

## *The Sedona Canada<sup>SM</sup> Commentary on Proportionality in Electronic Disclosure & Discovery*

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This Commentary provides a practical supplement to *The Sedona Canada Principles* by defining the concept of proportionality, its basis in law, and its application in various contexts. It also offers guidance to parties, lawyers, and judges in finding solutions to discovery dilemmas that honour the principle of proportionality.

The Commentary proposes ten principles of proportionate discovery:

1. The burdens and costs of preservation should be weighed against the potential value and uniqueness of the information when determining whether its preservation is required.
2. Discovery should initially be focused on those sources of information relevant to allegations, defences and issues that are supported by material facts and which are considered most important to the resolution of the conflict.
3. Only reasonably accessible and non-duplicative information in support of plausible causes of action should be requested or produced.
4. Requests for further production should be reasonably specific and targeted.
5. The burden, cost and delay of further production should be balanced against the probability of yielding unique information that is valuable to the determination of the issues.
6. Refusals to requests for further production, not based on relevance or privilege, should include details of the burden, cost, delay and/or prejudice on which the refusing party is basing its position.
7. Burden and expense that are the result of actions taken by the party asserting undue burden or expense should be weighed against that party.
8. A party's previous efforts to resolve problems through candour and cooperation should be considered, including in the cost award.
9. Non-monetary factors should be considered when evaluating the burdens and benefits of discovery.
10. The value of technological tools and approaches to reduce the volume of irrelevant and/or duplicative information should be considered in weighing the burden and cost.

The Commentary follows the ten principles with a discussion of discovery planning and its importance to balancing the burden, cost, and time of discovery against the need for information that will help the parties and the court determine the outcome of the dispute on the merits.

Two tables are included as appendices to the Commentary. The first summarizes the rules related to proportionality and relevance in discovery in all Canadian jurisdictions. The second outlines factors to be considered when applying proportionality analyses at each stage of discovery.

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