



## Anne with an ‘E’, Discovery Plans with a ‘P’

November 19, 2019

By Amrita V. Singh

In 2010, the Ontario Courts introduced discovery plans into civil litigation proceedings. Rule 29.1 of the *Rules of Civil Procedure* requires that parties agree to a discovery plan before the earlier of 60 days after pleadings close or later should the parties so agree, or attempting to obtain evidence in the action. The Rule requires that discovery plans be in writing, and include (i) the scope of documentary discovery, (ii) that every document relevant to any matter in issue shall be disclosed regardless of privilege claims, and (iii) that the Court on a motion may grant leave to withhold disclosure or production until after the determination of an issue in the action. However, there was no provision permitting the Court to impose a plan where the parties failed to agree.

In amendments to the *Rules* this year, the Court has now been granted the ability to impose a discovery plan upon parties where they cannot agree. If the Court does so, then Rule 29.1 does not apply. This has created confusion for parties who have discovery plans imposed by the Court with which they disagree.

In a [recent decision](#), the Court for the first time since the *Rules* amendment, imposed elements of a discovery plan in a copyright action relating to Netflix’s “Anne with an ‘E’” television program (the action alleges infringement of Sullivan Entertainment’s rights in its iconic Anne of Green Gables works). After canvassing the issues in the proceeding, including the requirements to prove copyright infringement, Master Short noted that one of the problems with the *Rules* amendment is that it is unclear how a party challenges the Court’s ruling if unsatisfied with it.

Master Short noted that while an application to the Court to resolve discovery plan disputes may avoid long delays from parties failing to agree to a plan, motions seeking the Court’s intervention will add to the Court’s load. While for routine disputes the Court could implement “the usual terms” of a plan, there would be difficulties where the claims are novel, making it hard for the Court to choose in its entirety, one party’s version of the discovery plan.

Master Short noted that the *Rules* amendment may effectively result in the Court using “baseball style” arbitration, where the arbitrator cannot pick a middle ground. Instead, one or the other side’s position must be selected in its entirety. He proposed that if parties are seeking the Court’s assistance with a discovery plan, they should each define the nature and extent of the categories of production that they each assert is appropriate for the areas of production sought by the other. As a result, the Court’s normal process would not be to “split the difference”, but to choose the “most practical and reasonable” of the proposed plans in each category of production.

Regarding the parties’ ability to appeal, Master Short noted that in his view, rather than an immediate appeal by a party dissatisfied with the discovery plan ordered by the Court, the extent of production should be capable of being revisited at a later stage of the action. This would allow the parties and proceeding to follow the least expensive and most expeditious path to an appropriate result. This decision provides much needed guidance regarding the implementation of Court-ordered discovery plans where parties disagree.

Content shared on Bereskin & Parr’s website is for information purposes only. It should not be taken as legal or professional advice. To obtain such advice, please contact a Bereskin & Parr LLP professional. We will be pleased to help you.