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# A Matter of Principle: Litigants Must Follow the *Sedona Principles* in E-Discovery

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In a key decision for any party staring down the barrel of extensive electronic production, Justice Mitchell confirmed that the Sedona Principles[1] are not simply guidelines to be selectively applied if and when convenient, but rather form an integral part of the Ontario discovery regime and impose enforceable obligations under the *Rules.*

In *Palmerston Grain v Royal Bank of Canada*,[2] the Court defined its expectations for what Ontario litigants are required to include in their discovery plans. The Court also provided detailed guidance on the interplay of relevancy and proportionality as shaped by the pleadings.

## BACKGROUND

Justice Mitchell's decision is the latest in a series of discovery motions in litigation between RBC and the plaintiffs, Palmerston.

The discovery dispute at issue on this motion originated in November of 2012. At that time, the parties had agreed to a consent order outlining a two-phase discovery process and a timetable for the completion of the balance of the steps in the litigation (the "**Consent Order**"). The Consent Order set out the following timeline pertaining to Documentary Production:

Phase 1 of Documentary Production to be exchanged by December 15, 2012;

> Phase 2 of Documentary Production, constituting consultation on e-discovery to take place by January 11, 2013, and completion of e-discovery productions to take place by February 28, 2013.[3]

Neither phase was defined further. After the parties produced their documents, it became clear that the parties had very different understandings of what Phase 1 and Phase 2 entailed. Palmerston envisioned Phase 1 as encompassing the core documents of the litigation (whether stored electronically or in a paper file), and expected Phase 2 to fill any gaps in Phase 1. RBC understood Phase 1 to encompass traditional production of paper records, with Phase 2 targeted to address e-discovery of electronically stored information.[4]

In July of 2013, Palmerston brought a motion seeking to compel RBC to make additional Phase 1 documentary production. RBC brought a cross-motion asking the court to direct the parties to meet and discuss the search terms that were to be applied to the e-discovery contemplated in Phase 2. In this initial discovery motion, the Court found that the timetable embodied in the Consent Order was the "discovery plan," and no further direction on the scope of those obligations was necessary.[5]

After further production was made following the July 2013 motions, disagreement about the scope of Phase 1 and Phase 2 continued.

The parties finally brought reciprocal cross-motions before Justice Mitchell in June of 2014 seeking, among other things, further and better productions from one another, and a decision as to what 'Phase 2' entailed. RBC also asked the Court to impose a discovery plan to conclusively define the scope of the parties' production obligations going forward. This discovery plan included specific search parameters that had been identified and refined by the parties as recently as the days before the hearing of the motion.[6]

Justice Mitchell's decision on these cross-motions is a significant development in the law of e-discovery.

## THE DECISION

When faced with RBC's request for court approval of its discovery plan, the plaintiffs argued that there already was a discovery plan in place - namely the Consent Order from November 2012 that contained the nebulous 'Phase 2' language.

Justice Mitchell reviewed the Consent Order, and concluded that this timetable was not a discovery plan because it did not meet the content requirements of Rule 29.1.03(3). She confirmed that Rule 29.1.03(3) requires a discovery plan to be in writing and include all of the following:

> (a) the intended scope of the discovery, considering relevance, costs, importance and complexity of the issues;
>
> (b) the dates for service of each party's affidavit of documents;
>
> (c) information regarding the timing, costs and manner of production of documents by the parties and any other persons;
>
> (d) the names of persons for examinations for discovery, and the timing and length of examinations; and,
>
> (e) any other information for an expeditious and cost-effective discovery process that is proportionate to the importance and complexity of the action.[7]

Since the Consent Order was not a discovery plan, and Phase 2 remained undefined, it fell to Justice Mitchell to determine the appropriate scope of Phase 2 and the parties' production obligations. She ultimately determined that the reasonable scope of Phase 2 was delineated in the discovery plan proposed by RBC.[8]

Because the parties had already agreed that documentary production would involve e-discovery, the Sedona Principles automatically applied to the production process. Furthermore, Rule 29.1.03(4) of the *Rules of Civil Procedure* "require[d] the parties to consult with one another and have regard to the Sedona Principles."[9] Justice Mitchell confirmed that "the parties must comply with these principles."[10]

However, the 'meet and confer' meetings mandated by the Sedona Principles had not taken place due to the ongoing debate over whether the Consent Order amounted to a discovery plan. Her Honour noted that the plaintiffs "refuse[d] to consider further the Sedona Principles".[11] The Court followed the principle set by *Harris v. ATC Aviation Technical Consultants,*[12] and held that failing to comply with the Sedona Principles constituted a breach of the *Rules*.

Since the parties had been unable to agree on their e-discovery obligations, Justice Mitchell determined "the court must provide its direction and guidance to the parties on the scope of e-discovery *having regard to the Sedona Principles*" [emphasis added].[13] Justice Mitchell went on to consider whether the discovery plan proposed by RBC was reasonable. Consistent with the Sedona Principles, Her Honour placed relevance and proportionality at the forefront of her analysis.[14]

The issues identified in the pleadings dictated the scope of e-discovery. This was "not simply a breach of contract case"; the plaintiffs had alleged that RBC breached fiduciary duties and duties of good faith, and claimed in excess of $8 million in damages, including punitive damages. In short, the complexity of these issues and the significant quantum of the claim required that RBC be granted a broader scope of e-discovery to allow it to properly answer the plaintiffs' allegations.[15] The proposed discovery plan and scope of discovery for both parties as proposed by RBC was therefore reasonable.

The Court approved the discovery plan filed by RBC, subject to a few modifications.[16] This follows *Siemens Canada Ltd v Sapient Canada Inc*,[17] where it was determined that the court has authority to impose a discovery plan when the parties cannot agree to one themselves.

## IMPLICATIONS

This decision stands as a ringing endorsement of the *Sedona Principles.* Since they first made their way into the *Rules* in 2010, there have been relativity few reported decisions driving home the message that litigants are bound to follow the *Sedona Principles* in precisely the same way they are bound to follow the *Rules.*

When debates about the nature and scope of e-discovery prevent a matter from moving forward on its merits, this decision reiterates the Court's ability to wade into the fray and impose a resolution.

It also reinforces the importance of consultation and cooperation between counsel, both during preliminary considerations of e-discovery, and also as production unfolds. While Justice Mitchell imposed one party's discovery plan on the other, she made it clear that the parties' obligations did not start and stop with what was written on the page. She explicitly noted that the search parameters contained in the approved discovery plan may require refinement as the e-discovery process unfolds, and left the door open for the parties to amend the discovery plan on mutual written agreement.

Finally, the decision reminds litigants that their obligation to abide by the *Sedona Principles* – and the consultation requirements articulated therein – are extant for so long as the discovery process continues.

## ABOUT THE AUTHORS

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## FOOTNOTES

[1] "The Sedona Canada Principles Addressing Electronic Discovery" developed by and available from The Sedona Conference (the "Sedona Principles").

[2] 2014 ONSC 5134 (Ont. S.C.J.).

[3] *Ibid.,* para. 8.

[4] *Ibid.,* paras. 53-54.

[5] *Ibid.,* para. 10.

[6] *Ibid.,* para. 73.

[7] *Ibid.,* para. 42.

[8] *Ibid.,* para. 75.

[9] *Ibid.,* para. 43.

[10] *Ibid.,* para. 46.

[11] *Ibid.,* para. 47.

[12] 2014 CarswellOnt 4709 (Ont. S.C.J.).

[13] *Palmerston, supra* note 2, para. 56.

[14] *Ibid.*, paras. 59-60.

[15] *Ibid.,* paras. 67-68

[16] *Ibid.*, paras. 75-76.

[17] 2014 ONSC 2314 (Ont. Master).