The Road to E-Discovery:
More Garden Path, Less Mountain Climb?

By Daniela Bassan – January 2016[1]

Any discussion of e-discovery in Canada – including how to make the process more efficient and user-friendly – should start with the Sedona Conference.[2]

The *Sedona Canada Principles Addressing Electronic Discovery* were first published in 2008 and recently updated in November 2015.[3] Based on the original Principles, Nova Scotia was the first Province to amend its Rules of Civil Procedure to address e-discovery, namely, through Rule 16. The revised Sedona Canada Principles, according to their author, have the following objectives:

> In 2008, the writers of the *Principles* necessarily advocated for cultural change in the legal profession to address the impact of e-discovery on the litigation process. Over the past seven years, we have seen notable changes: rules have been amended to accommodate e-discovery, a robust body of Canadian e-discovery case law has developed, the test for relevance has been narrowed in some jurisdictions to reflect a new, high volume, "e-reality," and across the country, the concept of proportionality has become firmly entrenched in the new discovery vernacular.
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> Now in 2015, further changes in legal culture are still required. Central to this shift is early and meaningful cooperation between counsel, as well as the

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[2] The Sedona Conference is a research and educational institute which has resulted in a number of Working Groups on a variety of law-based topics. Working Group 7 was created in 2006 with the purpose of creating "forward-looking principles and best practice recommendations for lawyers, courts, businesses, and others who regularly confront e-discovery issues in Canada". See https://thesedonaconference.org/wgs#WG6.

[3] The updated Sedona Canada Principles (2015) are available at https://thesedonaconference.org/download-pub/4432; the original Sedona Canada Principles (2008) are available at https://thesedonaconference.org/download-pub/71.

> acknowledgement that basic e-discovery principles apply to cases of every size and subject matter. The amended *Principles* presented below reflect these important ideals, as well as other important developments in Canadian law.[4] [emphasis added]

Three of the amended Sedona Canada Principles are highlighted below: (i) proportionality; (ii) cooperation; and (iii) costs. Common to all of these Principles is the notion of greater efficiency in discovery and more meaningful use of the litigation process.

(i) Proportionality Test

Principle 2 has been amended to include a five-part test for proportionality. This test tailors the procedural aspects of e-discovery to the specific context of the litigation:

> Principle 2. 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; (ii) the importance and complexity of the issues and interests at stake and the amounts in controversy; (iii) the relevance of the available electronically stored information; (iv) the importance of the electronically stored information to the Court's adjudication in a given case; and (v) the costs, burden and delay that the discovery of the electronically stored information may impose on the parties.[5] [emphasis added]

In Nova Scotia, the proportionality principle is reflected generally in Rule 1.01 (object of the Rules) and specifically in Rule 14.07 (expense of disclosure), Rule 14.08 (presumption for full disclosure), Rule 14.12 (order for production), and Rule 58.03 (order for economical procedures).[6] Just because a moving party *wishes* to take a certain procedural step – whether before, during, or after discovery – does not make it *proportionate* (or appropriate). Indeed, this concept underpins a "culture shift" in civil litigation and is playing an increasingly important role, after the Supreme Court of Canada decision in *Hryniak v Mauldin*, 2014 SCC 7.

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[4] Sedona Canada Principles 2015, p. iv.

[5] Sedona Canada Principles 2015, p. 16.

[6] See, for example, discussion of Rule 14 in the e-discovery context in *Halifax (Regional Municipality Pension Committee) v State Street Global Advisors Ltd*., 2012 NSSC 399. There, the Court dismissed the plaintiff's motion to vary the terms of an order setting out certain disclosure requirements, including search terms to be applied to categories of e-documents.

This principle was fully embraced in *Garner v Bank of Nova Scotia*, 2014 NSSC 63. There, Associate Chief Justice Smith applied the proportionality principle in refusing certain disclosure motions brought on the eve of trial.[7] Her comments, citing *Hryniak*, are in the same vein as Sedona Principle 2:

> [34] During the hearing of this motion, I referred counsel to the recent Supreme Court of Canada decision in *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII). In that case, the court, which was speaking in the context of a summary judgment motion, discussed a culture shift that must take place in relation to civil justice in Canada. It recognized that our civil justice system is premised upon an adjudication process that must be fair and just. The court went on to say, however, that undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes (see ¶ 24). It further stated that a fair and just process is illusory unless it is also accessible, proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure (see ¶ 28). While these comments were made in the context of a summary judgement motion, in my view, they are applicable to all civil cases in Canada. [emphasis added]

(ii) Cooperation Instructions

Principle 4 has been modified to stress the importance of cooperation – not just "meeting and conferring", as the concept was originally formulated – among counsel during the entire e-discovery process. The basic premise of "cooperation" is stated as follows:

> Principle 4. Counsel and parties should cooperate in developing a joint discovery plan to address all aspects of discovery and should continue to cooperate throughout the discovery process, including the identification, preservation, collection, processing, review and production of electronically stored information.[8]

Under Comment 4(e) of Principle 4, specific direction is given on how "good faith" sharing of information can facilitate an agreement being reached:

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[7] *Garner, supra* at paras 34-35. The Nova Scotia Court of Appeal has also accepted the proportionality principle, e.g. in *Blunden Construction Ltd v Fougere*, 2014 NSCA 52 at para 20.

[8] Sedona Canada Principles 2015, p. 16.

As stated above, an effective discovery planning process requires a meeting of the minds. The purpose is to facilitate proportionate discovery, not to create roadblocks. Open and good-faith sharing of relevant information is required for this purpose.

Discovery planning discussions are generally held on a "without prejudice" basis to facilitate the required level of openness. Once the discovery plan is signed, it becomes a "with prejudice" agreement.

The types of information properly exchanged during discovery planning are not privileged. These types of information include: search terms, names of custodians, systems from which information will be retrieved and the e-discovery process developed by the parties for use in the case. Further, describing discovery processes does not disclose trial strategy or limit counsel from being strong advocates for their clients' interests. Instead, it ensures a defensible framework inside which the case can proceed. Once the discovery plan is agreed upon, counsel can focus on the substantive aspects of and strategies for their case.

Accordingly, parties should describe the methodology they are employing for their case, including any steps they are taking to validate their results. If objections are raised to the validity or defensibility of the proposed process, the objections should be dealt with at the earliest possible stage. This level of openness ensures the discovery plan is meaningful and defensible at the earliest possible stage, potentially saving the clients the time, money and aggravation of having to re-do discovery processes at a much later date.

In cases where the parties (or a party) resist sharing relevant information or refuse to engage in the discovery planning process at all, counsel may consider sending a draft discovery plan to opposing counsel with a time line for agreement on its terms. If no response is received, the draft discovery plan may form the subject matter of a motion for court approval.[9] [footnotes omitted; emphasis added]

[9] Sedona Canada Principles 2015, p. 40. In Nova Scotia, see Rule 16.04 permitting agreements between parties for preservation of electronic information, and Rule 16.05 permitting agreements between parties for disclosure of relevant electronic information. Rule 16.06 governs in default of any agreement being reached by the parties.

(iii) Cost-Shifting Factors

Principle 12 has been updated to confirm that the producing party generally bears its own e-discovery costs in litigation, subject to any cost-shifting being ordered in appropriate circumstances.[10] The factors to be considered in cost-shifting scenarios have been expanded as follows:

1. whether the information is reasonably accessible as a technical matter without undue burden or cost;

2. the extent to which the request is specifically tailored to discover relevant information;

3. the likelihood of finding information that is important and useful;

4. the availability of such information from other sources, including testimony, requests for admission and third parties;

5. the producing party's failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessible sources, and the reasons for that lack of availability;

6. the total cost of production (including the estimated costs of processing and reviewing retrieved documents), compared to the amount in controversy;

7. the total cost of production (including the estimated costs of processing and reviewing retrieved documents), compared to the resources available to each party;

8. other burdens placed on the producing party, including disruption to the organization, lost employee time and other opportunity costs;

9. the relative ability of each party to control costs and its incentive to do so;

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[10] The Sedona Canada Principles 2015 (at p. 81) cite two Ontario cases as illustrating the discretion of the Courts to shift e-discovery costs and burdens where appropriate: (i) *Warman v National Post Company*, 2010 ONSC 3670 (CanLII), where the costs of a forensic expert to examine limited data on the plaintiff's hard drive would be paid initially by the defendant, subject to the trial Judge's discretion to deal with costs "in the cause"; and (ii) *Borst v Zilli*, 2009 CanLII 55302 (ONSC) where the plaintiffs' request to inspect the defendant's e-data was found to be similar to a request to inspect property under the Ontario Rules, such that the costs of a computer consultant were to be borne by the plaintiffs. However, the costs of an independent lawyer to review the documents for privilege and relevance were to be shared by the parties in the circumstances. In both cases, the Ontario Court emphasized the need for proportionality.

10. the importance of the issues at stake in the litigation; and

11. the relative benefits to the parties of obtaining the information.[11] [footnotes omitted]

In Nova Scotia, these types of factors should be engaged in motions under Rule 14.07 where a disclosing party seeks an indemnity for the expense of disclosure in order to achieve "proportionality", as meant by Rule 14.08(3).[12] These types of factors should not be limited to discovery motions in *actions* but should also find favour in *applications*.

(iv) Thesis for Discussion

The thesis behind this overview – and the corresponding presentation – is that greater adherence to the principles of proportionality, cooperation, and cost-shifting would have a positive impact on the development of e-discovery in Nova Scotia. This impact should be felt via greater efficiency in moving matters through pre-trial stages, that is, *proportionately and cooperatively* in both actions and applications. All users of the civil litigation system – from parties to lawyers to Judges – should also benefit from enhanced transparency of e-processes being adopted as well as their corresponding costs, thereby better informing cost-shifting remedies in appropriate circumstances.

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[11] Sedona Canada Principles 2015, p. 81-82.

[12] Nova Scotia Civil Procedure Rule 14.08(3) provides:

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 limited;

(b) the importance of the issues in the proceeding to the parties.

APPENDIX A

RECENT ARTICLES ON E-DISCOVERY

1. Ken Chasse, "Electronic Discovery: The Concept and Purpose of the Sedona Canada Principles 2nd Edition". *Slaw*, February 12, 2015, http://www.slaw.ca/2015/02/12/electronic-discovery-the-concept-and-purpose-of-the-sedona-canada-principles-2nd-edition/

2. Dera J. Nevin, "10 things lawyers can do to make e-discovery easier for clients". (Mar. 2014) 38 *Can. Lawyer* No. 3, 18-19

3. Dera J. Nevin, "E-discovery and litigation support: there is a difference". (July 2014) 38 *Can. Lawyer* No. 7, 18-19

4. Dera J. Nevin, "Evaluate the options: [e-discovery technology decisions]". (Nov. 2014) 38 *Can. Lawyer* No. 11, 19-21

5. Dera J. Nevin, "Puzzle or mystery?: [e-discovery]". (May 2014) 38 *Can. Lawyer* No. 5, 19-21

6. Brian Perry and Ian Dunbar, "Like it or not: Nova Scotia courts decide on production of electronic information". (Apr. 2014) 11 *Can. Privacy L. Rev*. 46-49

7. Shane Schick, "Chasing data: [the search for e-discovery tools]". (Oct. 2014) 38 *Can. Lawyer* No. 10, 37-41

8. Daniel Carmeli, "Keep an I on the sky: E-discovery risks forecasted for Apple's ICloud" *Boston College Intellectual Property & Technology Forum*, February 4, 2013, http://bciptf.org/wp-content/uploads/2013/02/Daniel-Carmeli-Cloud-Computing.pdf

9. Ari L. Kaplan, "Advice from counsel: Trends that will change e-discovery (and what to do about them now)". (2014) 12 *Ave Maria L. Rev.* 109-122