A key focus of the rules of evidence is on the search for truth. However, before one gets to the stage of applying the rules of evidence, a number of obstacles may impede a party's ability to marshal the evidence itself. Reliable evidence that would assist a trier of fact in finding the truth may not be accessible to a litigant. This is because other legal rules – some linked to the rules of evidence, some altogether separate – forbid or obstruct the collection and use of such evidence, on the basis of public policy objectives unconnected to the search for truth.

This paper discusses three of the principal legal obstacles to accessing and using relevant evidence in the civil litigation context: (1) privacy laws; (2) confidentiality rules; and (3) the principle of proportionality in the discovery process.

Listing these legal impediments to the collection and use of reliable evidence – all reflecting important social goals in their own right – highlights the fact that our system of civil justice seeks to achieve both “more” and less than the truth at the same time. It seeks to achieve more than truth, in the sense that the goal of the system is to find the truth without sacrificing other important values such as personal privacy, commercial secrecy and access to justice. But it tolerates achieving less than the truth, because the effect of accommodating these other values is to limit access to evidence that would help paint a true picture in the courtroom of what actually happened at a particular moment in time.

Privacy Laws and the Impact of PIPEDA

Since 2001, with the coming into force of the federal Personal Information Protection and Electronic Documents Act\(^1\) (PIPEDA) in Canada, the protection of privacy interests has become a central feature of our legal system. Prior to PIPEDA, Canada had not had a uniform or comprehensive legislative regime recognizing privacy interests, although some provinces possessed privacy legislation of varying scope.

PIPEDA provides that organizations engaged in commercial activity shall not collect, use or disclose an individual’s personal information without that person’s prior knowledge and consent, subject to certain exceptions. “Personal information” is broadly defined in section 2 of the Act as “information about an identifiable individual.” Notably, personal information need not be confidential to be subject to protection under PIPEDA – it need only be “personal.”

\(^1\) S.O. 2000, c. 5.
PIPEDA provides that a party can disclose personal information in order to comply with a court order or with the rules of court relating to the production of records once an action has been commenced. This is a critical provision of PIPEDA for the civil litigation process. It means that, in cases where personal information is relevant to a litigation claim, a party need not be concerned with violating PIPEDA by disclosing and producing that personal information if required by law to do so. However, if otherwise irrelevant personal information is found in documents that are producible because of other information they contain, prudent practice (and, likely, PIPEDA itself) dictates that the producing party redact the personal information since disclosure of the personal information is not strictly required in order to comply with the production obligation. A similarly cautious approach with respect to the disclosure of personal information should be taken during oral discovery, and in filing materials with the court as part of a record or at trial.

One of the most significant questions raised by PIPEDA, in connection with the civil litigation process, is whether the statute restricts a party’s ability to prepare for and conduct litigation. Although PIPEDA permits a party to disclose personal information under a court order or rule of court, much of the process of preparing for litigation, both before and after a claim is issued, involves the collection, use and disclosure of personal information by a party, on a discretionary basis, when investigating the background facts of the claim and preparing to examine witnesses. There is no explicit provision in PIPEDA authorizing a party to collect, use and disclose personal information for these purposes. As noted in Ferenczy v. MCI Medical Clinics, one of the leading decisions considering this issue, PIPEDA “is complex and so broadly worded that a reasonable argument could be made to extend its reach so far as to transform both civil and criminal litigation into something very different than it is today.”

The answer to this significant question about the restrictions that PIPEDA places on the conduct of litigation continues to be explored in the case law. One of the earliest contexts in which the issue arose was in cases involving surveillance. A strict interpretation of PIPEDA’s consent requirement with respect to collecting, using and disclosing personal information could have made it illegal for private investigators (who earn their living collecting, using and disclosing personal information without consent) to do their work.

The Ontario Superior Court of Justice considered the issue of PIPEDA’s application to the use of evidence collected by a private investigator in Ferenczy. This case involved a patient suing her doctor for malpractice. To rebut the claim, the defendant doctor sought to enter into evidence a videotape made by a private investigator showing the plaintiff performing an activity she claimed she could not perform. The plaintiff objected to the admission of the tape into evidence on the basis that the collection, use and disclosure of her personal information without her consent violated her right to privacy under PIPEDA.

The Court rejected the plaintiff’s objection for three principal reasons. First, PIPEDA does not contain a provision prohibiting the admission into evidence of personal information obtained in contravention of the statute. The Court found that, as a result, the traditional test for admissibility applied, which required a weighing of the probative value of the evidence against the prejudicial effects of its admission. The Court held that the tape was highly probative, and should be admitted notwithstanding any violation of PIPEDA.

Second, the Court held that, in any event, PIPEDA did not apply to the collection, use and disclosure of the video evidence. PIPEDA contains an exemption allowing the collection, use and disclosure of personal information by an individual for “personal or domestic purposes.” The Court

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2 PIPEDA, s. 7(3), allows disclosure without consent if such disclosure is “required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records.”


4 Ibid. at para. 27.
concluded that defending against a lawsuit is a personal use and not a commercial activity, therefore the “personal purposes” exemption applies. The Court then found that the private investigator was acting as the “agent” of the defendant, and was therefore protected by the exemption.

The Court also found that PIPEDA did not apply because the plaintiff, by commencing the lawsuit, had implicitly consented to the collection of personal information that related to her claim. The Court stated: “One who takes such a step surely cannot be heard to say that they do not consent to the gathering of information as to the nature and extent of their injury and the veracity of their claim by the person they have chosen to sue.”

The third reason the Court rejected the plaintiff’s privacy objection was that PIPEDA explicitly permits the collection of personal information without consent for certain investigatory purposes.

Paragraph 7(1)(b) of PIPEDA states that personal information may be collected without consent if it is “reasonable for the purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province.” The Court concluded that the “laws of Canada or a province” include the common law and that an investigation of a breach of the common law may include a private investigation. The personal information collected through the private investigation could further be disclosed, the Court concluded, under paragraph 7(3)(i) of PIPEDA, which permits disclosure as “required by law.”

The specific issue raised by Ferenczy with respect to private investigators has been resolved through amendments to PIPEDA. Paragraph 7(3)(h.2) of PIPEDA now provides that an organization may disclose personal information without the knowledge or consent of the individual if the disclosure is made by an investigative body and the disclosure is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province. The regulations under PIPEDA were amended so that the term “investigative body” includes licensed private investigators as well as insurance adjusters.

Notwithstanding these legislative changes, Ferenczy remains an important decision because the principles articulated in the case are of broader application — in particular, the finding that a breach of PIPEDA does not in itself result in inadmissibility of the personal information at issue, and the presumption of consent on the part of a plaintiff. The “personal purposes” exemption is also very important for personal litigants, although not available to corporate parties. The case also provides important commentary on the potential problems associated with interpreting PIPEDA broadly, with the Court noting in conclusion that “the wording of [PIPEDA] leaves a lot to be desired in terms of clarity and usefulness” regarding “many situations which can be envisaged that are common to and are a part of the fabric of litigation.”

Notably, the federal Privacy Commissioner has endorsed the concept that a plaintiff, by initiating a lawsuit, gives implied consent to the defendant to collect personal information about the plaintiff. The Privacy Commissioner’s view is that the implied consent is limited. It authorizes access only to the extent relevant to the merits of the case and the conduct of the defence.

Many unanswered questions remain relating to PIPEDA and its application to civil litigation claims. For example, although a plaintiff is deemed to consent to disclosure of personal information by initiating a lawsuit, it is unlikely that the same can be said about a defendant, whose involvement in the

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5  Ibid. at para. 31.
7  Ferenczy has been followed in subsequent cases. See in particular Bell ExpressVu Limited Partnership v. Rodgers, [2007] O.J. No. 4569 at para. 9 (S.C.J.).
8  Supra note 3 at para. 34.
9  Assistant Privacy Commissioner, Case Summary #311, issued August 9, 2005.
lawsuit is rarely truly voluntary. Query whether there is a principled basis upon which to argue that surveillance of a plaintiff is authorized by PIPEDA, but surveillance of a defendant is not. A related point is that the implied consent to disclosure of personal information likely does not apply with respect to witnesses with knowledge of relevant facts, who generally will not have chosen to be involved in the litigation process. Implied consent goes only so far, and then another rationale is required, if one is seeking to justify that the collection of personal information complies with PIPEDA.

Other questions raised by PIPEDA include (1) whether an organization can voluntarily disclose a customer’s personal information to settle a dispute before a lawsuit has been commenced; (2) whether a defendant in a proposed class action is permitted to supply information about putative class members to the proposed class counsel; and (3) whether a potential defendant to a lawsuit may rely upon PIPEDA in order to retain personal anonymity and avoid suit. In each case, PIPEDA may provide a barrier to disclosure, and may thus impede not only the search for truth, but also access to justice and the efficient resolution of claims. That barrier can presumably be removed through court order, but the court would need to at least consider privacy interests before making such an order.

The latter issue – the right to invoke PIPEDA in order to retain anonymity – has been considered by the courts. In *BMG Canada Inc. v. John Doe*, for example, representatives of the music industry brought a motion in Federal Court to compel the major Canadian Internet service providers to disclose the names, addresses and other personal information of customers who had allegedly downloaded songs and then shared them over the Internet in breach of copyright. The Court concluded that the test for disclosure of this personal information involved a weighing of the public interest in favour of disclosure against the legitimate privacy concerns of the persons sought to be identified.

In the particular case, the asserted public interest was the protection of the property rights of the music companies. The motions judge held that, although Internet customers have an expectation of privacy, “privacy cannot be used to protect a person from the application of either civil or criminal liability. Accordingly, there is no limitation in PIPEDA restricting the ability of the court to order production of documents related to identity.” In affirming this aspect of the motions judge’s ruling, the Federal Court of Appeal stated: “Modern technology such as the Internet … must not be allowed to obliterate those personal property rights which society has deemed important. … [I]n cases where plaintiffs show that they have a *bona fide* claim that unknown persons are infringing their copyright, they have a right to have the identity revealed for the purpose of bringing action.” The Court noted, though, that disclosure must be effected in such a manner that privacy rights are invaded in the “most minimal way.”

The decision in *BMG F.C.A.* has since been relied upon in other contexts, not involving proprietary interests. In *Warman v. Wilkins-Fournier*, a plaintiff sought disclosure of identifying information for eight individuals allegedly involved in conveying hate speech over the Internet. The Court quoted the statement of the motions judge in *BMG F.C.* regarding PIPEDA not restricting the court’s ability to order production of documents relevant to identity, and then distinguished that case on the basis that the public interest in upholding copyright law is “not as high” as the public interest in combating hate speech. In other words, the Court found that it is even more justifiable to order disclosure of personal information, notwithstanding PIPEDA, in the pursuit of compelling public purposes such as the promotion of equality and elimination of discrimination.

11 *BMG F.C.,* *ibid.* at para. 39.
12 *BMG F.C.A.,* *supra* note 10 at paras. 41-42.
Confidentiality

The interests protected by confidentiality safeguards are often confused with the interests protected by the right to privacy; in many cases they are, however, conceptually distinct. Confidentiality issues in litigation largely relate to the protection of trade secrets or other commercially sensitive information from exposure to competitors, although other types of information, including personal information, may be deemed confidential. An advocate wanting to protect confidential information will seek to impose a duty of confidentiality on the opposing party, to protect from further disclosure certain information that is required to be shared in litigation. In contrast, the right to privacy is an individual’s right to control the dissemination of his or her own personal information. That information may or may not be confidential, and will generally not be commercially sensitive.

Parties involved in litigation often wish the documents and information relevant to the lawsuit to remain confidential. However, the bare desire for confidentiality generally ranks behind the high priority given to the openness of the court system. The values of openness were expressed by Justice Dickson (as he then was) of the Supreme Court of Canada in Nova Scotia (Attorney General) v. MacIntyre:[14]

Let me deal first with the ‘privacy’ argument. This is not the first occasion on which such an argument has been tested in the courts. Many times it has been urged that the ‘privacy’ of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.

Indeed, it is the presumptive openness of court proceedings in Canada that has contributed in part to the rise of arbitration as an alternative dispute resolution mechanism; the parties in arbitration can control to a considerable degree the dissemination of their confidential information to the rest of the world, and to some extent to one another.

Nevertheless, there are still non-consensual protections available that courts will enforce to safeguard confidential information and thus limit access to relevant evidence. The openness of the court system does not entirely trump a party’s desire for secrecy. In particular, the following three remedies are available to a party seeking to maintain confidentiality:

1. Through redaction, a party may limit disclosure of irrelevant confidential information contained within otherwise relevant documents.
2. The deemed and implied undertaking rules impose some enforceable limits on the use that can be made of information gleaned through documentary and oral discovery.
3. Courts will, in appropriate cases, issue an order to protect the confidentiality of trade secrets and other commercially sensitive information.

Redaction

In Ontario, just as irrelevant documents need not be disclosed and produced in litigation, a party is entitled – through redaction – to maintain the confidentiality of irrelevant text within otherwise relevant and producible documents.[15] For example, the minutes of a board of directors meeting may reflect

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[14] [1982] 1 S.C.R. 175 at 185-86.
discussion on several agenda items, only one of which is relevant to the litigation. The text of the minutes relating to the irrelevant agenda items need not be disclosed.

As a best practice, a document that is redacted for confidentiality should clearly show the portion that has been redacted, and the opposite party should be told in general terms of the reason (e.g., irrelevance/confidentiality, solicitor–client privilege or litigation privilege). A party should not produce a document with a white or otherwise hidden redaction without providing notice of the redaction to the opposing party, since this would deprive the opposing party of the opportunity to test the determination of relevance made by the redacting party.

To avoid unnecessary motions with respect to redactions and to satisfy the opposite party’s counsel that the redacted text is actually irrelevant, counsel can be given an opportunity to inspect the redacted portion of the document (possibly on an undertaking not to disclose the confidential information to counsel’s client). Once these steps have been taken, the redacted document can be used in the proceedings without the irrelevant confidential information being formally produced or at risk of public disclosure.

The leading case on redaction of productions is the Federal Court of Appeal decision in Horn v. Canada.16 The Court confirmed a general rule that when a document has been found to be relevant and has been ordered produced, it must be produced for inspection in its entirety, absent the agreement of the opposing party. This general rule appears to permit the type of consensual arrangement suggested above, whereby documents are produced in redacted form but with the unredacted version made available for inspection to allow the opposing party’s counsel to be satisfied that the redacted text is truly irrelevant. At the same time, the Court noted that as an exception to this general rule of production, “clearly irrelevant” portions of relevant documents can be excluded from production. The Court stated, “Whether part of a relevant document can be withheld because it is irrelevant must ... be ascertained by reference to the pleadings.”17

Deemed/Implied Undertaking Rule

The deemed and implied undertaking rules provide limited protection against disclosure of confidential information because of several broad exceptions to the rules that authorize the use of the information for specified purposes.

In Ontario, Rule 30.1.01(3) of the Rules of Civil Procedure provides that all parties and their counsel are deemed to undertake not to use evidence subject to the rule for any purposes other than those of the proceeding in which the evidence was obtained. This rule applies to all evidence obtained through the discovery process.

The rule provides protection (and then only partial protection) primarily in cases that settle before going to trial and before the filing of any disclosed evidence in court in relation to a motion or other proceeding, because there is a broad exception allowing the subsequent use of any evidence that is filed with the court or that is given or referred to in court.18 The protection is only partial because, even if discovery evidence does not find its way into court, there is also a broad exception permitting the evidence obtained in one proceeding to be used to impeach the testimony of a witness in another proceeding.19 Finally, a court may order that the deemed undertaking does not apply, if the court is satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence.20

17 Ibid. at paras. 22, 25 (F.C.A.).
18 Rules of Civil Procedure (Ontario), Rule 30.1.01(5).
19 Ibid., Rule 30.1.01(6).
20 Ibid., Rule 30.1.01(8).
In the Federal Court, the implied undertaking rule is judge-made procedural law. The Supreme Court of Canada recently summarized the implied undertaking rule in *Juman v. Doucette*. The rule is that a party obtaining documentary and oral information on discovery is subject to an implied undertaking to the court not to use the information except for the purpose of the litigation unless and until the scope of the undertaking is varied by a court order, or a situation of immediate and serious danger emerges. The undertaking is imposed in recognition of the discovered party’s privacy interest and the public interest in the efficient conduct of civil litigation. At the same time, the implied undertaking rule is subject to exceptions, where these interests are trumped by a more compelling public interest. A party bound by the implied undertaking rule may therefore apply to the court for leave to use the information or documents otherwise than in the action.

**Protective Orders**

While the general rule in the Canadian court system is one of openness and accessibility to the public, the court will make exceptions to preserve confidentiality where the interests to be served warrant it. The Supreme Court of Canada expressed the point in *Sierra Club of Canada v. Canada (Minister of Finance)* in this way:

> The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is seen to be done, such public scrutiny is fundamental. The open court principle has been described as “the very soul of justice”, guaranteeing that justice is administered in a non-arbitrary manner. ...

A confidentiality order should ... be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects of the rights of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

Although in *Sierra Club* the Supreme Court was dealing with confidentiality orders in the context of the *Federal Courts Rules*, the reasoning of the decision has been applied in most Canadian provinces, including Ontario. In Ontario, the principles articulated by the Supreme Court are expressed, in part, in the *Courts of Justice Act*, which provides that all court hearings shall be open to the public, but that a court may order that any document filed in a civil proceeding be treated as confidential, be sealed and not form part of the public record.

The *Federal Courts Rules* similarly provide that hearings of the court “shall be open and accessible to the public,” but that on motion, the court may order that material to be filed shall be treated

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22 Ibid. at paras. 4, 30.
23 *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 at paras. 52-53 [*Sierra Club*].
25 *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, s. 135(1), 137(2). See also Rule 30.11 of the *Rules of Civil Procedure*, which provides that a relevant document may be deposited for safekeeping with the Registrar and thereafter not inspected by any person except with leave of the court.
as confidential. Before making such an order, the court must be satisfied that the material should be
treated as confidential “notwithstanding the public interest in open and accessible proceedings.”

The best-recognized exceptions to the general rule of openness and accessibility in the court
system are cases involving confidential intellectual property such as trade secrets and confidential
information regarding important commercial interests. Other cases in which the courts will impose
confidentiality safeguards are those involving minors, mentally disabled people and victims of sexual
assault.

In the commercial context, courts have granted protective orders when the party seeking the
protection can demonstrate that the harm that it will suffer through the disclosure of the confidential
business information outweighs the general principle of public access to court proceedings. The Supreme
Court in *Sierra Club* explained which types of commercial interests will outweigh the public interest of
disclosure:

[T]he phrase “important commercial interest” is in need of some clarification. In order to qualify as an “important commercial interest”, the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interest. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no “important commercial interest” for the purposes of this test. Or, in the words of Binnie J. in *F.N. (Re)*, the open court rule only yields “where the public interest in confidentiality outweighs the public interest in openness” [footnotes omitted].

Ontario courts have granted confidentiality orders in commercial cases where the parties have
demonstrated that public access to trade secrets and sensitive financial information such as marketing
figures and price lists would seriously hurt their competitive interests. On the other hand, a simple fear
that publicity might hurt a party’s reputation and result in lost customers is not a “serious risk to a
commercial interest.” Furthermore, the risk that information regarding a company’s insolvency may be
made public, thus resulting in the company’s demise, did not warrant the issuance of a confidentiality
order.

Motions for protective orders are common in the Federal Court, largely because most intellectual
property litigation occurs in that court. Protective orders are especially important in pharmaceutical
litigation. They can offer early-stage protection to highly sensitive costing and pricing information, as well
as confidential scientific information about drugs and their developmental processes.

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26 *Federal Courts Rules*, s. 29(1), 151(1) and (2).
The Federal Court of Appeal commented on the importance of protective orders in pharmaceutical litigation in *AB Hassle v. Canada (Minister of National Health and Welfare)*. The Court confirmed that “[p]rotective orders with respect to methods or processes of manufacture of pharmaceutical drugs are routinely sought early in the NOC Regulations proceedings and, it is fair to say, are generally granted.” The Court explained that the “perceived confidentiality” of the information at issue in these proceedings “is a cornerstone of the regulatory scheme set out in the *Food and Drug Regulations* ... and in the *Patented Medicines (Notice of Compliance) Regulations*...[footnotes omitted]”. The Court contrasted the countering public interest in these terms:

Let us not be naïve. There is little, if any, public interest in knowing the specific content of drug processes and no one can seriously argue that the issuance of protective orders of the type at issue in NOC proceedings imperils the principle of open justice.

The Federal Court has distinguished the early-stage protective orders discussed above from the type of protective order that a party would have to obtain in order to file material in the court under seal. This issue was considered in *Levi Strauss & Co. v. Era Clothing Inc.* The Court upheld a confidentiality order applicable during the pre-trial period that was prospective in nature and permitted the parties, “merely on their own say-so,” to claim that material was confidential, subject only to a challenge from a third party. The Court clarified, however, that Rule 151 of the *Federal Courts Rules* would likely also require that a party wishing to maintain the confidentiality of material in connection with the court hearing itself make a second motion before filing.

There are a number of situations in which damage from disclosure may arise from the opposite party itself seeing the confidential or sensitive documents. In appropriate cases, a court will make an order restricting disclosure even with respect to the opposite party. In some cases, a court will allow only certain officers of a corporate party to view documents subject to the protective order. In extreme cases, courts will allow only counsel of the parties to view documents. Courts will grant such a “counsel’s eyes only” protective order only under very limited circumstances. The Federal Court in *Merck & Co. v. Apotex Inc.* explained the necessity of limiting these types of orders. The Court held that the onus is upon the moving party to establish the need for such a restriction on ordinary disclosure, concluding that “such orders represent a serious inroad into the right ordinarily afforded to an opposite party to see all documents relevant to the case. A ‘bald’ statement that such an order is necessary is insufficient.” Nevertheless, there are circumstances in which information is sufficiently sensitive that “counsel’s eyes only” orders for counsel’s eyes only are ordered by both Ontario courts and the Federal Court.

**Proportionality in Discovery**

Starting January 1, 2010, the *Rules of Civil Procedure* in Ontario will feature a new Rule 29.2 titled “Proportionality in Discovery,” which will apply to both documentary and oral discovery. Notably, the rule limits the circumstances in which a party must produce relevant documents or answer relevant questions. It states in part as follows:

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**Footnotes**

34 Ibid. at para. 3.
35 Ibid. at para. 4.
36 Ibid. at para. 7.
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.

Overall Volume of Documents

(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.

Also being added to the Rules of Civil Procedure on January 1, 2010 is new Rule 1.04(1.1), which is a broad proportionality principle applicable to the interpretation and application of all of the rules, and will state: “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.”

The proportionality principle reflected in these two new rules has long implicitly guided judicial decision making with respect to discovery to some degree, but has never been expressed so explicitly nor so bluntly. The proportionality principle is an overt requirement that rather than the court considering only issues of relevance when deciding what information and documents must be disclosed, it should also consider pragmatic factors such as cost, time, prejudice, the orderly progress of the action and the comparative ease of obtaining the information elsewhere. The court must also consider the discovery request in the larger picture, taking into account the importance of the case, its complexity and the dollar amounts at stake. Proportionality requires the court to conduct a balancing exercise, weighing relevance against other important social goals such as, in particular, access to justice – achieved by minimizing the costs of litigation and streamlining the litigation process.

The introduction of an explicit proportionality principle is significant for many reasons and, overall, is to be welcomed. However, one of the important and ultimately profound implications of the proportionality principle for the discovery process is that evidence that is relevant to the matters in issue will nonetheless not be ordered disclosed or produced in instances in which the court concludes that other social interests (efficiency, cost-reduction, timeliness) outweigh the importance of the search for truth, taking into account all pertinent factors. The significance of this approach to the discovery process will be felt particularly in cases with lower dollar values, where courts will be more likely to decide that it is disproportionately expensive to order broad-ranging discovery. The goal of access to justice will be served, in part, by limiting access to evidence.

Conclusion

Privacy, confidentiality and proportionality are only three of the important social values that Canadian law seeks to protect within the civil litigation process, in a manner that is inevitably in tension with the search for truth. Other such values include the right to counsel (reflected in the law of solicitor–client privilege), the belief in an adversarial system of justice (reflected in the doctrine of litigation privilege) and
the protection of national security and other public goods (reflected in the principle of public interest immunity). Ultimately, a party’s ability to access the evidence required to properly prosecute or defend a civil action will depend upon the weight given, at any point in the development of the Canadian legal system, to these values relative to the value of ascertaining the truth and the balance struck by the courts.