OBA Review of ULCC's Harmonized eDiscovery Civil Procedure Rules

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Submitted by: Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

The Ontario Bar Association (the "**OBA**") appreciates the opportunity to make this submission in response to the Proposed Harmonized eDiscovery Civil Procedure Rules (the "**Harmonized Rules**") prepared by the Electronic Document Rules Working Group (the "**Working Group**") of the Uniform Law Conference of Canada (the "**ULCC**"). As set out in the invitation to respond, the Working Group's goal is to "develop harmonized civil procedure rules governing the production of electronic documents in civil and administrative proceedings for adoption by all jurisdictions in Canada."

We welcome these proposals as an opportunity not only for the reform of civil practice, but as an opportunity for our members to reflect on and share their experiences with similar rules that are already in place in Ontario, in the hopes that those experiences can inform the development of shared, best practices, in Ontario and across the country.

The OBA

Established in 1907, the OBA is Ontario's largest voluntary legal advocacy organization, representing lawyers, judges, law professors and students from across the province, on the frontlines of our justice system and in no fewer than 39 different sectors. In addition to providing legal education for its members, the OBA assists government and other decision-makers with several legislative and policy initiatives each year - both in the interest of the profession and in the interest of the public.

In addition to the Civil Litigation section, this submission has benefitted from the input of the Insurance Law and Class Actions sections of the OBA. Our members regularly represent clients in matters governed by the Ontario Rules of Civil Procedure (the "**Rules**"),[1] and have considerable experience in their interpretation and application.

General Comment on Discovery Planning

Discovery Planning

This submission primarily addresses the OBA's experience with discovery planning, a form of which has been in place in Ontario since 2010 through Rule 29.1 of Ontario's *Rules of Civil Procedure* (the "**Ontario Rule**"). In fact, the OBA's Civil Litigation section has spent the past three years gathering input from both its members as well as

[1] R.R.O. 1990, Reg. 194. Online.

members of the bench and bar at large on the effectiveness (or lack thereof) of Ontario Rule.

From this work, it has become evident that many lawyers take the position that the Ontario Rule is ineffective and, in some ways, counter-productive to the benefits - proportionality and efficiency, in particular - that it was designed to achieve. While there are undoubtedly some proceedings that can and do benefit from front-end discovery planning, many of our members report that Ontario's mandatory discovery planning regime does not provide a measurable benefit in most proceedings, and therefore propose that the Ontario Rule should be abolished.

Our work has also revealed that it is, generally speaking, not possible for counsel to identify categories or types of proceedings that are likely to benefit the most from mandatory discovery planning at the outset of those proceedings. Part of this finding hinges on the fact that, in Ontario, many of the cases that are likely to benefit the most from discovery planning (such as class actions and complex, document-intensive commercial litigation), already benefit from the availability of more active judicial case management than most proceedings, and this judicial involvement mitigates the need for a mandatory discovery planning rule. Moreover, it is not uncommon for these cases to involve law firms that have become accustomed to handling document production on a large scale, and in a cooperative manner amongst each other. If the bright line classification of cases that would benefit from mandatory discovery planning were possible, it would permit a recommendation for such cases to be included in a mandatory discovery planning regime, with other cases excluded. We are however, unable to make this kind of recommendation.

In the paragraphs that follow, we will provide a description of the key reasons in support of the view that the Ontario Rule should be abolished, as well as recommendations for how the Harmonized Rules might avoid some of these same pitfalls. The three main reasons our members have advanced that the Ontario Rule does not work effectively are: agreement, lack of information, and efficiency.

Agreement

The Ontario Rule states that the parties to an action "shall agree" to a discovery plan in accordance with the Rule. Our members have advised us that it is common that parties will not agree to a discovery plan. This is, technically speaking, a breach of the Ontario Rule that permits the court to refuse to grant relief and/or costs on motions under several rules related to discovery of documents and examinations. Indeed, if a motion is required and the parties do not agree to a discovery plan, the timing of such a motion

necessitates that the entire action grinds to a halt. Thus, by requiring agreement the Ontario Rule adds an extra opportunity for potential dispute within an already adversarial system.

We were pleased to note that the Harmonized Rules (and proposed Rule 6 in particular) do not require agreement between the parties to complete the discovery planning step. Instead, the Harmonized Rules mandate the exchange of documents and provides a framework for discovery planning if the parties choose to follow the recommended process. If proposed Rule 6 of the Harmonized Rules is implemented as a flexible process, incorporates the proposals described in these recommendations, and is implemented in conjunction with our recommendation for the availability of prompt, informal judicial intervention described further below, we believe this is a workable approach to discovery planning.

Lack of Information

A second concern which has been raised by our members with respect to discovery planning is that it requires counsel to make judgment calls with respect to the evidence that may be of assistance to their client(s) in cases where that information is in the knowledge or the opposing party; and, at a point in the litigation where counsel don't have enough information to reasonably require the production of, or permit the exclusion of certain documents or information.

In the view of our members, requiring counsel to 'agree' on the appropriate scope of discovery before taking (significant) steps to understand the evidentiary basis for the case (such as reading the documents disclosed in an affidavit of documents, and conducting examinations for discovery) is premature and, to some extent, illogical. Given the consequences, moreover, counsel are often paralyzed by efforts to ensure the discovery plan is broad enough to encompass the breadth of a case they do not yet quite understand. This, itself, creates a battle between sides whose clients' interests are to broaden (often the plaintiff) the ambit of discovery and narrow it (the defendant).

Indeed, it is common for additional documents to be produced following an examination for discovery, as part of undertakings. Innocent mistakes or omissions are commonplace and are often corrected in answers to undertakings. Moreover, at an examination counsel may request certain documents, and opposing parties refuse to produce them (for instance, because the documents are not agreed to be relevant). So-called 'refusals' motions are also common and, in such cases, connected to legitimate disagreement over the appropriate scope of discovery.

Accordingly, by removing the requirement for prior agreement between counsel on a discovery plan, proposed Rule 6 of the Harmonized Rules may remove one impediment presented by the Ontario Rule to the timely and cost-efficient completion of discovery in litigation matters. We emphasize our recommendation that prompt, informal judicial intervention be available in the event that disputes do arise that require judicial intervention.

Efficiency

The general rationale for discovery planning is that it promotes proportionality, mitigates or reduces costs in the long run, and provides a uniform, organized way for parties to fulfill their discovery obligations in an action.

As noted above, the OBA does not question that there are cases where early discovery planning is useful. However, it has not been the collective experience of our members that the Ontario Rule has led to efficiencies in the conduct of litigation matters generally. Indeed, the number of members who have indicated that their regular practice is to ignore the discovery planning rule in Ontario suggests otherwise. In our view, 'over-legislating' discovery planning will likely lead to the abuses of the system described in the 'Agreement' section above, and impede judicial efficiency.

We note that many of the most complex and document intensive cases in Ontario, where discovery planning is most useful, benefit from judicial case management. Two such classes of cases are class actions, and cases on Toronto's Commercial List. Our members have indicated that for these cases, the availability of prompt judicial intervention, whether through "9:30 appointments" or otherwise, provides a moderating influence on the parties and counsel, ensuring that the matter proceeds promptly. In our view, such a moderating influence should be available for all cases in which discovery planning is a necessary element.

The ULCC Proposal

While the Harmonized Rules proposed by the Working Group are limited in their application to "proceedings that require the disclosure of Electronic Documents or in which one or more steps will be conducted with the aid of digital technology", this is likely to encompass most proceedings given the prevalence of emails and other forms of electronic communications. We are also of the view that in order to implement harmonized rules, jurisdictions must consider best practices for discovery in civil litigation in a holistic manner, including non-electronic documents, and the roles of the parties, counsel and the court.

Proposed Rule 6 - Discovery Planning

Proposed Rule 6 of the Harmonized Rules is a discovery planning rule with respect to electronic documents. It shares some common features with the Ontario Rule, but is not identical and we recognize that it is intended to be more limited in its scope. A comparison of some key features of proposed Rule 6 of the Harmonized Rules and the Ontario Rule is provided at **Appendix A**.

For proposed Rule 6 regarding Discovery Planning to succeed, it will be essential to have available "light touch" case management to ensure that the proposed rule does not become an impediment to the progress of a case instead of an instrument for streamlining or avoiding discovery disputes. Indeed, for a discovery planning rule to be efficient and effective, we believe that there must be recognition of the "interrelated roles of the court, the parties and counsel in fairly and efficiently managing discovery."[2] Accordingly, we believe proposed Rule 6 of the Harmonized Rules must include suggested practices to guide judges, masters, the parties and counsel, including a recommendation to permit "prompt, informal" contact with the court to resolve discovery disputes.

The OBA has previously recommended a similar approach, referred to as "On-Demand, Light-Touch Case Management" and described as follows:

> The ability to consult with a judge in an informal setting, without paperwork or long scheduling delays, is one of the most widely admired features of the Commercial List. These brief "9:30 attendances" improve the flow of cases and reduce the number of unnecessary and costly contested motions.
>
> …
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> To be clear, we are not suggesting a return to the mandatory case management system of the past or to single-judge, "cradle to grave" case management. Indeed, most cases should progress through the courts without any need to take advantage of light-touch case management. The availability of this resource, however, could provide a moderating influence in cases where counsel might otherwise be tempted to act unreasonably or to engage in stalling tactics.[3]

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[2] American Bar Association, Civil Discovery Standards. August 2004. Online.
[3] OBA Letter to Justice Morawetz. December 3, 2013. "Civil Motions and Long Trials Review." Online.

We are aware that, in some jurisdictions in Ontario, so-called "9:30 appointments" are now available to resolve discovery disputes and more widespread adoption of this means of informal discovery dispute resolution will help ensure that discovery planning itself does not become a further tool in the toolkit of obstructionist litigants.

We also note that the American Bar Association's Civil Discovery Standards specifically recommend the use of prompt, informal contact with the Court to resolve discovery disputes.[4] The ABA also refers to a series of studies on judicial case management which concluded that "the time from a case's start to its disposition was significantly reduced by early judicial management."[5]

In addition to the general recommendation that the ULCC's Harmonized Rules incorporate rules designed to provide quick and efficient access to the Court to resolve front-end discovery disputes (as opposed to requiring parties to bring full motions), we have the following additional comments on specific aspects of proposed Rule 6 of the Harmonized Rules. These comments are all directed at streamlining the discovery planning process and reducing the number of required formal steps and the potential for the rule to be used for delay or to increase costs to litigants.

> **6.1** – replace "shall make best efforts to" with "may", and dispense with the requirement to file a notice of agreement with the Court. This is an unnecessary cost and step for most proceedings. In the event there is a dispute relating to a discovery plan that reaches the Court, the relevant material can be filed at that time. A revised rule would read as follows: "The parties may agree on a Discovery Plan within 60 days of the close of the pleading period."
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> **6.2** – replace "A Discovery Plan must be in writing and must" with "A Discovery Plan must be in writing and may". Based on the experience with the Ontario Rule, the greater the number of formal requirements to a discovery planning rule, the greater the likelihood that it will be ignored in those proceedings where the issues do not warrant much time or expense being invested in discovery planning. In many cases, an adequate discovery plan may simply consist of dates for exchanging documents and completing examinations for discovery.

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[4] ABA Standard at p. 4-5.
[5] See the ABA Standard's discussion of the Rand Reports. *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, Rand Corporation, 1996, online at pp. 67-69.

While the proposed content in 6.2 can serve as a useful guideline, it should not be mandated for all cases.

6.3 and 6.5 – dispense with the requirement that parties prepare and exchange affidavits setting out the enumerated items in the event there is no agreed discovery plan. Dueling affidavits may be appropriate in certain cases where early judicial intervention is necessary to address discovery disputes but we do not believe the majority of cases will benefit from or require this level of formality. On the contrary, this sort of formal legislation of steps is what may lead to the abuse and inefficiency that we believe has occurred as a result of the Ontario Rule's requirement for parties to agree on a discovery plan. In the interest of enhancing proportionality and reducing the costs of litigation, the requirement to prepare formal affidavits documenting the document collection and production process should be eliminated.

6.4 - Rule 6.4 requires the provision of the affidavit in Rule 6.3 "from a person knowledgeable about the steps taken" to, among other things, 'locate and identify' relevant documents for production [6.3(b)]. We would note that Rule 6.4 (and Rule 6.7, for that matter) does not explicitly apply to Rule 6.5, despite Rules 6.3 and 6.5 being nearly identical but applying to different parties. We suggest that requiring an affidavit from a person knowledgeable about the steps taken to identify relevant documents, in particular, runs the risk of requiring evidence from counsel because, in many cases, the 'identification' of relevant documents is done by counsel out of an initial data-dump (with or without the assistance of an e-discovery service provider). In our view, the risk of regularly making counsel a witness in any case where the parties have not agreed on a discovery plan, even in the absence of any complaint about insufficient production, is worth noting.

6.6 - we recommend removing reference to the "Discovery Plan" in rule 6.6. Based on the experience with the Ontario Rule, we do not believe that early resort to the Courts to address disputes over discovery plans is cost or time effective in most cases. The implementation of our light touch case management recommendation may help mitigate this concern. Otherwise, we believe it is appropriate to continue to allow parties to resort to the Courts in the event a party does not comply with Rule 6, for instance, if a party is not producing documents or refusing to cooperate with scheduling. As a result, we recommend that the wording of 6.6 be amended to "A party may apply to the Court for an order compelling another party or other parties to comply with Rule 6 on those terms

the Court may order." This amendment recognizes that there will always be cases where judicial intervention in the discovery process is necessary at an early stage; however, it reduces the likelihood that a party will apply to the Court to settle a discovery plan without good reason for doing so or simply to create delay and additional cost to their adversary.

Conclusion

The OBA welcomes the opportunity to comment on changes to the existing discovery plan regime in Ontario. It has been the experience of many OBA members that the existing Ontario Rule is ineffective and, in many ways, counter-productive to the objectives of streamlining the discovery process and reducing litigation costs. The Civil Litigation section has determined that eliminating the existing Ontario Rule is desirable.

Based on the experience with the Ontario Rule, if a new discovery planning rule is to be implemented, the OBA favours one that minimizes formalities and mandatory steps. Recommended best practices can be of assistance and may be suitable for certain cases where formal front-end discovery planning helps to clarify the discovery process for the parties and avoid later disputes. At the same time, there will continue to be many cases where the formality is unnecessary. By eliminating some of the mandatory requirements in proposed Rule 6 of the Harmonized Rules, as set out above, we believe that proposed Rule 6 will be more flexible and of greater benefit to a larger number of cases where counsel can exercise their discretion and make use of those aspects of the rules that will assist given the specific circumstances of their case.

Appendix A – Discovery Plans – Comparison of Ontario and ULCC Rule Proposal

CATEGORY	The Ontario Rule (Rule 29.1)	Discovery Planning (ULCC s. 6)
Requirement for Plan	29.01.03 says if the parties intend to obtain evidence, they SHALL agree to a discovery plan in accordance with the Rule	The parties shall make best efforts to agree on a discovery plan, and notice of their agreement needs to be filed with the court
Timing	Requires a discovery plan to be agreed upon 60 days after the close of pleadings (or longer if parties agree) or before attempting to obtain evidence	
Contents	Written discovery plan that includes: (a) the intended scope of documentary discovery under rule 30.02, taking into account relevance, costs and the importance and complexity of the issues in the particular action; (b) dates for the service of each party's affidavit of documents (Form 30A or 30B) under rule 30.03; (c) information respecting the timing, costs and manner of the production of documents by the parties and any other persons; (d) the names of persons intended to be produced for oral examination for discovery under Rule 31 and information respecting the timing and length of the examinations; and (e) any other information intended to result in the expeditious and cost-effective	Written discovery plan that does the following: a) define the scope of production of Electronic Documents; b) describe how each party will locate and identify Electronic Documents to be produced; c) describe those documents or classes of documents that will not be disclosed or produced; d) specify dates for the exchange of affidavits/lists of Electronic Documents; and,

	completion of the discovery process in a manner that is proportionate to the importance and complexity of the action.	e) specify a protocol for exchanging Electronic Documents.
If there is disagreement	No legislated dispute mechanism; disputes over discovery plans are sometimes resolved in motions court; they can now be addressed in Toronto actions with 9:30 appointments in both Commercial List and regular Superior Court	If there is disagreement, a party can serve the other with an affidavit of documents. Then within 60 days of service of the affidavit, the receiving party must serve its affidavit of documents. Either party "may apply to the Court" for an order compelling another party or other parties to comply with the Discovery Plan or to comply with Rule 6.