

Effective document management in large commercial litigation cases

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Early case assessment: identifying the universe of relevant documents

- **Custodians:** consider and speak with likely custodians/key players
- **Data sources and locations:** servers, local drives, laptops, home computers, tablets, handheld devices, USB keys, memory cards, backup tapes...
 - Meet with IT to understand systems, backup procedures and storage locations
- **Review needs and capability:** consider data volume and whether there is a need for advanced searching technologies and outside expertise (keeping in mind the issues and dollar value of the case)

Internal IT support v. outside experts

Internal IT Support

- Familiar with systems
- More cost-effective
- Preserves confidentiality



Outside Experts

- Significant resources may be required (particularly in large data collections)
- Understand forensic aspects of data collection
- Advanced collection and searching technologies

Litigation preservation and retention holds

- Duty to preserve documents once there is reasonable contemplation of litigation
- Circulate litigation hold notice with clear instructions:
 - Summarize the key issues
 - Explain that the duty applies to electronically stored information
 - Explain how to comply

Failure to preserve relevant documents and spoliation

- *McDougall v. Black & Decker Canada Inc.*, 2008 ABCA 353, relying on *St. Louis v. R.* (1896), 25 S.C.R. 649:

“Spoliation in law does not occur merely because evidence has been destroyed. Rather, **it occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation.** Once this is demonstrated, a presumption arises that the evidence would have been unfavourable to the party destroying it. This presumption is rebuttable by other evidence through which the alleged spoliator proves that his actions, although intentional, were not aimed at affecting the litigation, or through which the party either proves his case or repels the case against him.”

Failure to preserve relevant documents and spoliation

- ***Anderson v. St. Jude Medical Inc.***, 2012 ONSC 3660: Spoliation can be divided into four elements:
 - The missing evidence must be relevant.
 - The missing evidence must have been destroyed intentionally.
 - Litigation must have been ongoing or contemplated at the time the evidence was destroyed.
 - It must be reasonable to infer that the evidence was destroyed in order to affect the outcome of litigation.

Consequences of a finding of spoliation

- Adverse inference that the information contained in the missing document would be unfavourable to the party that lost it
- Cost consequences
- Exclusion of expert reports
- Dismissal of claim

Brandon Heating & Plumbing (1972) Ltd. v. Max Systems Inc., 2006 MBQB 90:

- Plaintiff failed to preserve disks and hardware central to defence position.
- “The prejudice in this case is clear. The very things by reference to which central issues raised in defence could be expected to be determined have disappeared. They cannot be replaced, and there is nothing the plaintiff can now do to restore the situation. The defendant is, in fact, left with very little...
Is there a remedy short of dismissal which would address the defendant's prejudice at this stage? I think not.”

Tort of spoliation

- Tort of spoliation not currently recognized in Canada

Spasic Estate v. Imperial Tobacco Ltd. (2000), 135 O.A.C. 126:

- The defendants brought a motion to strike out portions of the claim alleging that the defendants intentionally destroyed evidence relating to the inherent dangers of cigarettes, relying on the tort of intentional spoliation of evidence.
- The Court of Appeal acknowledged that in Canada the tort of intentional spoliation of evidence was not yet recognized, but allowed the issue to proceed to trial since the law on this issue is not fully settled.



Proportionality in discovery – *Rules of Civil Procedure* (Ontario)

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. R.R.O. 1990, Reg. 194, r. 1.04 (1).

Rule 1.04(1.1): In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding. O. Reg. 438/08, s. 2.

Proportionality in discovery – *Rules of Civil Procedure* (Ontario)

Rule 29.2.03(1): In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,

- (a) the time required for the party or other person to answer the question or produce the document would be unreasonable;
- (b) the expense associated with answering the question or producing the document would be unjustified;
- (c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;
- (d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and
- (e) the information or the document is readily available to the party requesting it from another source. O. Reg. 438/08, s. 25.

Proportionality in discovery – *Rules of Civil Procedure* (Ontario)

Rule 29.2.03(2): In addition to the considerations listed in subrule (1), in determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person. O. Reg. 438/08, s. 25.

Sedona Canada principles addressing electronic discovery – Principle 2

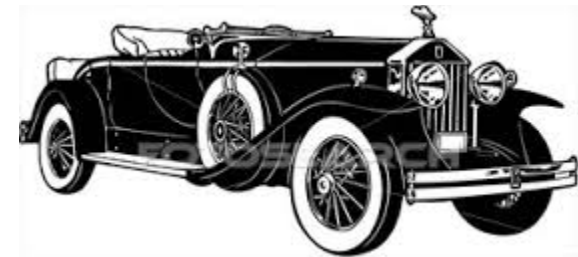
In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically 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.

Proportionality in discovery – What does that mean?

- “No one could tell me how much this would cost or how long it would take. To my mind the most expensive part of the whole exercise would be reviewing the search results to see what documents were relevant, what documents were not relevant and what documents were privileged... A lawyer or team of lawyers would have to do that review. How long that review would take and how many [sic] billable hours would be involved one can only guess. I am confident that the resulting expense would shock all but the most jaded of litigants... Weighing all of these factors, but particularly the certainty of heavy cost [the defendant] against the uncertainty of material benefit to the plaintiff, I decline to order that [the defendant] carry out the requested searches.”
- *Farris v. Staubach Ontario Inc.*, 2006 CarswellOnt 10914 (Ont. Master)

Proportionality in discovery – Allows for downsizing not upgrading

- “[A]n expansionary approach to proportionality is wrong. A parsimonious proportionality principle provides a useful tool for cases large and small. **The base line is that the Rules of Civil Procedure are designed for cases of all sizes, but the proportionality principle allows the court to downsize the procedure and still do justice for the parties. If downsizing is not procedurally fair then the normal rules should apply to the proceedings without augmentation...** The proportionality principles yields an ‘equality of arms’ by arms reduction and is not meant to prompt an arms race.”
- Court rejected idea that larger claims call for “a Rolls-Royce of procedure”.
 - *Ontario v. Rothmans Inc.*, 2011 ONSC 2504



Proportionality – Starting point for discovery

- “[T]he default rule for discovery should start with proportionality, and ‘a recognition that not all conceivably-relevant facts are discoverable in every case.’... Proportionality must be seen to be the norm, not the exception – the starting point, rather than an afterthought.”
 - *Warman v. National Post Co.*, 2010 ONSC 3670 (Ont. Master)
- “Counsel should be seeking to focus their production and discovery efforts on the information necessary for resolution of the case on the merits and not on unearthing every stray piece of evidence that might have marginal relevance.”
 - *L’Abbé v. Allen-Vanguard Corp.*, 2011 ONSC 4000 (Ont. Master)

The new test for relevance

Rule 30.02(1): Every document relevant 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. R.R.O. 1990, Reg. 194, r. 30.02 (1); O. Reg. 438/08, s. 26.

... replaces the old “semblance of relevance” test for disclosure and production of documents.

The new test for relevance

- “For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. **One fact is not relevant to another if it does not have real probative value with respect to the latter.**”
- Relevance “requires a determination of whether as a matter of human experience and logic the existence of ‘Fact A’ makes the existence or non-existence of ‘Fact B’ more probable than it would be without the existence of ‘Fact A’. If it does then ‘Fact A’ is relevant to ‘Fact B’. As long as ‘Fact B’ is in itself a material fact in issue or is relevant to a material fact in issue in the litigation, the ‘Fact A’ is relevant and prima facie admissible.”
- **“The new test requires that a party establish that a document is relevant, not that it may be relevant to some line of inquiry. The previous broad and liberal default rule of discovery is now gone.”**
 - *Meuwissen (Litigation Guardian of) v. Perkin*, 2013 ONSC 2732

Thank you

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