New Rules require 'cultural shift'

But what's to stop lawyers from launching proportionality motions?

BY SUSAN HUGHES
For Law Times

Exposing the expense and delays of litigation in Victorian England in his novel *Bleak House*, Charles Dickens describes the fictional case of *Jarndyce v. Jarndyce* as one that has aged and withered generations of the Jarndyce family.

Even the city of London is cloaked with fog, smoke, and mourning due to the eternal wrangling and delays:

"*Jarndyce and Jarndyce* drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises."

While thankfully the legal system has changed greatly from Dickens' time, the high cost of litigation still prevents access to justice for those with and without deep pockets. The new Rules of Civil Procedure, which became effective on Jan. 1 and grew out of justice Coulter Osborne's Civil Justice Reform Project, aim to make the system more accessible and affordable to Ontarians.

But will the Rules create a new landscape for civil justice, one that's more streamlined, less expensive, and more co-operative than the traditional adversarial system? It's still early days, but response from lawyers is fairly positive.

Kelly Friedman at Ogilvy Renault LLP is "cautiously optimistic." She has been speaking recently on the new buzzword of proportionality in discoveries.

"I've heard tons of criticism since I'm speaking so much," she says. "There are a lot of skeptics. Essentially, the whole purpose to the changes is to improve access to justice. The idea of proportionality really comes from the area of electronic discovery. We've got a history of litigation from the United States where parties started having quite onerous preservation and production obligations."

Even before the electronic era, Friedman says discovery was becoming too costly and that producing and preserving data had become so onerous that files weren't getting to trial, not only for those who didn't have the money to litigate but for the defendants she represents as well.

"Just the electronic discovery portion would cost a half a million dollars," she says. "They would settle early or pay to get out. The issue for me is to get to trial on the merits so that no one has to settle due to burdensome discovery obligations."

Proportionality factors into the new Rules in three ways. It's been brought into the interpretative provision at the beginning of the Rules, Friedman explains, and to court decisions on discovery. At the same time, lawyers now have to consult the Sedona Canada principles for electronic discovery in making the discovery plan. They state that electronically stored information is discoverable and that the parties should ensure the discovery process is proportionate to the nature and scope of the litigation, its relevance and costs, and the burden and delay it may impose on the parties.

"What it means is you weigh the importance of the issues [and] the money at stake with the costs and burdens of doing a certain task," Friedman says. "At its most simplistic, it's a cost-benefit analysis where the benefit is the ends of justice, not the parties. We look at the costs to the parties [and] the court system and the prejudice that will [result] versus the evidence needed to resolve the case. That's what matters as opposed to what one side thinks they need or want to best argue their case.

'In theory, it should limit the amount of discovery and force lawyers to know their case better in advance,' says Anne Kennedy.

"As a litigator, I will always want evidence that will discredit a witness, but the question is, 'Am I entitled to it? Is it relevant?' It'll be up to the motion judge or master to make the decision. The overarching concept of proportionality is whether the evidence is needed to resolve the key issues in the case."

Anne Kennedy, who heads up Pallett Valo LLP's commercial litigation practice, agrees the changes are a step in the right direction, particularly in terms of proportionality and curtailing costs. "It will force lawyers to come to terms with the theory of their case," she says. "They can't plan to do a week's worth of discovery and meander through the documents. They're going to have to be more focused."

Nevertheless, Kennedy says it's too early "to tell how it's actually going to play out in reality. In theory, it should limit the amount of discovery and force lawyers to know their case better in advance."

While Kennedy has heard people suggest that seven hours aren't realistic for discovery in complex cases, she's also hearing concerns about unco-operative counsel. "What I have heard is that rules anticipate that counsel are all going to be reasonable and co-operative, and in an ideal world that would be the case. We don't live in an ideal world, and I think there will be occasions where some parties will be frustrated. I'm not quite sure how that's going to work."

Friedman echoes that sentiment, noting she has heard people express concern the changes will lead to proportionality motions and therefore won't increase access to justice but instead increase the cost.

"It's a legitimate concern. It really depends so much on the reasonableness of counsel to negotiate and discuss these things. The idea is you get together with your opponent and try to resolve these issues as to what is proportional and come to agreements as to search terms, what databases are going to be searched, whether you have to go to back-up tapes or not.

"Experienced litigators say that's not realistic. People are not going to sit down and agree. It really demands a shift in culture in the way litigation is done and it's not going to happen overnight. It's going to have to become a lot less adversarial. The whole concept is we no longer want people to win or lose at litigation based on discovery tactics."

One great discovery tactic Friedman says has worked for years is to tell the other side up front how much a discovery request is going to cost. "It has worked beautifully. The judiciary is fed up with things not being resolved on the merits, not letting people have their day in court.

"The best litigators in the country are ones that are able to build a whole strategy and not only be able to deal with the merits of the case but have a whole range of tactics that get them where they need to be. Often, they never get to the merits because of their tactics. That's what's happening in class actions: settlement before certification."

So what if skeptics are right and you're up against a bully litigator who won't co-operate?

Friedman says she would triage the case. "I would argue before a judge that they're being unreasonable and make a discovery plan that would say, 'I'm going to give you this, and after you've done some discovery on it, if you can convince me or a judge that you need to go further, we'll go to the next stage.'" In other words, proposing a reasonable plan that tries to avoid production may work better.

"Proportionality isn't just about whether the company could afford to give you the data. It's about all kinds of prejudice," she says. "There's private data in there, [as well as] inter-corporate issues. You can bring a company to a stop if you have to get a data centre going.

"My strategy would be [that] I agree to preserve it. I don't agree to produce it. We can fight about that later. Once it's preserved, a judge can order production. And it's not just getting e-mails. You have to have lawyers review it for relevance and privilege. Who can afford the process?

"People are scared. They're saying, 'Am I going to be in motion upon motion and constantly fighting with my colleagues about proportionality?' I think we're going to have a couple of tough years on it. I do think it's a cultural shift." LT