E-discovery and Discovery Plans: A Cautionary Tale

By Molly Reynolds

One of the most difficult aspects of civil litigation is the need to manage and control the document review and management aspects of the discovery process, especially e-discovery. A recent decision from the Ontario Superior Court of Justice underscores the need to manage the process early and efficiently. In *Corbett v. Corbett; Pace Credit Union*,[1] Justice Brown excoriated a party and its counsel for failing to comply with discovery demands.

In Ontario, the rules of civil procedure require that opposing counsel consult and have regard to *The Sedona Canada Principles Addressing Electronic Discovery*. These principles indicate that timely communication between counsel is required in developing and implementing any e-discovery plan, as is evident from the commentary associated with it:

> The purpose of the "meet and confer" is to identify and resolve e-discovery related issues in a timely fashion. The participants in the "meet and confer" emerge with a more realistic understanding of what is ahead of them in the discovery process.
>
> These Principles strongly encourage a collaborative approach to e-discovery, reflecting recent attitudes in Canada.

In *Corbett*, Justice Brown, a seasoned civil litigator before his appointment to the Bench, was provoked into write a scathing judgment in response to the failure of a party to comply with these principles. Justice Brown reviewed the obligations of counsel in developing an e-discovery plan and made the following critical observation:

> It is most unfortunate that a judge must recall for counsel the need to comply with such basic obligations [of professional responsibility], especially a counsel practising at a firm with the stature of the [...] firm. However, [counsel's] failure to respond in a timely fashion to communications from plaintiffs' counsel simply is not acceptable conduct from a barrister practising before our Court.

Justice Brown concluded that the "failure by counsel to deal in a timely manner with communications on e-discovery issues will only turn the whole area of e-discovery into an unnecessary obstacle to the timely adjudication of cases..." On the facts before him, Justice Brown ruled that if his previous e-discovery order (the breach of which "turned a simple matter of e-discovery into a game of 'hide and seek'") was not satisfied within two weeks, he would hear a motion against the defendant for contempt of court.

With such strong language and threats of sanctions, this case is a cautionary tale to be sure. There is a lesson to be learned for all litigants. The courts in Canada are becoming increasingly impatient with foot-dragging litigants, and view stalling tactics – dressed up in the guise of difficulties in reaching agreement on discovery plans – as nothing more than strategic opportunities generated by counsel to complicate and delay the discovery process in advance.

[1] 2011 ONSC 7161.

Does this mean that a Canadian litigant has to simply hand over the keys to the vault in order to avoid sanctions? Hardly. Rather, the courts are prepared to be fair in helping counsel implement reasonable discovery plans. For example, in *Warman v. National Post Company*,[2] Justice Short looked to the U.S. multifactored proportionality test, developed by Magistrate Judge James C. Francis IV in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*[3] These are the eight factors identified by the U.S. court and adopted in Ontario:

1. specificity of the discovery requests
2. likelihood of discovering critical information
3. availability of such information from other sources
4. purposes for which the responding party maintains the requested data
5. relative benefit to the parties of obtaining the information
6. total cost associated with production
7. relative ability of each party to control costs and its incentive to do so
8. resources available to each party

In the *Corbett* case, the Justice Brown was critical of a two-month delay in responding to an order. Given the risk of sanctions, the requirement of counsel to confer and the broad discussions that might ensue (for example, to deal with the *Rowe* proportionality factors), counsel must, in every case, approach the discovery component of a case with diligence. Defendants cannot just slough off discovery to another day. T

[2] 2010 ONSC 3670.
[3] 205 F.R.D.421 (S.D.N.Y. 2002).