Sarah Millar
416-865-2948
smillar@litigate.com

April 10, 2025

Up-front Evidence: A New Era in Discovery Proposed by the Civil Rules Review in Ontario

The Ontario Superior Court of Justice and the Ministry of the Attorney General have proposed significant reforms to the *Rules of Civil Procedure* in the Civil Rules Review Phase 2 Consultation Paper. The Working Group responsible for the Civil Rules Review is rethinking the system of civil litigation in Ontario "from the ground up" to ensure accessible and expeditious justice for all. Our overview of their proposed changes can be found here.

The Working Group's efforts at bold reform are most apparent in the proposed full-scale redesign of the discovery process from a relevance-based model to an up-front evidence model.

What Are the New Discovery Rules

The proposed changes to the discovery process focus on two main areas:

1. **Document Production**: The process will now resemble arbitration, where litigants first produce key documents, followed by additional document requests from other parties.
2. **Examinations for Discovery**: These will be completely eliminated and replaced by up-front delivery of witness statements

The Working Group refers to the discovery reform as the up-front evidence model and contrasts its proposed revisions to the relevance-based model currently in place. Under the relevance-based model litigants have a duty to produce all documents relevant to the issues in the action. In the Working Group's view, this approach provides a low return on investment given that in many cases a party must collect, review and produce thousands, and in some cases tens of thousands of records, very few of which ultimately impact the disposition of the case.

Oral discovery under the current regime is also quite burdensome. Scheduling conflicts often push examinations months out, and attendance by all litigants is mandatory. After the examinations, parties must then handle the time-consuming tasks of answering undertakings and addressing refusals. The

process frequently leads to disputes, resulting in motions that take time to resolve and often have little to do with core issues in the case.

In contrast, the Working Group positions the up-front evidence model as quite different in that it is not driven by a “no stone left unturned” ethos that takes months and sometimes years to execute. Instead, it aims to get all the pertinent facts out very early in an action with minimal opportunities for delay or avenues for dispute.

The up-front evidence model proposes to streamline the litigation process by requiring parties to present key evidence early on. Here’s what it entails:

1. **Document Production**: All documents mentioned in the pleadings must be produced when the pleadings are served.
2. **Witness Statements**: Statements from all witnesses whose evidence will be presented at trial must be produced.
3. **Document Disclosure**: Parties must produce documents they intend to rely on, as well as those that may harm their claims or defenses.
4. **Expert Reports Timetable**: A schedule for exchanging expert reports must be established.
5. **Redfern Requests**: Document requests from other parties are limited and must follow the Redfern format.
6. **Written Interrogatories**: Only a limited number of written interrogatories are allowed.

Notably, steps 1 through 4 must be completed by claimants within the first six months of serving their claim. For defendants, it is within nine months. Timing is tight given the work required to identify, collect and review documents in such a way as to ensure a good grasp of one’s case, draft witness statements and retain and manage experts. The proposal is unclear on the required timeline for steps 5 and 6, which are equally involved, but it is likely the Working Group envisions them also being completed within a year of the claim being served.

Impact on Litigation

The up-front evidence model will translate into the up-front costs for litigants. Instead of spreading their costs related to evidence over months or even years, litigants will be required to spend heftily before they serve a claim or defence, and in the weeks thereafter, to understand their case and adequately prepare their discovery. The requirement for sworn witness

statements early confirm that litigants will want to be very sure of the case that they are making and the evidence they are relying on to make it. Content in sworn statements must be accurate and must align with documents being produced and interrogatories served.

An up-front evidence model should be less favourable to claimants who bring vague, broad and unspecified claims for large damages amounts in hopes of a quick settlement before any real work needs to be done. On the flipside, this model also provides significantly less room for defendants to avoid a hearing on the merits through delay, or by grinding plaintiffs down with expensive motions practice.

Although the elimination of oral discovery most certainly means less cost and delay, it is unclear whether there will be any cost savings with the document discovery. Clients rarely have key documents at their fingertips. Litigants will still need to go through the process of identifying, collecting and reviewing significant volumes of data to find helpful and hurtful evidence. Indeed, documents could be reviewed up to three separate times under the new model given the two-step process for discovery and the requirement to answer interrogatories. Current technology used to assist with discovery is not well suited for this new model and may soon be rendered obsolete with significant and rapid gains in the use of generative AI for document discovery.

The up-front evidence model lends itself particularly well to generative AI ability to quickly and accurately identify categories of documents, factual points, or answer questions about document contents. Gains in generative AI technology in e-discovery, and not the proposed *Rules*, will likely be the source of future cost savings in document discovery.

This is only one part of our series, A New Vision for Litigation, analyzing the proposed reforms to Ontario's Rules of Civil Procedure. See our other blogs here:

- Summary of Proposed Changes to the *Rules of Civil Procedure* in Ontario
- Preparing for Proposed Changes to the *Rules of Civil Procedure* in Ontario: Strategic Insights & Practical Steps for In-House Counsel
- Expediting Justice: Pre-Litigation Protocol in the Proposed Changes to the *Rules of Civil Procedure* in Ontario
- Motions Practice Transformed: What the Proposed Civil Justice Reform in Ontario Means for Litigants

- Trials on Trial: A New Vision for Adjudication in Ontario
- The Digital Shift in Ontario Courts: Proposed *Rules* for a Tech-Driven Future