

*"Let's play Twister, let's play Risk, yeah yeah yeah":*

## **An Analysis of Discovery Abuse in Civil Litigation**

Weinstock, Osborne & Company

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# T ABLE OF CONTENTS

<b>I. Introduction</b>	<b>1</b>	
<b>II. Discovery Abuse</b>		<b>2</b>
<b>III. Causes of Discovery Abuse and Game Theory</b>		<b>5</b>
<b>IV. The Pervasiveness of Discovery Abuse</b>	<b>8</b>	
<b>V. Solutions</b>		<b>9</b>

## INTRODUCTION

The literature commonly portrays the adversarial process in two ways.<sup>[1]</sup> It often describes the process as a regulated fight or sport, in which the primary goal is victory. A second view is that the process is a search for the truth. Both characterizations are accurate, revealing the tension that exists within the system. On one hand, lawyers have a duty to their clients to use strategy and cunning to win cases. On the other hand, the *Rules of Court* in New Brunswick (the *Rules*) and the CBA's *Code of Professional Conduct* (the *Code*) require them to cooperate with the opposing side, possibly undermining their clients' cases for the sake of finding the truth.

The system we have today is an eroded version of the pure adversarial process of the early common law.<sup>[2]</sup> One major modification to the system is the discovery process that, among other things, exists to encourage settlement rather than winning. The tension that exists within the system is the direct result of this modification, as the modern day adversarial system seeks to combine fundamentally opposing values. The fact that the system remains an adversarial process reflects the high value that society places on individualism and competition. Conversely, discovery is a process that places a great deal of faith in cooperation as a useful method for solving disputes. While competition and cooperation pull lawyers in opposite directions, the adversarial and competitive thrusts of the process are ultimately more powerful. Hence, the discovery process, intended to be a cooperative endeavour, predictably becomes a pre-trial game within the larger game of litigation.

Must we accept discovery abuse as an inevitable by product of the incompatibility of the adversarial system and discovery? Practising lawyers and academics suggest solutions, but are they effective enough to surmount the incompatibility of the process? This paper tries to answer these questions in five parts: the first part examines the rules applicable to the discovery process; the second part surveys the literature in an attempt to define what abuse is; the third part looks at the causes of discovery abuse, employing game theory to try to explain why abuse occurs;

the fourth part attempts to determine the pervasiveness of discovery abuse in practice using interviews with practising lawyers; and the final section looks at the viability of some solutions offered by both practising lawyers and academics.

#### DISCOVERY ABUSE

The fact that opponents seek to gain an advantage during discovery is no surprise given the adversarial nature of litigation. While neither the *Rules* nor the *Code* expressly permit gamesmanship in discovery, both contain massive gray areas within which players can operate. Further, the *Rules* and the *Code* are imprecise about what they allow and what they forbid, making it difficult to identify discovery abuse. For example, Rule 33.11 lists the violations of proper procedure during oral examination. Among the improprieties listed are,

(b) the examination is being conducted in bad faith, or in an unreasonable manner so as to annoy, embarrass or oppress the person being examined,

(c) the examination is excessive in length having regard to the nature of the proceeding

Yet, the *Rules* do not state exactly when an examination becomes unreasonable or excessive. The *Code* does not offer any guidance either, merely stating that “[w]hen acting as advocate, the lawyer . . . must represent the client . . . within the limits of the law.”<sup>[3]</sup> Additionally, some parts of the *Code* serve to frustrate the spirit of openness and cooperation in the discovery process, and may impliedly encourage the use of discovery tactics. For example, Chapter IV, Commentary 13 states “[w]hen disclosure is required by law . . . the lawyer should always be careful not to divulge more information than is required.” Chapter IX, Commentary 15 states “. . . the lawyer is not obliged (save as required by law) to assist an adversary or advance matters derogatory to the client's case.” Therefore, the *Rules* and the *Code* inadvertently create the playing field for discovery games, and give lawyers a tremendous amount of latitude to manoeuvre by using open-ended language.

Due to the vagueness of the language used, neither the *Rules* nor the *Code* are helpful in delineating the line between acceptable tactics and abusive ones. MacKenzie offers some instances of abuse, all of which share the common attribute of conducting discovery in bad faith, thereby violating the cooperative spirit of the process. He lists repetitive questions, frivolous objections, and the dogged pursuit of irrelevant details among his examples.<sup>[4]</sup> Yet, he does not give a precise definition of discovery abuse. In fact, no agreement exists among academics, rule makers, judges or practitioners as to what constitutes discovery abuse.<sup>[5]</sup> Easterbrook discusses the major difficulty identifying discovery abuse,

...we cannot define "abusive" discovery except in theory, because in practice we lack essential information. Even in retrospect it is hard to detect and prevent impositional discovery . . . .

Lawyers cannot limit their search for information in discovery, because they do not know what they are looking for. They do not know when to stop, because they never know when they have enough...Lawyers practicing in good faith, therefore, engage in extensive discovery; anything less is foolish...many lawyers do not know whether their own discovery requests are proper or impositional; it is almost impossible to tell one from the other... The recipients of discovery requests often cannot see what the requester is getting at, and for strategic reasons the

requester will not tell. So the recipient smells "abuse" even though he may have diagnosed only his lack of comprehension.<sup>[6]</sup>

Easterbrook highlights the fact that what may seem legitimate to one side may be perceived by the other as abusive, yet there is hardly any way to tell during, or after discovery .

How, then, should we define discovery abuse? Can it be distinguished from "merely unnecessary discovery, or discovery that is disproportionate in light of the case at hand"?<sup>[7]</sup> The line between legitimate and abusive discovery is most clear in the definition offered by the Civil Justice Reform Advisory Group of Texas (the Texas Definition). The Texas Definition states that abuse is taking discovery to inflict costs on an opponent or to build up fee charges.<sup>[8]</sup> In part, Easterbrook comes to a similar conclusion, stating that,

[a]n abusive request is one "justified" from the demander's perspective not by its contribution to an anticipated judgment but by its contribution to an anticipated settlement . . . Stated differently, an abusive request is one justified by the costs it imposes on one's adversary <sup>[9]</sup>

While these definitions are good starting points, they do not identify abusive discovery outside the context of inflicting costs on one's opponent as a settlement tactic or increasing one's billable hours. A survey of the literature on discovery abuse yields nothing beyond this in the way of useful definitions. Thus, we face a problem that exists in various forms (as MacKenzie's list shows), but is only identifiable subjectively on a case by case basis. This is best summed up by John Townsend

who said, “[d]iscovery abuse is like porn. It's hard to define, but you know it when you see it.”<sup>[10]</sup> **CAUSES OF DISCOVERY ABUSE AND GAME THEORY**

In an attempt to gain an upper-hand, players in the discovery game employ strategic behaviour, where each player's decision turns on what he or she expects the other actor to do.<sup>[11]</sup> A useful way to analyse discovery gamesmanship and abuse is through the application of game theory. Game theory employs formal rules of logic to understand such strategic behaviour. It works by simplifying a given social situation and stepping back from the many details that are irrelevant to the problem, enabling the user to discover optimum strategies.<sup>[12]</sup>

Modeled on the Prisoner's Dilemma, the Litigator's Dilemma demonstrates how strategic behaviour leads to gamesmanship and discovery abuse.

**Table 1.1 The Litigator's Dilemma**

		Lawyer A	
		Disclose	Not Disclose
Lawyer B	Disclose	(1, 1)	(0, 1)
	Not Disclose	(1, 0)	(0, 0)

Payoffs to Lawyer A and Lawyer B: 1 indicates an advantage, while 0 indicates a disadvantage.

A player's optimum strategy is his or her best response to the actions of the other actor. Lawyer A does not know which action Lawyer B is choosing, but if Lawyer B chooses to disclose, Lawyer A faces a “disclose” payoff of an advantage and a “not disclose” payoff of a disadvantage. In either case Lawyer A does better by not disclosing. Since the game is symmetric, Lawyer B’s incentives are the same. Thus, the optimum strategy equilibrium is (not disclose, not disclose), and the equilibrium payoffs for both players is (0, 0). As such, both

players are worse off than if they had both disclosed (disclose, disclose) where the payoff for both players would be (1, 1).

Game theory works on the assumption that players are rational actors, yet often it seems that these actors make sub-optimal, and therefore irrational choices. Tsebelis explains that one cannot look at a game in isolation, but rather, one should understand it in the context of multiple games. An actor may choose sub-optimally in one game in an attempt to produce more favourable conditions in another. “If, with adequate information, an actor's choices appear to be sub optimal, it is because the observer's perspective is incomplete. The observer focuses attention on only one game, but the actor is included in a whole network of games”.<sup>[13]</sup> Tsebelis refers to games within games as nested games. He argues that what appears sub optimal from the perspective of only one game could in fact be optimal when the whole network of games is considered.<sup>[14]</sup> The Litigator's Dilemma demonstrates this, where the optimum strategy is to pick the sub-optimal choice of not disclosing in the discovery game (the nested game) to gain an advantage in the larger litigation game.

The Litigator's Dilemma is a very simple illustration of how lawyers make choices in the discovery process. At the most /basic level they desire to gain an advantage, or fear being at a disadvantage, so they engage in gamesmanship that sometimes becomes abusive. Commentators identify many factors that encourage lawyers towards “gaming” the discovery process to the point of abuse. The biggest contributor to this type of behaviour is the idea of zealous representation of the client. Given the pressures of litigation, it is natural for zealous representation to become overzealous, manifesting itself in the use of borderline tactics. Further, the very people who use the cooperative discovery process are those trained in adversary culture to fight for every advantage. Overzealousness is also the key to attracting clients to the lawyer and the firm. Hyper-aggressive lawyering impresses clients who tend to regard cooperative behaviour as a betrayal of their interests.<sup>[15]</sup> Another factor is the growing importance of business rationality in the legal profession. In this mode of thinking, one regards the moral responses of others,

such as approval or outrage at one's conduct, as relevant only to the extent that it translates into effects on profits.

[16] Therefore, if being abusive in discovery has a positive effect on the bottom line, then the moral issue of acting in good faith becomes irrelevant. What makes the growth of business rationality possible is the weakening of the legal community, particularly in large urban centres. With the growth and atomization of law firms, lawyers tend to deal with each other on a one time basis. The discipline of informal sanctions, such as the fear of a bad reputation, are eliminated because in all probability Lawyer A must only deal with Lawyer B once. Therefore, Lawyers A and B use abusive tactics because there is no need to lay the groundwork for future cooperation, and profits are positively affected.

### **THE PERVASIVENESS OF DISCOVERY ABUSE**

Discussions with lawyers in both Fredericton, New Brunswick, and in St. John's, Newfoundland indicated that the perception of lawyers is that discovery abuse is not a problem in their jurisdictions. [17] However, when asked if they experienced any problems during the discovery process, all of them described problems that fell within MacKenzie's description of abuse. Complaints included stories of repetitive questions during oral discovery; oral discoveries that dragged on for days or weeks beyond what was necessary; asking questions having no relevance to the issue; demands for documents in frivolous suits; excessive demands for undertakings before agreeing to go to trial; and disclosing irrelevant documents within lists of documents. The feeling among many lawyers was that lawyers representing insurance companies in personal injury cases were the worst offenders. Some felt that the excessive behaviour may be an attempt to build up fees. Others complained that part of the problem was that the law does not require insurance companies to pay interest on general damages, the result being that it is economically in the best interest of insurance companies to prolong the litigation process. The longer the delays, the more money the insurance company generates in interest, and the greater the likelihood of forcing settlement on their terms.

## SOLUTIONS

The literature presents a plethora of solutions to eliminate discovery abuse. Recommendations include, *inter alia*, reducing the reliance on billable hours as a criterion for promotion; tying compensation of partners to complaints about their ethical behaviour; refusing to accept clients who bring pressures for ethical violations; and more outside monitoring of the discovery process by judges. While most of these solutions might solve the problem, many are not realistic in a capitalist economy. Expecting managing partners to ignore billable hours when considering promotions is unrealistic. It is also unrealistic for lawyers to reject corporate clients, such as insurance companies, who demand that the litigation process be stalled or delayed.

Some lawyers consulted believed that there was no need for formal reform, rather, an effective remedy for abusive behaviour was to address the issue with opposing counsel. For example, if Lawyer A feels that Lawyer B is asking repetitive questions during discovery, Lawyer A need only ask Lawyer B to stop. Those who made this suggestion felt that communication was an effective way of dealing with problems in the discovery process. While this may be effective in small legal communities such as Fredericton where there will be repeated games between counsel in the future, it would not likely fork in larger legal communities where the probability of lawyers meeting more than once is low.

A senior litigator who felt that discovery abuse is a problem said that some lawyers tend to

exploit the competing interests within the adversarial system. He stated that during discovery, some lawyers

demand cooperation when looking for information, and immediately rely on adversarial tools such as privilege when asked to cooperate. Others said that while judges often complain about discovery abuse, they do not support lawyers who attempt to challenge colleagues who abuse the process. For example, when Lawyer A instructs his or her client not to answer an irrelevant question during discovery, and Lawyer B brings the issue before a judge, the judge often reprimands Lawyer A for being difficult. The problem with getting judges to support lawyers who resist abusive tactics is that it is often difficult for a judge to distinguish a justified request from a request that was not justified at the time.<sup>[18]</sup> Case law suggests that discovery is subject to the test of “broad relevance”, therefore, any judicial limitation of the duty to answer relevant questions on discovery is difficult to justify.<sup>[19]</sup>

As noted from speaking with practitioners, most indicated that they had not experienced any discovery abuse in their practice. Yet, all lawyers described problems with discovery that fell within McKenzie's definition of discovery abuse. This is likely because of the ambiguity surrounding the definition of abuse. As Easterbrook noted “we cannot prevent what we cannot detect [and] we cannot detect what we cannot define”<sup>[20]</sup> Continued legal education in the area would facilitate the creation of a common standard whereby the legal community could come to understand discovery abuse in the same way.<sup>[21]</sup> However, while this would foster greater awareness among lawyers of what discovery abuse is, there is no guarantee that it would provide any protections in preventing abusive behaviour. This is ultimately due to the nature of litigation and adversarial culture. Further, the likely outcome of any reforms would be further “gaming” of the process. As Gordon states, any reform can be “evaded, worked around, narrowed by interpretation, or turned into another occasion for adversary maneuvers, by a profession whose basic normative commitments make it natural and legitimate to do so.”<sup>[22]</sup> Perhaps the only workable solution given by one lawyer is that judges award interest on general damages in personal injury cases to eliminate the incentive for lawyers to delay litigation on behalf of insurance companies. This, of course, only solves the problem of discovery abuse in one area. Generally though, there does not appear to be anything that can

be done short of a complete overhaul of the adversarial system.

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[1] Michael A. Reiter. “A Critical Notice of Gerald C. MacCallum, Jr., *Legislative Intent and Other Essays on Law, Politics and Morality*” (1996) 9 Can. J. L. & Jur. 207 at 219.

[2] Gavin MacKenzie, “Breaking the Dichotomy Habit: The Adversary System and the Ethics of Professionalism” (1996) 9 Can. J. L. & Jur. 33 at 37.

<sup>3</sup>C.B.A. Code, c. IX, Rule.

-2-

<sup>4</sup>Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, (Toronto: Carswell, 1993) at 4-10. Other forms of discovery abuse mentioned include oppressive requests to compile documents of little if any importance, unsupportable assertions of privilege, incomplete responses, improper refusals to produce documents, questioning that is calculated to exhaust or intimidate opponents, and producing of mostly immaterial documents in the hope that damaging documents will pass unnoticed.

[5] L. Mullenix, “The Pervasive Myth of Pervasive Discovery Abuse: The Sequel” (1998) 39 Boston Col. L. Rev. 683 at 688.

-3-

[6] F. Easterbrook, “Discovery as Abuse” 69 B.U.L.Rev. 635 at 638.

[7] L. Mullenix, “Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rule Making” (1994) 84 Stan. L. Rev. 1393 at 1429.

[8] *Ibid.*

[9] *Supra* note 6 at 637.

-4-

[10] Telephone interview with J. Townsend Q.C. of Fredericton, N.B.(18 February 2001).

[11] D. Baird, R. Gertner & R. Picker, *Game Theory and the Law*, (Cambridge: Harvard University Press, 1994) at 1.

[12] *Ibid.* at 7.

[13] G. Tsebelis, *Nested Games*, (Los Angeles: University of California Press, 1994) at 17.

[14] *Ibid.*

[15] R. Gordon, "The Ethical World of Large-Firm Litigators: Preliminary Observations" (1998) 67 *Fordham L. Rev.* at 709.

[16] *Ibid.*

[17] It was desired to speak with practising and insured lawyers. It was not possible to get a list of such lawyers from the New Brunswick Law Society, so to make our survey as random as possible each lawyer listed in the Yellow Pages telephone directory was assigned a number based on the alphabetical order that their names were listed (there were 206 lawyers listed). We then wrote numbers from 1 to 206 on pieces of paper and pulled numbers out of a hat. If the lawyer called was not a civil litigator, or if we were unable to contact the lawyer we moved on to the next lawyer. Every lawyer listed had an equal chance of being selected [this does not apply to the lawyers from Newfoundland, who were phoned based on acquaintance with one of the authors]. While this is not a scientific survey, it was desired to achieve as accurate a reflection as possible. Each interview was based primarily on the following five open ended questions:

1. From your experience, in your opinion, does discovery abuse exist in (Fredericton/ St. John's)?
2. How would you define discovery abuse?
3. What problems, if any have you experienced in the discovery process?
4. What do you believe is the cause of these problems?
5. What is the solution, if any, to these problems?

[18] Easterbrook, *supra* note 6 at 639. This problem is illustrated in *Ross v. New Brunswick Teachers' Association and Beutel* (1996), 174 N.B.R. (2d) 236 (N.B. Q.B.). In this action for defamation the plaintiff was asked to identify the person who made a drawing on the cover of a booklet. He refused to answer the question at discovery on the grounds that it was irrelevant. The case later turned on the interpretation of the drawing.

[19] *Rocca Enterprises Ltd. et al. v. University Press of New Brunswick Ltd. and Crowther* (1990), 103 N.B.R. (2d) 224 (N.B. Q.B.).

[20] *Supra* note 6 at 639.

-10-

[21] C. Yablon, "Stupid Lawyer Tricks: An Essay on Discovery Abuse" (1996) 95 Colum. L. Rev. at 1638.

[22] *Supra* note 15 at 737.

-11-