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The Sedona Canada[SM] Commentary on Proportionality in Electronic Disclosure and Discovery Working Group 7 "Sedona Canada[SM]"

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Preface

Welcome to another major publication in The Sedona Conference® Working Group Series[SM] (WGS[SM]): *The Sedona Canada[SM] Commentary on Proportionality in Electronic Disclosure and Discovery.*

This effort is a product of our Sedona Canada[SM] Working Group (WG7) and represents the collective expertise of a diverse group of lawyers offering the perspectives of the private sector, the public sector, trial lawyers, and inside counsel. This Commentary was conceived in the Spring of 2009 in response to the planned changes to the rules in Ontario, British Columbia, and Alberta that would introduce the concept of proportionality more specifically. The Working Group reviewed the outline at its meeting in September 2009 and decided that the Commentary should offer principles-based guidelines along with advice on the application of proportionality, recognizing the need for both theoretical and practical guidance.

On behalf of The Sedona Conference®, I want to thank the drafting team, the Editorial Board, and all WG7 members whose comments contributed to this Commentary and for all of their efforts to make this work product as helpful as possible. I especially want to acknowledge the contributions to the overall success of this project made by Todd Burke and Peg Duncan, who assumed lead roles in editing the Commentary and bringing the project to this stage, as well as WG1 Steering Committee member Conor R. Crowley, who provided a fresh perspective and an independent review of the draft Commentary.

As with all of our WGS[SM] publications, this Commentary is first being published as a "public comment version." After sufficient time for public comment has passed, the editors will review the public comments, and to the extent appropriate, make edits and include any changes in the law. The Commentary will then be re-published in "final" version, subject, as always, to future developments in the law that may warrant a second edition.

We hope our efforts will be of immediate and practical assistance to lawyers, judges, and others involved in the legal system. If you wish to submit a comment, please utilize the "public comment form" on the download page of our website at www.thesedonaconference.org. You may also submit feedback by emailing us at rgb@sedonaconference.org.

Richard G. Braman
Executive Director
The Sedona Conference®
October 2010

Foreword

The recent emphasis in most jurisdictions on the concept of proportionality poses challenges for lawyers, their clients, and judges. The concept has been recognized in rules for many years, but in practice, it has existed in tension with the belief that zealous advocacy notably required the pursuit of any information that might be related to the issues in the dispute.

The recent changes to the rules in many jurisdictions underscore that proportionality is a practical requirement as much as a conceptual ideal. For instance, in the field of discovery, consideration ought to be given to the fact that 99 percent of information today originates in electronic form. For litigation purposes, this information cannot simply be turned into paper and treated as if it were created on paper.

The characteristics of electronically stored information (ESI) and its sheer volume require the earliest attention of the lawyers involved in the litigation and their clients, and the cooperation between the lawyers on all sides of the litigation and their clients. Civil litigation simply becomes cost-prohibitive and burdensome without early and careful attention to identifying key sources of potentially relevant data and ensuring that only potentially relevant and unique data is preserved, collected and reviewed for production. In practice, the proportionality analysis involves the balance between the issues, the monetary and non-monetary remedies, and the rights in issue against the potential value of an information source in resolving the dispute.

The following Proportionality Commentary will assist lawyers, clients, and judges in the application of *The Sedona Canada[SM] Principles.* It is intended as a guide that provides a practical supplement to the *Principles.* While the focus of this paper is on the civil action, the application and importance of proportionality will also be applicable to many other situations under various provincial or federal rules.

This Commentary assists in defining the concept of proportionality, its basis in law, and its application in various contexts and provides guidance to find solutions to discovery dilemmas which honour the principle of proportionality. Two of the important tools offered to assist practitioners, clients, and judges are found in Appendix 1 and Appendix 2. Appendix 1 is a table of civil procedure rules dealing with relevance and proportionality in Canadian jurisdictions, and Appendix 2 outlines factors to be considered when applying proportionality analyses at each stage of discovery.

This Commentary, like *The Sedona Canada[SM] Principles* themselves, focuses on early cooperation between counsel in the development and update of a discovery plan. The Commentary has been prepared in recognition of the precedents and protocols prepared by the E-Discovery Implementation Committee (EIC) in Ontario, whose work will provide additional tools to enhance this Commentary and may be of assistance in other provinces.

Justice Colin L. Campbell
Superior Court of Justice
Toronto, Ontario

The Sedona Canada[SM] Principles on Proportionality in Discovery —At A Glance

1. The burdens and cost of preservation should be weighed against the potential value and uniqueness of the information when determining whether its preservation is required.

2. Discovery should initially focus on those sources of information relevant to allegations, defences, and issues that are supported by material facts

3. Only reasonably accessible and non-duplicative information in support of plausible causes of action should be requested or produced.

4. Requests for further production should be reasonably specific and targeted.

5. The burden, cost, and delay of further production should be balanced against the probability of yielding unique information that is valuable to the determination of the issues.

6. Refusals to requests for further production, not based on relevance or privilege, should include details of the burden, cost, delay, and/or prejudice on which the refusing party is basing its position.

7. Burden and expense that are the result of actions taken by the party asserting undue burden or expense should be weighed against that party.

8. A party's previous efforts to resolve problems through candour and cooperation should be considered, including in the cost award.

9. Non-monetary factors should be considered when evaluating the burdens and benefits of discovery.

10. The value of technological tools and approaches to reduce the volume of irrelevant and/or duplicative information should be considered in weighing the burden and cost.

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I. Introduction

In *Innovative Health Group, Inc. v. Calgary Health Region,*[1] a 2008 decision of the Alberta Court of Appeal, Justice Conrad observed: "The widespread use of computers for record keeping, communication and information storage has vastly expanded the breadth of potential discovery in litigation. Although technology is helpful in the sense that it makes fuller disclosure possible, it also creates an unfortunate paradox. The cost of sorting and producing all the relevant information in a party's possession may put litigation beyond the economic ability of a vast number of litigants. Thus, it is necessary to ask such questions as: How much discovery is enough? Do all cases justify the same type of disclosure? Should there be some rule of proportionality that governs production based upon the issues in the lawsuit? How is irrelevant and immaterial information protected from production in those situations where a court orders production of a hard drive for examination by an expert? Who pays the cost?" In this passage, Justice Conrad captures many of the important questions necessary to a proportionality analysis.

Several jurisdictions in Canada have recently recognized the importance of proportionality through amendments to their rules that give courts more flexibility to resolve discovery problems (Appendix 1). The Canadian experience thus far has shown that the application of proportionality is not a simple process with precise checklists and formulas, but rather an examination of the costs and benefits of the discovery that might take into consideration factors such as the uniqueness of the information, its importance to the resolution of key issues, whether the request for further production is intended to pressure the opponent to settle, whether the refusal to produce reflects a desire to keep damaging evidence from disclosure, and the likely prejudice to the opponent if the documents are not produced.

While the inclusion of explicit proportionality rules is recent, our courts are familiar with the exercise of their discretion to balance the interests of the parties to ensure fairness during discovery. The existing case law offers a number of techniques, such as limiting disclosure to what the parties will rely on in cases where small amounts are at stake,[2] placing reasonable limits on the extent of document disclosure until there is evidence that establishes that further disclosure is warranted,[3] limiting production to specific addressees of email from key custodians,[4] date ranges for document identification,[5] and the use of key words as search terms.

A. The principle of proportionality in Canadian law

Canadian courts have considerable experience applying the principle of proportionality in contexts other than e-discovery. Before being introduced into the rules of civil procedure, practice notes, and *The Sedona Principles,* Canadian courts had adopted the principle of proportionality in addressing diverse areas such as sentencing[6] (weighing the penalty with the offence), wrongful dismissal[7] (considering nature and seriousness of the dishonesty in order to assess whether it is reconcilable

[1] 2008 ABCA 219 (CanLII).
[2] *Barne Building and Construction, Inc. v. Young,* 2009 CanLII 4 (ON S.C.); *Importations Avaco Canada Ltée* c. *Lisi*, 2005 CanLII 19393 (QC C.Q.).
[3] *Border Enterprises Ltd. v. Beazer East, Inc.,* 2003 BCSC 49 (CanLII).
[4] *4145356 Canada Limited v. The Queen,* 2009 TCC 480 (CanLII).
[5] *First Choice Capital Fund Ltd. v. First Canadian Capital Corp.,* 2000 SKQB 403 (CanLII).
[6] *R. v. M. (J.J.),* 1993 CanLII 91 (S.C.C.).
[7] *McKinley v. BC Tel,* 2001 CanLII 38 (S.C.C.).

with sustaining the employment relationship), injunctive relief (balance of convenience), punitive damages,[8] and in the limitation of rights and freedoms guaranteed by the Charter.[9]

In addition to the application of proportionality in the substantive jurisprudence, judges have also employed proportionality in the management of cases. In the 2009 Supreme Court of Canada decision *Marcotte v. Longueuil (City),*[10] Madam Justice Deschamps wrote:

> What is clear from these different sources is that the purpose of art. 4.2 C.C.P. is to reinforce the authority of the judge as case manager. The judge is asked to abandon the role of passive arbiter. At first glance, this case management function does not mean that it would be open to a judge to prevent a party from exercising a right. However, the judge must uphold the principle of proportionality when considering the conditions for exercising a right.

M. Justice Lebel, further noted:

> The requirement of proportionality in the conduct of proceedings reflects the nature of the civil justice system, which, while frequently called on to settle private disputes, discharges state functions and constitutes a public service. This principle means that litigation must be consistent with the principles of good faith and of balance between litigants and must not result in an abuse of the public service provided by the institutions of the civil justice system. There are of course special rules for the most diverse aspects of civil procedure. The application of these rules will often make it possible to avoid having recourse to the principle of proportionality. However, care must be taken not to deny this principle, from the outset, any value as a source of the courts' power to intervene in case management.

The decision in *Marcotte* appears to stand for the proposition that a judge is to apply proportionality principles in the exercise of judicial discretion in balancing the rights of the parties.

A review of Canadian case law indicates that the application of proportionality involves the following:

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[8] *Whiten v. Pilot Insurance Co.,* 2002 SCC 18 (CanLII). The Supreme Court outlined six dimensions for examination in determining whether a quantum for punitive damages was proportionate: the blameworthiness of the defendant, the vulnerability of the plaintiff, the harm directed specifically at the plaintiff, the need for deterrence, the other penalties, and the advantage wrongfully gained. The court also identified factors for consideration in assessing the level of each dimension.

[9] In *R. v. Oakes,* 1986 CanLII 46 (S.C.C.), the Supreme Court established an analytical framework to address proportionality, in evaluating the constitutional validity of legislation under section 1 of the Charter (see para. 70). It was stated again in *R. v. Edwards Books and Art Ltd.,* 1986 CanLII 12 (S.C.C.) at para. 122 : "Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective […] must bear on a 'pressing and substantial concern." Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights. The Court stated that the nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards."

[10] 2009 SCC 43 (CanLII) at para. 67.

- To be proportionate, a measure should not exceed what is reasonably necessary to achieve an objective and exclude excessive burdens, costs, and delay that would contribute little to achieving the objective.

- In approaching proportionality, the simplest, smallest, and least intrusive steps should be taken first, with escalation as more action is recognized as needed to meet the objective.

B. Proportionality ensures a fair and just outcome

In his decision in *Andersen v. St. Jude Medical, Inc.*,[11] Master MacLeod highlights the purpose of the rules of civil procedure and the integral role of proportionality in achieving fairness and justice in our system:

> As noted, this must be understood in the context of the overarching purpose of the Rules of Civil Procedure and in a Class Proceeding of the purposes of the class proceeding legislation. Rules of civil procedure are designed to serve and effect justice. They do not define it. Fairness and justice require that there be a sense of balance and proportionality. There are at least three imperatives in the justice system. The imperative of fairness has to be balanced against considerations of cost and delay in proportion to the complexity of the action and the importance of the issues in dispute. This balance should be the touchstone if the court is called upon to exercise its discretion in expanding or restricting discovery rights.

C. Justice is not to be denied under the guise of proportionality

Proportionality is not intended nor designed to prevent reasonable discovery. It is not intended to be used as a sword or a shield to either increase the cost to the opponent or avoid the burden, expense and delay associated with the search for and production of information that is crucial to the determination of the core issues.

D. Assumption of cooperation, communication, and common sense

Principle 4 of *The Sedona Canada[SM] Principles Addressing Electronic Discovery* states: "Counsel and parties should meet and confer as soon as practicable, and on an ongoing basis, regarding the identification, preservation, collection, review, and production of electronically stored information." The meet and confer, to be effective, assumes that the parties will be cooperative, will communicate, and that common sense will prevail. These are assumptions which have been the cornerstone of the Commercial List of the Toronto Region of the Superior Court of Justice. The manner in which these behaviours have been embraced by the bench and bar have contributed to the success of the Commercial List and have met with considerable approval. As stated by Master MacLeod in *Andersen v. St Jude Medical, Inc.,*[12] and subsequently cited by the court in *Pearson v. Inco Limited,*[13] "In the case of electronic data, a liberal dose of collaboration and common sense may go a long way."

[11] 2007 CanLII 64140 (ON S.C.) at para. 19.
[12] 2008 CanLII 29591 (ON S.C.).
[13] 2009 CanLII 37928 (ON S.C.).

E. Judicial expectations of conduct

In order for a new dynamic to develop where cooperation and collaboration with opponents are considered part of the "zealous advocacy" for the client, courts will have to insist on effective discovery planning, and discourage inflexibility and tactical maneuvering.

Cooperative, collaborative conduct at the discovery stage is underpinned by the following:

- Parties should recognize that civil rule changes emphasizing proportionality are in response to a need for a change in legal culture[14] given the exponential growth of information. It is simply cost-prohibitive, and in many cases impossible, to undercover and produce every potentially relevant document.

- Parties and their counsel should accept a change in focus from all potentially relevant information to that which is truly necessary to the resolution of the conflict.

- Parties should recognize and accept the need for early and timely agreement and decisions given the nature of electronically stored information (ESI).

- Parties and counsel should explore and attempt informal means of resolution of disputes before initiating a formal motion.

- Counsel should consider the cost and delay to their client, as well as the resources of the court, before requesting judicial resolution of discovery disputes.

- Counsel should be prepared to provide the court with specifics, in written form, of their efforts to meet and resolve issues of proportionate obligations before engaging the court to resolve disputes, detailing what they proposed, what they were prepared to do, what was wrong with what was offered or refused, and what modifications they attempted.

[14] The report that led to the Quebec's Code of Civil Procedure reform of 2003, where the principle of proportionality was introduced, was aptly titled *A New Judicial Culture* (July 2001), online: Quebec Minister of Justice <http://www.justice.gouv.qc.ca/english/publications/rapports/crpc-rap2-a.htm>.

II. Components of Proportionate Discovery

Rules of procedure that have been enacted in many Canadian jurisdictions[15] as well as recent case law have set forth proportionality as a key principle to be considered when addressing discovery issues and disputes.

In 2007, the Court of Queen's Bench of Alberta recognized the growing importance of proportionality as follows:

> It appears to be accepted in Canadian practice that the obligation of discovery is tempered by the application of proportionality or cost/benefit ratio: in Alberta, this means that records must be only be disclosed if they are not only relevant, but also material. Although this is a principle of general proportionality that is articulated in the Rules of Court, I accept that there is an implicit requirement that limits production to those records which are reasonably accessible.[16]

This section is destined to provide guidance to members of the bar and the judiciary on how to implement the principle of proportionality when addressing discovery issues.

A. The burdens and costs of preservation should be weighed against the potential value and uniqueness of the information when determining whether its preservation is required.

In Canada, the duty to preserve was reaffirmed by the Saskatchewan Court of Appeal in a 2002 decision: "A party is under a duty to preserve what he knows, or reasonably should know, is relevant in an action. The process of discovery of documents in a civil action is central to the conduct of a fair trial and the destruction of relevant documents undermines the prospect of a fair trial."[17]

As noted in the commentaries pertaining to *The Sedona Canada[SM] Principles,* the general obligation to preserve evidence must be balanced against the party's right to continue to manage its electronic information in an economically reasonable manner and organizations are not expected to take every conceivable step to preserve all ESI that may be potentially relevant.[18] Considering that legal holds put in place in accordance with an organization's preservation obligation will usually interfere with its operations, parties need to clearly identify the scope of the ESI to be preserved, in order to avoid undue burden. A legal hold should be limited in scope only to ESI that may be relevant to the litigation, and on the contrary, a hold should not be all-inclusive, or encompass entire bodies of ESI.

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[15] See *infra,* Relevance and Proportionality in the Rules of Civil Procedure in Canadian Jurisdictions.
[16] *Spar Aerospace Limited v. Aerowerks Engineering, Inc.,* 2007 ABQB 543 (CanLII) (appeal dismissed).
[17] *Doust v. Schatz,* 2002 SKCA 129 (CanLII) at para. 27.
[18] The Sedona Conference®, *The Sedona Canada*[SM] *Principles Addressing Electronic Discovery* (Phoenix: The Sedona Conference®, Jan. 2008) at 13.

Although the rules of procedure incorporating the proportionality principle in most Canadian jurisdictions apply only to proceedings per se, an analysis of the scope and method of preservation (in most cases a pre-litigation decision) should be based on the principle of proportionality.

Support for such an approach is found in the section of the *Manual for Complex Litigation* addressing preservation orders:

> Such an order requires the parties to define the scope of contemplated discovery as narrowly as possible, identify the particular computers or network servers affected, and agree on a method for data preservation, such as creating an image of the hard drive or duplicating particular data on removable media, thereby minimizing cost and intrusiveness and the downtime of the computers involved.[19]

In the course of deciding the scope and method of preservation, both parties, in anticipation of litigation, and the courts, in ordering preservation, should go beyond the strict availability of the ESI and also consider the burdens and expenses to be assumed in preserving the information in view of the latter's value and uniqueness. In the same manner, courts conducting a *post-hoc* analysis of pre-litigation preservation decisions should evaluate the decision based on the good faith, reasonableness, and proportionality of the decision at the time it was made. However, the poor management of information by a party, resulting in increased expenses or burdens, should not be retained as part of the proportionality assessment.

The determination of the appropriate scope of preservation commands a risk analysis. Among the elements to be considered is the potential for amendments to the original pleadings, a procedural right provided for in every jurisdiction to which all parties are usually entitled unless such amendments entail prejudice to the other parties.[20] In instances where pleading may indicate potential amendments, parties should carefully consider the scope of preservation to avoid spoliation allegations. On the other hand, in instances where neither the pre-litigation notices nor the pleadings point to further issues, parties should not be sanctioned for post-litigation destruction of evidence relevant to initially remote facts. In view of the foregoing, a party may, in certain instances of imminent litigation, be well-founded to proceed with the routine destruction of ESI pertaining to

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[19] *Manual for Complex Litigation,* 4th ed. (Washington, D.C.: Federal Judicial Center, 2004) at 72-73. Additional support can also be found in American case law and law review articles: J. Grimm, et al. "Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions" (2008) 37 U. Balt. L. Rev. 381; *Concord Boat Corp. v. Brunswick Corp.,* 1997 WL 33352759, at *4 (E.D. Ark. Aug. 29, 1997): "[t]o hold that a corporation is under a duty to preserve all e-mail potentially relevant to any future litigation would be tantamount to holding that the corporation must preserve all e-mail"; such a holding, the court found, would be crippling to large corporations, which are often involved in litigation; *Zubulake v. UBS Warburg LLC,* 220 F.R.D. 212 at 217 (S.D.N.Y. 2003), at paragraph 7, the court commented as follows on the scope of the duty to preserve: "Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, 'no.' Such a rule would cripple large corporations like UBS that are almost always involved in litigation. As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation." Michael R. Nelson and Mark H. Rosenberg, "A Duty Everlasting: The Perils of Applying Traditional Doctrines of Spoliation to Electronic Discovery" (2006) 12 Rich. J. L. & Tech. 14 at 7: "…courts (face a challenge) to strike a balance between the general duty to preserve discovery and the impracticality of preserving even a fraction of the vast amount of electronic data generated daily by a business of even moderate size."

[20] Indeed, Quebec's Superior Court decided that the proportionality principle does not bar a defendant from amending its pleadings to add a ground for defence, even if doing so will force the plaintiff to amend its motion to institute proceedings and call for new examinations on discovery after defence under s. 398 CCP.

subject matter only remotely or indirectly linked to the source of the obligation and the pre-litigation claims.[21]

In many cases, the parties and the Court may not have sufficient knowledge of the facts underlying an imminent conflict to precisely determine the scope of the information to be preserved. In such instances, the parties should preserve broadly within the limits of reasonableness and, as the case advances and the relevant facts are narrowed, reduce the scope of the preservation obligation preferably with the agreement of the other parties to the proceeding or, failing agreement, court approval.

B. Discovery should initially be focused on those sources of information relevant to allegations, defences, and issues that are supported by material facts and which are considered most important to the resolution of the conflict.

To determine what information is significant and effectively controls discovery, the parties must examine the pre-litigation allegations, the elements of the claims and defences, the facts needed to support their theory of the case, and the evidence that will likely be necessary to prove those facts.

The rules make clear the concept that the scope of discovery is bounded by relevance. In a decision rendered in 2008, the Federal Court of Canada commented on the importance of limiting the scope of discovery and on the objective of Rule 222(2) of the Federal Court Rules, which states "a document of a party is relevant if the party intends to rely on it or if the document tends to adversely affect the party's case or to support another party's case." In reference to a conference given by James Farley Q.C., previously of the Ontario Superior Court of Justice, the court wrote:

> This type of discovery has become common place and occurs when discovery itself becomes the objective - to uncover as much as possible from the other side however marginally relevant. One is in danger of losing perspective and becoming enmeshed in discovery, which should be only an intermediate process between pleading and trial, *rather than focusing on obtaining only matters necessary and relevant for the trial on issues as defined by the pleadings.*[22] (emphasis added).

In reference to Rule 222(2) of the Federal Court Rules, the Court said:

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[21] *Stevenson v. Union Pacific Railroad Co.,* 354 F.3d 739 (8th Cir. 2004). "There is no showing here that Union Pacific knew that litigation was imminent when, prior to any litigation, it destroyed track maintenance records from up to two years prior to the accident pursuant to its document retention policy. […] It appears that Union Pacific was not on notice that the track maintenance records should be preserved until it received the October 1999 request for production of documents, and the condition of the track was not formally put into issue until the second amendment to the complaint in May 2000. Thus, any bad faith determination regarding the pre-litigation destruction of the track maintenance records is not supported by the record, and any adverse inference instruction based on any pre-litigation destruction of track maintenance records would have been given in error." However, "Union Pacific continued destroying track maintenance records *after this lawsuit was initiated. We find no abuse of discretion in the district court's decision to impose sanctions* for the destruction of track maintenance records after the commencement of litigation and the filing of the plaintiffs' request for production of documents on October 25, 1999. (emphasis added). […]Sanctioning the ongoing destruction of records during litigation and discovery by imposing an adverse inference instruction is supported by either the court's inherent power or Rule 37 of the Federal Rules of Civil Procedure, even absent an explicit bad faith finding, and we conclude that the giving of an adverse inference instruction in these circumstances is not an abuse of discretion."

[22] *AstraZeneca Canada, Inc. v. Apotex, Inc.,* 2008 FC 1301 (CanLII) at para. 6.

> (…) it is clear that the Rule is intended to bring to bear a more issue-oriented test of relevance and avoid the "train of inquiry" cases that have served to expand discovery with little or no effect on matters that are ultimately presented to the trial judge.[23]

In the first instance, precise and clear pleadings permit both sides to understand what information will be necessary to the resolutions of the dispute. A number of courts[24] have turned to *Odgers on High Court Pleading and Practice*[25] to describe the function of pleadings in defining issues:

> The pleadings should always be conducted so as to evolve some clearly defined issues, that is, some definite propositions of law or fact, asserted by one party and denied by the other, but which both agree to be the points which they wish to have decided in the action.
>
> … The function of pleadings then is to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus to arrive at certain clear issues on which both parties desire a judicial decision.

The rules in most jurisdictions in Canada require a concise statement of the material facts on which the party relies for the claim or defence.[26] Pleading with particularity provides advantages to both plaintiffs and defendants because it will ensure that important electronic evidence will be produced. For instance, if an email or series of emails are crucial to the litigation, then it is advisable to refer to the emails in the pleadings with a specificity that allows them to be identified among what may be a very large number of similar documents.[27]

While pleading facts with particularity helps focus discovery, it may be difficult at the initial pleading stage for the parties to state facts with particularity beyond the minimum requirements of the applicable rule. In that situation, as a matter of sound case management, the parties are encouraged to submit supplemental statements of the material facts at issue in the case and on which evidence will be sought.

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[23] *Ibid.* at para. 11.
[24] *See General Motors of Canada Limited v. The Queen,* 2008 TCC 117 (CanLII) at para. 35; *Skender v. Farley,* 2007 BCCA 629 (CanLII) at para. 43.
[25] William Blake Odgers, *Odgers on High Court Practice and Pleading,* 23d ed. by D.B. Casson (London: Sweet and Maxwell, 1991) at 123 – 24.
[26] See Ontario, *Rules of Civil Procedure,* r. 26.05, R.R.O. 1990, Reg. 194, "Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved." Similar phrasing is found in r. 174, *Federal Courts Rules,* SOR/98-106; r. 3-7, British Columbia, *Supreme Court Civil Rules* (formerly r. 19); r. 12.6(2), Alberta, *Rules of Court*; r. 139(1), Saskatchewan, *Queen's Bench Rules*; r. 25.06(1), Manitoba, *Court of Queen's Bench Rules,* Man. Reg. 553/88; r. 27.06(1), New Brunswick, *Rules of Court*, N.B. Reg. 82-73; r. 38.02, Nova Scotia, *Civil Procedure Rules*; r. 20(1), Yukon Territory, *Supreme Court of Yukon Rules*; r. 14.03, Newfoundland and Labrador, *Rules of Supreme Court*; r. 25.06(1), Prince Edward Island, *Supreme Court Rules of Civil Procedure*. Quebec's *Code of Civil Procedure*, R.S.Q., c. C-25, s. 76, states similarly that "In their written pleadings, the parties must state the facts that they intend to invoke and the conclusions that they seek. Such statement must be frank, precise and brief; it shall be divided into paragraphs numbered consecutively, each paragraph referring so far as possible to one essential fact." The Discovery Task Force reinforced the need for particularity in the guidelines published in "Discovery Best Practices," online: The Advocates' Society <http://www.advocates.ca/assets/files/pdf/Discovery-Best-Practices.pdf>.
[27] Berkley D. Sells & Ian Collins, "Obtaining Electronic Evidence through Motions and the New Rules of Civil Procedure" (Presented at the Obtaining, Producing and Presenting Electronic Evidence Conference, Osgoode Hall Law School, York University, Jan. 2010).

Parties and courts should adopt an approach to discovery that concentrates on the issues most important to the resolution of the litigation in order to limit, at least initially, the scope of discovery. Support for this principle can be found in a growing corpus of jurisprudence that has applied the proportionality principle in the analysis of the reasonability of discovery requests. The reasons of the British Columbia Supreme Court in the matter of *Goldman Sachs & Co. v. Sessions* illustrate this approach:[28]

> Seen in that light, the evidence sought is not of significant probative value on the issue identified by [plaintiff's counsel] and, moreover, there are interests competing with its production. An order for production would raise the risk of confusing the issues. As well, discovery of these documents would require the expenditure of significant time and effort. Further, it would intrude into the confidentiality of the affairs of [defendant] and of its clients, who are not parties to the plaintiff's action. On balance, an order for production of these documents is not warranted.

Relevance for the purpose of discovery of documentary information is not defined solely by the demands of the requesting party or the wishes for limitations of the producing party. Relevance for the purposes of documentary discovery will be framed by the pleadings, refined by the definition of issues, and modified by consideration of the time and cost associated with various stages of document production including preservation.

Similarly, parties ought to consider the possibility of staged (phased) discovery. Staged discovery was one of six principles put forward by the Ontario Discovery Task Force in order to complement the discovery rules.[29]

C. Only reasonably accessible and non-duplicative information in support of plausible causes of action should be requested or produced.

The principle of proportionality commands that discovery of relevant information available from multiple sources should be limited to sources that are the most convenient, least burdensome, and/or least expensive.[30]

In 2003, the Ontario Superior Court of Justice rejected a request for further production made by the plaintiff, who obtained electronic copies of the documents sought, on the basis of proportionality:

> The plaintiffs wish paper copies of every document and wish to inspect every original document. As I understand it they also wish to see every document in its original file folder in original order and they wish production of the file tracking documents or stamps which are believed to show who within [defendant] had possession of any file and at what time. In the particular circumstances of this case with the volume of documentation involved, that

[28] *Goldman Sachs & Co. v. Sessions,* 2000 BCSC 67 (CanLII) at para. 32; *See also Bishop v. Minichiello,* 2009 BCSC 358 (CanLII) at para. 47 (application for leave to appeal dismissed); *Ireland v. Low,* 2006 BCSC 393(CanLII); *Park v. Mullin,* 2005 BCSC 1813 (CanLII); *Value Analytix Ltd. v. Doman Industries Limited,* 2006 BCSC 860 (CanLII); *Strata Plan LMS 3851 v. Homer Street,* 2006 BCSC 1362 (CanLII).

[29] Discovery Task Force (Ontario), "Supplemental Discovery Task Force Report" (Oct. 2005), online: The Canadian Bar Association <http://www.cba.org/OBA/en/pdf_newsletter/DTFFinalReport.pdf>.

[30] In the United States, the Federal Rules of Civil Procedure expressly empower courts to limit discovery accordingly.

> demand is unrealistic, onerous, expensive and excessive. It is unnecessary for every document to be subjected to this level of scrutiny. There is a right to inspect original documents and there may be relevance to file tracking information or file organization but it is necessary for such rights to be exercised in a focused and targeted manner.[31]

In other instances, a court may choose to limit discovery of inaccessible media if the information stored on the tapes can be obtained from other more accessible sources, such as through hard copy records, testimony, or non-party discovery. For example, if the producing party can easily produce hard copies of emails, why should that party incur the costs of restoring back-up tapes containing the same emails?

In determining whether to limit discovery on this basis, a court's analysis will be tailored to the specific facts at issue, taking into account the costs and burdens of producing the requested information from the various sources in which it is located, and whether limiting discovery to more accessible sources will result in a reduction in the utility of the information sought. For example, in the scenario described above, hard copy emails may be more accessible to produce, but because they are not in electronic form, the requesting party must incur the costs of scanning the hard copies, optically recognizing characters and coding the images and loading them onto a search platform, or conducting a manual search. In this situation, it may be appropriate for a court to consider the totality of litigation costs, and who should bear those costs, in assessing a request to limit production. On the other hand, in cases where the native metadata has a high level of relevancy and is critical to the case, it might be necessary to restore the ESI from the inaccessible media.

The court should focus on finding the least expensive forms of information. Justice is not served if parties are forced to turn over massive amounts of information that do not pass muster even under the most basic concepts of marginal utility. The marginal utility of the more expensive course of information should be analyzed closely. Production of these sources should be compelled only if this utility is measurably greater than a cheaper source.

D. Requests for further production should be reasonably specific and targeted.

Requests for further production should be reasonably specific and targeted, and the requesting party will have the onus to establish, by convincing evidence rather than mere speculation, that specific additional documents exist and are relevant to the substantial issues in dispute.
In *White v. Winfair Management Ltd.,*[32] the court stated:

> [t]he choice as to what documents in a party's possession are relevant and should be produced is in the first instance up to the party making production. This is subject to abuse, as a party may not disclose relevant documents, either by design or because of a genuine dispute as to relevance. The onus then is on a party alleging that relevant documents have been omitted from an affidavit of documents to lead convincing evidence, as opposed to mere speculation, as to the existence and relevance of the documents sought. Often this evidence is obtained by conducting an examination for discovery and asking questions as to

[31] *Logan v. Harper,* 2003 CanLII 15592 (ON S.C.) at para. 28; *see also Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen*, 2006 BCSC 554 (CANLII) at para. 36: "Without some indication that the application of the interesting technology might result in relevant and previously undisclosed documents, the privacy interests of the third parties and the avoidance of unnecessary and onerous expense militate against allowing such a search merely because it can be done."
[32] 2005 CanLII 13037 (ON S.C.) at para. 9.

> the existence of documents, although it is not necessary to first conduct discovery if convincing evidence otherwise exists.[33]

In *White,* Master Dash further stated that:

> [t]he plaintiff herein has asked for a wide scope of corporate and financial records, a substantial portion of which may bear no relevance to the issues herein. Although the plaintiff has provided some evidence that records likely exist as to the financial and corporate relationships among the defendants, an examination for discovery of the defendants could have revealed the precise documentation available and help narrow what documents are relevant to the issues pleaded. I agree with Master MacLeod in *RCP, Inc. v. Wilding* at p. 4 that when dealing with wide categories of business records it may not be possible to determine the extent or depth of the required productions until preliminary questions have been asked at an examination for discovery or a preliminary level of production of a category of documents have been made, then followed by examinations and possibly a follow up motion for a further level of production.

In *Vector Transportation Services, Inc. v. Traffic Tech, Inc.,*[34] a case about a wrongful solicitation of clients by a former employee, the defendant appealed a master's order to produce the laptop he uses for work purposes to a forensic data recovery expert who would inspect the computer for emails containing names of the plaintiff's clients or customers. With $1 million at stake, the plaintiff requested the order because the defendant had not produced emails that the plaintiff could prove had been on his computer since he had been one of the recipients. The defendant claimed these emails were not produced because they had been deleted. The defendant relied on *Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen*[35] and *Desgagne v. Yuen*[36] to support the position that the master had erred in his order. After reviewing Principle 2 of *The Sedona Canada*[SM] *Principles* (published January 2008), the court decided that the plaintiff had produced evidence of the existence of relevant electronic information on the laptop and concluded that the master had been correct to order its production for inspection. The court noted that the master's order asked for a *highly targeted search* of the recovered contents of the laptop, which also distinguished it from the requests for the entire contents of a drive in both *Baldwin* and *Desgagne*. Furthermore, the plaintiff agreed to pay for the work of the forensic data recovery expert.

A similar situation occurred in *Bishop v. Minichiello,*[37] where the defendants sought production of the plaintiff's family computer's hard drive. The purpose is to determine, via forensic analysis, the use of the computer between eleven and five in the morning and, further, the seriousness of the plaintiff's allegations of insomnia and ability to work. The court held that:

> The information sought by the defence in this case may have significant probative value in relation to the plaintiff's past and future wage loss, and the value of production is not outweighed by competing interests such as confidentiality and the time and expense required for the party to produce the documents. Additionally, privacy concerns are not at issue because the order sought is so narrow that it does not have the potential to unnecessarily

[33] Citing *Bow Helicopters v. Textron Canada Limited,* [1981] O.J. No. 2265 (Gen. Div.) (CanLII); *RCP, Inc. v. Wilding* [2002] O.J. No. 2752 (Gen. Div.) (CanLII).
[34] 2008 CanLII 11050 (ON S.C.).
[35] 2006 BCSC 554 (CanLII).
[36] 2006 BCSC 955 (CanLII).
[37] *Bishop v. Minichiello*, 2009 BCSC 358 (CanLII), *aff'd* by *Bishop v. Minichiello*, 2009 BCCA 555 (CanLII).

> delve into private aspects of the plaintiff's life. In saying that, I recognize the concern of the plaintiff that to isolate the information the defence does seek, its expert may well have consequent access to irrelevant information or that over which other family members may claim privilege. For that reason, I direct that the parties agree on an independent expert.

In *Peter Kiewit Sons Co. of Canada Ltd. (c.o.b. Kiewit-Ceco) v. British Columbia Hydro & Power Authority,*[38] the court stated:

> [t]o put it differently, the Plaintiffs must choose a smaller target within B.C. Hydro. As is well known, B.C. Hydro is the largest enterprise in the Province, and the Plaintiffs must define a more manageable area for enquiry. In addition, the Plaintiffs must establish a prima facie case that something relevant will be uncovered before a further affidavit and further inspection will be ordered. Upon any such further application I would expect a senior responsible officer of B.C. Hydro to verify on oath the extent of its production to date, the magnitude and estimated expense of the search required to satisfy the further production which is being sought, and such further circumstances as may be necessary to enable the Court to decide whether a further search will be fruitful. In addition, I would expect such deponent to verify, upon grounds which are stated, what his belief is regarding the likelihood of further relevant documents being uncovered.

Additional support for the requirement of demonstrated relevance can also be found in American case law.[39]

In *Ritchie v. 830234 Ontario, Inc. (Richelieu Hardware Canada Ltd.),*[40] an action based on wrongful dismissal, the plaintiff moved for an order "that the defendant preserve, retrieve and produce all relevant electronic documents in its possession or control. The plaintiff seeks to have a third party information technology company image and store the contents of all computers, mobile handheld devices and other electronic devices of every kind used by the defendant. The plaintiff then wants the defendant to review the imaged file index to determine if privilege is claimed and to produce in electronic form all relevant documents for which privilege is not claimed."

The defendant in this case had already produced the attachment to one email as the one relevant document. The defendant had not produced the container email, claiming the email had no relevant information and had long since been purged. The court held that the plaintiff had produced "no evidence on this motion that there is any other relevant data and information in electronic form," but speculated about the existence of other emails exchanged among his immediate supervisor, the regional manager and the general manager of the company. The plaintiff asked the court to assume there were other (relevant) emails. Citing Master Dash in *White v. Winfair*, the *Ritchie* court declined to grant the order based on the lack of convincing evidence of the existence and relevance of the documents sought. The court went on to state that the plaintiff could renew its motion if evidence of other relevant documents arose during examinations for discovery. The court did, however, order the defendant to "use its best efforts to retrieve this (container) email and produce it and the attachment, in electronic form to the plaintiff."

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[38] 1982 CanLII 575 (BC S.C.) at para. 27 and 28.
[39] In *Waldron v. Cities Service Co.,* 361 F.2d 671, 673 (2d Cir. 1966), *aff'd* 391 U.S. 253, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968), the court stated that "[t]he plaintiff…may not seek indefinitely…to use the [discovery] process to find evidence in support of a mere 'hunch' or 'suspicion' of a cause of action."
[40] 2008 CanLII 4787 (ON S.C.).

E. The burden, cost, and delay of further production should be balanced against the probability of yielding unique information that is valuable to the determination of the issues.

As detailed in respect of the other Principles, in assessing whether to limit discovery, courts may consider, among other factors,[41] whether "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues".[42] This holds true for requests for further production as with production in the first instance. The proportionality principle can also be construed in a more comprehensive, overarching way, and perhaps more importantly, from the very beginning of the dispute judiciarization:

> *Je crois qu'en enracinant dès le départ la notion de proportionnalité dans l'enjeu pécuniaire du litige, dans les moyens financiers de chacune des parties et, accessoirement, dans les dépenses qu'elles risques d'engager, on donne une indication beaucoup plus claire de ce qu'il faut entendre en fait par la proportionnalité. On annonce par la même occasion que, désormais, le tribunal pourra légitimement contrôler le coût des procès qu'il instruit en cours de route, et ce, avant d'atteindre le stade des dépens, alors qu'il est généralement trop tard pour remédier aux excès.*[43]

In *Hayden Manufacturing Co. v. Canplas Industries Ltd.,*[44] Prothonotary Hargrave paraphrased the six general principles placing sensible limitations on the scope of discovery[45] "given the resources of courts and the concern over costs, congestion and delay" and that it would be an "unaffordable luxury to allow litigants to engage in protracted and far-reaching discovery of marginal usefulness":

- The documents to which parties are entitled are those which are relevant. Relevance is a matter of law, not discretion. The test to apply, in determining relevance, is whether information obtained may directly or indirectly advance one party's case, or damage that of the other party.

- Questions which are too general, or which seek an opinion, or are outside the scope of a proceeding, need not be answered.

- Discovery is confined to matters relevant to the facts which have been pleaded, rather than to facts which a party proposes to prove; thus relevance, in the context of discovery, limits

[41] See the factors explicitly outlined in Rule 29.2.3 that the Court "shall" consider in making a determination as to whether a party or other person must answer a question or produce a document.
[42] See *Park v. Mullin,* 2005 BCSC 1813 (CanLII). The court held that it "…. has used its discretion to deny an application for the production of documents in the following circumstances: (1) where thousands of documents of only possible relevance are in question (citing *Peter Kiewit Sons Co. v. B.C. Hydro, supra,* and *B.C. Milk Marketing Board v. Aquilini,* 1996 CanLII 1980 (BC S.C.)); and (2) where the documents sought do not have significant probative value and the value of production is outweighed by competing interests, such as confidentiality, and time and expense required for the party to produce the documents (citing *Goldman, Sachs & Co. v. Sessions, supra*)."
[43] Hon. Yves-Marie MORISSETTE, « Gestion d'instance, proportionnalité et preuve civile : État provisoire des questions », (2009) 50-2 *Cahiers de droit* 381, 389.
[44] 1998 CanLII 8339 (F.C.).
[45] Originally stated in *Reading & Bates Construction Co. v. Baker Energy Resources Co.*, (1988), 25 F.T.R. 226 (T.D.) at 230.

> questions to those that may prove or disprove allegations of fact which have not been admitted.

- A court should not compel answers which, although perhaps relevant, are not likely to advance the party's legal position.

- Before requiring an answer to a discovery question, the court should weigh the probability of the usefulness of the answer against the time, trouble, expense and difficulty which might be involved in obtaining it: "One must look at what is reasonable and fair under the circumstances . . ."[ ]

- Fishing expeditions undertaken through far-reaching, vague, or irrelevant questions are to be discouraged.

Prothonotary Hargrave's decision was quoted by the court in *GSC Technologies Corp. v. Pelican International, Inc.,*[46] where the court went on to quote Judge Hughes in *Astrazeneca Canada, Inc. v. Apotex, Inc.*[47]:

> Thus, simply to say that a question is "relevant" does not mean that it must inevitably be answered. The Court must protect against abuses so as to ensure the just, most expeditious and least expensive (Rule 3) resolution of the proceeding not the discovery. Relevance must be weighed against matters such as among other things, the degree of relevance, how onerous is it to provide an answer, if the answer requires fact or opinion of law and so forth.

In determining the proper balance, in *Shields Fuels, Inc. v. More Marine Ltd.,*[48] the court ordered further production as requested by the moving party. In this case, the plaintiff requested subsequent production of financial records so that the issue of financial means could be explored on discovery. The defendant had produced an unedited balance sheet, but the plaintiff considered the production insufficient to allow them to examine the defendant on the capacity to provide a bond. On the motion, the plaintiff requested an order to produce supplementary affidavits of documents listing the financial records for 2007 and 2008, including the monthly income statements and balance sheets. In opposition, the defendant stated it had produced all relevant financial records in its possession. The defendant explained that its A/R and A/P records update on payments made and then "fall away". The defendant would have had to engage on contract the former employee who set up the financial system at a cost of $500-$750. The defendant also declined the plaintiff's offer to send a technician at its own expense to retrieve the information from the database and argued it should not be required to expend time and resources to create tailor-made documents. The most relevant electronic data and information in the "control" of a party will be that which can be accessed by the party's computer users in the ordinary course of business, otherwise known as the active data. The court held that

> [t]he rules should not be interpreted, however, so narrowly as to prevent a party from obtaining other relevant information, such as archival data that is still readily accessible and not obsolete. In exercising its discretion whether to compel production, the Court should

[46] 2009 FC 223 (CanLII).
[47] 2008 FC 1301 (CanLII) at para. 18.
[48] 2008 FC 947 (CanLII).

> have regard to how onerous the request for a generated record may be when balanced against its relevance and probative value.[49]

The court granted the order, concluding "[t]he information requested by (the Plaintiff) consists of basic archival accounting records that would be available to a company in the usual course of business."[50]

Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen[51] was an action where the plaintiff alleged that the defendant breached his fiduciary duty by using confidential information and soliciting clients. The plaintiff sought to compel production of a supplemental list of documents, listing the defendant's hard drives and a mirror image copy of those drives. The court rejected that request and held:

> In a review of electronic documents, as with any other body of documents, it is necessary to separate relevant materials to be produced from irrelevant materials. An entire HDD may be a relevant document, depending on the nature of the case. On the other hand, it may simply be a receptacle for documents from a myriad of sources, some of which are relevant, and some of which are not…
>
> The plaintiff says search of the mirror image HDD might turn up files that are otherwise inaccessible because they have been deleted from the HDD's as they presently exist. However there is no support for this supposition in the material before me. It is not appropriate to order the production of the mirror image HDD simply because it exists and because there is interesting technology that one might apply to it, even assuming authority exists to order such a search outside an Anton Piller order. Nor is it sufficient that the plaintiff is willing to pay what would likely be a great deal of money to have its expert search the HDD, with the cost of the search to be assessed as a disbursement at the end of the case. Without some indication that the application of interesting technology might result in relevant and previously undisclosed documents, the privacy interests of the third parties and the avoidance of unnecessary and onerous expense militate against allowing such a search merely because it can be done.[52]

While expenses have been identified in many cases as the prime reason for not ordering further production, it is a dangerous avenue because the price of technology and its use is steadily going down. On the other hand, there is a number of more stable concepts, including privacy, that will justify a party or a court to refuse further production.

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[49] *Ibid.* at para. 13.

[50] See also *Honour v. Canada (Attorney General),* 2008 BCCA 346 (CanLII) (A pilot's widow sought leave to appeal the order in *Chadwick v. Canada* to produce her husband's computer for forensic analysis. The court declined to grant leave, since the scope covered a limited time period, and would be paid for by the defendant, contemplated a search protocol agreed to by the parties [or determined by the court in the absence of agreement], and the search results were to be reported to plaintiff's counsel. Although the court did not emphasize it, the order also required review of the documents by an independent counsel to avoid the possibility of disclosure of privileged or irrelevant information.)

[51] 2006 BCSC 554 (CanLII).

[52] *Ibid.* at para. 31 and 36.

F. Refusals to requests for further production, not based on relevance or privilege, should include details of the burden, cost, delay, and/or prejudice on which the refusing party is basing its position.

Without explicitly invoking proportionality, courts have evaluated the burden, cost, likely prejudice, and delay in deciding whether to order the production of more information from a party. As early as the *Peter Kiewit* decision,[53] courts have considered the impact of a request for further production on a party and have balanced the effects against the probative value of the information. The results have very much depended on how the request for the search was justified and the refusal defended.

Where the requesting party argued that the information sought was important to their case and the producing party gave no justification for their statements about the burden or cost, the court has ordered production. In the case of *Walter Construction v. Catalyst,*[54] a suit for breach of contract, the plaintiff sought an order for further production, including the electronic versions of documents already produced in paper. There was no support found by the court for the position that further production would be onerous. The court found that the documents sought would be relevant and ordered the production.

On the other hand, where a party resisting the motion has presented a convincing argument of the detrimental effect or excessive expense required to retrieve and review the information, the court has refused to order production. In the appeal from an order by the case management judge to produce the imaged hard drives *in specie* and of drives containing the "hybrid" files (those patients whose care was partially funded by the defendant) in *Innovative Health Group, Inc. v. Calgary Health Region,*[55] the court, in reflecting on the decision in *Spar Aerospace Limited v. Aerowerks Engineering, Inc.,* stated:

> [w]hile I agree with Madam Justice Veit's decision, I would add a caveat. Even in circumstances where it is clear that a litigant is thwarting the litigation process, and the court deems it appropriate to order production of a hard drive, measures should be taken to protect disclosure of irrelevant and immaterial information which the producing party objects to produce. Although litigation confidentiality exists, many times that will not be sufficient to protect personal, confidential, and private material. A judge should always hear representations as to how information that is neither material nor relevant can be protected from exposure, and frame any production order in the least intrusive manner.

G. Burden and expense that are the result of actions taken by the party asserting undue burden or expense should be weighed against that party.

Typically, a party producing documents is expected to bear the costs of such production. This notion is reinforced in the first sentence of Sedona Principle 12, which states "[t]he reasonable costs of preserving, collecting and reviewing electronically stored information will generally be borne by the party producing it."[56] However, there may be circumstances where a party will argue that the production sought by the opposing party creates undue burden or expense and is thus not

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[53] *Peter Kiewit Sons Co. of Canada Ltd. (c.o.b. Kiewit-Ceco) v. British Columbia Hydro & Power Authority, supra.*
[54] 2003 BCSC 1582 (CanLII).
[55] 2008 ABCA 219 (CanLII).
[56] The Sedona Conference®, *The Sedona Canada*[SM] *Principles Addressing Electronic Discovery* (Phoenix: The Sedona Conference®, Jan. 2008) at 39 ff. "Principle 12."

proportionate to the litigation in question. Where appropriate, the concept of proportionality may justify a limitation on discovery, based on such burden and expense. Alternatively, the court may consider a cost-shifting order.

In assessing such arguments, courts should consider the cause of such burden and expense. Where the alleged burden and expense is caused (whether by action or inaction) by the party seeking to limit production, the extent of causation should be weighed against that party.

In *Jay v. DHL*, a case involving opportunity costs (among other claims), the plaintiff sought disclosure of evidence of revenue by other contractors working for the defendant in the form of copies of waybills and associated invoices showing the weight and dimensions of the packages delivered. The plaintiff had been requesting this information since 2003 and successfully moved for an order for its production in January 2006. Having not received it by late October 2006, the plaintiff moved to strike out the statement of defence. The court delayed judgment to give the defendants more time to produce the documents. The plaintiff again moved to strike the defendants' pleadings in May 2007 and that motion was heard in November 2007. At that hearing the senior vice president of the defendant reviewed the processing of waybills and invoices in Canada. Since 2000, paper copies of waybills had been scanned and destroyed after nine months. The policy continued even after the plaintiff specifically requested the information in 2003. Paper waybills represented about 30 percent with the remaining transactions being processed electronically. All computer facilities were centralized in the United States. In October 2005 the computer system crashed, losing critical information. Evidently backup processes had not been strictly followed, and although the images could be recovered, the indexes by which the transactions/waybills would be searched were irretrievable. Using alternate approaches, the defendant had been able to produce some of the information, but not the dimensions and weight requested.

The court dismissed the statement of defence and recommended the plaintiff proceed with a motion for default judgment. The Court of Appeal considered dismissal as too harsh a remedy but recognized the prejudice to the plaintiff resulting from the failure to produce the information. While it reinstated the statement of defence, the Court of Appeal addressed the defendants' failure to produce the waybills by permitting the matter to go to trial and substituting another "order as is just" for relief by the trial judge for failure to produce documents for inspection.[57]

Where a party has failed to adequately preserve relevant information when litigation was reasonably contemplated, it should not be excused from the burden and expense of having to retrieve the information from sources that are more difficult (and expensive) to access.

Further, where a party has not consulted the other side about the most suitable format of the production, it may incur the burden and expense associated with conversions from electronic to quasi-paper formats that are ultimately more expensive to produce yet less useful to the receiving party. Where appropriate, such conversion or unusable production should be weighed against the converting/producing party. Again, early discussions between the parties can address and prevent these situations before they materialize.

[57] *Jay v. DHL*, 2009 PECA 2 (CanLII).

Indeed, these discussions are helpful in clarifying what information a party is seeking from other parties and in agreeing on a suitable production format.[58]

H. A party's previous efforts to resolve problems through candour and cooperation should be considered, including in the cost award.

Lawyers solving problems through candour and cooperation has long been an aspiration of our civil justice system. The Rules of Professional Conduct require lawyers to be "courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice."[59] The importance of cooperation was underlined by The Advocates' Society in its recent publication, "Principles for Civility for Advocates/Principles of Professionalism for Advocates": [a]dvocates should avoid unnecessary motion practice or other judicial intervention by negotiating and agreeing with opposing counsel where practicable.[60]

Agreements addressing e-discovery issues have long been a "best practice". The Sedona Conference®, in an article entitled "The Case for Cooperation" has described cooperation in the area of electronic information as a two-tiered concept, the first tier being the level of cooperation defined by the applicable rules of procedure, ethical considerations, and the common law. The second tier is more focused, where parties work together to "develop, test, and agree upon the nature of the information being sought."[61] This second tier "best practice" has now become a requirement in the rules of civil procedure of both Nova Scotia and Ontario. The Nova Scotia Civil Procedure Rules promote the parties agreeing to the scope of preservation and disclosure in relation to electronic information.[62] In Ontario, parties are mandated to agree, in writing, upon a discovery plan which will address all aspects of the discovery process including the approach to electronic information.[63] Guidance with respect to the content of such a discovery plan is found at section 3 of the "Additional Guidance to Achieve Proportional Discovery" section of this commentary. Although the requirement to discuss and make efforts to agree upon electronic discovery issues has been formalized only in Nova Scotia and Ontario, it is reasonable to suggest that judges in all jurisdictions would expect lawyers to make these efforts on their own before seeking the intervention of the court. For instance, Quebec courts could rely on section 151.1 of the Code of Civil Procedure[64] which states that "the parties […] must negotiate an agreement as to the conduct of the proceeding, specifying the arrangements between them and the timetable with which they are to comply […]". This disposition is further reinforced

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[58] The Sedona Conference®, *The Sedona Canada Principles*[SM] *Addressing Electronic Discovery* (Phoenix: The Sedona Conference®, Jan. 2008) at 30 ff. "Principle 8." In the U.S., such a meet and confer is required by Rule 26(f) of the United States Federal Rules of Civil Procedure.

[59] Ontario, *Rules of Professional Conduct,* r. 6.03(1). Quebec, *Code of Ethics of Advocates,* R.Q. c. B-1, r.1, art. 2.00 is similar and states at section 2.00.01. that "[a]n advocate shall act with dignity, integrity, honour, respect, moderation and courtesy."

[60] "Principles for Civility for Advocates/Principles of Professionalism for Advocates, Co-Operating with Opposing Counsel, Principle 5" (2009), online: The Advocates' Society <http://www.advocates.ca/assets/files/pdf/publications/principles-of-civility.pdf>; *see also* Peter J. Lukasiewicz et al., "A Lawyer's Duty to Opposing Counsel," online: The Advocates' Society <http://www.advocates.ca/assets/files/pdf/education/Symposium-on-Professionalism/Duty_to_Opposing_Counsel.pdf>.

[61] "The Case for Cooperation," (Fall 2009) 10 Sedona Conf. J. Supp. at 342.

[62] Nova Scotia, *Civil Procedure Rules,* r. 16.

[63] Ontario, *Rules of Civil Procedure,* r. 29.1.03(1).

[64] Quebec, *Code of Ethics of Advocates,* R.S.Q., chapter C-25.

by section 4.1.[65] It is important to recognize that working in a cooperative manner does not constitute a disservice to a lawyer's client:

> Cooperation is not capitulation. Cooperation simply involves maintaining a certain level of candour and transparency in communications between counsel so that information flows as intended by the Rules. It allows the parties to identify those issues that truly require court intervention. The parties may not always agree, but with cooperation their real disputes can be addressed sooner and at lower costs.[66]

The degree to which a party participates in the collaborative approach contemplated by the rules and codes of professional conduct will influence how a Court will approach requests to resolve discovery disputes and how it will address the issue of costs in that context. Courts will carefully scrutinize the behaviour of each party in an effort to determine whether court intervention could reasonably have been avoided. This was the approach adopted by Master Haberman in the 2009 decision of *Sherman v. Gordon*:

> [T]he Court has been equally concerned where court time has been sought and then squandered. The concept of proportionality has to apply in the context of litigants' use of court time as well as to the expenditure of their funds. It is unfair to all users of the court where one party seeks far more court time than they should need because they are not prepared to do the work to streamline their motion. Court intervention should be reserved for situations where the parties are unable to resolve their differences *inter se.* If they expend no effort in resolution but simply present the court with their problems, we will soon find we are unable to provide our services in a timely fashion.
>
> This is of particular concern at this juncture, as the new Rules require the parties to agree on discovery plans. That, and ill-prepared refusals motions, may end up eating unfairly into masters' available time to the detriment of all litigants.[67]

It is clear from this ruling that courts see the solution to the problems raised by e-discovery as one that should be borne by the participants in the litigation process. Failure to embrace the principles of candour and cooperation in addressing e-discovery issues will only result in detriment to the interests of your client.

I. Non-monetary factors should be considered when evaluating the burdens and benefits of discovery.

The rules of procedure of almost every Canadian jurisdiction require those rules to be interpreted in a manner which promotes the just determination of disputes. Necessarily, this requires the court to assess the importance and complexity of the issues before it. This overarching focus on securing just decisions should also guide the court in its approach to electronic discovery issues. *The Sedona Canada[SM] Principles* highlight the importance of a holistic analysis at Principle 2 which states:

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[65] "Subject to the rules of procedure and the time limits prescribed by this Code, the parties to a proceeding have control of their case and must refrain from acting with the intent of causing prejudice to another person or behaving in an excessive or unreasonable manner, contrary to the requirements of good faith."
[66] "The Case for Cooperation," (Fall 2009) 10 Sedona Conf. J. Supp. at 339.
[67] *Sherman v. Gordon,* 2009 CanLII 71722 (ON S.C.).

> 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 of the available 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.

Issues of electronic production are not limited to disputes of a commercial nature but pervade all types of litigation. Practitioners and judges are encouraged in appropriate cases to look beyond the simple cost/benefit analysis of production particularly where issues are raised which implicate the dignity of the individual or may have potentially broad implications for society at large. In such cases the court should evaluate the importance of the rights being adjudicated and should not focus solely on issues of cost.

While non-monetary factors are equally appropriate to justify the granting of increased production, they have most commonly been used, thus far, to support restricted production. Non-monetary factors have been used in several Canadian jurisdictions to restrict production on the basis of privacy and confidentiality concerns. These cases have justified restricted production by questioning the relevance of the requested information and recognizing that the privacy and confidentiality interests of the individual litigant or non-parties must be balanced against the probative value of the information being sought.[68]

J. The value of technological tools and approaches to reduce the volume of irrelevant and/or duplicative information should be considered in weighing the burden and cost.

The sheer volume of ESI maintained by an organization makes the use of technological tools and approaches to reduce the volume of irrelevant and/or duplicative information a necessity. Without these tools, litigation of any degree of complexity would become a practical impossibility. Principle 7 of *The Sedona Canada[SM] Principles* highlights how these technological tools are to be used:

> A party may satisfy its obligations to preserve, collect, review and produce electronically stored information in good faith by using electronic tools and processes such as data sampling, searching or by using selection criteria to collect potentially relevant electronically stored information.

The appropriateness of these tools was recognized in *Shell Canada Limited v. Superior Plus, Inc.*,[69] which cited with approval Principle 10 of the Ontario Guidelines on E-Discovery, which mirrors Sedona Canada[SM] Principle 7.

A number of common approaches have developed in the use of these technological tools. Every effort should be made to reduce the data that will be preserved and collected (and ultimately reviewed for relevance and privilege) through the effective application of exclusion and inclusion

[68] *Desgagné v. Yuen,* 2006 BCSC 955 (CanLII) at para. 36-42; *Ireland v. Low*, 2006 BCSC 393 (CanLII) at para. 12; *Bishop v. Minichiello*, 2009 BCSC 358 (CanLII) at para. 57; *Innovative Health Group v. Calgary Health Region*, 2005 ABCA 266 (CanLII) at para. 41.
[69] 2007 ABQB 739; see also *Air Canada v. Westjet Airlines Ltd.,* 2006 CanLII 14966 (ON S.C.).

criteria. Best practices in this area propose the definition of time periods and the identification of key players as a means of limiting the process of selection of ESI for preservation and collection.

In addition to temporal and key player restrictions, considered attention should be placed on the use of appropriate search terms. The choice of search terms should be determined in consultation with the adverse party, as part of discovery planning whether done in the context of a formal discovery plan or otherwise. A number of decisions have been critical of parties that fail to embrace a collaborative approach when determining appropriate search terms.[70] Efforts should also be undertaken to assess what types of data, such as MP3, WAV, MPEG, or spam, are required to resolve the dispute. Those types of data not required should be excluded from the initial phase of preservation, collection, and production. Where possible, tools that have proven themselves to be reliable and will result in a reduced volume of information to be addressed should form part of a party's approach to proportionality in a given case.

As detailed in this section, proportionality is not uni-dimensional; it has numerous facets that must be taken into consideration based on the facts and nature of each case. However, given the fact that many of the above-mentioned components are generally known or controlled by only one of the parties, in order for all of them to reap the benefits of proportionality, litigation must be approached in a collaborative fashion which will be presented in the following section.

[70] *Shell Canada*, *ibid.* at para. 36. See also *Kaymar Rehabilitation, Inc. v. Ottawa-Carleton Community Care Access Centre,* 2007 CanLII 9757 (ON S.C.).

III. Achieving Proportionality by Developing a Cooperative Discovery Plan

The court in *Timmis v. Allen-Vanguard Corporation*[71] stated that the purpose of a discovery plan is to limit any overlap in the discovery of the key players and to streamline the litigation to the extent possible. However, a discovery plan is only effective at reducing costs and time to the degree that the parties cooperate in its development. Cooperation is key to effectiveness.

The Sedona Conference® *Cooperation Proclamation* states that cooperation in discovery is consistent with zealous advocacy, going on to say:

> Lawyers have twin duties of loyalty: While they are retained to be zealous advocates for their clients, they bear a professional obligation to conduct discovery in a diligent and candid manner. Their combined duty is to strive in the best interests of their clients to achieve the best results at a reasonable cost, with integrity and candour as officers of the court. Cooperation does not conflict with the advancement of their clients' interests—it enhances it. Only when lawyers confuse *advocacy* with *adversarial conduct* are these twin duties in conflict.[72]

In "The Case for Cooperation," The Sedona Conference® explains what cooperation is and what it is not:

> Cooperation in the discovery context does not mean giving up vigorous advocacy; it does not mean volunteering legal theories or suggesting paths along which discovery might take place; and it does not mean forgoing meritorious procedural or substantive issues. Cooperation does mean working with the opposing party and counsel in defining and focusing discovery requests and in selecting and implementing electronic searching protocols. It includes facilitating rather than obstructing the production and review of information being exchanged, interpreting and responding to discovery requests reasonably and in good faith, and being responsive to communications from the opposing party and counsel regarding discovery issues. It is characterized by communication rather than stonewalling, reciprocal candour rather than "hiding the ball," and responsiveness rather than obscuration and delay.
>
> Cooperation defined in this manner is not only largely compelled by the attorney's obligation to comply with legal rules, ethical obligations, and the professional rules of conduct, but it also offers the client the benefits of creating and maintaining credibility with the court and the opposition, enhancing the effectiveness of advocacy, and minimizing client costs and risks.[73]

How does cooperation achieve proportionality and cost-effectiveness? In the first instance, cooperation and information exchange prevent a fairly common problem of "over-preservation," a consequence of risk aversion in the absence of clear information of what is required. Without some idea of what kind of information the opposing parties will require to prove their case, counsel will

[71] 2009 CanLII 41902 (ON S.C.) at para. 35.
[72] "The Sedona Conference® Cooperation Proclamation," (Fall 2009) 10 Sedona Conf. J. Supp. at 331.
[73] "The Case for Cooperation," (Fall 2009) 10 Sedona Conf. J. Supp. at 339.

often issue vague instructions to the client about preserving "whatever might be related to the case" without some analysis of what is possibly significant and important. The flipside is "under-preservation," where information that is later deemed necessary to the issues has been deleted according to normal record destruction procedures.

Second, cooperation avoids unnecessary motion practice by clarifying the issues, determining which issues form the basis for discovery (and possibly trial), and which issues can be dropped by agreement. Rather than demanding particulars and possibly seeking an order to enforce the demand, parties should provide the detail that is necessary to determine what information is going to be relevant. Thus the clients on both sides avoid the expense.

Finally, it allows for the collegial exploration of practical solutions to handling the volume.

How does planning achieve the goal of proportionality? As part of the planning exercise, parties produce estimates of the level of effort, cost, and time it will take to conduct discovery as well as the impact it might have on one's personal and confidential information. Done with sufficient details (which will vary with the nature of the case and the particular fact pattern), the parties can assess the burden of the discovery against its likely value to the determination of the issues.

When parties cooperate in planning, they can together decide whether discovery can be "staged" or "phased". The Supplemental Discovery Task Force Report[74] published in Ontario in October 2005 proposed "staged discovery" or "proportional discovery" as a means to

> [l]imit unnecessary or prolonged discovery without compromising the opportunity of a party to obtain all the truly relevant information….
>
> Where a party is of the opinion that the production of documents in ordinary compliance with the rules would unduly prolong or add to the cost of litigation, that party may propose a 'staged' or 'proportional' discovery.
>
> 'Staged discovery' in this context means a production of documents and oral discovery limited by subject matter, by time period covered by the discovery, or a selective production (some pre-determined portion of the documentation.)[75]

The new Ontario rule[76] provides a general description of what should be covered in a discovery plan:

- The intended scope of documentary discovery under Rule 30.02, taking into account relevance, costs, and the importance and complexity of the issues in the particular action

- Dates for the service of each party's affidavit of documents (Form 30A or 30B) under Rule 30.03

[74] Hon. Colin L. Campbell et al., "Supplemental Discovery Task Force Report" (Oct. 2005), online: The Canadian Bar Association <http://www.cba.org/OBA/en/pdf_newsletter/DTFFinalReport.pdf >.
[75] In the U.S. case, *Mancia v. Mayflower Textile Services Co.,* 253 F.R.D. 354 (D. Md. 2008), the court recommended phased discovery "so that the most promising, but least burdensome or expensive sources of information could be produced initially, which would enable Plaintiffs to reevaluate their needs depending on the information already provided."
[76] Ontario, *Courts of Justice Act*, R.R.O. 190, Reg. 194, r. 29.1.03 (3).

- Information respecting the timing, costs, and manner of the production of documents by the parties and any other persons

- The names of persons intended to be produced for oral examination for discovery under Rule 31 and information respecting the timing and length of the examinations, and

- 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.

The following section proposes elements to look at in devising the discovery plan and a framework for assessing what might be "proportionate" in any given situation.

- An articulation of the precise allegations which will be made in the litigation, whether taken from the pleadings or otherwise.

- In the absence of cooperation from the opposing party, a discovery plan should state any assumptions about the opposing party's theory of the case and requirements for information to support their positions.

- Key custodians and key events, as well as locations (office locations or organizational units).

- Steps taken to preserve documents and data in native format including or excluding certain metadata depending on the circumstances of each case.

- Parties should address whether metadata is relevant to the case.

- Proposed sources for initial collection (document and data types – e.g., email, loose files such as spreadsheets or word-processed documents, databases, Web site, smartphones, etc.).

- Likely volumes and schedule for collection.

- Collection methodology (active file collection, forensic imaging, etc.).

- Proposed process for reduction (duplication, threads, etc.) and identification and removal of irrelevant clumps (plus application of technology).

- Schedule for review for privilege, based on phasing where most valuable information (in sense of rich vein of relevant info) are reviewed first and then exchanged and discussed with other parties before moving to other sources as informed by the first phase.

- Review methodology – parties should promote the use of technology to identify information that may invite priority review and early disclosure.

- Estimates of likely volume of production (and any assumptions).

- Format of production.

- High-level schedule for oral discovery, with number of witnesses to be deposed (where applicable).

- Float –experienced project managers add extra days called "float" to a schedule to accommodate unanticipated delays resulting from obstacles or problems.

This list should not be looked at as being exhaustive since technology and business processes evolve quickly and force new changes on litigation itself. However, for the moment, Appendix 2 outlines the factors that should be considered in determining whether the measures are in balance with the significance and uniqueness of the information sought. It should also be noted that the factors that contribute to cost, burden, and delay, and the possible measures will vary depending upon the stage of discovery.

Appendix 1: Relevance and Proportionality in the Rules of Civil Procedure in Canadian Jurisdictions

Jurisdiction	*Rule: General Principles or Interpretation Section*	*Rule: Relevance*	*Rule: Proportionality*
Federal[1]	Rule 3. These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.	Rule 222(2). For the purposes of Rules 223 to 232 and 295, a document of a party is relevant if the party intends to rely on it or if the document tends to adversely affect the party's case or to support another party's case.	Rule 230. On motion, the Court may relieve a party from production for inspection of any document, having regard to (a) the issues in the case and the order in which they are likely to be resolved; and (b) whether it would be unduly onerous to require the person to produce the document.
Tax[2]	Rule 4(1). These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits.	Partial Disclosure: Rule 81(1). A party shall, within thirty days following the closing of the pleadings, file and serve on every other party a list of the documents of which the party has knowledge at that time that might be used in evidence (a) to establish or to assist in establishing any allegation of fact in any pleading filed by that party; or (b) to rebut or to assist in rebutting any allegation of fact in any pleading filed by any other party.	Rule 79. Nothing in sections 78 to 91 shall be taken as preventing parties to an appeal from agreeing to dispense with or limit the discovery of documents that they would otherwise be required to make to each other. Rule 93(8). Where a party is entitled to examine for discovery (a) more than one person under this section; or (b) multiple parties who are in the same interest, but the Court is

[1] *Federal Courts Rules,* online: <http://laws.justice.gc.ca/en/F-7/SOR-98-106/index.html>.
[2] *Tax Court of Canada Rules (General Procedure),* online: <http://laws.justice.gc.ca/en/showtdm/cr/SOR-90-688a>.

Jurisdiction	*Rule: General Principles or Interpretation Section*	*Rule: Relevance*	*Rule: Proportionality*
		Full Disclosure: Rule 82(1). The parties may agree or, in the absence of agreement, either party may apply to the Court for an order directing that each party shall file and serve on each other party a list of all the documents that are or have been in that party's possession, control or power relevant to any matter in question between or among them in the appeal.	satisfied that multiple examinations would be oppressive, vexatious or unnecessary, the Court may impose such limits on the right of discovery as are just.
British Columbia[3]	Rule 1-3(1). The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits. Rule 1-3(2). 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;	Rule 7-1(1). Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period, (a) prepare a list of documents in Form 22 that lists (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to **prove or disprove a material fact**, and (ii) all other documents to which the party intends to refer at trial; and (b) serve the list on all parties of record.	Rule 7-1(14). On an application under subrule 13 or otherwise, the court may (a) order that a party be excused from compliance with subrule 1, 3, 6, 15, or 16 or with a demand under subrule 10 or 11, either generally or in respect of one or more documents or classes of documents

[3] Rules coming into effect July 2010, online: <http://www.courts.gov.bc.ca/supreme_court/Practice_directions_and_notices/acts_rules_and_forms>.

Jurisdiction	*Rule: General Principles or Interpretation Section*	*Rule: Relevance*	*Rule: Proportionality*
	(b) the importance of the issues in dispute; and (c) the complexity of the proceeding.		
Alberta[4]	Rule 1.2(1). The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost effective way. (2) In particular, the rules are intended (a) to identify the real issues in dispute; (b) to facilitate the quickest means of resolving a claim at the least expense; (c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable; (d) to oblige the parties to communicate honestly, openly and in a timely way; and (e) to provide an effective,	Rule 5.1(1). Within the context of Rule 1.2, the purpose of this Part is (a) to obtain evidence that will be relied on in the action; (b) to narrow and define the issues between parties; (c) to encourage early disclosure of facts and records; (d) to facilitate evaluation of the parties' positions and, if possible, resolution of issues in dispute; and (e) to discourage conduct that unnecessarily or improperly delays proceedings or unnecessarily increases the cost of them. Rule 5.2(1). For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or if the record or information, could reasonably be expected	Rule 5.3(1). The court may 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.

[4] Proposed *Alberta Rules of Court* for implementation November 2010, online: <http://www.albertacourts.ab.ca/Home/Spotlight/tabid/310/Default.aspx>.

Jurisdiction	*Rule: General Principles or Interpretation Section*	*Rule: Relevance*	*Rule: Proportionality*
	efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.	(a) to significantly help determine one or more of the issues raised in the pleadings; or (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.	
Saskatchewan[5]	None.	Rule 212(1).[6] Parties to an action shall, within ten days after a statement of defence has been filed, and without notice, serve on each opposite party a statement as to the documents which are or have been in his possession or power **relating to any matter in question in the action.** Rule 213(1). Every party to a cause or matter shall be entitled at any time, by notice in writing, to give notice to any other party in whose pleadings, affidavits, or statement as to documents reference is made to any document, to produce such document for the inspection of the party giving such	Rule 478(1). The simplified procedure shall be used in an action where the plaintiff's claim is exclusively for (a) an amount of $50,000 or less, exclusive of interest and costs; (b) real or personal property the fair market value of which at the date of commencement of the action is $50,000 or less; or (c) both an amount of money and real or personal property the total value of which at the date of commencement of the action is $50,000 or less, exclusive of interest and costs, having regard to the fair market value of the property at that date.

[5] *The Queen's Bench Rules,* Saskatchewan, online: <http://www.qp.gov.sk.ca/documents/English/Rules/qbrules.pdf >.
[6] Practice Directive No. 6, E-Discovery Guidelines, came into effect September 1, 2009. The Guidelines "incorporate a new standard for e-discovery disclosure which might be described as proportionate direct relevance."

Jurisdiction	*Rule: General Principles or Interpretation Section*	*Rule: Relevance*	*Rule: Proportionality*
		notice or of his solicitor and to permit him or them to take copies thereof.	But see: Rule 484(1). An affidavit of documents and witnesses shall be in Form 484, and shall: (a) disclose to the full extent of the party's knowledge, information and belief, all documents relating to any matter in issue in the action that are or have been in the party's possession, control or power; and (b) include a list of the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the action.
Manitoba[7]	Rule 1.04(1). These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.	Rule 30.01(1)(c). A relevant document is one which **relates to any matter in issue in an action**.	
Ontario[8]	Rule 1.04(1.1). Proportionality "In applying these rules, the	Rule 30.02(1). Every document relevant to any matter in issue in an action that is	Rule 29.2.03. In making a determination as to whether a party

[7] *Court of Queen's Bench Rules,* online: < http://www.canlii.ca/mb/laws/regu/1988r.553/20090324/part1.html>.
[8] *Rules of Civil Procedure,* coming into effect January 2010, online: <http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm>.

Jurisdiction	*Rule: General Principles or Interpretation Section*	*Rule: Relevance*	*Rule: Proportionality*
	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."	or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document.	or other person must answer a question or produce a document, the court shall consider a) time b) expense c) undue prejudice d) undue interference e) availability from another source.
Quebec[9]	Section 4.1. Subject to the rules of procedure and the time limits prescribed by this Code, the parties to a proceeding have control of their case and must refrain from acting with the intent of causing prejudice to another person or behaving in an excessive or unreasonable manner, contrary to the requirements of good faith. The court sees to the orderly progress of the proceeding and intervenes to ensure proper management of the case.	Section 397. The defendant may, before the filing of the defence and after two days' notice to the attorneys of the other parties, summon to be examined before the judge or clerk upon all facts relating to the issues between the parties or to give communication and allow copy to be made of any document relating to the issues ["*se rapportant à la demande*"] […] Section 398. After defence filed, any party may, after two days' notice to the attorneys of the other parties, summon to be examined before the judge or clerk upon all facts relating to the issues between the parties or to give communication and allow copy to be	Section 4.2. In any proceeding, the parties must ensure that the proceedings they choose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute; the same applies to proceedings authorized or ordered by the judge.

[9] *Code of Civil Procedure,* online: <http://www.canlii.org/en/qc/laws/stat/rsq-c-c-25/latest/rsq-c-c-25.html>.

Jurisdiction	*Rule: General Principles or Interpretation Section*	*Rule: Relevance*	*Rule: Proportionality*
		made of any document relating to the issue [“*se rapportant au litige*”] […]	
New Brunswick[10]	Rule 10.03(2). These rules shall be liberally construed to secure the just, least expensive and most expeditious determination of every proceeding on its merits.	Rule 31.02(1). Every document which relates to a matter in issue in an action and which is or has been in the possession or control of a party or which the party believes to be in the possession, custody or control of some person not a party, shall be disclosed as provided in this rule, whether or not privilege is claimed in respect of that document.	
Nova Scotia[11]	Rule 1.01. These Rules are for the just, speedy, and inexpensive determination of every proceeding.	Rule 14.01. (1) In this Part, “relevant” and “relevancy” have the same meaning as at the trial of an action or on the hearing of an application and, for greater clarity, both of the following apply on a determination of relevancy under this Part: (a) a judge who determines the relevancy of a document, electronic information, or other thing sought to be disclosed or produced must make the determination	Rule 14.08(3). A party who proposes that a judge modify an obligation to make disclosure must rebut the presumption for disclosure by establishing that the modification is necessary to make cost, burden, and delay proportionate to both of the following: (a) the likely probative value of evidence that may be found or acquired if the obligation is not

[10] *Rules of Court,* New Brunswick Reg. 82-73, online: <http://www.iijcan.com/en/nb/laws/regu/nb-reg-82-73/latest/nb-reg-82-73.html>.
[11] *Nova Scotia Annotated Civil Procedure Rules,* online: <http://nslaw.nsbs.org/nslaw/>.

Jurisdiction	*Rule: General Principles or Interpretation Section*	*Rule: Relevance*	*Rule: Proportionality*
		by assessing whether a judge presiding at the trial or hearing of the proceeding would find the document, electronic information, or other thing relevant or irrelevant; (b) a judge who determines the relevancy of information called for by a question asked in accordance with this Part 5 must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the information relevant or irrelevant. (2) A determination of relevancy or irrelevancy under this Part is not binding at the trial of an action, or on the hearing of an application.	limited; (b) the importance of the issues in the proceeding to the parties. Rule 14.09(2)(c). A party to whom a demand for a copy of a document or electronic information … must … make a motion to limit the party's obligation to produce the document or electronic information, and seek to rebut the presumption in favour of disclosure by establishing that compliance with the demand is disproportionate under Rule 14.08.
PEI[12]	Rule 1.04(1). These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.	Rule 30.02(1). Every document **relating to any matter in issue** in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in Rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document.	The Supreme Court of P.E.I. adopted the *Ontario Rules of Civil Procedure* in 1990. Ontario amendments coming into effect in January 2010 may therefore be available to litigants in PEI.
Nfld	None	Rule 32.01(1). Unless the Court	

[12] *Prince Edward Island Supreme Court Annotated Rules of Civil Procedure,* online: <http://www.gov.pe.ca/courts/supreme/rules/index.php3.>.

Jurisdiction	*Rule: General Principles or Interpretation Section*	*Rule: Relevance*	*Rule: Proportionality*
Labrador[13]		otherwise orders, a party to a proceeding shall, within ten days after the close of the pleadings between an opposing party and the party, or within seven days after the service of the originating document where there are no pleadings, file and serve on the opposing party a list in Form 32.01A of the documents of which the party has knowledge at that **time relating to every matter in question in the proceedin**g and file in the Registry the list without a copy of any document being attached thereto.	
Yukon[14]	Rule 1(6). The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits and to ensure that the amount of time and process involved in resolving the proceeding, and the expenses incurred by the parties in resolving the proceeding, are proportionate to the court's assessment of	Rule 25(3). Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in this rule whether or not privilege is claimed in respect of the document.	Rule 25(16). The court may, on application, order that a party be excused from compliance with this rule, either generally or in respect of one or more documents or classes of documents.

[13] *Rules of the Supreme Court,* online: <http://www.assembly.nl.ca/legislation/sr/regulations/Rc86rules.htm>
[14] *Rules of Court,* online: <http://www.yukoncourts.ca/courts/supreme/ykrulesforms.html.>.

Jurisdiction	*Rule: General Principles or Interpretation Section*	*Rule: Relevance*	*Rule: Proportionality*
	(a) the dollar amount involved in the proceeding, (b) the importance of the issues in dispute to the jurisprudence of Yukon and to the public interest, and (c) the complexity of the proceeding.		
Nunavut	Follows the Rules of the Supreme Court of the Northwest Territories		
NWT[15]	Rule 3. The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding.	Rule 219. Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in this Part, whether or not privilege is claimed in respect of the document.	

[15] *Rules of the Supreme Court of the Northwest Territories,* online: <http://www.justice.gov.nt.ca/pdf/REGS/JUDICATURE/Rules_Supr_Crt_NWT_Pt_1.pdf >.

Appendix 2: Applying proportionality at different stages of discovery

Stages	*Some factors for consideration*	*Influence on the cost, burden, and/or delay*	*Uncertainties examples*
When litigation is reasonably anticipated or contemplated What measures should be taken to prevent the destruction of information that would be relevant to the issues as they are understood by the parties?	• What issues are likely central to the anticipated litigation and who were the key decision-makers and players involved in the actions?[16] • Is it clear what information and information sources are critical to the issues that will likely be raised in the pleadings? If not, what is the probability that certain issues will be raised, and what is the risk if the information relevant to an individual issue is no longer available? • What is the probable significance of each source of information? • Where there are multiple copies of certain types of information, what is the most readily available source and the easiest to secure from destruction? • Is that source at risk of being destroyed? What measures are necessary to secure the information from destruction?	• How many different sources in how many different locations will require measures to prevent destruction? • What resources will be required to track down the information? • How many custodians will have to be interviewed to identify sources of information? • What volume of information will have to be stored outside of the day-to-day business environment? Costs for additional hardware/software or hosting services?[17] • Will forensic techniques be required to secure the information from destruction? • What steps will be required to verify compliance with the litigation hold?	• The point of view of other parties to the litigation is not generally available at this stage; thus their perspective of the significance of certain sources and the relative importance of individual issues is uncertain. • Unknown conformance with email retention or destruction policies – personal stores. • Information from former employees.

[16] According to an article in the Richmond Journal of Law and Technology, recent U.S. case law suggests that action to preserve data is required only for sources belonging to custodians at the centre of the conflict. In *In re NTL, Inc. Sec. Litig*., 244 F.R.D. 179 (S.D.N.Y. 2007), the magistrate judge indicated in his decision that the obligation to preserve documents applied only to key employees of the defendant, such as "directors, officers, managers and the employees in charge of financial decision making." In *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614 (D. Colo. 2007), the court said that counsel for the defendants in this trademark infringement action was required to undertake a reasonable investigation of "employees who played a significant or decision-making role." Finally, in *Miller v. Holzmann*, 2007 WL 172327 (D.D.C. Jan. 17, 2007), the magistrate judge said the hold memo needed to be sent to "only those reasonably likely to maintain documents relevant to the litigation or investigation." This statement implicitly recognizes that some relevant documents held by non-key employees may be deleted without adverse consequences to the company, or otherwise the litigation hold notice would have to be sent to more employees. Douglas L. Rogers, "A Search for Balance in the Discovery of ESI Since December 1, 2006" (2008) 14 Rich. J. L. &Tech. 8, online: <http://law.richmond.edu/jolt/v14i3/article8.pdf.>.

[17] "…courts (face a challenge) to strike a balance between the general duty to preserve discovery and the impracticality of preserving even a fraction of the vast amount of electronic data generated daily by a business of even moderate size." Michael R. Nelson and Mark H. Rosenberg, "A Duty Everlasting: The Perils of Applying Traditional Doctrines of Spoliation to Electronic Discovery" (2006) 12 Rich. J. L. & Tech. 14, online: <http://law.richmond.edu/jolt/v12i4/article14.pdf>.

Stages	*Some factors for consideration*	*Influence on the cost, burden, and/or delay*	*Uncertainties examples*
During collection In identifying the scope of information that will be extracted, processed (e.g., culled, reduced), reviewed and produced	• Which custodians and which timeframes are likely to produce the most significant information? • Can "surrogate" or alternate sources of information be substituted for sources that may no longer be available or which are burdensome, expensive, or time-consuming to retrieve, process, review, and produce?[18] • Can some measures be taken to eliminate duplicates during collection? For example, by choosing the email store of one of the central correspondents in a community of co-workers? • Is there a concern about private, personal, or commercially sensitive information that may be revealed? What measures would be required to excise irrelevant but sensitive information from the source? • How complex is the extraction? • Is forensic extraction required? • Is the information stored in a version of software or a legacy system no longer widely used or supported? • Can sampling be used to test the density of relevant information in the source to identify the richest sources for early processing, review, and production?	• The cost, burden, and delay are generally directly proportional to the volume of information collected. • Number of custodians whose information will have to be collected. • Number of different sources that will have to be collected. • Data stored off-line, on tapes, and disks for example, can become difficult to extract if the medium has degraded over time, or if the format is no longer supported. • Specialist services are required for forensic extraction, for obsolete versions of software and, for older media. • Large, complex collection projects require project management techniques to ensure completeness, to track information as it is collected, and to avoid delays.	• The cost of extraction from more complex sources (older versions of software, aging or damaged media, unindexed or unlabelled sources) is difficult to predict. It may be helpful to process a sample to determine what level of effort and time would be required, and whether it yields useful information. • Viruses, worms, and other malicious software can add expense, burden, liability, and delay.

[18] In the same article cited above, the author states: "Whether there are alternate sources available for the same ESI can be an important consideration for some courts in determining the scope of the duty to preserve. In *Greyhound Lines, Inc. v. Wade,* 485 F.3d 1032 (8th Cir. 2007), an Archway truck rear-ended a Greyhound bus, and litigation ensued. Ten days after the accident, Greyhound removed the electronic control module that stored certain information concerning speed, starts, stops, and the times and types of mechanical failures that could befall a bus. The electronic control module (ECM) indicated that failure in a speed-sensor had caused the slow speed of the bus. Greyhound had sent the electronic control module to the engine manufacturer, who erased the information before the case was filed. Archway moved for sanctions against Greyhound for spoliation, but the district court denied the motion and the court of appeals affirmed. The Eighth Circuit said that "although some material was not preserved, the ECM data identified the specific mechanical defect that slowed the bus, and several bus passengers testified about how the bus acted before the collision." In other words, lack of prejudice – because the necessary information was otherwise available – was important to the Eighth Circuit.

Appendix 2: Applying Proportionality at Different Stages of Discovery

Stages	*Some factors for consideration*	*Influence on the cost, burden, and/or delay*	*Uncertainties examples*
During processing In applying criteria for the automatic elimination of categories of information, in the reduction of collections through use of date ranges, location, etc., and in focusing on sources that are likely to contain the information most highly relevant to issues critical to the case.	• According to key players or experts, what types of emails and other office documents can be automatically removed from the collection? (e.g., social notices, marketing, emails from lists and news sources.) • Are there clusters of documents that can be identified as highly relevant for early review and production? • What de-duplication and near-de-duplication processes can be used to reduce the volume? • Hybrid collections combining documents from paper and electronic sources will often contain duplicates.	• The variety of document types in the collection to be processed. • Tools and services for de-duplication and analytics are often priced on the basis of the volume going into the process. • Documents from paper sources have to be imaged and OCR'd before processing for de-duplication, culling and clustering. • Legal judgment is required to decide what kinds of information may be automatically removed, or how other culling and de-duplication processes take place. • Similarly, legal judgment is required in selecting clusters for early review and production.	• Linguistic analysis tools are used in culling and clustering; skill and knowledge are required – errors can happen. • Need to anticipate the risk and mitigate in order to demonstrate use of the tools is reasonable.
During keyword and concept search of the reduced, processed collection to retrieve relevant documents In selecting search strategies and in the application of sampling to confirm the recall and precision of the search.	• Well-designed and well-documented process for selecting, testing, and refining search terms. • Balance between narrow search parameters yielding more manageable volumes and possible omission of important information. • Collaboration with other parties in selecting search terms.	• Indexing and searching requires specialized hardware and software to handle the volume. • Selection of search terms, testing and review require legal judgment along with expert guidance. • Seeking input from key players, and studying the terms and names that appear in those documents that the key players feel are the most relevant. • Looking for communications patterns – who communicates with whom about what kinds of events and decisions – and using this information to drive search approach.	• Language used in day-to-day email communications is generally informal and imprecise: even the best designed searches will omit relevant information. Need to assess the risk and mitigate. • Nested emails, attachments, compressed files, and encrypted and corrupted files may be excluded from searches depending on the process and the software used.

Appendix 2: Applying Proportionality at Different Stages of Discovery

Stages	*Some factors for consideration*	*Influence on the cost, burden, and/or delay*	*Uncertainties examples*
During review for privilege and confidentiality • In selection of review approaches that combine automated and manual review to avoid inadvertent disclosure. • In steps taken when inadvertent disclosure has been discovered.	• Total volume of documents to be reviewed. • Tools used to identify information, including searches based on names of counsel (privilege), commercial secrets and individuals (privacy). • Process used to identify information not automatically classified as privileged or confidential based on the search, including sampling to confirm that certain sets of information do not contain privileged or confidential information (e.g., emails exchanged between two correspondents who have no contact with lawyers). • Process followed to notify recipient of possible inadvertently released information and the delay between release and notification.	• Overall volume to be reviewed. • Complexity of the issues, and the level of difficulty associated with finding. commercially sensitive information in cases such as patent, unfair competition, trademark, or competition. • Review of metadata and embedded data when native production is required. • Volume of sets of information requiring page by page review.	No review is perfect. There is a small but not negligible probability that a confidential, private, or privileged document will be overlooked during review no matter how thorough and painstaking the process. This is especially true when documents come from both paper and electronic sources.
During production In selecting form of production, schedule, affidavits or lists of documents, and shared hosting	• Cooperation with other parties in finding the best approach to production that meets everyone's needs. • Agreement on common standards for producing documents originating in paper (e.g., coding schemes, format) and electronically (e.g., capturing which metadata).	• Volume of material requiring redaction. • Variety of document types and relative volume of paper and electronic sources. • Existence of obsolescent document formats in the production set.	It is not yet settled how to handle information redacted from production. The text or OCR associated with a paper-equivalent image may not be removed during the production process, depending on the nature of the software.

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The Sedona Conference® Working Group Series[SM] ("WGS[SM]") represents the evolution of The Sedona Conference® from a forum for advanced dialogue to an open think-tank confronting some of the most challenging issues faced by our legal system today.

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The first Working Group was convened in October 2002, and was dedicated to the development of guidelines for electronic document retention and production. The impact of its first (draft) publication—*The Sedona Principles; Best Practices Recommendations and Principles Addressing Electronic Document Production* (March 2003 version)—was immediate and substantial. *The Principles* was cited in the Judicial Conference of the United State Advisory Committee on Civil Rules Discovery Subcommittee Report on Electronic Discovery less than a month after the publication of the "public comment" draft, and was cited in a seminal e-discovery decision of the Southern District of New York less than a month after that. As noted in the June 2003 issue of Pike & Fischer's *Digital Discovery and E-Evidence, "The Principles*...influence is already becoming evident."

The WGS[SM] Membership Program was established to provide a vehicle to allow any interested jurist, attorney, academic or consultant to participate in Working Group activities. Membership provides access to advance drafts of Working Group output with the opportunity for early input, and to a Bulletin Board where reference materials are posted and current news and other matters of interest can be discussed. Members may also indicate their willingness to volunteer for special Project Team assignment, and a Member's Roster is included in Working Group publications.

We currently have active Working Groups in the areas of 1) electronic document retention and production; 2) protective orders, confidentiality, and public access; 3) the role of economics in antitrust; 4) the intersection of the patent and antitrust laws; (5) *Markman* hearings and claim construction; (6) international e-information disclosure and management issues; and (7) e-discovery in Canadian civil litigation. See the "Working Group Series[SM]" area of our website www.thesedonaconference.com for further details on our Working Group Series[SM] and the Membership Program.