

Supreme Court of Nova Scotia

Justice John M. Davison



NOVA SCOTIA

The Law Courts
1815 Upper Water Street
Halifax, Nova Scotia
B3J 1S7

424-4900

MEMORANDUM

“Civil Procedure Rules Revision Project”

TO: Steering Committee

FROM: Justice John M. Davison

DATE: May 24, 2005

**RE: FINAL REPORT OF THE DISCOVERY AND DISCLOSURE
WORKING GROUP**

This group met on seven occasions considering many issues including examinations for discovery, document discovery, interrogatories, “will say” statements and exchange of witness lists. We are grateful for the assistance we have received from the Nova Scotia Law Reform Commission. Professor Bill Charles supplied us with several memoranda which were of great help in reaching conclusions on some of the issues.

Examinations for Discovery

If the parties are individuals they can be examined by way of discovery without a court order. Where a party is a corporation the other adverse parties can examine one manager (to be defined) and one employee of the corporation without a court order.

A court may grant leave to examine for discovery any person who, there is reason to believe, has information relevant to a material issue in the action, other than an expert engaged by, or on behalf of a party in preparation for contemplated or pending litigation. This provision to which the group agreed is similar to the Ontario

Rule 31.10(1) and 31.10(2). These rules read as follows:

31.10(1) *General* - The court may grant leave, on such terms respecting costs and other matters as are just, to examine for discovery any person who there is reason to believe has information relevant to a material issue in the action, other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation.

(2) *Test for granting leave* - An order under subrule (1) shall not be made unless the court is satisfied that,

- (a) the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person he or she seeks to examine;
- (b) the examination will not,
 - (i) unduly delay the commencement of the trial of the action,
 - (ii) entail unreasonable expense for other parties, or
 - (iii) result in unfairness to the person the moving party seeks to examine.

4. There is a burden on the person applying for an order for the discovery of a non-party. The extent of this burden has been set out in *Famous Players Development Corp. v. Central Capital Corp.* (1991) O.J. No. 2127; 6 O.R.(3d) 765. This decision was advanced by the three member Divisional Court. The court noted the word “may” in sub-rule (1) and the words “shall not be made unless” in sub-rule (2). The court interpreted sub-rule (1) and sub-rule (2)(a) and agreed with the statements of Justice Eberle in *Rothwell v. Raes* (1986) 13 O.A.C. 60 (Div. Ct.). That justice stated:

It is evident that the framers of the Rule, while granting a

new remedy for discovery of a non-party, felt it proper to establish a number of conditions which must be satisfied before the new remedy may be resorted to. Otherwise the remedy could easily be subject to abuse. Accordingly, it is consistent with the overall thrust of the Rule to read the two parts of sub-clause (a) as cumulative and not alternative.

The three member Divisional Court also agreed with the words of Justice van Camp in *Lloyd's Bank Canada v. Canada Life Assurance Company* (released October 10, 1991) wherein she stated Rule 31.10 “does not confer a right to discovery of non-parties but since 1985 it has permitted some discovery of non-parties under certain defined conditions.” The court in the *Famous Players* case concluded:

In our view, there must be a refusal, actual or constructive, to obtain the information before the applicant will be able to meet the onus under Rule 31.10(2)(a).

After the onus has been met under the Rule, the court may then look to Rule 1.04 to decide whether the court's discretion, as set out in Rule 31.10(1), should be exercised on the facts of a particular case.

In this case, there is no evidence of any actual refusal of Ms. Cunnison, or by the defendants, to provide the requested information.

Ontario Rule 1.04(1) is similar to our Rule 1.03. The court's interpretation of the burden on any applicant to obtain an order for discovery of a non-party should satisfy the member of the Disclosure and Discovery Group who, at the March 9th meeting, expressed concern that the “proposed test might encourage people to apply for leave to examine non-parties, which would leave us in the situation we currently occupy.” The rules should be framed to indicate a substantial burden on the applicant.

5. A “manager” who is to be examined by way of discovery has an obligation to make inquiries of the corporation’s current or former officers, directors and employees to inform himself and to review all corporate records in anticipation of the examination for discovery.
6. The applicant who wishes to examine corporate persons is the one permitted to select the person they wish to examine. The corporate party would be able to apply to the court for leave to have some other person chosen but the onus in establishing that is on the corporate party. Unless circumstances otherwise dictate an officer, director or manager (to be defined) should bind a corporation.

There are detailed provisions to be included in the rules which the Working Committee did not have time to consider. For example there should be provision to discover representative persons such as trustees in bankruptcy, representative for person under disability and assignees. There should be rules setting out the procedure for setting up an examination for discovery, the scope of examination, any penalties for persons who refuse to answer and this use of examination for discovery at trial.

In my view these details can be left to the “drafting stage” to the same extent that other new issues will be considered at that stage. There will be further consultation with members of the bar should there be any objection to these issues.

It must be remembered whether an expert witness can be the subject of examination for discovery is to be considered by the Evidence Working Group.

Discovery of Documents

There was the complaint of some lawyers in our consultation meetings, by correspondence and by general comments during discussions that the terms “semblance of relevance” placed a burden on parties which rendered excessive expense and the waste

of considerable time searching for documents which met the test. It was agreed that “semblance of relevance” test, which the Nova Scotia Court of Appeal accepted, should be narrowed. These words were also adopted in Ontario where, like Nova Scotia, the rules require listing the documents which “relate to” the matter in issue.

Bill Charles provided a very helpful memorandum on how to effect a change in the wording and he set out possible approaches to change. Professor Charles’ summary in the memorandum is in the following terms:

“The Nova Scotia language of either ‘relevance’ (R.18) or ‘relating to’ (R.20) has been given a broad meaning by the Nova Scotia judiciary because: 1) of the difficulty of determining what is relevant at an early stage of litigation when all the evidence regarding the dispute has not been presented and 2) to give full effect to the policy of disclosure and the objectives of the new rules.

In Ontario where the governing words are ‘relating to’ , the courts have similarly given the words a broad interpretation by use of the ‘semblance of relevance’ doctrine. Proposed reforms anticipate that by changing the wording to ‘relevance’ (which is basically the current Nova Scotia language but without the broader judicial interpretation) and by giving guidance to the Bar via guidelines and imposing discovery conferences, they can further narrow the scope of discovery.

In Alberta, the rule language of ‘relevant’ was also extended by the courts and broadened to include questions that ‘touched upon the matters in question’. ‘In order to limit or narrow the expanded meaning created by the courts, the word ‘material’ was added to Rule 200 (1.2) and Rule 186.1 was enacted to help define ‘relevance’. Alberta courts see this change as not merely semantic but bringing about a substantive change in meaning. However, the Bar has ignored these changes.

In all three provinces the judiciary, by its broad interpretation of either 'relevancy' or 'relating to' language, made it clear that questions or documents that were seemingly relevant or possibly relevant or potentially relevant or marginally relevant or indirectly relevant or had tertiary relevance, were acceptable. The objective in changing or proposing changes in the language was to narrow questions or documents to those that were actually relevant or strictly relevant or significantly relevant or primarily relevant.

Possible approaches to change

1. Use qualifying adjectives, like directly, strictly, primarily or significantly to convey a narrower meaning.
2. Add an additional qualifying word such as 'material'.
3. Define 'relevance' as Alberta has done in (sic) s. 186.1 or R. 661(3) of the streamlined procedure.

Even if we agree that the objectives of full disclosure, to allow for clearer identification of issues, reduce surprise and promote settlement, must be sacrificed to some extent in order to reduce cost and delay, we are still left with the difficulty of someone having to make a decision about what is relevant, upon limited facts and evidence at any early stage in the litigation. Counsel will be the first who have to make this determination, followed possibly by an examiner and then the courts. The decision will be more important in cases involving documents than oral discovery for counsel. Alberta courts are clear that discovery material can no longer be possibly, potentially or seemingly relevant but counsel might still have difficulty drawing the line as will the courts. Alberta proposes tougher sanctions for counsel who don't comply with the new language.

It would seem that the best way to deal with the difficulties faced by counsel and the courts is to adopt the Ontario proposal for getting the parties (counsel) together with or without a judge to engage in discovery planning via discovery conference with or without a change in language to signal intent to narrow.

The 'discovery conference' would have to take place prior to the DAC which, under the proposals from the Management of Litigation Working Group will take place early in the litigation process. Reference to such a 'discovery conference' could be included in the Questionnaire which is to be completed prior to the DAC according to the Management of Litigation proposals."

The Discovery Working Group decided to adopt the Alberta Committee's suggestion to use "relevant and material". In a meeting of the Steering Committee, a member vigorously opposed the use of these words at a time when documents are to be produced as they advance a stricter test than the standard of "relevance" at trial. It was argued this meant there could be documents which would be admissible at trial but would not be produced before trial. The Steering Committee agreed with these concerns.

The issue of the use of "relevant and material" was returned for the consideration of the Disclosure and Discovery Working Committee. That committee agreed the word "relevant" should be used instead of "relating to" and further agreed the inclusiveness test for discovery of documents should be as broad or broader than a later trial standard. This committee also agreed that it would not revisit the issue of discovery of documents again. Thus, it would seem if the rules are going to address the concerns expressed by barristers, it should be done at the drafting stage when "relevant" may be defined. The policy recommendation of the Disclosure and Discovery Working Group is clear from their agreements when the matter was returned to them.

Another issue concerning list of documents was whether it should be produced with a certificate attached as set out in the present rules or should there be an affidavit of the

party or representative of a party together with the certificate of the lawyer set out in the Ontario rules. At the meeting on May 18, 2005 five members of those present preferred the Ontario rule and two preferred the Nova Scotia rule.

Interrogatories

At the meeting of the Disclosure and Discovery Group on May 18, 2005 there was discussion about the extent of the rules relating to interrogatories. Five of the persons present agreed interrogatories could be directed to parties and non parties, but the rules had to have strict provisions to control the length and propriety of the interrogatories. Application could be made to court to affect that principle and the court must consider all three objectives as set out in Civil Procedure Rule 1.04.

Two of the members advanced the position that the rules with respect to interrogatories should be the same as in Ontario. This would set up a procedure in Nova Scotia similar to the suggested new rules on examination for discovery.

Witness Lists

It was agreed the parties exchange witness lists on or before ten days before trial. There will be no need to disclose the witness called solely on the issue of credibility which is a similar exclusion as contained in Civil Procedure Rule 31.15(2).

There will be no provision in the new rules for “will say” statements.