

Civil Justice Reform – Service Providers

Proportionate Litigation

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APPLIED DISCOVERY

Proportionality has always been a guiding principle in Canadian Courts on a number of different issues including remedies, costs and Charter claims. Since January 2010, the Ontario Rules of Civil Procedure (the "Rules") have required a proportionality analysis to be conducted with respect to the overall civil proceeding and more specifically, in the discovery process. A proportionality analysis involves the balancing of many factors so as to meet the defined objectives while limiting the burdens, costs or delays that are not strictly necessary to meet those objectives. The rules regarding proportionality aim to minimize the time, costs and delay to obtain truly relevant evidence and thereby increase access to justice.

The Rules now require counsel to carefully consider and plan the file strategy and discovery objectives at a very early stage. Counsel will need important preliminary information from their clients to enable meaningful and cooperative discussions with opposing counsel to prepare a discovery plan. Counsel will need to be able to justify the scope of their requests of opponents and, where necessary, gather the appropriate evidence to argue a motion on the proportionate scope of discovery.

The Proportionality Rules

The Rules were amended to include the following:

Rule 1.04, s. 1.1:

In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

Rule 29.1 requires Discovery Plans where the parties intend to obtain evidence under Rules 30-33 and 35. Discovery Plans must be completed before evidence is obtained, need to be in writing, and shall include:

(a) the intended scope of documentary discovery, taking into account relevance,

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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 under rule 30.03;

(c) information respecting the timing, costs and manner of the production of documents by the parties and any other persons;

(d) the names of persons intended to be produced for oral examination for discovery 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.

Where the evidence includes electronically stored information, Rule 29.1.03(4) directs the parties to consult and have regard to "The Sedona Canada Principles Addressing Electronic Discovery" developed by and available from The Sedona Conference. The Sedona Canada principles also contain a specific proportionality principle, Principle 2, which is stated as follows:

In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance and availability electronically stored information; (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.

Rule 29.2, Proportionality in Discovery, sets out the factors the court will consider in a proportionality dispute. Rule 29.2.03 provides:

(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.

(2) In addition to the considerations listed in subrule (1), in determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person.

Planning For Proportionality

An adjustment in practice and the approach to civil litigation is needed to



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effectively implement proportionality throughout civil proceedings, and specifically in the discovery process. The factors set out in Rule 29.2.03 and the proportionality principles will need to be considered by the parties at the outset of a proceeding and during discussions with opposing counsel to develop a discovery plan. This will require counsel to be much more careful with pleadings, narrowing the claim to the real issues and shifting away from a broad stroke approach. If they do not do so, they will find that agreement on a discovery plan is next to impossible. The file strategy, including what evidence is required to prove or defend each legitimate claim, needs to be carefully considered and planned even before pleadings are served.

In order to conduct a proper analysis, plan the objectives of the discovery, and have meaningful discussions with opposing counsel, counsel will need a range of information from their clients, including a preliminary data map of IT systems and document retention and management policies. Having this information at the outset should improve the discussions with opposing counsel, encourage cooperation and keep the time and costs required proportionate to the matter.

Counsel should consider creating a standard checklist of questions regarding the client's electronic information to discuss with each client at the very outset of a given piece of litigation that includes:

- likely custodians involved;
- location of information (i.e. servers, storage, laptops);
- email systems;
- routine documents;
- online resources;
- specialty electronic information;
- relevant date ranges;
- preservation steps taken; and
- document management policies.

The importance of the information cannot be understated. Master MacLeod recently commented at the IQPC Conference on June 30, 2010, that "Companies without a protocol for managing electronically stored information are in big trouble for a number of reasons ... It will cost them a fortune to respond to e-discovery requests; they're going to have a tough time finding what they need and it will be difficult for them to raise the proportionality argument when they have no idea what's involved in retrieving the information."

Recently, in *Guestlogix Inc. v. Hayter*, [2010] O.J. No. 3365, Justice Brown supplemented a case management memorandum requiring the parties to serve and file a completed *Proportionality Chart – Document Production*, in the format set out by the Ontario E-Discovery Implementation Committee, found on the Ontario Bar Association website. In *Telus Communications Co. v. Sharp*, [2010] O.J. No. 2095, Master Short confirmed the court's ability to impose a discovery plan upon a party that was not willing to "agree" to a plan.

Proportionality Disputes

Where counsel are unable to agree on the scope of discovery, despite good faith efforts of cooperation, motions to establish the terms of discovery may be brought before the court. While the particular evidence required on any specific motion will be case dependent, the parties may need to provide evidence on the following issues:

- the document retention and management policies;

- the time required;
- the estimated costs involved;
- whether there is any prejudice or undue delay;
- availability of alternate evidence;
- steps taken by the parties to date; and
- the reasonableness of the scope and plan proposed.

In recent decisions, the courts have confirmed that evidence will be required to argue proportionality on the scope of discovery. In *Winter et al. v. Sherman, Apotex et al.*, [2010] O.J. No. 2777, Master Haberman commented that the evidence presented on the proportionality issue was broad, general and vague. Stating that the evidence lacked any specifics on which aspect of the task would be onerous or costly and provided no time or cost estimate, Master Haberman further commented that the evidence was not helpful in the context of the motion and should have been contemplated.

It is important to note, however, that lack of document retention or management policy will likely not be adequate reason for claiming that the scope of discovery sought was disproportionate to the amounts in issue. The obligations to preserve business records and relevant evidence have not changed, and electronic evidence is not excluded from these legal requirements.

In the past, arguments of undue expense without real evidence were common place and often accepted. Pursuant to the new Rules, this will likely no longer be acceptable. Evidence providing estimates for the time and costs associated to locate, collect, process and review the electronic information can be obtained from experts providing these services. Certainly, as clients establish and implement better management of electronic information, the costs and time required to respond to discovery requests will decrease.

Further, the continued advancements in the technology involved in collecting and processing electronically stored information will further decrease time, costs and delays in electronic discovery. Reliable tools can significantly reduce the costs of review for relevance and privilege. In complex matters, litigation counsel alone typically do not have the expertise to develop defensible search protocols and data sampling processes, and the assistance of experts may be required.

The Sedona Canada Principles promote the use of electronic tools and state that the parties may satisfy their obligations to preserve, collect, review and produce electronic evidence in good faith by tools and processes such as data sampling, searching or by using selection criteria to collect potentially relevant electronically stored information. The technology available for managing electronic evidence disclosure has advanced significantly and there are tools and services available to manage electronic information while reducing the time and costs involved.

Summary

The new Rules have been in place for less than a year, and the full impact of the changes has yet to develop. The proportionality principles and required discovery plans will necessarily shift planning and discovery strategies to an early stage in the action. The planning, careful consideration and cooperation amongst the parties should, however, assist in reducing the time and cost required for civil litigation.

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