreement with respect to a Discovery Plan as required by the *Rules*.”¹¹

Master Short went on to state that the problems between the parties in that case “could have, and would have, been avoided had the parties focused on the Discovery Plan in accordance with the philosophy of the *Rules* amendments. Motions such as this can and should be avoided by counsel by addressing their Plan at an early stage.”¹² The courts have discretion to impose a Discovery Plan on the parties where they cannot otherwise agree, consistent with the requirements set out in Rule 29.1.03(3).¹³

IV: Dealing with Objections and Refusals in a Civil Manner

In this new era of proportionality, all counsel will have to learn how to better deal with objections and refusals to questions in a concise and efficient manner. Counsel, particularly junior ones, should be prepared to deal with incivility during examinations for discovery and to respond in a civil manner. The best response to incivility is civility.

All counsel have a duty to keep the discovery process under control to promote efficiency and confidence in the administration of justice. To that end, responding counsel should be careful not to interject or obstruct the discovery in an effort to run out the clock, otherwise they risk exposing their client to cost consequences for bad behaviour. As responding counsel, it is useful to have a short list of the types of refusals that can be made (such as relevance, privilege, findings/opinions/conclusions, repetition, confusion/ambiguity, probative value, etc) and to object to the question in a precise manner so as not to take up too much time. The new seven-hour time limit provides a good reason not to argue with counsel on the record. Refusals can be dealt with at a later date, by way of motion if necessary. It also helps if the responding counsel takes the time to explain to their clients the importance of

¹¹ *Oakdale Kitchens Inc. v. Williams & Partners Chartered Accountants LLP*, [2011] O.J. No. 2464 (Master), at para. 35.

¹² *Ibid*, at para. 42.

¹³ *Ravenda Homes Ltd. v. 1372708 Ontario Inc.*, 2010 ONSC 4559.

answering questions in a fair and truthful manner and to treat the examining counsel with courtesy and respect.

In return, the examining counsel should listen to the refusal, state their position on the record and move on to the next question. It is important to remember that, often, clients meet opposing counsel for the first time at examinations for discovery. As such, the examining counsel should start their examination by introducing themselves to the party or witness who they are examining and identify their role in the litigation. They should advise the party or witness that should they require a break, they need only ask. The appropriate accommodations should also be made for parties and witnesses who have special needs, disabilities, language barriers or other issues that may affect their testimony if not properly accommodated. An example that recently came up was where a witness being examined had dyslexia. In that context, it was important for the examining counsel (and the responding counsel) to take that party through the documents in a manner that ensured the witness understood the document and the question that was being asked.

In addition, counsel should agree upon what constitutes a reasonable time to discover a witness or party. If the examining party surpasses the seven-hour time limit, the responding counsel should grant them a reasonable indulgence. Similarly, all counsel should grant requests for reasonable extensions of time to comply with discovery obligations or adjournments when required, unless it is clearly inconsistent with the legitimate interests of the lawyer's client. Opposing reasonable requests wastes client resources and needlessly inconveniences the court. On the flip-side, counsel should never request an extension of time or an adjournment of the examination for discovery merely for the purposes of delay. In other words, lawyers should treat other lawyers in the same way that they would want to be treated.

Following the release of the "Report of the Task Force on the Discovery Process" in 2003 and the Supplemental Report in 2005 (which was chaired by the Honourable Justice Campbell and recommended certain changes to the discovery process to increase efficiency and cut down on costs), the Ontario Bar Association adopted guidelines setting out best practices in the discovery process. While these guidelines are not enforceable in the way that the *Rules of Civil Procedure* and the *Rules of*

Professional Conduct are, they provide useful advice that all counsel should follow. With respect to professional conduct in the discovery context, the commentary to the guidelines states:

A lawyer should never conduct oral discovery for an improper purpose, for example, to harass, intimidate or unduly burden the opposite party with unreasonable demands for information or document production. Lawyers should conduct themselves with decorum and should never verbally abuse or harass a witness or unnecessarily prolong an examination. Counsel must keep in mind that their purpose is not to protect their client from “bad facts” that are relevant and within the scope of an examination, regardless of whether those facts hinder the client’s position. A useful guide for all counsel in conducting himself or herself at discovery is this: do nothing, which one would not do at trial, with a judge in attendance.¹⁴

In an effort to provide guidance to counsel on how to conduct themselves during examinations for discovery, the Court in *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*¹⁵ set out a number of principles that should be observed by both the examining counsel and responding counsel:

- Counsel representing a party who is being examined is entitled to interrupt the examining party for the purpose of objecting to an improper question, placing the objection on the record, either directing the witness to answer under protest or not to answer, or ensuring the witness and counsel both understand the question asked;
- Counsel may sometimes wish to answer a question or to correct an answer but if the examining counsel objects then neither of these are permitted;
- Counsel may choose to re-examine his own client in order to correct an answer or to clarify or explain an apparent admission or inconsistency. Alternatively he or she may provide the correction subsequently in writing. In either case, the examining party is entitled to the evidence of the witness and not that of counsel. It is the duty of the witness and not counsel to correct the evidence.

¹⁴ OBA Newsletter, *Discovery Best Practices: General Guidelines for the Discovery Process in Ontario*, 2005, available at <http://cfcj-fcj.org/clearinghouse/publication.php?id=22643>.

¹⁵ 83 O.R. (3d) 438.

Some tips for dealing with inappropriate conduct of counsel during examinations for discovery include stating the issue or objection on the record; taking a short break to compose one's self and consider possible responses to the opposing counsel's behaviour (including trying to diffuse the situation with some tasteful humour); and, in egregious cases, adjourning (but not ending) the examination for discovery to seek directions from the court under Rule 34.14 of the *Rules of Civil Procedure*.

In very extreme cases, a motion may be brought under Rule 34.15, which includes, among other things, relief such as striking out evidence or dismissing a proceeding. The use of such motions to redress another lawyer's poor behaviour (and the corresponding affidavit outlining that lawyer's behaviour which inevitably goes with such motions) must be carefully considered and employed in a judicious manner. As stated by one Court, "[a] lawyer's reputation is delicate. He or she works a lifetime to establish it. It can be shattered in a moment by careless or vengeful pleading [...] The reputation of a lawyer for integrity is fundamental to his ability to earn a living in a practice. It is his calling card in the community. When a lawyer's reputation is damaged, so too is the personal credibility he brings to the court."¹⁶

In light of this, Rule 34.15 motions (and even Rule 34.14 motions) should be reserved for cases of excessive unprofessional or uncivil conduct. The reality is that lawyers exist in an inherently adversarial and stressful environment which often results in heated arguments, sometimes escalating into personal attacks either at the examinations for discovery or even outside the discovery process. This is particularly so in today's world of instant email communications. The question to consider is whether the impugned conduct is sufficiently egregious to warrant public airing of the dispute at a Rule 34 motion hearing.

In *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, the Court made it clear that accusations of professional misconduct ought to be reserved for the clearest of cases based on cogent and persuasive evidence and when such a finding is a necessary and inescapable conclusion. Motions for direction

¹⁶ *1013952 Ontario Inc. et al v. Sakinofsky, Rosso, Lawyers Professional Indemnity Company, et al.*, [2010] O.J. No. 168 (S.C.J.) at paras. 11-12, varied by [2010] O.J. No. 2078 (C.A.).

should only be necessary when responding counsel has refused all requests to conduct him or herself in accordance with the rules and interference has become so extreme as to render the discovery futile.

As such, before running to the courts, lawyers should consider the implications of bringing a motion and whether, in the grand scheme of things, such a motion is necessary or productive, notwithstanding the poor conduct of the opposite side. All lawyers will encounter intense and aggressive verbal and email arguments in the course of their practice. For the most part, such arguments are par for the course and do not warrant court intervention.

V: Rules of Professional Conduct in the Discovery Process

The rules of professional conduct and the principles of civility are complimentary to the principle of proportionality in the discovery process.

Rule 4.01(4) of the *Rules of Professional Conduct* state:

(4) Where the rules of a tribunal require the parties to produce documents or attend on examinations for discovery, a lawyer, when acting as an advocate:

(a) shall explain to his or her client (i) the necessity of making full disclosure of all documents relating to any matter in issue, and (ii) the duty to answer to the best of his or her knowledge, information, and belief, any proper question relating to any issue in the action or made discoverable by the rules of court or the rules of the tribunal,

(b) shall assist the client in fulfilling his or her obligations to make full disclosure, and

(c) shall not make frivolous requests for the production of documents or make frivolous demands for information at the examination for discovery.

There are times when, through inadvertence or for other reasons, a lawyer may unknowingly fail to make full disclosure of all documents relevant to the matters at issue or to ensure that a client or witness has answered all questions to the best of their knowledge, information and belief. The issue of correcting omissions or mistakes of this nature is often a tricky one, which requires objective thought and good judgment.

Rule 4.01(5) of the *Rules of Professional Conduct* requires lawyers who have unknowingly done or failed to do something that if done or omitted knowingly would have been in breach of the rule, to disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it. Of course, this is subject to client confidentiality requirements contained in rule 2.03 of the *Rules of Professional Conduct*.

In circumstances where a client instructs the lawyer not to make the necessary corrections (which in turn would result in a breach of the rules), the lawyer should refuse the client's request and try to persuade the client that honesty and candor are the best policy. If the client still refuses, the lawyer should withdraw or seek leave to do so, in accordance with rule 2.09 of the *Rules of Civil Procedure*. This approach is reinforced by rule 4.01(6) of the *Rules of Professional Conduct*, which states:

A lawyer shall be courteous, civil and act in good faith to the tribunal and with all persons with whom the lawyer has dealings with in the course of litigation. [emphasis added]

The *Principles of Civility for Advocates*, published by The Advocates Society, also set out a number of rules which lawyers should abide by during the discovery process:

Principle 21: Counsel, during examination for discovery, should at all times conduct themselves as if a Judge were present. This includes avoiding inappropriate objections to questions, discourteous exchanges among counsel and excessive interruptions to the examination process.

Principle 22: Counsel should not ask repetitive questions or argumentative questions or engage in making excessive or inappropriate self-serving statements during examination for discovery.

Principle 23: The witness who is being examined should be treated with appropriate respect and should not be exposed to discourteous comments by opposing counsel or their clients.

Principle 24: Counsel should instruct their witnesses as to the appropriate conduct on examination and the requirement for courtesy and civility to opposing counsel and their clients.

Principle 25: Counsel should not engage in examinations for discovery that are not necessary to elicit facts or preserve testimony but rather have their purpose the imposition of a financial burden on the opposite party.

The importance of civility and professional conduct in the discovery process has been recognized by the courts. In *Kobre v. Sun Life Assurance Co.*, the Court stated:

Discovery is a process pursuant to the Rules of Court and it is under court supervision. Barristers and Solicitors are officers of this court. They are liable to answer to the court for the manner in which they are conducting the litigation and that includes the conduct of such procedures as discovery or documentary productions that does not take place in a court room. [...] Counsel are expected to bring to litigation a measure of objectivity and professionalism. In cases where objectivity and the ability to advance the interests of the client appropriately and effectively appear to be compromised, counsel may have the obligation to withdraw from the case. In extreme cases the court may have the obligation to require counsel to withdraw even if that relief has not been requested.¹⁷

In a more recent decision involving a dispute by counsel over an e-discovery plan, the Court criticized one of the parties for their conduct in developing and implementing the e-discovery plan. The Court relied upon the *Rules of Professional Conduct* and the *Principles of Civility* in addressing the failure of the one party to respond to and communicate with the opposing party in a timely fashion in respect of the e-discovery plan. The Court determined that the failure of counsel to respond in a timely fashion to communications from opposing counsel is not acceptable conduct for those practicing before the court.¹⁸

Unfortunately, incivility is most commonly encountered during the discovery process, a forum in which counsel generally carry on litigation in the absence of a Judge or Master. Indeed, the Report of the Task Force on Discovery Process reported that unnecessarily aggressive or uncivil examinations – when they occur – can be a product of local legal culture, inexperienced counsel, complexity of the case and/or the attitude or posturing of individual lawyers.¹⁹ It found that inappropriate attitude and behaviour

¹⁷ [2005] O.J. No. 4235 (S.C.J.).

¹⁸ *Corbett v. Corbett*, [2011] O.J. No. 5415 (S.C.J.).

¹⁹ Report of the Task Force on Discovery Process, chaired by the Honourable Justice Campbell (November 2003), pg. 54, available at <http://www.ontariocourts.on.ca/scj/en/reports/discoveryreview>.

during examinations for discovery was one of the thirteen most frequent discovery problems. The Report cited the following story from one litigant:

"My husband and I have spent 12 years trying to get to court and finally gave up. It was a dreadful experience impacting our health and our lives. We were discovered until we gave up. The discovery we were submitted to was atrocious. We did not get to discoveries until 1999. Our... issue happened in 1990. I do not understand why it took so long. The questions were asked in open-ended fashion – therefore the answer was every file that ever existed.... They then asked the same question in a different format. There were 9 days of discoveries over 4 years and they wanted more. The cost of the discoveries I am sure exceeded what we were asking for [in] damages. The lawyers were very aggressive at times... I believe a system that allows this kind of treatment is wrong!"²⁰

The Report went on to find in 4% to 8% (depending on the city) of cases, opposing counsel was disrespectful or unprofessional, that in 2% to 5% of cases, opposing counsel harassed or abused witnesses, and that in 4% to 7% of cases, there were excessive discovery-related motions arising from abuses or lack of cooperation.²¹

In his paper entitled "Professionalism and Proportionality", published in the Advocates Journal (March 2009), the Honourable Chief Justice Winkler stated that "[t]he unfortunate truth is that if the adversarial process is left to itself, it often actively discourages proportionality." While the court's rules and procedures have been modified to encourage proportionality, it is, first and foremost, up to the legal profession to implement these rules, apply proportionality to all aspects of their cases and to impress the importance of professionalism and civility upon their clients.

Ultimately, the priority is for all counsel to work together in a cooperative and respectful manner during the discovery process. Civil conduct and proportionality will promote efficiencies and cost savings that will, in turn, instill (or restore) public confidence in the administration of justice and improve the reputation of all members of the bar.

²⁰ *Ibid.*

²¹ *Ibid.* at Appendix "M".



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