Discovery Plans: To Impose or Not to Impose?

Jennifer Hodgins, *Sherrard Kuzz LLP*

Rule 29.1 came into effect with the amendments to the *Rules of Civil Procedure* in 2010, and requires parties to an action to agree on a discovery plan following the close of pleadings. The Rule reflects the theory that discovery should, to the extent possible, be a collaborative rather than an adversarial exercise. It is intended to assist parties to move litigation forward expeditiously and efficiently by requiring them to consider the issues as early as possible, and avoid protracted and costly motions within the discovery process.

But what happens when parties cannot or will not agree to a discovery plan? Does the court have jurisdiction to impose a discovery plan? The *Rules of Civil Procedure* do not appear to address this issue leaving the court to grapple with this apparent void.

A closer look at Rule 29.1

Rule 29.1.05 states as follows:

> On any motion under Rules 30 to 35 relating to discovery, the court may refuse to grant any relief or to award any costs if the parties have failed to agree to or update a discovery plan in accordance with this Rule. O. Reg. 438/08, s. 25.

Rule 29.1 therefore sets out some consequences for non-compliance with the requirement to agree on a discovery plan, but nowhere does the Rule give the court the authority to impose a discovery plan. Interestingly, rule 20.05(2)(d) gives the court express authority to impose a discovery plan within the context of a summary judgment; namely, where summary judgment is refused or granted in part, the court may order examinations for discovery be conducted in accordance with a discovery plan established by the court. One could argue this express authority in the context of summary judgment suggests the court has no such authority in regards to any other circumstance. However, as the courts have noted, this interpretation could create a scenario where Rule 29.1 cannot be effectively enforced when parties cannot or will not agree on a discovery plan.

Rule 29.1 is relatively new and so there is not a great deal of judicial comment on it or the issue of whether the court can impose a discovery plan on parties. To the extent courts have been called upon to evaluate the Rule, they have not looked favourably on a narrow interpretation of its application, choosing instead to include in their jurisdiction the authority to impose a discovery plan where necessary.

How the court has approached the issue

One of the first cases in which a discovery plan was imposed by the court was *Telus Communications Co. v. Sharp*, 2010 ONSC 2878. In that case, Master Short ruled he had jurisdiction under rule 1.04 of the *Rules of Civil Procedure* to impose a discovery plan where the defendant to the action failed to cooperate over a period of months. Master Short noted that while Rule 29.1 did not explicitly give the court jurisdiction to impose a discovery plan, this situation seemed to be "one of those circumstances to which rule 1.04(2) was clearly directed." Rule 1.04(2) is a general, oversight rule that provides that in applying the rules the court shall make orders and give directions that are proportionate to the importance and complexity of the issues and amount involved in the proceeding.

In *Ravenda Homes Ltd. v. 1372708 Ontario Inc.*, 2010 ONSC 4559, Justice

Henderson was faced with parties who each submitted a discovery plan but could not reach an agreement. While Justice Henderson agreed that Rule 29.1 does not expressly grant a court authority to impose a discovery plan on the parties, he called this an "obvious oversight" and went on to hold that the court "clearly" has the jurisdiction to make orders regarding all of the matters that could possibly be included in a discovery plan. He cited Rule 30, 31, 32, 33, and 35 (the discovery rules) and stated that "at the very least, the authority to make an order on any matter that might be included in a discovery plan is derived from these other rules."

More recently, in *Dewan v. Burdet*, 2012 ONSC 4465, Justice Kane imposed a discovery plan on parties that failed to move an action along in a timely fashion and where acrimony spilled over to counsel. Justice Kane held that the court should only impose a discovery plan in "exceptional circumstances", noting that his decision to impose a discovery plan should not be considered authority under Rule 29.1 for the making of such an order.

Court ordered discovery plans – a good thing?

What are we, as litigators, to make of the apparent willingness of the courts to impose a discovery plan on parties unwilling or unable to agree?

On the one hand, the threat of a court order may encourage parties to agree on a plan sooner than they otherwise would have (if at all). On the other hand, one wonders how a discovery plan assists in achieving its purpose if imposed by the court, rather than agreed to by the parties? Parties to a proceeding would seem to be in a better position than the court to look ahead, determine, and proactively address the issues that may arise during the discovery process. Furthermore, if the parties choose not to, or a party frustrates the process, there are already consequences set out in rule 29.1.05.

An arguably better approach may be one in which the court directs the parties to prepare a discovery plan in accordance with Rule 29.1 by a specified date, failing which the parties must return to court. This approach was recently taken by Master Glustein in *The Cash Store Financial Services Inc. et al. v. National Money Mart Company*, 2013 ONSC 2905. In that case, rather than impose a discovery plan on the parties, the Master imposed a timetable by which a plan was to be agreed upon, failing which the parties would return to court and potentially have one imposed on them.

In my view and experience, this latter approach is to be preferred. Where agreement on a discovery plan cannot be reached and a party brings a motion to have one imposed, in many cases directing the parties to agree on a plan facilitates discussion and ultimate agreement. In contrast, imposing a plan may cause the action to move along a course one or both part(ies) never wished to take. As it is still early in the life of Rule 29.1, it will be interesting to watch how litigation counsel and the courts continue to grapple with this issue.

Jennifer Hodgins *is a lawyer with* ***Sherrard Kuzz LLP.*** Her practice is dedicated to providing advice and representation to management in many areas of employment and labour law.