

We Are Not Finished Yet: Discovery reform in Canada and the United States

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“We are not finished yet.” With those words, former Colorado Supreme Court Justice Rebecca Love Kourlis¹ concluded her acceptance remarks after receiving the Samuel E. Gates Litigation Award from the American College of Trial Lawyers in September 2016 at the Annual Meeting in Philadelphia.

This article highlights the state of discovery reform, both in Canada and the United States, with an emphasis on the continuing cost of the most significant part of documentary production: e-discovery.

The challenge in both countries will continue to be that rules alone will not achieve the reduction in time and cost associated with the discovery process, essential for preserving the civil justice system. The pace of technological change, which affects the retrieval, availability and production of digital information, is such that, without clear principles which are understood and accepted by lawyers and their clients, rules may complicate rather than solve discovery problems.

Lawyers need to know how and to what extent technology can assist in the discovery process. In the United States, the comments to the American Bar Association (ABA) Model Rules of Professional Conduct addressing attorney competence were amended in August 2012 to state that “[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of ... the benefits and risks associated with relevant technology.”²

Discovery Obligations Distinguished

The U.S. *Federal Rules of Civil Procedure* provide that a requesting party is entitled to receive from responding parties documents in their possession, custody and control that are relevant and proportional to any party’s claim or defense, which the requester asks for with specificity. The cost of production is generally borne by the responding party.

In Canada, in general terms, with the exception of Quebec, each party may be required to supply an affidavit of documents attesting that all relevant documents in its possession and control have been listed. In theory, the requesting party is obligated to pay for the cost of production.

In both Canada and the United States, exceptions are made for various kinds of claims of privilege. Under both regimes, issues of identification, preservation, collection, processing, review and production of electronically stored information (ESI) arise in a rapidly changing world where forces outside the particular litigation that involve privacy,

confidentiality, parallel proceedings and often multiple jurisdictions may affect discovery obligations.

Document review is the most costly part of the discovery process.³

Discovery Reform in the United States

It is not possible in such a brief article to detail the many efforts being made in the United States to advance discovery reform, so this article will focus on three of the more prominent areas.

Pilot projects

The award that Justice Kourlis accepted on behalf of her team represented the culmination of the work she initiated in 2009 and concluded in 2014, with ongoing results. Her task force recommended the establishment of several pilot projects, a number of which have come to fruition, adopting the following major principles:

- that a single judge be assigned to manage each case from commencement through to trial;
- that a firm trial date be set early in the process; and
- that an early and mandatory identification and exchange take place of those documents counsel know will likely be used at trial.

The goals of the pilot projects appear to be working in a number of states, although some counsel still resist locating and producing, at an early stage, those documents they know will likely be used at trial – particularly when they are not helpful to the responding party's cause. Apparently, "hiding the ball" of "bad documents" is still regarded by many as an acceptable tactic.

Without a firm timetable, there is often a lack of incentive for at least one side in litigation to co-operate, such that discovery often becomes an end in itself.

U.S. Federal Rule Changes

In December 2015, amendments to the U.S. *Federal Rules of Civil Procedure* came into effect regarding discovery obligations. As revised, Rule 26(b)(1) permits a party to

obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within the scope of discovery need not be admissible in evidence to be discoverable.

Commentary has explained that the revisions do not change the existing responsibilities of the parties and the court to consider proportionality but, rather, were intended to send a message about the need for reductions in cost and delay.

Among other things, U.S. Federal Rule of Evidence 502, enacted in 2008, addressed waiver of privilege in the event of inadvertent disclosure, when the privilege-holder took reasonable steps to prevent such disclosure and took prompt measures to rectify the error.

Guidelines

Recent U.S. case law has emphasized the importance of proportionality in document discovery, addressed the specifics of preservation and encouraged the use of technology in the e-discovery process. Guidelines and principles, available from various sources, have become increasingly more important to meet court expectations in this respect.

Prominent among those promoting guidelines and principles is the *Sedona Conference*,⁴ which continues to produce commentaries on various aspects of e-discovery, both in the domestic U.S. context and in connection with international and cross-border issues. As well as providing practical assistance to lawyers and their clients for dealing with e-discovery issues, the *Sedona Guidelines and Principles* have increasingly been accepted by the courts as authoritative guidelines for resolving disputes in that area.

In a recent report from the American College of Trial Lawyers (ACTL), in association with the Institute for the Advancement of the American Legal System, titled *Working Smarter, Not Harder: How Excellent Judges Manage Cases*, interviews with leading state and federal judges focused on how active case management and the application of proportionality can efficiently and effectively ensure a proportional process to resolution, including trial.⁵ Cooperation, communication and a firm timetable are key elements in that process.

Canadian Discovery Reform

The *Sedona Canada Principles*, following those in the United States, were first published in 2008 and followed the report of an Ontario Task Force on e-Discovery.⁶

The principles were incorporated into the *Ontario Rules of Civil Procedure* in amendments in 2010, which included two new Rules: Rule 29.1, which imposes an affirmative obligation on the parties to agree to a discovery plan; and Rule 29.2, mandating proportionality in discovery. Rule 29.1 requires that, “in preparation of the Discovery Plan, the party shall consult and have regard to ... *The Sedona Canada Principles Addressing Electronic Discovery*.”

In Ontario, it has been held that failing to comply with the *Sedona Canada Principles* is a breach of the *Rules of Civil Procedure*.⁷ Those principles have come to play a prominent role in Canadian civil procedure beyond Ontario, not as a set of national rules but as

guidelines and best practices that can assist parties and judges in deciding how best to manage discovery in a range of circumstances.

The *Sedona Canada Principles* (second edition, February 2016) were updated not only to reflect the 2010 Rule changes in Ontario, but also to provide reference to process changes in other provinces, including changes in practice related to the growing use of technology both in providing additional sources of access to ESI and in helping to lower the cost and time of its preservation and production.

The Uniform Law Conference of Canada, building on the *Sedona Canada Principles*, has undertaken a project to propose common e-discovery rules across the country.

Hryniak v. Mauldin

In a 2014 decision, the Supreme Court of Canada took the opportunity to discuss the role of proportionality in the Canadian civil justice system and emphasize the need for a shift in legal culture to maintain the goals of a fair and just process that results in a just adjudication of disputes.⁸

The decision itself was an appeal of a summary judgment motion, but the court dealt with the developing consensus that an extensive pre-trial process no longer reflects modern reality and a new and proper balance requires proportionality in process and a procedure for adjudication in a timely and affordable way. To date, the decision has resulted in a lively debate about just what proportionality means in practice.

Case Management

Active case management is alive and well across Canada, although to a limited extent in some courts and with some judges, including those of the Federal Court of Canada. Availability of case management is often confined to large commercial cases with urgency or potentially long and complicated trials.

A recent paper from the Canadian fellows of ACTL, *Working Smarter but Not Harder in C Canada: The Development of a Unified Approach to Case Management in Civil Litigation*, urges more widespread availability and implementation of active case management to assist not just with discovery but with the entire process, including trial.⁹

In the busiest jurisdictions, two major issues impede access to effective case management. The more important one is resources. There are simply not enough judges assigned to civil cases who are willing, or who have the time or administrative assistance, to do the job as necessary. Those judges who have civil duties must be aware of the priorities that criminal and family cases take in the justice system. Far-off motion dates for discovery-related issues impede the ability to fix a trial date. And, once that date is fixed, the parties may find themselves waiting many months, or years, for the trial itself. As a result, many issues of documentary production are solved by further costly production as a way of moving the case forward.

In addition, there is insufficient administrative assistance to enable most judges to work efficiently. Compounding the problems with judicial resources are those lawyers and clients who feel that their best interests are served by the delay. In many of those cases, proportionality is simply illusory.

Where Do We Go From Here?

Change in legal culture moves slowly both in Canada and the United States. At the same time, resources allocated to deal with civil cases continue to diminish. There are lawyers—and sometimes clients—in both countries who may welcome the absence of access to judicial assistance in civil cases and appear impervious to the idea of the matter actually getting to trial or of the cost of delay. These lawyers are not interested in using technology that might lower the cost or expedite the process of production.

Some lawyers and firms thrive on—indeed, profit from—a first-pass, page-by-page review by junior lawyers or clerks, followed by a second-pass review by a senior lawyer of documents that have been printed from an electronic source for that purpose, seemingly without considering how long the process might take. Such activity has provided a profit center for many firms at higher and higher hourly rates.

The litigation world is changing. Increasingly sophisticated clients who have become aware of what advanced-search technology can do to reduce the burden and cost of disclosure are demanding better service from counsel or turning to other means of dispute resolution to produce faster and cheaper results. This trend occurs in all kinds and sizes of cases.

In a brief period, we have moved from litigation that included a very few hard-copy documents and oral recollections to a process in which the culling of digital information from an increasing number of sources and devices has become the norm. Greater use of technology and cultural change in the legal profession will be required to respond to the increasing sources and volume of digital information.

In a growing number of cases—in the United States, the United Kingdom, Ireland and Australia—courts have approved the use of technology-assisted review (TAR, also known as predictive coding) as a reasonable means of reviewing ESI for production.¹⁰ The justice system cannot afford to continue to resort to antiquated methods for the search and review of ESI, nor can it tolerate counsel who refuse to learn about and avail themselves of reasonably accessible technology to reduce the burden and cost of e-discovery.

We also see a growing use of early mediation, where knowledgeable lawyers help their clients recognize that the production of essential documents and an early opportunity to discover whether there is common ground with the other side is preferable to costly discovery disputes. Even in cases where there is no settlement, issues can be narrowed.

Clients in both large and small cases are taking greater control of the information governance and e-discovery processes. In large institutions and corporations, more work

related to active records management and e-discovery is being done in-house. For smaller entities, clients are choosing to represent themselves to avoid the cost of lawyers.

To maintain a viable civil justice system, lawyers will have to recognize that good advocacy can encompass co-operation and communication instead of all-out warfare at any cost. Proportionality is the focus of rules and guidelines in both Canada and the United States. And cooperation has become the hallmark of proportionality.

With the prescription in *Hryniak* and the cases that have followed in Canada, as well as similar decisions in the United States, perhaps more cases with narrowed issues can go to trial and many more be settled much earlier in the process. In the United States, much is being achieved by those judges willing to take an active role in case management and familiarizing themselves with the issues surrounding e-discovery.

The framework for change of civil justice has been set. However, as noted by Justice Kourlis, more needs to be done to finish the task of changing the legal culture.

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Footnotes

1. Rebecca Love Kourlis, a former justice of the Colorado Supreme Court, is executive director of the Institute for the Advancement of the America Legal System (IAALS) and the initiator of a joint task force with the American College of Trial Lawyers. IAALS plays a leading role in the United States in legal and judicial reform.

2. American Bar Association: Center for Professional Responsibility. Model Rule 1, Comment – *Client–Lawyer Relationship*.

3. A 2012 report of the US Rand Corporation, “Where the Money Goes – Understanding Expenditures for Electronic Discovery,” reported that approximately 73 percent of every dollar spent on ESI production in discovery is spent on document review, primarily for privilege.

4. The Sedona Conference, a non-profit US think tank, was founded in 1997 to provide a forum through its working groups for advanced dialogue on cutting issues of law, and through various publications on issues including privacy, information security, privilege and preservation, particularly as the associated use of technology has become necessary. Few lawyers and most judges have not grown up with the problems associated with e-discovery and are therefore unfamiliar with technological tools that may be helpful in this regard.

5. IAALS and ACTL, “Working Smarter, Not Harder: How Excellent Judges Manage Cases” (2014).

6. The Sedona Conference Working Group 7, Sedona Canada, the Sedona Canada Principles (2008).

7. See *Palmerston Grain v Royal Bank of Canada*, [2014] OJ No 4132.

8. *Hryniak v Mauldin*, [2014] 1 SCR 87.

9. American College of Trial Lawyers in Toronto, “Working Smarter but Not Harder in Canada: The Development of a Unified Approach to Case Management in Civil Litigation” (2016).

10. The Sedona Conference, “TAR Case Law Primer: A Project of the Sedona Conference Working Group on Electronic Retention and Production” (Public Comment Version, 2016).