

CONSULTATION PAPER

REVIEW OF DISCOVERY IN CIVIL LITIGATION

1 The Rules of Court Working Party (“ROCWP”) is reviewing the law, practice and management of the discovery of documents in civil litigation in Singapore to consider whether they should be modified and updated to better serve present and future business practices and needs. This consultation paper explores ways to revise and update the current law, practice and management of discovery, and seeks feedback and suggestions on the above.

2 The paper first sets out preliminary feedback obtained from the legal profession and business groupings on the time and costs spent in the discovery process, as well as the procedural rules governing that process. A section of the paper is dedicated to examining the discovery of electronically-stored documents. The views of the Attorney-General’s Chambers on discovery against the Government and statutory bodies are also included.

3 Finally, the paper considers the approach of other jurisdictions to discovery, the problems they have faced and identifies possible features which could be considered for adoption or adaptation locally.

4 Please direct your comments and feedback marked “Re: Review of Discovery in Civil Litigation” *via*:

- (a) mail, addressed to “The Supreme Court of Singapore, 1 Supreme Court Lane, Singapore 178879 (Attention: Ms Teresa Lee)”;
- (b) fax, at 63379450; or
- (c) electronic mail, to Teresa.Lee@supcourt.gov.sg.

Review of Discovery in Civil Litigation

- 5 The closing date for this consultation is Wednesday, **9 November 2011**.

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CONTENTS

(A) PRELIMINARY FEEDBACK FROM THE LEGAL PROFESSION AND BUSINESS GROUPINGS	1
(I) TIME SPENT ON DISCOVERY	2
(II) COSTS OF DISCOVERY	3
(III) EXISTING RULES ON THE DISCOVERY PROCESS	4
(a) <i>The test of necessity</i>	4
(b) <i>Possession, custody and power</i>	4
(c) <i>The obligation to provide discovery</i>	5
(d) <i>Separate discovery regimes</i>	5
(e) <i>Confidentiality</i>	6
(f) <i>Specific discovery applications</i>	6
(g) <i>Third party discovery against banks</i>	7
(IV) SUB-CONCLUSION.....	7
(B) DISCOVERY OF ELECTRONICALLY STORED DOCUMENTS	8
(I) THE CURRENT FRAMEWORK AND SCOPE OF PRACTICE DIRECTION No 3 of 2009.....	8
(a) <i>The current framework</i>	8
(b) <i>The Court's power to order digitisation of hardcopy documents</i> .	9
(c) <i>The Court's powers in overseeing the adequacy of a discovery plan/protocol</i>	9
(d) <i>The Court's power in making costs shifting orders</i>	10
(II) SAVING COSTS AND TIME IN THE E-DISCOVERY PROCESS	12
(a) <i>Compulsory meetings and discussions</i>	13

Review of Discovery in Civil Litigation

(b)	<i>The use of search terms</i>	13
(c)	<i>The use of a checklist of issues</i>	15
(III)	THE TRADITIONAL STEPS IN THE DISCOVERY PROCESS.....	15
(IV)	THE TEST OF “NECESSITY”	16
(V)	DOCUMENTS WHICH ARE <i>PRIMA FACIE</i> NOT REASONABLY ACCESSIBLE	18
(VI)	INSPECTION AND TAKING OF COPIES OF ELECTRONIC DOCUMENT	21
(a)	<i>Party’s obligation to provide reasonable means and assistance to allow inspection</i>	21
(b)	<i>Party’s obligation to supply copies of discoverable electronic documents in native format or other reasonably accessible format</i>	21
(VII)	“TRUE” ELECTRONIC COPIES AS EQUIVALENT OF “ORIGINALS”....	22
(VIII)	SAFEGUARDS AGAINST TRAWLING OF COMPOUND ELECTRONIC DOCUMENTS	24
(IX)	REVIEW OF PRIVILEGED DOCUMENTS BY PARTY GIVING DISCOVERY	26
(X)	DEFINITIONS.....	27
(a)	<i>“Documents” and “compound documents”</i>	27
(b)	<i>“Metadata”</i>	28
(c)	<i>“Search term”</i>	29
(XI)	SUGGESTED NEW REGIME FOR THE EXCHANGE OF DOCUMENTS AND DEFERRED INSPECTION WHERE A DISCOVERY PLAN IS IN PLACE....	30
(XII)	SUB-CONCLUSION.....	31
(C)	DISCOVERY FOR AND AGAINST THE GOVERNMENT	34
(I)	THE PRESENT LEGAL POSITION	34
(a)	<i>Where the Government is a party to legal proceedings</i>	34

Review of Discovery in Civil Litigation

(b)	<i>Where the Government is not a party to legal proceedings</i>	36
(II)	JUDICIAL REVIEW PROCEEDINGS	36
(a)	<i>The common law position</i>	36
(b)	<i>Order 53</i>	38
(III)	SUGGESTIONS FOR REFORM	39
(D)	PRACTICE OF COMPARABLE JURISDICTIONS	40
(I)	SUMMARIES.....	40
(a)	<i>United Kingdom – “post-Woolf”: the Jackson menu?</i>	40
(b)	<i>Australia – Australian Law Reform Commission 2011 and “managing discovery”</i>	45
(c)	<i>Hong Kong – Civil Justice Reform 2009</i>	47
(d)	<i>Canada – discovery and litigation plans</i>	49
(II)	OPTIONS TO CONSIDER FOR ADOPTION/ADAPTATION	50
(E)	CONCLUSION	52
	ANNEX A – ORDER 24	53
	ANNEX B – PD 3/2009	66
	ANNEX C – PROPOSED CHECKLIST	77
	ANNEX D – PROPOSED AMENDMENTS TO PD 3/2009	80
	ANNEX E – JURISDICTION OUTLINES	82
(A)	UNITED KINGDOM	82
(B)	AUSTRALIA	86
(I)	HIGH COURT OF AUSTRALIA	86
(II)	FEDERAL COURT OF AUSTRALIA	86

Review of Discovery in Civil Litigation

(a)	<i>Application for Discovery</i>	87
(b)	<i>Orders for Discovery</i>	87
(c)	<i>Applicable test: whether discovery necessary</i>	88
(d)	<i>Serving a list of documents</i>	90
(e)	<i>Production of documents</i>	90
(f)	<i>Pre-Discovery Practice</i>	91
(g)	<i>Planning for Electronic Discovery</i>	92
(C)	HONG KONG	93
(I)	SCOPE OF DISCOVERY	94
(II)	AUTOMATIC DISCOVERY	94
(III)	PROVISION OF COPIES OF DOCUMENTS	95
(IV)	UNDERTAKING WITH REGARD TO THE USE OF DOCUMENTS	95
(V)	LIMITING DISCOVERY	95
(D)	CANADA (SELECTED PROVINCES)	96
(I)	BRITISH COLUMBIA	97
(II)	ALBERTA	98
(III)	ONTARIO	100
(a)	<i>Discovery plan</i>	100
(b)	<i>Proportionality in discovery</i>	102

(A) PRELIMINARY FEEDBACK FROM THE LEGAL PROFESSION AND BUSINESS GROUPINGS

6 Between July and August 2011, feedback was sought from various stakeholders, including the Civil Practice Committee of the Law Society of Singapore (“Law Society”), the Singapore Corporate Counsel Association (“SCCA”), local and foreign banks (“Banks”) and other multinational companies (“MNCs”), on the existing rules.

7 The feedback was conducted through questionnaires stating the following five general questions:

- (a) Is excessive or inadequate time spent on the discovery process?
- (b) Are excessive costs incurred during the discovery process?
- (c) Are the existing rules on the discovery process too complicated or too vague to be useful?
- (d) Holistically, are the existing rules on the discovery process satisfactory? If not, what are the areas in pressing need of reform?
- (e) Do you have any suggestions to improve the discovery process? If so, please state them.

8 Additionally, responses were sought from a number of lawyers of the Singapore Bar (“the Singapore Bar”) on an informal basis.

9 The views and feedback received are summarised below.

(I) Time spent on discovery

10 With regard to the amount of time spent on the discovery process, the Law Society and the SCCA were of the view that it is difficult to state a general position as much would depend on the facts of each case. Informal feedback from the Singapore Bar highlighted experiences of both excessive and inadequate time spent on the discovery process resulting in time being wasted either at the pre-trial stage or at the trial.

11 One MNC also noted that where the dispute in question was complex, it was inevitable that additional time would have to be spent and costs be incurred. However, it raised the concern that the existing rules on discovery were subject to potential abuse and noted that judicial officers hearing discovery applications were therefore important “gate-keepers”.

12 The Law Society highlighted the importance of the discovery process in adjudication and noted that while parties should be given sufficient time for discovery, there should be rules to avoid inefficient discovery. The Law Society cited multiple applications for specific discovery without good reason, as an example of inefficient discovery.

13 The Banks surveyed expressed the view that the existing rules do not generally result in inefficiency in terms of the time and costs expended in the discovery process although a few areas of reform were highlighted for the ROCWP to consider (*eg*, see paras 25 and 31 below) The Banks noted that the Court’s imposition of tight deadlines for the compliance of discovery obligations may affect the parties’ ability to comply with those timelines.

(II) Costs of discovery

14 With regard to the issue of costs incurred in the discovery process, the SCCA was of the view that in balancing between fact-finding and cost-effectiveness, the rules should err on the side of fact-finding and establishing the truth. In contrast, the Law Society and the Singapore Bar indicated that costs might be a more pressing concern. In particular, they were of the view that excessive costs are incurred when multiple specific discovery applications are made without good reason and requests for disclosure of documents prior to the making of the formal application are poorly defined.

15 The Banks surveyed also raised concerns about the existing gap between the costs incurred by a successful applicant for discovery and that which are usually awarded by the Court.

16 Further, the Banks highlighted important costs considerations specific to discovery applications made against banks. Due to the manner in which banks store original documents, where a party insists on inspecting original documents (rather than merely copies of the same), banks may incur additional costs when complying with their discovery obligations, and further, there may be unnecessary delays in the proceedings.

17 In addition, the Banks have noticed an increase in attempts to obtain information from them even though they are not a party to the litigation. This could be due to parties misplacing their documentation or a perception that documents produced by a bank may be more reliable. As with the concern stated in the foregoing paragraph, the time and costs involved in such discovery can be very excessive, especially if historical documents have to be

retrieved. This consequently results in business disruptions with no avenue for adequate compensation for banks.

(III) Existing rules on the discovery process

18 Various suggestions were offered on modifying the existing discovery rules under O 24 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) (“the Rules of Court” or “the Rules” as the case may be) to meet the concerns alluded to above. Order 24 of the Rules of Court is reproduced in **Annex A**.

(a) *The test of necessity*

19 The Law Society opined that the test of “necessity” is not clearly defined, leading to either an underestimation or overestimation of the documents or information to be discovered. The Law Society suggested that the alternative test of “materiality” (employed in the International Bar Association Rules on the “Taking of Evidence for International Arbitration”) should be considered.

20 The Singapore Bar also highlighted the difficulty with the test of “necessity” and determining the proper scope of documents to be disclosed in discovery. They proposed limiting the obligation of a party during general discovery to disclose only documents favourable to its own case or unfavourable to the counterparty’s case. This would incentivise full compliance with the parties’ discovery obligations.

(b) *Possession, custody and power*

21 The Law Society suggested that it should be expressly set out in the Rules of Court that where a party or witness states on oath or affirms in an affidavit that it does not have a particular document requested, that statement

Review of Discovery in Civil Litigation

should be treated as being conclusive. The Court should not thereafter make an order for discovery when presented with such an affidavit. Where the affidavit is subsequently proven to be untrue, the appropriate sanctions should apply, and the credibility (or lack thereof) of that party or witness may be called into question by the Court in deciding the substantive disputes between the parties.

22 Additionally, the Law Society proposed clarifying the meaning of “possession, custody or power” as set out in O 24 of the Rules of Court.

(c) *The obligation to provide discovery*

23 The Law Society proposed clarifying the scope of the discovery obligations of directors and officers of a company who are personally involved in litigation together with the company, as well as clarifying the instances where privileged communications become subject to discovery.

24 The SCCA proposed the adoption of a rule expressly allowing the Court to draw an adverse inference should a party fail to disclose documents which are adverse to its own case.

(d) *Separate discovery regimes*

25 The Banks raised the issue of whether the same rules should apply to corporations and individuals, taking into account the vast difference in resources available to corporations as compared to individuals. The Banks further raised the issue of whether a separate set of rules should apply where issues of national security or data protection are involved, with the Court assuming a more inquisitorial role in such cases.

(e) Confidentiality

26 It was suggested by an MNC that a mechanism should be put in place for a party to seek a protective Court order to compel parties to maintain the confidential nature of specific information and to enable the Court to impose severe sanctions for a breach of such order. This would greatly assist industries that rely on trade security for their technology to be kept confidential, where often a simple confidentiality agreement between parties is insufficient.

(f) Specific discovery applications

27 As mentioned above (in para 14), the Law Society proposed disallowing parties from making repeated applications for specific discovery and suggested deterring such behaviour by way of adverse costs consequences. Similarly, the Singapore Bar suggested that the costs of the application for specific discovery should be borne by the applicant unless the applicant succeeds at trial and manages to show that the documents were relevant.

28 Further, the Law Society proposed that parties should be obliged to consolidate their requests for discovery and limit the number of specific discovery applications. Additional specific discovery applications may be allowed in exceptional cases, for example, when there is an amendment of pleadings subsequent to the specific discovery application.

29 The Singapore Bar also suggested specifying a time frame for making specific discovery applications, with allowance for such applications to be made outside the relevant time period only in exceptional cases.

Review of Discovery in Civil Litigation

30 Additionally, the Law Society alluded to the existing practice of using pleadings as “fishing lines” where a party makes certain allegations and seeks discovery on the basis that the documents sought would be relevant to these allegations. In the Law Society’s view, a possible solution would be for parties to first administer interrogatories, followed by an application for specific discovery based on the answers obtained from the interrogatories.

(g) *Third party discovery against banks*

31 In order to address the problem experienced by banks relating to the demands by litigants to inspect original documents, the Banks suggested that the Rules of Court be amended to specify the circumstances under which original documents must be produced.

(IV) Sub-conclusion

32 The respondents to the ROCWP’s survey highlighted several important issues concerning the time, costs and procedure employed in the discovery process, with particular concerns raised as to the test to be applied in determining the scope of discovery, the electronic discovery regime, and the practice in other jurisdictions. These issues will be considered in further detail in Parts (B) and (D) of the paper.

(B) DISCOVERY OF ELECTRONICALLY STORED DOCUMENTS

33 This part of the paper considers the electronic discovery (or e-discovery) regime presently in existence in Singapore and how it may be improved. Electronic discovery is concerned with the discovery of documents which are stored electronically, and extends to inspection and supply of copies of the same. The current framework for e-discovery is set out in Practice Direction No 3 of 2009 (“PD 3/2009”), reproduced in **Annex B**. PD 3/2009 does not apply to hardcopy documents.

(I) The current framework and scope of Practice Direction No 3 of 2009

(a) *The current framework*

34 PD 3/2009 establishes a regime for parties to request and/or apply for discovery and inspection of electronically stored documents. Parties can mutually agree to adopt PD 3/2009, or one party may invoke it by making a request and application thereunder. In any event, the Court may order parties to comply with PD 3/2009.

35 One of the considerations for improvement is that O 24 r 1 be amended to make it *mandatory* for parties to adopt an electronic discovery plan in cases where:

- (a) A significant number of documents relevant to the proceedings have been created or are stored in an electronic format (*ie*, more than 200); and

Review of Discovery in Civil Litigation

(b) The use of technology in the management of documents and conduct of the proceeding will help facilitate the quick, inexpensive and efficient resolution of the matter.¹

(b) *The Court's power to order digitisation of hardcopy documents*

36 In certain cases, it may be expedient that hardcopy documents be digitised for ease of management. For example, where the majority of discoverable documents are electronically stored, digitising the remaining hardcopy documents, which form the minority of documents, may make managing those documents easier.

37 The current position is that parties may agree to digitisation, or alternatively, the Court may order digitisation (if necessary) in reliance on its inherent powers. It is suggested that the Court should be empowered to order the digitisation of hardcopy documents if it is expedient to do so, especially where an electronic discovery plan is mandatory.

(c) *The Court's powers in overseeing the adequacy of a discovery plan/protocol*

38 The Court may at times find a proposed electronic discovery plan to be inadequate, especially where one party or both parties have little technical know-how. Furthermore, it may also find that the electronic discovery plan agreed by the parties, although *prima facie* reasonable, could be simplified to save time and costs.

¹ Federal Court of Australia's Practice Note CM 6, http://www.fedcourt.gov.au/how/practice_notes_cm6.html.

Review of Discovery in Civil Litigation

39 The Court has the discretion to, on its own motion or upon the request of a party, review the adequacy of the electronic discovery plan and to make appropriate variations if necessary for the just, expeditious and economical disposal of the cause or matter. This power is a common feature of e-discovery regimes,² and is included in PD 3/2009; albeit currently premised on the Court's inherent jurisdiction.

40 It is suggested that if O 24 r 1 is amended to mandate the adoption of an electronic discovery plan, the Court should be expressly empowered to, on its own motion, or upon the request of a party, review the adequacy of the electronic discovery plan and to make appropriate variations if necessary for the just, expeditious and economical disposal of the cause or matter.

(d) The Court's power in making costs shifting orders

41 Costs shifting orders are intended to shift the costs of producing discoverable documents from the (traditional) party giving discovery to the party entitled to discovery. This is useful particularly where the documents sought are not reasonably accessible ("NRAD") and where the party seeking discovery may not have successfully convinced the Court that the documents, though relevant, are sufficiently material that it is necessary to make an order for discovery. It is very likely that orders for discovery of such NRAD would necessitate the producing party to take steps far beyond what the producing party normally does in its ordinary course of business; such orders could even disrupt the running of its business, especially when its day to day operations are reliant on the same technological resources as those subject to the Court's

² See also UK PD 31B, para 18.

Review of Discovery in Civil Litigation

discovery and inspection orders, *eg*, a corporate mail server or file server. Often, the costs of producing NRAD would be substantial, as it includes the costs of appointing the services of computer experts and the costs of using special data recovery programs.

42 Currently, PD 3/2009 states that the Court may make costs shifting orders in reliance on the inherent powers of the Court.³ In such situations, the Court may consider making the discovery order but on the condition that the party seeking discovery bears a part of or the full costs incurred in giving discovery.⁴ It is suggested that the option of making costs shifting orders,

³ There is judicial recognition of this power in New Zealand where the Court of Appeal in *Commerce Commission v Telecom Corporation of New Zealand Limited* [2006] NZCA 252 held that the Court has the power to make costs-shifting directions if it was just to do so for an interlocutory order, despite the fact that the New Zealand High Court Rules only expressly provides for the shifting of costs for pre-commencement discovery orders and discovery orders against a non-party.

⁴ See Principle 12 of the Sedona Canada Principles (January 2008):

Principle 12. The reasonable costs of preserving, collecting and reviewing electronically stored information will generally be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.

In most Canadian provinces and territories, the costs of discovery are traditionally borne by the producing party... However, when documents are produced, the opposing party is responsible for the immediate costs of the production, such as copying, binding and delivery costs. Any other cost-shifting generally occurs at the end of the litigation, at which time the unsuccessful party may be required to contribute, in whole or in part, towards the costs (fees and disbursements) of the successful party.

While litigants are properly expected to bear the costs, on at least an interim basis, of producing electronically stored information in the ordinary course of business, different considerations are engaged when extraordinary effort or resources will be required to first restore data to an accessible format before it can be produced. For example, restoring deleted data, disaster recovery tapes, residual data, or legacy systems may involve extraordinary efforts or resources. In such cases, requiring the producing party to fund the significant costs associated with restoring such data may be unfair, and may hinder the party's ability to litigate the dispute on the merits.

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along with setting out the conditions that determine when such orders ought to be made, be specifically provided for. For example, the New Zealand Rules Committee had, in their substantive consultation on discovery and e-discovery, proposed the use of a “manifestly unjust” standard in the making of costs shifting orders.⁵

(II) Saving costs and time in the e-discovery process

43 Electronic documents come in varied formats and may be stored in diverse storage media. Thus, the volumes involved may potentially be large. Electronic documents (such as emails) are also subject to high rates of replication, and are more difficult to dispose than hardcopy documents (“deletion” does not equate to permanent disposal). Furthermore, electronic

Accordingly, it is generally appropriate that the party requesting such extraordinary efforts should bear, at least on an interim basis, all or part of the costs of doing so.

⁵ See Rule 8.22 of the New Zealand Rules Committee, Draft Rules on Discovery (v 1.18), available at: http://www.Courtsofnz.govt.nz/about/system/rules_committee/consultation. Rule 8.22 states:

8.22 Costs of discovery

(1) If it is manifestly unjust for a party to have to meet the costs of complying with an order made under this subpart, a Judge may order that another party meet those costs either in whole or in part, in advance or after the party has complied.

(2) Despite subclause (1), the Court may subsequently discharge or vary an order made under that subclause if satisfied that a different allocation of those costs would be just.

(3) If an order is made under rule 8.20(2) or 8.21(2), the Judge may, if the Judge thinks it just, order the applicant to pay the person from whom discovery is sought the whole or part of the person’s expenses (including solicitor and client’s costs) of and incidental to the application in complying with any order made on the application.

Review of Discovery in Civil Litigation

documents are not fixed in a final form; they can be modified easily by automated programs/systems or by human intervention.⁶

44 Due to the varied nature of electronic documents and their storage locations, a person familiar with these issues needs to provide input at an early stage of discussions. Otherwise, lawyers may not be properly instructed and the Court's orders may not be effective.

(a) *Compulsory meetings and discussions*

45 To deal with the potential wastage of time and costs, it is suggested that the obligation for parties to meet and discuss in good faith all issues relating to discovery, both of hardcopy and electronic documents, be made compulsory. It is suggested that the meeting should take place within two weeks of the close of pleadings, unless the plaintiff intends to make an application for summary judgment, in which case, the meeting may be held after determination of the summary judgment application. The end product of such meetings is, ideally, the adoption of an electronic discovery plan, either voluntarily or as mandated (by the suggested amendments outlined at para 35 above).

(b) *The use of search terms*

(i) *General discovery*

46 It is suggested that the Rules of Court be amended to permit the use of search terms to conduct general discovery as an alternative to the manual

⁶ See The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production, (June 2007, 2nd Ed) ("The Sedona Principles, Best Practices") at pp 2-3.

Review of Discovery in Civil Litigation

identification of the three categories of discoverable documents in O 24 r 1(2) of the Rules of Court. Parties may agree to a set of search terms and also on which custodians and repositories to run the search. The search results will then form the complete set of documents for general discovery with the benefit of reducing time and effort for reviewing a large set of documents to draw up a subset of “relevant” documents. For this approach to work, however, lawyers will need to know how to craft search phrases properly.

47 Under this approach, electronic documents which are uncovered from the agreed search terms will be deemed to be relevant. Thus, the use of search terms may also assist in managing discovery in stages whereby parties may agree that, to better manage the costs of discovery, a defined list of custodians and repositories should first be searched before deciding thereafter whether to proceed beyond this list to other custodians.

48 It is also highlighted that under this approach, practitioners and the Court will have to live with the possibility that: (a) not all documents in the search results will be relevant; and (b) not all relevant documents may have been identified in the search results. In other words, consumers of this approach will have to live with some imperfection. This view was expressed in the case of *Sanae Achar v Sci-Gen Ltd* [2011] SGHC 87 (“*Sanae*”).

49 It ought to be clarified that this approach does not preclude the making of applications for specific discovery.

(ii) *Specific discovery and discovery against third parties*

50 Classes of documents may be described with reference to search terms and the use of such search terms can be a new way of describing documents for specific discovery. Once the search is conducted, all documents which

Review of Discovery in Civil Litigation

respond to the search term will be provided, without the need for further review for relevance: *cf Sanae* at para 48 above.

51 It is suggested that the use of search terms in the description of classes of documents in specific discovery and discovery against third parties requests be specifically added to O 24 of the Rules of Court.

(c) *The use of a checklist of issues*

52 PD 3/2009 currently provides for an Agreed Electronic Discovery Protocol (“sample electronic discovery protocol”) and Protocol for Inspection of Computer Databases and Electronic Media or Recording Devices (“sample inspection protocol”) (collectively “sample electronic and inspection protocols”). Lawyers have been using these protocols as a starting point for discussions and modifying them as is necessary. In so doing, *bona fide* discussions which are conducted may avert the need for subsequent specific or further discovery applications, or at least alert parties to the areas of dispute.

53 In order to further facilitate discussions, it is suggested that a checklist of issues which lawyers need to traverse in relation to discovery and inspection of electronic documents be provided *via* Practice Directions (“PDs”): see **Annex C** for a sample list. This is intended to complement the existing sample electronic discovery and inspection protocols, which are to be retained.

(III) The traditional steps in the discovery process

54 The traditional steps in the discovery process, *viz*, the enumeration of documents in a list of documents, followed by inspection and taking copies,

especially in cases involving large numbers of documents, need to be reviewed to ascertain whether they are necessary in this digital age. PD 3/2009 currently spells out the information which has to be included in the list. It also requires that the list be provided in a structured electronic format, so that it can be used as a load file.

55 It is suggested that a list of documents in a structured format, *ie*, a properly delimited information and machine-readable electronic list, be provided in addition to or *in lieu* of a hardcopy list. This will facilitate searching the list and using it as a load file. The information to be provided should be revised and continue to be spelt out in the PDs.

(IV) The test of “necessity”

56 The present language of O 24 of the Rules of Court does not use the words “proportionate” or “relevance”. Yet not only has the concept of proportionate discovery been propounded in various common law jurisdictions, it has also been expressly recognised in local jurisprudence on electronic discovery.⁷ The principle of proportionality requires the balancing of the likely benefits of obtaining *relevant and necessary* evidence, against the time, costs and burden of giving discovery. It would not be feasible nor practicable to conduct an extensive discovery of voluminous electronic documents to “leave no stone unturned” especially when the costs of so doing would outweigh the number of issues at stake in the litigation.

⁷ See *Sanae Achar v Sci-Gen Ltd* [2011] SGHC 87 at [23] and *Alliance Management SA v Pendleton Lane P and another and another Suit* [2007] 4 SLR(R) 343 at [19].

Review of Discovery in Civil Litigation

57 As the principle of proportionality is already implicit in the phrase “disposing fairly of the cause or matter or for saving costs” (for instance, see O 24 r 7), it is suggested that the concept of proportionality be expressly introduced into the discovery regime under the Rules of Court.

58 PD 3/2009 sets out a list of factors which the Court may consider in determining whether discovery should be ordered. This is adapted from the pre-2010 UK PD on electronic disclosure. The Federal Court of Australia’s Practice Note CM 6 and US Federal Rules of Civil Procedure were also considered.

59 Since then, the UK has introduced a refreshed PD on electronic disclosure, *ie*, PD 31B. In paragraph 20 of the PD 31B, parties are required to bear in mind the overriding objective to deal with the case in ways which are proportionate. British Columbia and Ontario, on the other hand, have both adopted the Sedona Canada Principles.⁸ These are similar to the Sedona Principles in use in the US. There are twelve principles, each of which has commentary to expand upon and further explain how to implement the principles in practice. In particular, there is a focus on proportionality, which is key to making e-discovery more manageable and cost effective.

60 There appears now to be a clear international trend of setting down the key touchstones for determining proportionality. The considerations are primarily (a) whether the electronic documents are reasonably accessible (this includes considering the cost of retrieval); and (b) whether they contain

⁸ *The Sedona Canada Principles: Addressing Electronic Documents Production* (January 2008), at p iv, <http://www.thesedonaconference.org/publications_html?grp=wgs170>.

Review of Discovery in Civil Litigation

information which is relevant and material to the issues in dispute. It is suggested that the list of factors in PD 3/2009 be revised (see **Annex D**) and incorporated into O 24 of the Rules of Court.

(V) Documents which are *prima facie* not reasonably accessible

61 Examples of documents which are not reasonably accessible documents (*ie*, NRAD) include backup data stored for disaster recovery purposes (or “backup data” in short), legacy data that remains on obsolete systems and is unintelligible on the successor systems, residual data (including deleted data that remains in fragmented form),⁹ and non-current archival data.

62 The costs of producing NRAD would be substantial in most cases, as it would include the costs of appointing the services of computer experts, the costs of using special data recovery programs, the costs of the actual conduct of forensic examination, as well as the costs of converting the recovered data into a readable format. In addition, as many companies hold on record a substantial volume of archival and backup data pursuant to their document retention policy, much time and technological expertise would be required to conduct an effective review of the archival and backup databases in such cases. Furthermore, as such NRAD were stored and recorded in a particular point in time (in the past) for a particular purpose, it is possible that a substantial portion of irrelevant data would be reviewed for the purpose of

⁹ See comment 2c, in The Sedona Principles Best Practices. See also *Laura Zubulake v UBS Warburg (Zubulake I)* 217 FRD 309 (SDNY 2003), where Shira A Scheidlin, USDJ, described, at [24], the following as “inaccessible” documents: information stored on backup tapes, erased data, fragmented data, and damaged data.

Review of Discovery in Civil Litigation

obtaining a smaller portion of relevant data. Hence, there is a good case for setting a higher threshold for the discovery and production of NRAD.¹⁰

¹⁰ See Principles 5 & 6 of The Sedona Canada Principles (January 2008):

Principle 5. The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.

Comment 5.a. Scope of Search for Reasonably Accessible Electronically Stored Information

The primary sources of electronically stored information in discovery should be those that are reasonably accessible ... Certain forms of electronically stored information—such as old backup tapes, data for which applications no longer exist, and databases—are often considered “not reasonably accessible” simply because they are more difficult to deal with than other data forms ... It is important, therefore, to recognize that the determination of accessibility does not depend strictly upon convenience, but rather on the concept of marginal utility. Accordingly, the test for the discovery of electronically stored information now becomes: Will the quantity, uniqueness and/or quality of data from any particular type or source of electronically stored information justify the cost of the acquisition of that data?

...

Principle 6. A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information.

Comment 6.a. The Scope of the Search

Deleted or residual data that is not accessible except through forensic means should not be presumed to be a document that is discoverable in all circumstances. Such data may be discoverable, but the evaluation of the need for and relevance of such discovery should be analyzed on a case by case basis.

Ordinarily, searches for electronically stored information will be restricted to electronically stored information that is available from reasonably accessible sources. In the absence of demonstrated need for the collection of hidden files, system logs, deleted files, fragmented data and partially over-written files, the scope of collection should be limited to the relevant electronically stored information that would have been used in the ordinary course of business....

Deleted and residual data, like papers discarded in the trash, may be subject to discovery. However, only exceptional cases will turn on “deleted” or “discarded” information (whether paper or electronic).

Review of Discovery in Civil Litigation

63 Currently, there is no list of NRAD in the main body of PD 3/2009, although the sample electronic discovery protocol states that “deleted files or file fragments containing information which are recoverable through the use of computer forensic tools or techniques are...**not** within the scope of general discovery”. [emphasis in original]

64 In the US, the Federal Rules of Civil Procedure prescribes a “first tier” of discovery that is limited to reasonably accessible documents. Similar distinction between reasonably accessible and NRAD is drawn in the UK PD 31B, where *relevance and materiality* have to be demonstrated before disclosure of NRAD will be ordered.¹¹

65 To promote certainty, it is suggested that categories of NRAD be spelt out and that O 24 of the Rules of Court be amended to include presumptions that certain categories of electronic documents be deemed to be not reasonably accessible and therefore not within the scope of general discovery. Parties requesting such documents will have to make a request for specific discovery and must demonstrate proportionality by showing that they are relevant and material. NRAD should include: (a) information recoverable using forensic tools and techniques from storage devices; and (b) documents stored on backup tapes or storage media.

¹¹ See UK PD 31B, para 24:

The primary source of disclosure of Electronic Documents is normally reasonably accessible data. A party requesting under rule 31.12 [of the Civil Procedure Rules for] specific disclosure of electronic documents which are not reasonably accessible must demonstrate that the *relevance and materiality* justify the cost and burden of retrieving and producing it. [emphasis added]

(VI) Inspection and taking of copies of electronic document

(a) *Party's obligation to provide reasonable means and assistance to allow inspection*

66 Whereas paper documents may be inspected with the naked eye, electronic documents may only be inspected if the correct equipment is available, *ie*, a computer with the necessary software. It may also be necessary to provide an operator to retrieve the electronic document and display on screen for inspection.

67 PD 3/2009 requires that the party giving discovery should provide reasonable means and assistance to allow inspection of the original electronic document. This is necessary where, for example, the original electronic document exists in a proprietary format and requires specific software which is not easily available (*eg*, mainframe computers or AUTOCAD drawings). It is suggested that the obligation to provide reasonable means and assistance to enable inspection of electronic documents be expressly introduced into the Rules of Court.

(b) *Party's obligation to supply copies of discoverable electronic documents in native format or other reasonably accessible format*

68 PD 3/2009 currently mandates the supply of copies of discoverable electronic documents in their native format, or if that is not usable for the party receiving the copies, in another reasonably accessible format. Native format refers to the document in the format which it was originally created. A list of reasonably accessible formats is provided for in PD 3/2009.

69 There is a consensus in Canada, Australia and the UK that production of electronic documents should be in native form whenever possible. In the

UK, para 33 of PD 31B states that “save where otherwise agreed or ordered, electronic copies of disclosed documents should be provided in their native format, in a manner which preserves metadata relating to the date of creation of each document.”

70 It is suggested that supply of electronic copies should, unless the contrary is ordered or agreed by parties, be in the native format. A list of reasonably accessible formats should continue to be made available *via* the PD to facilitate agreement by parties. It is suggested that the mode of supply of electronic copies should be left to the parties. For instance, parties may exchange documents by simple methods such as optical discs or flash-based removable media or more advanced methods such as an online platform.

(VII) “True” electronic copies as equivalent of “originals”

71 The best evidence rule requires that original documents, where available, should be disclosed during discovery and tendered as evidence during the trial. However, since electronic copies of documents are perfect copies, the concept of a “digital original” needs to be addressed.

72 The Rules of Court relies on the distinction between “originals” and “copies”. This has implications in preparing the list of documents and inspection of documents. There are two potentially inconsistent definitions of what is an “original” electronic document. The Electronic Transactions Act 2010 (No. 16 of 2010) (“ETA 2010”) has a definition of what qualifies as a “digital original”.¹² The definition focuses on the “purposes for which the

¹² See s 10 ETA 2010:
Provision of originals

(cont'd on next page)

information was generated” in order to determine the level of security that is required before an electronic document qualifies as a “digital original”. Under the ETA 2010, if the information has a high level of significance (*eg*, client instructions to private bankers to enter into transactions), a higher standard of security may be required for storage in order to satisfy the criterion that the document is complete and has not been altered, and is thus a digital original.¹³ In contrast, the proposed amendments to the Evidence Act (Cap 97, 1997 Rev Ed) (“Evidence Act”)¹⁴ seek to expand the definition of “primary evidence” such that “if a copy of a document in the form of an electronic record is shown to reflect that document accurately, then the copy is primary evidence”.¹⁵ The bar is set lower, in that any electronic document “which has

10.—(1) Where a rule of law requires any document ... to be provided or retained in its original form ... that requirement is satisfied by providing or retaining the document ...if the following conditions are satisfied:

(a) there exists a reliable assurance as to the integrity of the information contained in the electronic record from the time the document, record or information was first made in its final form, whether as a document in writing or as an electronic record; ...

(2) For the purposes of subsection (1)(a) —

(a) the criterion for assessing integrity shall be whether the information has remained complete and unaltered, apart from the introduction of any changes that arise in the normal course of communication, storage and display; and

(b) the standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.

¹³ It may be argued that where the transaction is of high value, a simple email or SMS stored in the ordinary course, without enhanced security measures, may not be sufficient.

¹⁴ Public Consultation on Proposed Amendment to the Evidence Act released by the Ministry of Law on 30 September 2011, see <<http://app2.mlaw.gov.sg/News/tabid/204/Default.aspx?ItemId=579>>

¹⁵ Proposed insertion of Explanation 3 to the definition of “primary evidence” found in s 64 Evidence Act. See Draft Evidence (Amendment) Bill at: <<http://app2.mlaw.gov.sg/News/tabid/204/Default.aspx?ItemId=579>>.

been manifestly or consistently acted on, relied upon, or used as the information recorded or stored on the computer system (the document), is primary evidence of that document.”

73 Amendments to the Rules of Court may be required to clarify that for electronic documents, “true” electronic copies are to be treated as the equivalent of originals. “True” electronic copies are copies which fall within the proposed expanded definition of primary evidence in the Evidence Act, *ie*, accurate copies. Hence, these may be listed as “originals” in the list of documents and also be provided for inspection, if necessary. In addition, it is suggested that the extent of the application of the concept of “digital original” under the ETA 2010 should be clarified, if not excluded, for the purposes of discovery and inspection.

(VIII) Safeguards against trawling of compound electronic documents

74 Databases and hard disks are in the nature of compound documents, *ie*, they contain a lot of information, much of which may not be relevant or may be privileged from disclosure. Inspection of compound documents may take place in various forms, such as:

- (a) By searching, browsing and calling up records for ocular examination; or
- (b) By subjecting hard disks and other recording devices or storage media to examination using forensic tools and techniques, *eg*, searching for file fragments and information in slack or unallocated space.¹⁶

¹⁶ Forensic examination is not unique to electronic storage media. Hardcopy documents can be subject to forensic examination for, for example, handwriting analysis.

Review of Discovery in Civil Litigation

75 Case law has established that inspection of compound electronic documents is intrusive and not readily granted by the Court; and that it is necessary to have a protocol in place to prevent trawling.¹⁷

76 Increasingly, lawyers have become aware of the need to provide for safeguards against trawling. The sample inspection protocol in PD 3/2009 is helpful in this regard as it requires the compound document to be discovered before forensic inspection may be requested. Thus, the practice is that before one can request a forensic examination of a hard disk, the hard disk must have already been disclosed during discovery, *viz*, enumerated in the list of documents or specifically ordered to be disclosed.

77 This current practice should be refined further, in the light of case law developments. It is suggested that O 24 be amended to mandate the adoption of an inspection protocol whenever compound documents are to be inspected. This includes forensic examination of hard disks and ocular inspection of records in databases. Further, it is suggested that O 24 be amended to mandate that before inspection of compound documents is requested, the

¹⁷ The Court in *Alliance Management SA v Pendleton Lane P and another and another Suit* [2007] 4 SLR(R) 343 held that a protocol should be put in place to provide adequate safeguards to prevent trawling and further emphasised the need for an intricate balance of competing considerations, at [19]:

... the inquiry in respect of the production of the documents for inspection is a far more intricate one involving judicial balancing of the competing interests of the parties; i.e, the requesting party's right to reasonable access to documents that are necessary to conduct his case without unduly burdening the other party in terms of time and expense and to prevent unauthorised "trawling" through the database. A protocol has to be put in place to ensure that the requesting party only has access to inspect documents that are found to be necessary for the conduct of his case and is not allowed to trawl through the entire database on the guise of an inspection order.

Review of Discovery in Civil Litigation

information which is sought must have been discovered, either *via* a list of documents or a Court order for discovery, and that inspection is confined to locating the information thus discovered.

(IX) Review of privileged documents by party giving discovery

78 Where search terms are used during general discovery or to identify a class of documents, it is necessary for the party giving discovery to review the search results for privilege. While there is no need for a further review for relevance, time must be provided for review for privilege. Currently, this procedure is provided for in the sample electronic discovery and inspection protocols.

79 Order 24 may be amended to provide a fixed window period, *eg*, 14 days, for the party giving discovery to complete the privilege review following the use of search terms. Time may be extended by the Court in appropriate cases.

80 At first blush, the use of the privilege claw-back device¹⁸ (which appears to be commonly adopted in the US) would assist to provide a security blanket for lawyers. However, this would have an impact on the common law relating to the use of privileged documents which are inadvertently disclosed. Hence, the use of such device is not suggested at this time, without a more thorough review of its workings and impact.

¹⁸ A claw-back agreement is one where documents are produced without intent to waive privilege and the responding party may identify documents which have been mistakenly produced, which the requesting party has to return.

81 Nevertheless, it is necessary to provide some certainty for a party acting expeditiously upon discovering that privileged information had been inadvertently disclosed. It is suggested that some features of the privilege claw-back device be adopted: (a) the party who has inadvertently disclosed privileged material may put the adversary on notice; and (b) the rules ought to place a concomitant obligation on opposing counsel to sequester the documents from clients (if not already disclosed), pending any application to Court. Compliance with this procedure can be taken into consideration when the Court is asked to exercise its discretion to permit the use of inadvertently disclosed documents.

(X) Definitions

(a) “Documents” and “compound documents”

82 Case law adopts a broad definition of “documents”: see *Sanae*. Under case law, “documents” can refer to simple documents which exist as single files (eg, a word processor document or a spreadsheet) as well as compound documents such as database files and hard disks, which may exist as one or more files. Compound documents are akin to filing cabinets in that each compound document can potentially contain numerous documents, not all of which are discoverable. For discovery and inspection, single documents and compound documents are treated differently: cf *Alliance Management SA v Pendleton Lane P and another and another Suit* [2007] 4 SLR(R) 343, where compound documents need special safeguards against trawling.

83 A definition of compound documents (eg, hard disk) may be useful to distinguish it from single files (eg, a word processor document or spreadsheet), particularly where inspection protocols are concerned.

(b) “Metadata”

84 “Metadata” is a new type of information which is unique to electronic documents. It can mean application metadata or system metadata; and metadata can be stored internally or externally. Examples of application metadata are spreadsheet formula and editorial changes which are tracked in a word processor document. Examples of system metadata are date and time of creation.

85 Metadata may be viewed using the software which produced it and may not be visible when the electronic document is printed. For example, formulae in an Excel spreadsheet are visible in the Excel software program, but when the spreadsheet is printed, the results of the formulae are printed as numbers in the spreadsheet, but not the formulae proper.

86 Metadata which are stored internally should be treated as part of the electronic document. Metadata which are stored externally are usually stored in a separate database or file. It is suggested that treatment of metadata should follow from whether they are part of a document or stored separately. In the former, such metadata should be provided together with the electronic document, without deletion or alteration. In the latter, such metadata should be treated as a separate document for purposes of discovery.

87 Hence, it is suggested that the definition of metadata in PD 3/2009 be revised. It is further suggested that the treatment of internally stored and externally stored metadata be spelt out (as in para 86 above).

(c) **“Search term”**

88 Currently, PD 3/2009 requires that reasonable limits be set on a request for discovery that uses search terms to describe a class of documents. This is to prevent trawling, save costs and ensure that the search is not conducted across all electronic repositories within the possession, power or control of the party giving discovery, or across an indeterminate period of time.

89 With the advance in technology, keyword searches are slowly being replaced by conceptual searches. A conceptual search is a search on electronically stored unstructured text (for example, digital archives, email, scientific literature, *etc.*) for information that is conceptually similar to the information provided in a search query, *ie*, it is a search for *ideas* expressed in the information retrieved. As search technology advances, other types of searches may become economically viable. Hence, a technology-neutral and broader definition of “search term” may be required.

90 It is further suggested that “search term” be defined in an inclusive manner and to include within the definition the requirement that reasonable limits be put in place, *eg*, restrictions on specific custodians and/or repositories, and limitations to specific time periods.

91 As the Court in *Sanae* opined, there are certain details which parties need to take care of when using keyword searches, *eg*, preparation of the search engine. It is suggested that the PDs provide guidance on the best practices for the preparation of a search engine, such as by re-indexing before running the search.

(XI) Suggested new regime for the exchange of documents and deferred inspection where a discovery plan is in place

92 The current procedure of providing disclosure by first enumerating discoverable documents in a list, followed by inspection of and taking copies of discoverable documents may no longer be efficient, particularly for cases involving voluminous documents. A better way of managing disclosure may be to focus on providing lawyers with what they really require – copies of the documents.

93 To this end, where an electronic discovery plan is in place, soft copies of discoverable electronic documents may be provided in native format *as of right* and the ritual of inspection deferred. Inspection of such documents should be *discretionary* and ordered only when necessary.

94 It is suggested that the Court should have the power to adopt a new approach towards discovery where it takes place *via* the direct exchange of copies of discoverable documents. An electronic list of documents may be provided or dispensed with if so ordered; or if parties so agree.

95 Exchange of documents may take place in either of the following ways:

(a) Central online repository of documents: Parties are given a specified period to complete uploading documents which they wish to disclose. For documents which are confidential, redacted copies can be disclosed. After the cut-off date, a software tool is run to “deduplicate”, *ie*, remove duplicates. The repository is finalised and this forms the complete set of documents for general discovery.

(b) Direct provision of copies: If parties do not wish to use a central online repository, they can provide electronic copies directly on optical

Review of Discovery in Civil Litigation

discs or other storage media (*eg*, USB drives), or using an online platform (*eg*, DropBox).

96 Production of the “original” electronic document for inspection should be discretionary and ordered only upon request and where necessary. The procedure for requesting production for inspection can be modelled after the existing regime for notices to produce documents referred to in pleadings and affidavits, but modified to refer to the list of documents, *viz*, the party entitled to discovery to put in a Notice To Produce (Form 40) for examination of the digital or hardcopy original, if examination is necessary. If he does not object, he will put in a Notice Where Documents May Be Inspected (Form 41), stating the date, time and location for inspection.

97 It is suggested that the broad framework be added into the Rules of Court with the substantive details enumerated in the PDs.

(XII) Sub-conclusion

98 An overview of the suggestions for reform in the area of e-discovery are as follows:

(a) Electronic discovery plan: Making it mandatory for parties to meet and discuss the adoption of a discovery plan (for both hardcopies and electronic documents). For certain categories of cases, an electronic discovery plan must be adopted. The Court may order adoption of an electronic discovery plan and may review the adequacy of any electronic discovery plan.

(b) Search terms in general discovery: The use of search terms may be adopted during general discovery *in lieu* of a manual identification

Review of Discovery in Civil Litigation

of the three categories of documents under O 24 r 1(2) of the Rules of Court. Having agreed on the search terms and running the searches, the obligations for general discovery are deemed to be fulfilled.

(c) Search terms in specific discovery and discovery against other parties: Classes of documents may be described with reference to search terms.

(d) Proportionality: Enunciating the principle of proportionality as one of the considerations within the test of “necessity”.

(e) Presumptions of not reasonably accessible documents: To save time and costs, certain categories of documents should be presumed to be not reasonably accessible. The party seeking discovery of such documents will have to show that they are relevant and material and demonstrate proportionality.

(f) Cost shifting orders: To provide that the Court may order that the party seeking discovery bear part or all of the costs for producing the documents sought where the documents are not reasonably accessible and the party seeking discovery has not been able to demonstrate that the documents sought are, though relevant, sufficiently material.

(g) Electronic lists of documents: To mandate the provision of electronic lists of documents in a structured format, to aid searching and loading of files.

(h) Inspection and supply of electronic copies: To mandate that reasonable means and assistance be given for the inspection of electronic documents. There is also a need to deem “true” electronic

Review of Discovery in Civil Litigation

copies (which fall within the proposed expanded definition of primary evidence in the Evidence Act, *ie*, accurate copies) as “originals” for the purpose of inspection; and to clarify whether the ETA’s definition of “digital originals” apply to “original” electronic documents for the purpose of discovery and inspection. Softcopies of documents are to be provided in native format unless ordered or agreed otherwise.

(i) Inspection of compound documents: To entrench the practice that for inspection of compound documents, discovery of the specific “singular” documents or classes of documents must have been given (whether *via* a list of documents or ordered), and the inspection is restricted to them. Further, an inspection protocol must be adopted to safeguard against trawling.

(j) Privilege review: The period within which a review for privilege documents in search results be specified, *eg*, 14 days, with the power for the Court to extend time.

(k) Definitions: To define certain terms, *eg*, “compound documents”, “metadata” and “search term”.

(l) New regime for discovery by exchange of copies and to defer inspection: A new rule is suggested to allow, where an electronic discovery plan is in place, that discovery be conducted by direct exchange of documents and for inspection to be deferred and ordered only when shown to be necessary.

(C) DISCOVERY FOR AND AGAINST THE GOVERNMENT

99 This section sets out the suggestions for reform that are specific to the Government’s discovery obligations in civil and judicial review proceedings. In so doing, the existing legal position under statute and the common law are first outlined.

(I) The present legal position

(a) *Where the Government is a party to legal proceedings*

100 The Government Proceedings Act (Cap 121, 1985 Rev Ed) (“GPA”) has its origins in Ordinance 58 of 1956 which, in turn, was based on the Crown Proceedings Act 1947.

101 The general rule in the English common law prior to the enactment of the Crown Proceedings Act 1947 was that discovery in an action can only be ordered as between parties to the action. The Court had no power to order a person who is not a party to the action to give discovery or to stay proceedings until he was made a party to the action.¹⁹ In proceedings involving the Crown, discovery was not available against the Crown even when it was a party to proceedings.²⁰ Further, whether the Crown was a party or not, a party or a witness could object to producing documents if production was against the public interest.

¹⁹ UK Supreme Court Practice 1976, para 24/3/2.

²⁰ See Glanville L Williams, *Crown Proceedings: An Account of Civil Proceedings By and Against the Crown as Affected by The Crown Proceedings Act, 1947* (London: Sevens & Sons Limited, 1948), at p 128, and UK Supreme Court Practice 1973, para 24/5/11.

Review of Discovery in Civil Litigation

102 The English position changed with the enactment of the Crown Proceedings Act 1947. Section 28(1) of the Crown Proceedings Act required the Crown when it is a party to civil proceedings to make discovery of documents subject to Crown privilege. This placed the Crown in the same position as a private person except that discovery must be by order of Court and discovery was not available where it would be injurious to the public interest. This was mirrored in O 77 r 12 of the UK Rules of the Supreme Court. Apart from making such discovery obligation applicable to the Crown, the general common law position remained that discovery could only be ordered against the Crown where it was a party to proceedings.

103 This state of the law was imported into Singapore *via* Ordinance 58 of 1956. Section 36(1) of Ordinance 58 of 1956 stated:

Subject to and in accordance with the rules of Court: -

(a) In any civil proceedings in the High Court or a Subordinate Court to which the Government is a party, the Government may be required by the Court to make discovery for documents and produce documents for inspection ...

Provided that this section shall be without prejudice to any other written law or to any rule of law which authorises or requires the withholding of any document or the refusal to answer any question on the ground that the discovery of the document or the answering of the question will be injurious to the public interest.

This is substantially similar to the current s 34 of the GPA and is also encapsulated in O 73 r 10 of our Rules of Court.

104 It is thus settled law that s 34 of the GPA, as interpreted in its proper historical context, requires the Government to be a party to proceedings before discovery can be ordered against it. Further, even where discovery is

potentially available, this is still subject to the application of the public interest immunities under the Evidence Act²¹ and the common law.

(b) *Where the Government is not a party to legal proceedings*

105 The requirement that the Government has to be a party to proceedings before discovery may be ordered (as set out in s 34 of the GPA and O 73 r 10) applies to preclude orders under O 24 rr 6(1), 6(2) or 6(5) from being made against the Government. The First Schedule to the Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) was amended *via* Supreme Court of Judicature (Amendment) Act 1993 (No. 16 of 1993) to give the High Court power to order pre-action or non-party discovery.²² As the amendment to the First Schedule of the Supreme Court of Judicature Act does not specifically override the GPA, the position in s 34 of the GPA that discovery is available against the Government only where it is a party to proceedings remains. In any event, even if an order for discovery was made against the Government, the Government would still be able to rely on the immunities available under the Evidence Act and the common law.

(II) *Judicial Review proceedings*

(a) *The common law position*

106 In Singapore, Woo Bih Li J in *Yip Kok Seng v Traditional Chinese Medicine Practitioners Board* [2010] 4 SLR 990 stated that it is not clear

²¹ See sections 125 and 126 of the Evidence Act.

²² The Supreme Court of Judicature (Amendment) Bill (No. 12 of 1993) was passed without any specific debate on pre-action discovery.

Review of Discovery in Civil Litigation

whether certain processes applicable to ordinary originating summons, such as discovery, are applicable in addition to those prescribed under O 53.

107 The latest pronouncement on the state of the law was set out in *Lim Mey Lee Susan v Singapore Medical Council* [2011] SGHC 132. Philip Pillai J went through the historical position in England and Singapore and held that, whatever the historical position, discovery should in principle be available in all judicial review proceedings. In so deciding, he relied on the phrase “any party to a cause or matter” in O 24 r 1 of the Rules of Court. However, the Judge held that discovery in judicial review proceedings is necessarily limited because, in such proceedings, the Court does not make findings of fact based on evidence. The Court’s role is limited to determining whether, based on the record, the action being challenged ought to be quashed or prohibited. Hence, discovery would be granted only where it is necessary for disposing fairly of the *applicant’s case for judicial review on the record* (*ie*, discovery is limited to that which is necessary to assist the Court in determining the judicial review application). Order 53 has subsequently been amended (see para 109 below) such that discovery may have a wider application (than in the limited sense referred to by Pillai J) when a private law remedy is sought subsequent to the applicant obtaining one of the prerogative remedies or declaration and has established that he has valid cause of action for the private law reliefs sought. However, Phillip Pillai J’s observations are still pertinent to an application for the prerogative remedies or declaration.

Review of Discovery in Civil Litigation

108 By virtue of s 34 of the GPA, which also applies to judicial review proceedings (see s 2(2) of the GPA),²³ discovery is only available against the Government where the Government is a party to the judicial review proceedings. Further, where the Government is a party to judicial review proceedings and a substantive public law relief is being claimed, the Government can still rely on the immunities available to it under the Evidence Act and the common law.

(b) Order 53

109 Order 53 was amended with effect from 1 May 2011 to allow an applicant who successfully obtains one of the prerogative orders or a declaration to subsequently seek a private law remedy (defined under the Rules of Court as any liquidated sum, damages, equitable relief or restitution) in the same proceedings if he can successfully prove that his private law rights have been infringed. Previously, an applicant who was successful under O 53 would have had to take out a separate action in order to obtain these private law remedies.

110 In this regard, the Court has full power to give the necessary directions in order to determine whether the private law relief should be granted. The directions that the Court may give include directions on discovery. However, given that O 53 r 7 is expressly made subject to the GPA, such discovery is only available against the Government where the Government is a party to legal proceedings.

²³ Section 2(2) of the GPA was amended in 1997 by the Statute (Miscellaneous Amendments) Act (Act 7 of 1997) to include the reference to proceedings for judicial review in the definition of “civil proceedings”.

(III) Suggestions for reform

111 In view of the applicable law as outlined above, it is suggested that there is no need for any reform to the discovery obligations of the Government, save that any amendments to the Rules of Court should be made expressly subject to the GPA. This is to ensure that the reforms suggested in this paper, which are meant to streamline the discovery process to reduce costs, do not inadvertently alter the existing position in law.

(D) PRACTICE OF COMPARABLE JURISDICTIONS

112 In this part of the ROCWP’s review, we propose to set out brief summaries of the discovery processes in selected jurisdictions, namely the United Kingdom, Australia, Hong Kong and Canada. In comparing them, we will attempt to identify commonalities and innovations, as well as practical problems that have arisen, and possible features which can be considered for adoption or adaptation.

(I) Summaries

113 The basic test for discovery requires the Courts to consider relevance and proportionality as *key principles*. Broadly, the objectives in all the jurisdictions surveyed are similar – to ensure that the discovery framework *facilitates* the just resolution of disputes in an efficient, inexpensive and expeditious manner.

114 Detailed outlines of the practice in the four selected jurisdictions of the United Kingdom, Australia, Hong Kong and Canada may be found in **Annex E** to this paper.

(a) United Kingdom – “post-Woolf”: the Jackson menu?

115 Prior to 1999, UK law required litigants to comply with “automatic discovery” of all relevant documents in civil proceedings, as governed broadly by the *Peruvian Guano*²⁴ test formulated by Brett LJ. This was an expansive test that required discovery not only of documents with direct

²⁴ *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55.

Review of Discovery in Civil Litigation

relevance because they supported or were adverse to a party's case, but also documents that had an indirect bearing on issues because they could start a "train of inquiry" that could produce one of these two results.

116 Amendments to the UK Civil Procedure Rules ("CPR") came about in 1999 in the wake of Lord Woolf's 1995 "Access to Justice" Interim Report. With Part 31 of the UK CPR, a new discovery framework meant to address criticisms of the costly and often-protracted discovery process was introduced.

117 This framework represented a "deliberate intention to curtail the process of discovery"²⁵ by narrowing the scope and range of documents that had to be disclosed. Under Part 31 of the current UK CPR, automatic disclosure was no longer required, and unless the Court ordered otherwise, parties were only required to comply with "standard disclosure" requirements. "Standard disclosure" required a party to disclose only those documents on which he relied, and the documents which adversely affected his own case or another party's case, or which supported another party's case.²⁶ The scope of discovery required under this "standard disclosure" is similar to that currently required under O 24 r 1(2) of our Rules of Court.

²⁵ *Three Rivers District Council and ors v Bank of England (No 4)* [2002] 4 All ER 881, at 893, per Chadwick LJ.

²⁶ Rules 31.5 and 31.6 of the UK Civil Procedure Rules state:

31.5 Disclosure limited to standard disclosure

- (1) An order to give disclosure is an order to give standard disclosure unless the court directs otherwise.
- (2) The court may dispense with or limit standard disclosure.
- (3) The parties may agree in writing to dispense with or to limit standard disclosure.
- ...

31.6 Standard disclosure – what documents are to be disclosed.

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Review of Discovery in Civil Litigation

118 These rules on discovery are currently being reviewed in England as part of a broader study on the rules and principles governing the costs of civil litigation.

119 In his reports, Lord Justice Jackson, who was commissioned to undertake this review, observed that the compliance costs of discovery had, “if anything ... spiralled over the last ten years”.²⁷ Thus, despite the intention to limit the scope and costs of disclosure, it appeared that costs had tended to increase following the 1999 UK CPR because its discovery framework, amongst other things, often required individual review of each relevant document to ascertain whether it fell within the narrowed scope of “standard disclosure”.

120 Jackson LJ also made observations regarding parties’ continued adherence to the *Peruvian Guano* approach in the face of the UK CPR. They continued to simply disclose everything that might be relevant, as a matter of prudence. The thrust of the UK CPR’s disclosure provisions was thus often blunted. In an earlier report on Long Trials,²⁸ “standard disclosure” was also said to have produced the propensity towards automatic production of large

Standard disclosure requires a party to disclose only -

(a) the documents on which he relies; and

(b) the documents which -

(i) adversely affect his own case;

(ii) adversely affect another party’s case; or

(iii) support another party’s case; and

(c) the documents which he is required to disclose by a relevant practice direction.

²⁷ Jackson LJ’s Review of Civil Litigation Costs: Preliminary Report of 2009 (Vol 2), Chapter 41 at para 4.1; repeated in Jackson LJ’s Review of Civil Litigation Costs: Final Report of 2010 (“Jackson Report”).

²⁸ *Report and Recommendations of the Commercial Court Long Trials Working Party* (2007) at para 59.

Review of Discovery in Civil Litigation

quantities of documents which turned out to be irrelevant or missing critical classes of documents altogether. Thus, a more “surgical” or targeted approach was seen as necessary in complex commercial cases.

121 In view of these perceived shortcomings in the UK CPR framework, Jackson LJ’s final report proposed that “standard disclosure” should cease to be the default position for large commercial and similar claims as the costs of “standard disclosure” were likely to be disproportionate in such cases.²⁹ The parties and the Court should instead be required to select the most appropriate process for disclosure from a “menu” of possible disclosure orders at the first case management conference, with no steer from the rules towards a particular outcome. The default “standard disclosure” approach should also be replaced by this “menu” option in any case where the costs of “standard disclosure” were likely to be disproportionate.

122 The range of disclosure options which Jackson LJ proposed putting before the Court and parties in such cases are:

- (a) An order dispensing with disclosure; or
- (b) An order that a party disclose the documents on which it relies, and at the same time requests any specific disclosure it requires from any other party (this is narrower than standard disclosure); or
- (c) An order that directs on an issue by issue basis, the disclosure to be given by a party; or
- (d) An order that a party give standard disclosure; or

²⁹ Jackson Report, at pp 370-372.

Review of Discovery in Civil Litigation

(e) An order that a party disclose any documents which it is reasonable to suppose may contain information which may (i) enable the party applying for disclosure either to advance his own case or to damage that of the party giving disclosure, or (ii) lead to a train of inquiry which has either of those consequence (the *Peruvian Guano* test); or

(f) Any other order in relation to disclosure that, having regard to the overriding objective,³⁰ the Court considers appropriate.

123 According to the Jackson Report, this discovery “menu” would enhance the Court’s ability to tailor the type of disclosure order to a given case, and encourage more rigorous case management *in complex cases*.

124 In preparing for the first case management conference,³¹ each party must file and serve a report which:

(a) Describes in broad terms what documents exist or may exist that are or may be relevant to the matters in issue in the case,

³⁰ In the Jackson Report, p 31, it is stated that the overriding objective is embodied in the CPR, Rule 1.1(2) which provides that: “Dealing with a case justly includes, so far as is practicable... (c) dealing with the case in ways which are proportionate –

- (i) to the amount of money involved;
- (ii) to the importance of the case;
- (iii) to the complexity of the issues; and
- (iv) to the financial position of each party...”

³¹ Jackson Report, p 371.

Review of Discovery in Civil Litigation

- (b) Describes where and with whom those documents are or may be located (and in the case of electronic documents and metadata how the same are stored),
- (c) Estimates the broad range of costs that could be involved in giving standard disclosure in the case, and
- (d) States the disclosure directions which are to be sought (including what searches are to be undertaken or whether lists of documents are required).

125 The Judicial Executive Board has expressed support for the Jackson Report's final recommendations and a steering group has been established to oversee areas such as cost management. Thus the UK discovery regime now seems headed towards customised or differentiated approaches instead of "standard disclosure". A preference for this more customised approach was expressed by some of the stakeholders surveyed.

(b) *Australia – Australian Law Reform Commission 2011 and “managing discovery”*

126 The Australian High Court Rules 2004 do not contain specific provisions about the obligation to make discovery of documents. The scope of discoverable documents is based on the *Peruvian Guano* test and a party may apply to the Court for directions to provide discovery. In the Australian Federal Court, O 15 of the Federal Court Rules provides for discovery and inspection of documents. Order 15A provides for preliminary discovery and discovery from a non-party.

127 In the Federal Court, it appears that the *Peruvian Guano* test of relevance for discoverable documents has been replaced with categories of

Review of Discovery in Civil Litigation

documents “required to be disclosed” pursuant to O 15. In practice, the Court will ordinarily only make orders for limited discovery under O 15 r 3 and not general discovery under O 15 r 2. This is to prevent unnecessary discovery, and would seem to mirror the “standard disclosure” framework in the UK CPR.

128 In spite of the rules, it has been observed that discovery of documents is an increasingly costly feature of commercial litigation. For instance, in *Seven Network Limited v News Limited* [2007] FCA 1062, Justice Sackville noted that the estimated cost of discovery came to \$200 million, compared with a damages estimate of \$195 to \$212 million.

129 Similar concerns to those raised in the Jackson Report have arisen in Australia over the costs and efficacy of the discovery process. Practitioners have to assess which documents to discover by reference to whether they are relevant to the matters in dispute, and thereafter which discovered documents to tender into evidence. Online databases are commonly used and in choosing to err on the side of caution, all or most documents are included without due regard to their specific relevance to the issues in dispute.

130 In May 2010, AG Robert McClellan requested the Australian Law Reform Commission (“ALRC”) to identify reform options for discovery in Federal Court proceedings, to bring them in line with the “overarching purpose” provision which was introduced in January 2010 to the Federal Court of Australia Act (Cth). This provision states that the overarching purpose of the civil practice and procedure provisions of the Act is to facilitate the just resolution of disputes according to law, and as quickly, inexpensively and efficiently as possible.

Review of Discovery in Civil Litigation

131 The ALRC first circulated a Consultation Paper in November 2010, and tabled its Report in the Federal Parliament on 25 May 2011. In the Report, *Managing Discovery: Discovery of Documents in Federal Courts*, it was noted that the “underlying premise for this Inquiry was that the costs of discovery, which can be very high, may inhibit access to justice and generate, in addition, an undue public cost”.

132 The Report attempts to address the increasing cost of discovery through early access measures, discovery plans, case management and costs orders. The Federal Government has yet to consider whether the recommendations contained in the Report will be introduced into Parliament.

(c) *Hong Kong – Civil Justice Reform 2009*

133 Although the Hong Kong provisions on discovery largely mirror those in Singapore, the scope of discovery appears to be broader. The Hong Kong practice still adheres to the “pre-Woolf” *Peruvian Guano* test, requiring parties to give discovery of documents “relating to any matter in question in the cause or matter”.

134 In Hong Kong, it has been said that discovery is still a time-consuming and, consequently, costly process. Hong Kong’s 2009 Civil Justice Reform (“CJR 2009”) came into force on 2 April 2009. The underlying objectives of the CJR 2009 are:

- (a) To increase the cost-effectiveness of any practice and procedure to be followed in relation to civil proceedings before the Court;
- (b) To ensure that a case is dealt with as expeditiously as is reasonably practicable;

Review of Discovery in Civil Litigation

- (c) To promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
- (d) To ensure fairness between the parties;
- (e) To facilitate the settlement of disputes; and
- (f) To ensure that the resources of the Court are distributed fairly.

135 Among the preliminary proposals prior to the enactment of the CJR 2009 were proposals to remove the very wide automatic discovery obligations which were imposed on all parties to litigation and to introduce a less burdensome discovery regime based on the UK CPR. However, it was widely acknowledged that the UK CPR discovery framework had not made the procedure any quicker or cheaper. Also it was generally felt that, in Hong Kong, discovery obligations were poorly complied with and any change to the discovery regime should be aimed at enforcing compliance with the existing rules rather than narrowing the scope of discovery.

136 Therefore, the preliminary proposals were not adopted and the fundamental rules on discovery have not changed. Several other minor recommendations have been adopted, pertaining to widening the availability of pre-action discovery and non-party discovery, and the use of case management to manage costs and modify full automatic discovery. It may be noted, however, that the CJR 2009 pre-dated the recommendations in the Jackson Report and a further review of the rules could possibly be forthcoming.

(d) Canada – discovery and litigation plans

137 There is no uniform discovery process in the various Canadian provinces. For present purposes, we have focused on examining the processes in British Columbia, Alberta and Ontario which have been most pro-active in responding to the need to limit the costs of discovery. The discovery rules are essentially a combination of rules developed in the UK and the USA.

138 All three provinces saw the introduction of new discovery rules in 2010. They adopt a litigation plan in some form which is based on party initiatives and agreement subject to the supervision of the Court. The approaches differ to some extent. For example, Alberta limits the plan to complex cases, while British Columbia and Ontario provide a broader scope. The Ontario rules contain a special section on the proportionality of discovery, although this is a key principle in the preambles to all three sets of rules.

139 The discovery plan seems somewhat analogous to the concept of a “menu” for discovery options. Some of the potential advantages of a discovery plan include: focusing the parties’ minds on the discovery needs of the particular case; avoiding blanket applications to the Court; making the parties responsible for the scope of discovery through mutual agreement; the involvement of the Court so as to ensure documents sought are clearly necessary to the dispute and to exclude documents which are disproportionate in significance to the costs of their production; and the potential of securing more documents without the need to apply for specific discovery (on the assumption that the discovery plan has been properly drawn up).

(II) Options to consider for adoption/adaptation

140 The following may be considered for adoption/adaptation in Singapore.

141 First, **imposing costs sanctions where an over-inclusive approach to discovery is adopted**. Jackson LJ's observations regarding parties' continued adherence to the *Peruvian Guano* approach in the face of the UK CPR amendments raise equivalent questions in the Singapore context. Although, it appears from the feedback obtained that a similar concern has not arisen as yet, it may be useful to introduce supportive measures to encourage parties to move towards the more circumscribed approach under the new O 24 r 1 (for instance, through the imposition of adverse cost orders for parties that adopt an overly inclusive approach to discovery). This would address some of the concerns raised in the preliminary feedback from the legal profession and business groupings (see Part A above) as to the costs of discovery.

142 Second, a **"menu" or differentiated approach to discovery** depending on, *inter alia*, the complexity of the case in question may be adopted or adapted to the local context. It may be that the adoption of different basic standards of disclosure for different types of cases in Singapore would help to alleviate the costs of discovery and avoid unnecessarily broad discovery exercises, particularly where complex cases are involved. The "menu" approach may also be employed to facilitate differentiation by strictly limiting discovery to a simplified process for claims below a specified quantum (*eg*, Magistrates' Court claims).

143 Third, **discovery plans to facilitate electronic discovery**. Even if the general experience among practitioners has been that enforcing compliance with the existing rules continues to be a pressing issue, as was noted in Hong

Review of Discovery in Civil Litigation

Kong's case, it may not necessarily imply that the rules themselves are in no need of refinement. Apart from the Jackson Report's proposed "menu" approach, other possible "surgical" measures could be considered, such as the discovery plans in use in various Canadian provinces and now being considered in Australia's Federal Courts. Such measures would possibly help address the difficulties posed by the growing reliance on electronic discovery.

(E) CONCLUSION

144 The suggestions and ideas contained in this paper are expected to undergo further consideration and refinement once additional comments and feedback are received during the public consultation.

ANNEX A – ORDER 24

DISCOVERY AND INSPECTION OF DOCUMENTS

Order for discovery (O. 24, r. 1)

1. —(1) Subject to this Rule and Rules 2 and 7, the Court may at any time order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to give discovery by making and serving on any other party a list of the documents which are or have been in his possession, custody or power, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.

(2) The documents which a party to a cause or matter may be ordered to discover under paragraph (1) are as follows:

- (a) the documents on which the party relies or will rely; and
- (b) the documents which could —
 - (i) adversely affect his own case;
 - (ii) adversely affect another party's case; or
 - (iii) support another party's case.

(3) An order under this Rule may be limited to such documents or classes of documents only, or to only such of the matters in question in the cause or matter, as may be specified in the order.

Order for determination of issue, etc., before discovery (O. 24, r. 2)

2. —(1) Where on an application for an order under Rule 1 it appears to the Court that any issue or question in the cause or matter should be determined

Review of Discovery in Civil Litigation

before any discovery of documents is made by the parties, the Court may order that that issue or question be determined first.

(2) Where in an action begun by writ an order is made under this Rule for the determination of an issue or question, Order 25, Rules 2 to 7 shall, with the omission of so much of Rule 7 (1) as requires parties to serve a notice specifying the orders and directions which they desire and with any other necessary modifications, apply as if the application on which the order was made were a summons for directions.

Form of list and affidavit (O. 24, r. 3)

3. —(1) A list of documents made in compliance with an order under Rule 1 must be in Form 37, and must enumerate the documents in a convenient order and as shortly as possible but describing each of them or, in the case of bundles of documents of the same nature, each bundle, sufficiently to enable it to be identified.

(2) If it is desired to claim that any documents are privileged from production, the claim must be made in the list of documents with a sufficient statement of the grounds of the privilege.

(3) An affidavit made under Rule 1 (1) verifying a list of documents must be in Form 38.

Defendant entitled to copy of co-defendant's list (O. 24, r. 4)

4. —(1) A defendant who has pleaded in an action shall be entitled to have a copy of any list of documents served under Rules 1, 2 and 3 on the plaintiff by any other defendant to the action; and a plaintiff against whom a counterclaim

Review of Discovery in Civil Litigation

is made in an action begun by writ shall be entitled to have a copy of any list of documents served under any of those Rules on the party making the counterclaim by any other defendant to the counterclaim.

(2) A party required under paragraph (1) to supply a copy of a list of documents must supply it free of charge on a request made by the party entitled to it.

(3) Where in an action begun by originating summons the Court makes an order under Rule 1 requiring a defendant to the action to serve a list of documents on the plaintiff, it may also order him to supply any other defendant to the action with a copy of that list.

(4) In this Rule, “list of documents” includes an affidavit verifying a list of documents.

Order for discovery of particular documents (O. 24, r. 5)

5. —(1) Subject to Rule 7, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power, when he parted with it and what has become of it.

(2) An order may be made against a party under this Rule notwithstanding that the party may already have made or been required to make a list of documents or an affidavit under Rule 1.

Review of Discovery in Civil Litigation

(3) An application for an order under this Rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this Rule has, or at some time had, in his possession, custody or power, the document, or class of document, specified or described in the application and that it falls within one of the following descriptions:

(a) a document on which the party relies or will rely;

(b) a document which could —

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) a document which may lead the party seeking discovery of it to a train of inquiry resulting in his obtaining information which may —

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case.

(4) An order under this Rule shall not be made in any cause or matter in respect of any party before an order under Rule 1 has first been obtained in respect of that party, unless, in the opinion of the Court, the order is necessary or desirable.

Discovery against other person (O. 24, r. 6)

6. —(1) An application for an order for the discovery of documents before the commencement of proceedings shall be made by originating summons and the person against whom the order is sought shall be made defendant to the originating summons.

(2) An application after the commencement of proceedings for an order for the discovery of documents by a person who is not a party to the proceedings shall

Review of Discovery in Civil Litigation

be made by summons, which must be served on that person personally and on every party to the proceedings.

(3) An originating summons under paragraph (1) or a summons under paragraph (2) shall be supported by an affidavit which must —

(a) in the case of an originating summons under paragraph (1), state the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely to be party to subsequent proceedings in Court;

(b) in any case, specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings or the identity of the likely parties to the proceedings, or both, and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.

(4) A copy of the supporting affidavit shall be served with the originating summons or summons on every person on whom the originating summons or summons is required to be served.

(5) An order for the discovery of documents before the commencement of proceedings or for the discovery of documents by a person who is not a party to the proceedings may be made by the Court for the purpose of or with a view to identifying possible parties to any proceedings in such circumstances where the Court thinks it just to make such an order, and on such terms as it thinks just.

Review of Discovery in Civil Litigation

- (6) An order for the discovery of documents may —
- (a) be made conditional on the applicant's giving security for the costs of the person against whom it is made or on such other terms, if any, as the Court thinks just; and
 - (b) require the person against whom the order is made to make an affidavit stating whether the documents specified or described in the order are, or at any time have been, in his possession, custody or power and, if not then in his possession, custody or power, when he parted with them and what has become of them.
- (7) No person shall be compelled by virtue of such an order to produce any document which he could not be compelled to produce —
- (a) in the case of an originating summons under paragraph (1), if the subsequent proceedings had already been commenced; or
 - (b) in the case of a summons under paragraph (2), if he had been served with a subpoena to produce documents¹ at the trial.
- (8) For the purpose of Rules 10 and 11, an application for an order under this Rule shall be treated as a cause or matter between the applicant and the person against whom the order is sought.
- (9) Unless the Court orders otherwise, where an application is made in accordance with this Rule for an order, the person against whom the order is sought shall be entitled to his costs of the application, and of complying with any order made thereon on an indemnity basis.

Discovery to be ordered only if necessary (O. 24, r. 7)

7. On the hearing of an application for an order under Rule 1, 5 or 6, the Court may, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

Duty to discover continues throughout proceedings (O. 24, r. 8)

8. After the making of any order under Rule 1 or 5, the party required to give discovery under any such order shall remain under a duty to continue to give discovery of all documents falling within the ambit of such order until the proceedings in which the order was made are concluded.

Inspection of documents referred to in list (O. 24, r. 9)

9. A party who has served a list of documents on any other party in compliance with an order under Rule 1 must allow the other party to inspect the documents referred to in the list (other than any which he objects to produce) and to take copies thereof and, accordingly, he must when he serves the list on the other party also serve on him a notice in Form 39 stating a time within 7 days after the service thereof at which the documents may be inspected at a place specified in the notice.

Inspection of documents referred to in pleadings and affidavits (O. 24, r. 10)

10. —(1) Any party to a cause or matter shall be entitled at any time to serve a notice in Form 40 on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the

Review of Discovery in Civil Litigation

inspection of the party giving the notice and to permit him to take copies thereof.

(2) The party on whom a notice is served under paragraph (1) must, within 4 days after service of the notice, serve on the party giving the notice a notice in Form 41 stating a time within 7 days after the service thereof at which the documents, or such of them as he does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds.

Order for production for inspection (O. 24, r. 11)

11. —(1) If a party who is required by Rule 9 to serve such a notice as is therein mentioned or who is served with a notice under Rule 10 (1) —

(a) fails to serve a notice under Rule 9 or, as the case may be, Rule 10 (2);

(b) objects to produce any document for inspection; or

(c) offers inspection at a time or place such that, in the opinion of the Court, it is unreasonable to offer inspection then or, as the case may be, there,

then, subject to Rule 13 (1), the Court may, on the application of the party entitled to inspection, make an order in Form 42 for the production of the documents in question for inspection at such time and place, and in such manner, as it thinks fit.

(2) Without prejudice to paragraph (1), but subject to Rule 13 (1), the Court may, on the application of any party to a cause or matter, order any other party to permit the party applying to inspect any documents in the possession, custody or power of that other party in respect of which discovery has been

Review of Discovery in Civil Litigation

given under any Rule in this Order or in pursuance of any order made thereunder.

(3) An application for an order under paragraph (2) must be supported by an affidavit specifying or describing the documents of which inspection is sought and stating the belief of the deponent that they are in the possession, custody or power of the other party and that discovery has been given of them under any Rule in this Order or in pursuance of any order made thereunder.

Order for production to Court (O. 24, r. 12)

12. —(1) At any stage of the proceedings in any cause or matter the Court may, subject to Rule 13 (1), order any party to produce to the Court any document in his possession, custody or power that falls within one of the following descriptions:

- (a) documents on which a party applying relies or will rely;
- (b) documents which could —
 - (i) adversely affect a party's case; or
 - (ii) support a party's case; and
- (c) documents which may lead to a train of inquiry resulting in the obtaining of information which may —
 - (i) adversely affect a party's case; or
 - (ii) support a party's case.

(2) The Court may deal with the document when produced in pursuance of an order made under paragraph (1) in such manner as it thinks fit.

Production to be ordered only if necessary, etc. (O. 24, r. 13)

13. —(1) No order for the production of any documents for inspection or to the Court shall be made under any of the foregoing Rules unless the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

(2) Where on an application under this Order for the production of any document for inspection or to the Court privilege from such production is claimed or objection is made to such production on any other ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid.

Production of business books (O. 24, r. 14)

14. —(1) Where the production of any business books for inspection is applied for under any of the foregoing Rules, the Court may, instead of ordering the production of the original books for inspection, order a copy of any entries therein to be supplied and verified by an affidavit of some person who has examined the copy with the original books.

(2) Any such affidavit shall state whether or not there are in the original book any, and, if so what, erasures, interlineations or alterations.

(3) Notwithstanding that a copy of any entries in any book has been supplied under this Rule, the Court may order production of the book from which the copy was made.

**Document disclosure of which would be injurious to public interest:
Saving (O. 24, r. 15)**

15. Rules 1 to 14 shall be without prejudice to any rule of law which authorises or requires the withholding of any document on the ground that the disclosure of it would be injurious to the public interest.

Failure to comply with requirement for discovery, etc. (O. 24, r. 16)

16. —(1) If any party who is required by any Rule in this Order, or by any order made thereunder, to make discovery of documents or to produce any document for the purpose of inspection or any other purpose, fails to comply with any provision of the Rules in this Order, or with any order made thereunder, or both, as the case may be, then, without prejudice to Rule 11 (1), in the case of a failure to comply with any such provision, the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.

(2) If any party or person against whom an order for discovery or production of documents is made fails to comply with it, then, without prejudice to paragraph (1), he shall be liable to committal.

(3) Service on a party's solicitor of an order for discovery or production of documents made against that party shall be sufficient service to found an application for committal of the party disobeying the order, but the party may show in answer to the application that he had no notice or knowledge of the order.

Review of Discovery in Civil Litigation

(4) A solicitor on whom such an order made against his client is served and who fails, without reasonable excuse, to give notice thereof to his client shall be liable to committal.

(5) A party who is required by any Rule in this Order, or by any order made thereunder, to make discovery of documents or to produce any document for the purpose of inspection or any other purpose, but who fails to comply with any provision of that Rule or with that order, as the case may be, may not rely on those documents save with the leave of the Court.

Revocation and variation of orders (O. 24, r. 17)

17. Any order made under this Order (including an order made on appeal) may, on sufficient cause being shown, be revoked or varied by a subsequent order or direction of the Court made or given at or before the trial of the cause or matter in connection with which the original order was made.

Production of certain documents in marine insurance actions (O. 24, r. 18)

18. —(1) Where in any action relating to a marine insurance policy an application for discovery of documents is made by the insurer under Rule 1 then without prejudice to its powers under that Rule, the Court may, if satisfied that the circumstances of the case are such that it is necessary or expedient to do so, make an order, either in Form 43 or in such other form as it thinks fit, for the production of such documents as are therein specified or described.

(2) An order under this Rule may be made on such terms, if any, as to staying proceedings in the action or otherwise, as the Court thinks fit.

Review of Discovery in Civil Litigation

Restriction on use of privileged document, inspection of which has been inadvertently allowed (O. 24, r. 19)

19. Where a party inadvertently allows a privileged document to be inspected, the party who inspected it may use it or its contents only if the leave of the Court to do so is first obtained.

ANNEX B – PD 3/2009

Practice Direction No 3 of 2009 – Part IVA Discovery and Inspection of Electronically Stored Documents

43A. Introduction

(1) This Part provides an opt-in framework for requests and applications for the giving of discovery and inspection of electronically stored documents, and the supply of electronic copies of such documents. A party that seeks to rely on this Part must cite the relevant paragraph(s) in any request or application made hereunder.

Location of electronically stored documents

(2) Electronically stored documents may reside in storage management systems, folders or directories in storage locations, electronic media or recording devices, including folders or directories where temporarily deleted files are located (for example, the Recycle Bin folder or Trash folder), Electronically stored documents or parts thereof may also reside in the unallocated file space or file slack on an electronic medium or recording device as deleted files or file fragments which may be recovered through the use of computer forensic tools or techniques.

Definition of metadata information

(3) Metadata information refers to the non-visible and not readily apparent information embedded in or associated with electronically stored documents and may include both application metadata, which is created by the application software used to create the electronic documents, and system metadata, which

is created by the operating or storage system. Examples of application metadata include hidden columns or text, formatting and display codes, formulae, prior edits and editorial comments; examples of system metadata include data relating to creation, modification and access of the electronic document, its size, file format and storage location, and other document profile information like title, author, subject and keywords or tags. Metadata information may be stored internally within the electronically stored document or externally in a separate file or database. Externally stored metadata information shall be discoverable as separate documents.

43B. Time to consider electronic discovery issues during general discovery

(1) Parties are encouraged to collaborate in good faith and agree on issues relating to the discovery and inspection of electronically stored documents within the framework for discovery set forth in Order 24 of the Rules of Court. Such issues may include the scope and/or any limits on documents to be given in discovery, whether parties are prepared to make voluntary disclosures, and the giving of discovery in stages according to an agreed schedule, as well as the format and manner in which copies of discoverable documents shall be supplied.

(2) Parties may, immediately after the close of pleadings, but within the time prescribed in Order 25, Rule 8(1)(a) of the Rules of Court, agree on an electronic discovery protocol which may take the form set forth in Appendix E Part 1. Parties may include the agreed electronic discovery protocol in the summons for directions. The Court shall consider the adequacy of the agreed electronic discovery protocol and may make such order or give such direction as it thinks fit, for the just, expeditious and economical disposal of the cause or matter. The agreed electronic discovery protocol, as amended by such order or

Review of Discovery in Civil Litigation

direction of the Court as the case may be, shall form part of the order under the summons for directions to be extracted for the action.

(3) If parties are unable to agree on an electronic discovery protocol, the party seeking discovery of electronically stored documents may apply for an order. The application must include a draft electronic discovery protocol and must be supported by affidavit providing an account of the parties' attempts to collaborate in good faith to reach agreement on an electronic discovery protocol.

43C. Requests and applications for the giving of discovery

Requests for discovery

(1) A request for discovery of any electronically stored document or class of electronically stored documents may be made before the commencement of proceedings, or at any time to any party to a cause or matter, or any person who is not a party to the proceedings. Unless the request specifies that discovery of externally stored metadata information of the requested electronically stored documents is required, the party providing discovery shall not be required to discover externally stored metadata information.

(2) A class of electronically stored documents may be described by specifying or describing a search term or phrase to be used in a reasonable search for electronically stored documents. A request for the giving of discovery by reasonable search must specify or describe limits on the scope of the search; such limits shall include at least the following:

- (a) Specifying or describing physical or logical storage locations, media or devices; and

Review of Discovery in Civil Litigation

(b) Specifying the period during which the requested electronically stored documents were created, received or modified.

(3) A request shall not be made for the discovery of deleted files or file fragments containing information which may be recovered through the use of computer forensic tools or techniques unless:

(a) A request is made for the discovery of the electronic medium or recording device on which a forensic inspection is to be conducted; and

(b) A request is made for inspection of the said electronic medium or recording device in compliance with paragraph 43F.

Applications for discovery

(4) An application for discovery of any electronically stored document or class of electronically stored documents which includes externally stored metadata information must be supported by an affidavit showing that a request for externally stored metadata information of the requested electronically stored document or class of electronically stored documents had been made previously.

(5) An application for discovery of any electronically stored document or class of electronically stored documents which specifies or describes a search term or phrase to be used in a reasonable search for electronically stored documents must specify or describe limits on the scope of the search to be conducted.

(6) An application for the discovery of a computer database, electronic medium or recording device may be made together with an application for inspection of

Review of Discovery in Civil Litigation

the said computer database, electronic medium or recording device in accordance with paragraph 43F.

(7) Upon the hearing of an application for an order for discovery of electronically stored documents, the Court shall have regard to the matters set forth in paragraph 43D.

(8) Nothing in this paragraph shall prevent the party giving discovery from reviewing the discoverable electronically stored documents or the results of any reasonable search for the purpose of identifying privileged documents. However, such review for the purpose of identifying privileged documents shall not extend to the deletion, removal or alteration of metadata information.

43D. Matters to which regard shall be had in determining whether discovery or inspection is necessary

(1) Order 24, Rules 7 and 13 of the Rules of Court states that an order for discovery and production of documents for inspection shall not be made unless such order is necessary either for disposing fairly of the cause or matter or for saving costs. The matters to which regard shall be had, in determining whether an application for discovery or inspection (including the supply of copies) of electronically stored documents is necessary either for disposing fairly of the cause or matter or for saving costs, shall include:

- (a) The number of electronic documents involved;
- (b) The nature of the case and complexity of the issues;
- (c) The value of the claim and the financial position of each party;

Review of Discovery in Civil Litigation

- (d) The ease and expense of retrieval of any particular electronically stored document or class of electronically stored documents, including—
 - (i) the accessibility, location and likelihood of locating any relevant documents,
 - (ii) the costs of recovering and giving discovery and inspection of any relevant documents,
 - (iii) the likelihood that any relevant documents will be materially altered in the course of recovery, or the giving of discovery or inspection; and
- (e) The significance of any particular electronically stored document or class of electronically stored documents which are likely to be located to the issues in dispute.

43E. Form of list

(1) The following matters shall be included in any list of documents made pursuant to the giving of discovery in accordance with this Part in which electronic documents are enumerated:

- (a) The name of the electronic file constituting or containing the electronic document; and
- (b) The file format (and its version) of the electronic document.

(2) Where the party giving discovery objects to the production of certain discoverable electronically stored documents solely on the ground that the internally stored metadata information is protected by privilege, he must state

Review of Discovery in Civil Litigation

in the list of documents whether he objects to the production of the electronic documents without the internally stored metadata information. If he does not object to the production of the electronic documents without the internally stored metadata information, he must enumerate the electronic documents in Part 1 of Schedule 1 to the list of documents. In any event, he must enumerate such documents in a separate section in Part 2 of Schedule 1 to the list of documents and shall state that he objects to the production of the whole or part of the internally stored metadata information of these documents.

(3) Reasonable efforts shall be made to remove duplicated documents from the list of documents. A document shall be considered a duplicate of another if the contents of both (including metadata information) are identical. The use of a hashing function to identify duplicates shall be deemed to be reasonable effort.

(4) If copies of electronic documents are supplied in one or more read-only optical disc(s) or other storage medium, the party giving discovery shall provide a further list, at the time when such copies are supplied, stating the following:

(a) The storage format (and its version) of the optical disc or storage medium; and

(b) If there are multiple optical discs or storage media, a list of electronic documents stored on each optical disc or storage medium.

(5) An index of documents enumerated in a list of documents referred to in sub-paragraph (1) or (4) above shall be provided in an electronic, text searchable and structured format. In the absence of parties' agreement, this index or load file shall be provided in a delimited text file in the Comma Separated Value (or "CSV") file format.

43F. Inspection of electronically stored documents

(1) A party required to produce electronically stored documents for inspection under Order 24 of the Rules of Court shall provide reasonable means and assistance for the party entitled to inspection to inspect the electronically stored documents in their native format.

(2) Where an inspection is carried out under Order 24, Rule 9, 10 or 11(1) of the Rules of Court and the inspecting party wishes to take copies of electronically stored documents produced for inspection, his request to take copies shall comply with the protocol set forth in paragraph 43G.

Inspection of computer databases and electronic media or recording devices

(3) No request or application for the inspection of any computer database, electronic medium or recording device shall be made unless discovery of the computer database, electronic medium or recording device has been given.

(4) A request may be made for the inspection of an electronic medium or recording device (for which discovery has been given) for the purpose of recovering deleted electronic documents through the conduct of a forensic examination of the unallocated file space or file slack of the electronic medium or recording device using computer forensic tools or techniques.

(5) Where an application under Order 24, Rule 11(2) is made for the inspection of computer databases, electronic media or recording devices for which discovery has been given, the party seeking inspection shall include in his application an inspection protocol, which may take the form found in Appendix E Part 2, in order to ensure that the party entitled to inspection has access only

Review of Discovery in Civil Litigation

to electronic documents that are necessary and is not allowed to trawl through the entire database, electronic media or recording device.

(6) Upon the hearing of an application for an order for the inspection of computer databases, electronic media or recording devices, the Court shall have regard to the matters set forth in paragraph 43D. The Court shall have the power to review the adequacy of an inspection protocol and may make such order or give such direction as it thinks fit, for the just, expeditious and economical disposal of the cause or matter.

(7) Nothing in this paragraph shall prevent the party producing computer databases, electronic media or recording devices for inspection from reviewing the discoverable electronically stored documents or the results of any reasonable search for the purpose of identifying privileged documents. However, such review for the purpose of identifying privileged documents shall not extend to the deletion, removal or alteration of metadata information.

43G. Supply of copies of electronically stored documents

(1) Copies of discoverable electronically stored documents shall generally be supplied in the native format in which the requested electronic documents are ordinarily maintained and in one or more read-only optical disc(s).

(2) Metadata information internally stored in the native format of discoverable electronically stored documents shall not be deleted, removed or altered without the agreement of the parties or an order of Court. Where the party giving discovery objects to the production for inspection of certain discoverable electronically stored documents solely on the ground that the internally stored metadata information is protected by privilege, but does not

Review of Discovery in Civil Litigation

object to the production of the electronic documents without the internally stored metadata information, copies of such documents may be supplied in a reasonably usable format with all or such of the metadata information over which privilege is claimed removed.

Requests for the supply of copies

(3) A request for copies of discoverable electronically stored documents may specify the format and manner in which such copies are to be supplied, If the party giving discovery does not agree with the specified format or manner or both, he may either:

- (a) Propose a reasonably usable format and/or storage medium and/or a reasonable manner in which he intends to supply copies of the requested electronic documents; or
- (b) In default of agreement, supply copies of the requested electronic documents in accordance with sub-paragraph (1).

(4) The party giving discovery shall not be required to supply copies of electronically stored documents in more than one format.

(5) The file format versions set forth in Appendix E Part 3 shall be deemed to be reasonably usable formats for the purpose of this paragraph.

Applications for the supply of copies

(6) Applications for the supply of copies of discoverable electronically stored documents shall specify the format and manner in which copies of such electronic documents are to be supplied.

43H. Restriction on use of privileged document, inspection of which has been inadvertently allowed

Order 24, Rule 19 of the Rules of Court applies to the giving of discovery or inspection of electronically stored documents, including the supply of copies, as it would to the giving of discovery or inspection of any other document.

43I. Costs

(1) Except for orders made in respect of third party or pre-action discovery, the costs of complying with an order for the giving of discovery or inspection of electronically stored documents shall generally be borne by the party giving discovery; and disbursements incurred in providing copies shall be reimbursed by the party requesting for copies.

(2) The Court may invoke its inherent powers under Order 92, Rules 4 and 5 of the Rules of Court to make or give such further orders or directions incidental or consequential to any order as may be necessary, to order the party entitled to discovery to bear the whole or a portion of the costs of compliance with such order for the giving of discovery or inspection of electronically stored documents, and the supply of copies, if such order is necessary to prevent injustice or to prevent an abuse of the process of the Court.

ANNEX C – PROPOSED CHECKLIST¹

Where electronic discovery and inspection are contemplated, parties should discuss and consider, with a view of agreeing to as much as possible, the following aspects of electronic discovery:

- (a) The particular custodians of documents sought to be disclosed;
- (b) The physical locations where the searches will be conducted;
- (c) The precise date range of requested documents, including the period during which the requested documents were created, modified, and/or received, if necessary;
- (d) The specific categories of documents sought to be disclosed;
- (e) The use of agreed search terms and/or phrases;
- (f) The use of agreed software tools, such as predictive coding software, and the use of search engines;
- (g) The manner of preparation of the search engine (such as, the updating and preparation of a search index);
- (h) The manner of conducting the search;
- (i) The use of de-duplicating software, and/or the methods used to identify duplicate documents;

¹ The proposed checklist is compiled with reference to the UK PD 31B, the Ontario Model Discovery Agreement and the Ontario annotated E-Discovery checklist.

Review of Discovery in Civil Litigation

- (j) The format(s) of documents which parties accept for the purposes of the disclosure;
- (k) The methods to be used to identify privileged documents and other non-disclosable documents;
- (l) The methods used to redact documents (where redaction is required);
- (m) The use of data sampling;
- (n) The use of a staged approach in the disclosure of electronic documents, if appropriate;
- (o) The place of inspection of the documents;
- (p) The manner of inspection of the documents;
- (q) The supply of copies of documents if any, and the format and manner in which the copies will be supplied;
- (r) Whether to produce documents which have been deleted;
- (s) Whether to produce archival data, especially non-current archival data;
- (t) Whether to produce backup data;
- (u) Whether to produce metadata;
- (v) The appointment of a joint computer expert for the conduct of the inspection of databases, electronic medium, recording devices, storage devices, and documents;

Review of Discovery in Civil Litigation

- (w) The appointment of a joint computer expert for the conduct of the forensic examination of the databases, electronic medium, recording devices, storage devices, and documents, if required; and
- (x) The costs of and incidental to the conduct of the search, including the costs of appointment of any joint experts.

ANNEX D – PROPOSED AMENDMENTS TO PD 3/2009

43D. Matters to which regard shall be had in determining whether discovery or inspection is necessary

(1) Order 24, Rules 7 and 13 of the Rules of Court states that an order for discovery and production of documents for inspection shall not be made unless such order is necessary either for disposing fairly of the cause or matter or for saving costs. The matters to which regard shall be had, in determining whether an application is necessary and proportionate, shall include:

- (a) The number of electronic documents involved;
- (b) The nature of the case and complexity of the issues;
- (c) The value of the claim and the financial position of each party;
- (d) The ease and expense of retrieval of any particular electronically stored document or class of electronically stored documents, including—
 - (i) the accessibility, location and likelihood of locating any relevant documents,
 - (ii) the costs of recovering and giving discovery and inspection including the supply of copies, of any relevant documents,
 - (iii) the likelihood that any relevant documents will be materially altered in the course of recovery, or the giving of discovery or inspection;
- (e) The availability of electronically stored document or class of electronically stored documents from other sources; and

Review of Discovery in Civil Litigation

(f) The relevance and materiality of any particular electronically stored document or class of electronically stored documents which are likely to be located to the issues in dispute.

ANNEX E – JURISDICTION OUTLINES

(A) UNITED KINGDOM

1 The present English position on discovery is similar to that in Singapore. Under Part 31 of the English Civil Procedure Rules, generally, a party is required to disclose only those documents on which he relies, and the documents which adversely affect his own case or another party’s case, or which support another party’s case.¹

2 The aforesaid scope of disclosure is referred to in the English rules as “standard disclosure” and was introduced via Lord Woolf’s ‘Access to Justice’ Reforms in 1999. The scope of discovery under Order 24 Rule 1(2) of the Singapore Rules of Court is similar to the English standard disclosure.

3 The rules on discovery are currently being reviewed in England. In the Review of Civil Litigation Costs: Final Report (December 2009) issued by Lord Justice Jackson (“the Jackson Report”), it was proposed that for large

¹ Rules 31.5 and 31.6 of the UK Civil Procedure Rules state:

31.5 Disclosure limited to standard disclosure

- (4) An order to give disclosure is an order to give standard disclosure unless the court directs otherwise.
- (5) The court may dispense with or limit standard disclosure.
- (6) The parties may agree in writing to dispense with or to limit standard disclosure.

31.6 Standard disclosure – what documents are disclosed

Standard disclosure requires a party to disclose only -

- (a) the documents on which he relies; and
- (b) the documents which -
 - (i) adversely affect his own case;
 - (ii) adversely affect another party’s case; or
 - (iii) support another party’s case; and
- (c) the documents which he is required to disclose by a relevant practice direction.

Review of Discovery in Civil Litigation

commercial cases,² the parties and the Court are to consider the most appropriate process for disclosure at the first case management conference. This is referred to as the “menu” option and the options to be decided by the Court are:

- (a) An order dispensing with disclosure; or
- (b) An order that a party disclose the documents on which it relies, and at the same time requests any specific disclosure it requires from any other party (this is narrower than standard disclosure); or
- (c) An order that directs on an issue by issue basis, the disclosure to be given by a party; or
- (d) An order that a party give standard disclosure; or
- (e) An order that a party disclose any documents which it is reasonable to suppose may contain information which may (1) enable the party applying for disclosure either to advance his own case or to damage that of the party giving disclosure, or (ii) lead to a train of enquiry which has either of those consequence (known as *Peruvian Guano* disclosure after the case of *Compagnie Financiere Et Commerciale Du Pacifique v Peruvian Guano* (1882) 11 QBD 55 and wider in scope than standard disclosure); or

² Jackson Report, pp 370-372.

Review of Discovery in Civil Litigation

(f) Any other order in relation to disclosure that having regard to the overriding objective,³ the Court considers appropriate.

4 In preparing for the first case management conference,⁴ each party must file and serve a report which:

(a) Describes in broad terms what documents exist or may exist that are or may be relevant to the matters in issue in the case,

(b) Describes where and with whom those documents are or may be located,

(c) Estimates the broad range of costs that could be be involved in giving standard disclosure, and

(d) States the disclosure directions which are to be sought (including what searches are to be undertaken or whether lists of documents are required).

5 For other cases, the Jackson report is of the view that the menu option may also be useful, particularly where the cost of standard disclosure is

³ In the Jackson Report, p 31, it is stated that the overriding objective is embodied in the CPR, Rule 1.1(2) of which provides that “Dealing with a case justly includes, so far as is practicable...

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party...”

⁴ Jackson report, p 371.

Review of Discovery in Civil Litigation

disproportionate. With respect to personal injury and clinical negligence claims, the report is of the view that standard disclosure should apply.⁵

6 The Jackson report is of the view that *Peruvian Guano* disclosure should be included as one of the menu options as this level of disclosure is sometimes appropriate for fraud cases.⁶

7 The report also considers that under the existing rules, the Court may order a party seeking disclosure to pay for the costs of giving disclosure and mentions that in the United States, such reverse costs orders have apparently been useful in controlling excessive discovery.⁷

8 Following the publication of the Jackson Report, the Judicial Executive Board expressed its support for the recommendations and established a Judicial Steering Group to oversee areas such as cost management. It remains to be seen whether, and if so how, the CPR will be amended to incorporate specific proposals in the Jackson Report pertaining to discovery.

9 The UK experience raises two key points of relevance in the Singapore context. The first relates to the practical efficacy of Singapore's own amendments to O 24 of the Rules of Court in 1996. Prior to 1996, Singapore, like the UK, had in place a system of automatic mutual discovery after the close of pleadings that was defined by the categories of relevance formulated in *Peruvian Guano*: see, generally, *Tan Chin Seng and others v Raffles Town*

⁵ *Ibid*, p 373.

⁶ *Ibid*, p 372.

⁷ *Ibid*, p 374.

Club Pte Ltd [2002] 2 SLR(R) 465 at para 13. This approach was replaced in 1996 by a system of general and specific discovery orders: see Rules of Court, O 24 rr 1 and 7.

10 Whilst “train of inquiry” discovery continued to be available via specific discovery orders, the scope of general discovery orders were, like the UK’s system for “standard disclosure”, limited to the documents which (a) a party relied or would rely on, or (b) either adversely affected his own or another party’s case or which supported another party’s case: see Rules of Court, O 24 r 1(2).

(B) AUSTRALIA

(I) High Court of Australia

11 In respect of the High Court of Australia, there are no specific provisions in the High Court Rules 2004 (Cth) about the obligation to make discovery of documents. Should circumstances arise in proceedings before the High Court that necessitate the discovery of documents, a party may apply to the Court for directions. The scope of discoverable documents is based upon the “train of inquiry” test.

(II) Federal Court of Australia

12 The availability of discovery in the Federal Court is limited to the provisions in the Federal Court Rules (Cth).⁸ Order 15 provides for discovery

⁸ From the Consultation Paper on Discovery in Federal Courts by the Australian Law Reform Commission dated November 2010, Chapter 2 on “Legal Framework for Discovery in Federal Courts” (see further the ALRC’s Final Report: “Managing Discovery: Discovery of Documents in Federal Courts”; published 25 May 2011).

Review of Discovery in Civil Litigation

and inspection of documents in a proceeding while order 15A provides for preliminary discovery and discovery from a non-party.

(a) *Application for Discovery*

13 A party may file and serve a notice for discovery, with leave of the Court, after a directions hearing under Order 10 of the Federal Court Rules and within any period fixed by the Court for this purpose. The rules require that in all cases, a party must have the leave of the Court to file and serve a notice for discovery.⁹ In practice, the Court may expect the parties to indicate at the first directions hearing or case management conference whether leave for discovery will be sought.¹⁰

(b) *Orders for Discovery*

14 The Court must determine an application for leave for discovery in the way that best promotes the overarching purpose of civil practice and procedure, being the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.¹¹ Hence, the Court will not order general discovery as a matter of course, even where a consent direction to that effect is submitted.¹² In this context, general discovery (as defined in Order 15 rule 5) refers to the broad categories of documents required to be disclosed as stated in Order 15 rule 2.

⁹ Order 15 rule 1.

¹⁰ See Practice Note CM 6: Pre-Discovery Conference Checklist, para 1.2.

¹¹ Federal Court of Australia Act 1976 (Cth), s 37M.

¹² From the ALRC Consultation Paper on Discovery in Federal Courts dated November 2010, Chapter 3 on “Discovery Practice and Procedure in Federal Courts”.

(c) ***Applicable test: whether discovery necessary***

15 An order for discovery shall only be made by the Court if it is necessary at the time when the order is made as stated in Order 15 rule 15. This is similar to Order 24 rule 7 of the Rules of Court . The word “necessary” has been held to mean “reasonably necessary in the interests of a fair trial and of the fair disposition of the case”.¹³ In determining whether to make orders for the discovery of documents, Practice Note CM 5 states that the Court will have regard to the issues in the case and the order in which they are likely to be resolved, the resources and circumstances of the parties, the likely cost of the discovery and its likely benefit.¹⁴

16 In respect of the scope of discoverable documents in the Federal Court, it appears that the *Peruvian Guano* test of relevance has been replaced with broad categories of documents “required to be disclosed” pursuant to O 15 r 2(3) of the Federal Court Rules. The documents required to be disclosed in the Federal Court are any of the following documents of which the party giving discovery is, after reasonable search, aware at the time discovery is given:

- (a) Documents on which the party relies;
- (b) Documents that adversely affect the party’s own case;
- (c) Documents that adversely affect another party’s case; and

¹³ *University of Western Australia v. Gray (No. 8)* [2007] FCA 89; *Gray v. Associated Book Publishers (Aust) Pty Ltd* [2002] FCA 1045.

¹⁴ Practice Note CM 5: Discovery (Federal Court of Australia), para 2.

Review of Discovery in Civil Litigation

- (d) Documents that support another party's case.

17 A number of matters are specified by O 15 r 2(5) as matters which may be taken into account by a party in making a "reasonable search", namely:

- (a) The nature and complexity of the proceedings;
- (b) The number of documents involved;
- (c) The ease and cost of retrieving a document;
- (d) The significance of any document likely to be found; and
- (e) Any other relevant matter.

18 Order 15 r 3 further provides that the Court may limit discovery orders to specific documents or classes of documents, or in relation to specific matters in question in the proceedings, to prevent unnecessary discovery. It has been held in *Racing New South Wales v. Betfair Pty Ltd* by Buchanan, Jagot and Foster JJ that:

[a]s apparent from Order 15 r2(3) of the Federal Court Rules, discovery ordinarily should be limited to the documents on which the party relies and the documents that adversely affect or support that party's case or the case of another party. Moreover, Order 15 rr3(1)(2) indicate that, if anything, discovery by order should be restricted rather than expanded.

19 Practice Note CM 5 also suggests in paragraph 3 that, in the normal course of events, the Court will only make orders for limited discovery under rule 3 and not general discovery under rule 2. On the other hand, specific or particular discovery is still available under rule 8 where the Court may order at any stage of the proceedings that a party give discovery of some document or class of documents relating to any matter in question in the proceeding that

Review of Discovery in Civil Litigation

– at it appears from the evidence or from the nature or circumstances of the case or from any document filed in the proceedings.

(d) *Serving a list of documents*

20 Where leave for discovery is granted – and a notice for discovery is served – the party required to give discovery must do so within the time specified in the notice, not being less than 14 days after service, or within such time as the Court directs.¹⁵ Unless the Court otherwise orders, the party must give discovery by serving a list of documents required to be disclosed and an affidavit verifying that list.¹⁶

21 The contents of the list must conform to the requirements of O 15 r 6. The list must describe each document or group of documents sufficiently to be identified, state the grounds for privilege claimed over any of the documents and, for documents no longer in the party’s possession, custody or power, state when the party parted with the documents and what has become of it.

(e) *Production of documents*

22 The Court may, subject to any question of privilege which may arise, order a party to produce a document which appears from its list of documents to be in the party’s possession, custody or power¹⁷ for inspection by any other party at a time and place specified in the order. The party to whom a

¹⁵ Order 15 rule 2(1).

¹⁶ Order 15 rule 2(2).

¹⁷ Order 15 rule 11(1).

Review of Discovery in Civil Litigation

document is produced may make copies at their own expense.¹⁸ However, it is not necessary to disclose a document if the party giving discovery reasonably believes that the document is already in the possession, custody or control of the party to whom discovery is given.¹⁹ Where a question of privilege or any other objection to the production of discoverable documents between the parties arises, the Court may order that the document be produced to Court for inspection to decide the validity of the privilege claim or objection.²⁰

(f) *Pre-Discovery Practice*

23 Practice Note CM 5 implies that practitioners are expected to consider carefully any application for discovery, before approaching the Court for orders, with a view to narrowing the scope of discovery. Practice Note CM 5 expressly states that the Court will expect practitioners to be in a position to answer the following questions when applying for orders, designed to eliminate or reduce the burden of discovery:

- (a) Is discovery necessary at all, and if so for what purpose?
- (b) Can those purposes be achieved:
 - (i) by a means less expensive than discovery;
 - (ii) by discovery only in relation to particular issues; or

¹⁸ Order 15 rule 12.

¹⁹ Order 15 rule 2(4).

²⁰ Order 15 rule 14.

Review of Discovery in Civil Litigation

- (iii) by discovery (at least in the first instances) only of defined categories of documents?
- (c) Particularly in cases where there are many documents, should discovery be given in stages, for example, initially on a limited basis, with liberty to apply later for particular discovery or discovery on a broader basis?
- (d) Shoulder discovery be given in the list of documents by general description rather than by identification of individual documents?

(g) *Planning for Electronic Discovery*

24 Where discovery involves significant amounts of electronically-stored information, Practice Note CM 6 states that before the Court will make orders for electronic discovery, the parties are expected to have discussed and agreed upon a practical and cost-effective discovery plan having regard to the issues in dispute and the likely number, nature and significance of the documents that might be discoverable in relation to them.

25 Practice Note CM 6 also provides Document Management Protocol which addresses issues such as page number conventions, document descriptions, file format and media to be exchanged. An example of an Advanced Document management Protocol is also provided under the practice note.

26 The Court may order the parties to attend a case management conference, called a “pre-discovery conference”, with a judge or registrar to facilitate or mediate resolution of any areas of disagreement between the parties concerning their discovery plan or document management protocol.

Review of Discovery in Civil Litigation

Parties are also expected to address the issues stated in a pre-discovery conference checklist at the said conference. These issues include strategies for the identification, collection, processing, analysis, review and exchange of electronic documents, as well as a timetable and estimate of costs for discovery.

27 If the Court requires a pre-discovery conference, each party may have up to three representatives – including one representative to act as a single point of contact for the party in relation to the matters resolved at the conference, called “Discovery Liaison”.²¹ Parties representatives at a pre-discovery conference are expected to have sufficient knowledge and access to information to address the discovery plan and document management protocol. The parties or the Court may also engage an expert or adviser to attend a pre-discovery conference to facilitate or mediate resolution of any of these issues.

(C) HONG KONG

28 The Hong Kong procedures on discovery can be found in O 24 of the Hong Kong Rules of the High Court (“the Hong Kong Rules”). The Civil Justice Reform of April 2009 did not introduce major changes to the existing procedures but focused instead on ensuring compliance with the existing rules, through more proactive case management.

²¹ See para 9 of the Pre-Discovery Conference Checklist.

(I) Scope of Discovery

29 While the Hong Kong provisions on discovery largely mirror those in Singapore, the scope of discovery in Hong Kong appears to be broader in that parties are required to give discovery of documents “relating to any matter in question in the cause or matter”.²²

30 In addition, there are several provisions in the Hong Kong Rules which are not found in the Singapore Rules of Court.

(II) Automatic discovery

31 The Hong Kong Rules provide for mutual discovery of documents by parties without order. Order 24 r 1 of the Hong Kong Rules provides for mutual discovery to take place after the close of pleadings in an action begun by writ. Order 24 r 2 states that parties are required, within 14 days after the pleadings in the action are deemed to be closed, to make and serve on each other a list of documents which are or have been in their possession, custody or power relating to any matter in question between them in the action. Defendants in actions arising out of a road traffic accident²³ and actions for the recovery of any penalty recoverable by virtue of any written law²⁴ are exempted from the aforesaid automatic discovery requirements.

²² In our Rules of Court, the scope of discovery is more specific and is limited to: (a) documents on which the party relies or will rely; (b) documents on which the party relies or will rely; and (c) documents which could: adversely affect his own case; adversely affect another party’s case; or support another party’s case.

²³ Order 24 rule 2(2) of the Rules of the High Court, Hong Kong.

²⁴ Order 24 rule 2(3) of the Rules of the High Court, Hong Kong.

Review of Discovery in Civil Litigation

32 Parties required to make discovery of documents under O 24 r 2 may apply under r 2(5) to limit the scope of documents subject to discovery, or for an order that there be no discovery of documents by any or all of the parties either at all or at that stage of the action. Such orders would be given if the Court is of the opinion that discovery is not necessary either for disposing fairly of the action or for saving costs.

(III) Provision of copies of documents

33 Under O 24 r 11A of the Hong Kong Rules, a party who is entitled to inspect any documents may by notice to the party required to produce the documents for inspection, request him to supply a true copy of any such document. The party who is served with the notice must supply the copy within 7 days, together with an account of the reasonable charges.

(IV) Undertaking with regard to the use of documents

34 Under O 24 r 14A, unless the Court otherwise orders, any undertaking not to use a document for any purposes other than those of the proceedings in which it is disclosed would cease to apply once it has been read to or by the Court, or referred to in open Court.

(V) Limiting discovery

35 For case management purposes and to further the overall objectives of the Hong Kong Rules in ensuring that disputes are resolved in the most cost effective and expeditious manner,²⁵ O 24 r 15A empowers the Court to give

²⁵ Order 1A rule 1 of the Rules of the High Court, Hong Kong provides:
The underlying objectives of these rules are-

(cont'd on next page)

orders on limit the scope of discovery, how discovery is to be made, and when inspection of documents may be conducted.²⁶

(D) CANADA (SELECTED PROVINCES)

36 British Columbia, Alberta and Ontario are identifiable as the provinces which have been most pro-active in responding to the need to limit the costs of discovery. Two related preliminary points should be taken into account concerning civil procedure in Canada. The first is that the rules in most of the provinces (including the three above) are essentially a combination of rules developed in the UK and the US. The second point, which is a consequence of the US influence, is that the discovery process involves the interlocutory examination of parties and other witnesses on the documents and related information disclosed. As this form of oral examination is not part of the Singapore process, and has been shown to substantially increase costs and contribute to delay in the US and Canada, it will not be addressed in this paper.

-
- (a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;
 - (b) to ensure that a case is dealt with as expeditiously as is reasonably practicable;
 - (c) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
 - (d) to ensure fairness between the parties;
 - (e) to facilitate the settlement of disputes; and
 - (f) to ensure that the resources of the Court are distributed fairly.

²⁶ Hong Kong Practice Direction 5.2 on Case Management also highlights the need for parties to achieve economies in discovery: “The parties should proceed with discovery without the need to wait for an order of the Court and try to agree on the directions for modifying discovery obligations (e.g. limiting discovery to specified issues) or on the manner of their implementation (e.g. exchanging copy documents without the need to prepare lists of documents) with a view to achieving economies in respect of discovery.”

(I) British Columbia

37 New rules were introduced on 1 July 2010 (the Supreme Court Civil Rules). The rules commence with a statement of their objective: “The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.” This is followed by a statement on proportionality: “Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to (a) the amount involved in the proceeding, (b) the importance of the issues in dispute, and (c) the complexity of the proceeding.”

38 The system of discovery has been reformed by linking it to a new case planning system. Part 5 provides for a “case planning conference” after the conclusion of the pleading process. This may be initiated on the application of a party (r 5-1(1)) or directed by the Court (r 5-1(2)). The parties may also agree to such a conference (this is indicated by r 5-1(3)).

39 Provision is made for the mode and timing of the application (r 5-1(3), (4)). The parties must file their respective case plan proposals (r 5-1(5)), which are required to summarily indicate the steps they intend to take with regard to a number of processes including “discovery of documents” (r 5-1(6)(a)). Provision is made for the conduct of the case planning conference (r 5-2(1)-(7)), case planning conference orders (r 5-3(1)-(7)) including limitations to be imposed on the discovery of documents and electronic discovery (rr 5-3(1)(f)). Applications may be made to amend case plan orders (r 5-4(1)-(3)).

Review of Discovery in Civil Litigation

40 As the case planning system may not operate (where no party applies and the Court does not make an order), general provisions on discovery are included in the rules (under Part 7). Part 7 applies the automatic general discovery process (service of lists of documents within 35 days after the close of pleadings) (r 7-1(1)). If a party believes that his opponent's list is insufficient, he is required to make a written demand for the list to be amended prior to making an application to Court (r 7-1(10)). These and other provisions perpetuate the traditional processes of discovery.

(II) ALBERTA

41 The new *Alberta Rules of Court* came into force on 1 November 2010. They also incorporate a case plan but its application is much more limited. For the purpose of the rules, actions are categorised as “standard cases” or “complex cases” (r 4.3(1)).

42 In deciding whether an action should be categorized as a standard or complex case, the parties or the Court (r 4.8 empowers the Court to decide whether the case is standard or complex), must consider the following factors (r 4.3(2)):

- (a) The amount of the claim, the number and nature of the claims, and the complexity of the action;
- (b) The number of parties;
- (c) The number of documents involved;
- (d) The number and complexity of issues and how important they are;
- (e) How long questioning under Part 5 is likely to take;

Review of Discovery in Civil Litigation

- (f) Whether expert reports will be required and, if so, the time it will take to exchange reports and to question experts under Part 5;
- (g) Whether medical examinations and reports under Part 5, Division 3 will be required;
- (h) Any other matter that should be considered to meet the purpose and intention of the rule described in r 1.2;
- (i) Whether a third party claim has been or is likely to be made. If, within 4 months after the date a statement of defence is filed, the parties do not agree on whether the action is a standard or complex case, and the Court does not otherwise order, the action is to be categorized as a standard case (r 4.3(3)).

43 If the case is classified as “complex”, specific obligations follow including the preparation of a “complex case litigation plan”. If the parties cannot agree to the plan, the Court will give the necessary directions. Rule 4.5(1) states:

The parties to an action categorized as a complex case must, within 4 months after the date that the parties agree to the categorization or the Court determines that the action is a complex case,

- a. agree on a complex case litigation plan, and
- b. unless reasons are given in the plan not to do so,
 - i. establish a date by which the real issues in dispute will be identified,
 - ii. agree on a protocol for the organization and production of records,
 - iii. set a date by which disclosure of records will be completed under rule 5.5,
 - iv. set a date by which questioning under Part 5 will be completed,

Review of Discovery in Civil Litigation

- v. set a date by which all experts' reports and rebuttal and surrebuttal expert reports will be served,
- vi. set a date by which reports of any health care professionals will be obtained, and
- vii. agree on an estimated date to apply for a trial date.

44 When a complex case litigation plan or an amendment to the plan is agreed to, the plaintiff must file it and serve it on all parties (r 4.5(2)). Ancillary provisions are also included (r 4.6 and r 4.7). The rules also provide for the extensive involvement of the Court in managing litigation: see Division 2 of the Rules.

45 Under the general discovery provisions (under Part 5), the Court is empowered (pursuant to r 5.3(1)) to “modify or waive any right or power under a rule in this Part or make any order warranted in the circumstances if:

- (a) A person acts or threatens to act in a manner that is vexatious, evasive, abusive, oppressive, improper or tediously lengthy, or
- (b) The expense, delay, danger or difficulty in complying with a rule would be grossly disproportionate to the likely benefit.

(III) ONTARIO

46 The Ontario Rules of Civil Procedure were last amended in 2010 (O. Reg. 436/10). These rules provide for a discovery plan and articulate a series of considerations concerning proportionality.

(a) *Discovery plan*

47 Rule 29.1.03(1) requires the parties to agree to a discovery plan for the purpose of obtaining disclosure of documents. The discovery plan, which is to

Review of Discovery in Civil Litigation

be agreed after the close of pleadings (r 29.1.03(2)), must contain (r 29.1.03(3)):

- (a) The intended scope of documentary discovery under r 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 r 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 r 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 completion of the discovery process in a manner that is proportionate to the importance and complexity of the action. O. Reg. 438/08, s. 25.

48 In preparing the discovery plan, the parties are required "to consult and have regard to the document titled "The Sedona Canada Principles Addressing Electronic Discovery". Supplementary provisions concern the updating of the plan (r 29.1.03(4)) and consequences of failure to agree to the plan (r 29.1.03(5)).

49 Additionally, r 20.05(1) and (2) state that when summary judgment is refused or granted in part, the Court may make an order specifying what material facts are not in dispute, define the issues to be tried and order that the action "proceed to trial expeditiously". Furthermore, it may make any order

Review of Discovery in Civil Litigation

which is just including directions as to discovery. Rule 20.05(2)(e) concerns the amendment of a discovery plan agreed to by the parties under r 29.1

(b) *Proportionality in discovery*

50 The Ontario rules include a special section entitled “Proportionality in Discovery” (r 29.2). It applies “to any determination by the court under any of the following Rules as to whether a party or other person must answer a question or produce a document”. One of these Rules is r 30, which concerns discovery of documents. The considerations of proportionality in discovery are as follows (r 29.2.03(1)):

In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,

- (a) the time required for the party or other person to answer the question or produce the document would be unreasonable;
- (b) the expense associated with answering the question or producing the document would be unjustified;
- (c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;
- (d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and
- (e) the information or the document is readily available to the party requesting it from another source. O. Reg. 438/08, s. 25.

51 In addition to these considerations, in determining whether to order a party or other person to produce one or more documents, the Court is required to consider “whether such an order would result in an excessive volume of documents required to be produced by the party or other person” (r 29.2.03(2)).