

# A Comparative Discussion of Who Pays for Document Discovery in Australia, Canada, Guernsey (Channel Islands), and Singapore and its Effect on Access to Justice

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## INTRODUCTION

The content of this Article was first presented at a symposium organized by the *Vanderbilt Law Review* to discuss the future of discovery in the United States.<sup>1</sup> More specifically, the topic for discussion was an ongoing debate in the United States about proposals by the U.S. Chamber Institute for Legal Reform and Lawyers for Civil Justice to adopt a “requestor-pays” discovery rule.<sup>2</sup> In a requestor-pays system, each party pays for the discovery it seeks, which includes the costs of discovery belonging to the other parties to the litigation. It is based on the theory that a requestor-pays rule will encourage each party to manage its own discovery expenses and tailor its discovery requests to its needs by placing the cost-benefit decision on the requesting party.<sup>3</sup> It is intended to discourage parties from using discovery as a weapon to force settlements without regard to the merits of a case.<sup>4</sup>

At the opposite end of the spectrum is a discovery system known as “producer-pays,” which is presently used in the United States. Under this system, the party producing the documents must pay to locate, identify, list, and make available the documents relevant to the

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1. Symposium, *The Future of Discovery*, 71 VAND. L. REV. 1775 (2018).

2. See *Public Comment to the Advisory Committee on Civil Rules Concerning Proposed Amendments to the Federal Rules of Civil Procedure*, U.S. CHAMBER INST. FOR LEGAL REFORM 2 (Nov. 7, 2013), [https://www.instituteforlegalreform.com/uploads/sites/1/FRCP\\_Submission\\_Nov.7.2013.pdf](https://www.instituteforlegalreform.com/uploads/sites/1/FRCP_Submission_Nov.7.2013.pdf) [<https://perma.cc/4MTX-5AR8>] [hereinafter *Public Comment*] (suggesting that “the Committee should consider, over the longer term, an amendment requiring each party to pay the costs of the discovery it requests”).

3. *Id.* at 15 (arguing that placing the costs of discovery on the party asking for it may “generally give incentives for the optimal production of information,” resulting in a “less expensive discovery system”).

4. *Id.* at 12 (noting that a “significant consequence of the current producer-pays rule is the routine settlement of even meritless claims”).

litigation at its own expense.<sup>5</sup> The genesis of the producer-pays presumption is largely an accident of history.<sup>6</sup> Historically, certain limitations on discovery production existed simply due to the form of discovery sought. When records were kept only on paper and photocopying was unavailable, the cost of providing discovery was minor. An implicit assumption arose that the producing party would pay.<sup>7</sup> Today, the impact of this discovery system is particularly dramatic when a party has made massive discovery requests.<sup>8</sup> Critics of today's system argue that discovery is often used as a weapon to impact the outcome of a case. As an example, where litigants request substantial volumes of information, that information must then be collected and reviewed by the producing party at considerable expense.<sup>9</sup>

This Article examines what is happening in some other countries with respect to requestor-pays rules to help inform the debate. It will canvass relevant discovery rules in four countries that have elements of both producer-pays and requestor-pays systems—Australia, Canada (the common law provinces and Quebec separately),<sup>10</sup> Guernsey, and Singapore. This Article also comments briefly on how those rules are working from an access-to-justice perspective. In each country, the general approach to document discovery is that each party to a lawsuit has an automatic obligation to locate, identify, list, and make available for inspection documents relevant to the matters at issue in the litigation at its own expense. Again, this is called the producer-pays system of discovery.<sup>11</sup> However, in all four countries there are also

5. Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 774 (2011) (“[A] party required to produce discovery requested by another party was—and to this day continues to be—assumed to bear whatever costs it incurred in the course of that production.”).

6. *Id.* (indicating that since the adoption of the Federal Rules of Civil Procedure in 1938, “the allocation of discovery costs has been governed by the presumption that the party from whom the information is sought—the producing party—must bear the expenses associated with the fulfillment of its opponent’s discovery requests”).

7. *Public Comment*, *supra* note 2, at 2 (identifying the rule that “the producing party bears the cost of production”).

8. *Id.* at 12 (arguing that the rule that the producing party pays “is the ultimate driver of expensive discovery because it incentivizes a party to lodge burdensome requests on the other side without any downside risk to itself”).

9. AM. COLL. OF TRIAL LAW. & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAW. TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2 (Apr. 15, 2009), [http://iaals.du.edu/sites/default/files/documents/publications/actl-iaals\\_final\\_report\\_rev\\_8-4-10.pdf](http://iaals.du.edu/sites/default/files/documents/publications/actl-iaals_final_report_rev_8-4-10.pdf) [<https://perma.cc/T56X-G34J>] (emphasizing that “cases of questionable merit . . . are settled rather than tried because it costs too much to litigate them”).

10. Unlike the other Canadian provinces, Quebec is a civil code jurisdiction and the parties to an action produce only the documents they intend to rely upon, at least initially.

11. Brittany K.T. Kauffman, *Allocating the Costs of Discovery: Lessons Learned at Home and Abroad*, INST. FOR ADVANCEMENT AM. LEGAL SYS. 27 (Sept. 2014),

requestor-pays elements at play. The most significant are: (1) courts have some discretion to order that the requestor pay costs at the discovery stage;<sup>12</sup> (2) the requestor normally pays for nonparty discovery, at least the nonparty's costs;<sup>13</sup> and (3) the requestor, if unsuccessful on the merits, ordinarily has to pay for a portion of the discovery costs because of "loser-pays" cost shifting.<sup>14</sup>

We conclude that, in the context of the judicial systems in each country discussed, the elements of a requestor-pays system do not generally impede access to justice but could be expanded to address concerns in cases like class actions, in which the discovery burdens and the loser-pays exposure to costs are asymmetrical and can pressure defendants to settle for extraneous reasons unrelated to the merits of the case.

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[http://iaals.du.edu/sites/default/files/documents/publications/allocating\\_the\\_costs\\_of\\_discovery.pdf](http://iaals.du.edu/sites/default/files/documents/publications/allocating_the_costs_of_discovery.pdf) [<https://perma.cc/62C7-X8ZW>] (establishing that in Canada, "[p]roduction costs during discovery are generally treated in a similar manner as in the United States, with the responding party bearing the costs of collection, review, and production"); see also *Managing Discovery: Discovery of Documents in Federal Courts*, AUSTL. L. REFORM COMM'N 91 (Mar. 24, 2011), <https://www.alrc.gov.au/sites/default/files/pdfs/publications/Whole%20ALRC%20115%20%2012%20APRIL-3.pdf> [<https://perma.cc/2GYV-7QVU>] (noting the "ongoing obligation on the party giving discovery").

12. See *Federal Court of Australia Act 1976* (Cth) s 43(3)(h)(i) (stating that the court or judge may "order the party requesting discovery to pay in advance for some or all of the estimated costs of discovery").

13. Elizabeth Atlee et al., *Third Party Subpoenas: Reversing a Cost Center in the Law Department*, 35 ACC DOCKET 60, 61 (Jan. 1, 2017) (recognizing that "countries like Australia . . . provide cost-shifting protocols for non-party compliance").

14. See, e.g., *A Guide to Civil Proceedings in Guernsey*, BEDELL CRISTIN 3 (Aug. 2015), <https://www.bedellcristin.com/media/1564/a-guide-to-civil-proceedings-in-guernsey.pdf> [<https://perma.cc/865T-6V3K>] (identifying the application of the principle that "costs follow the event . . . so that the successful party ought to obtain an order for his costs to be paid by the unsuccessful party"); see also TAT LIM, LITIGATION AND ENFORCEMENT IN SINGAPORE: OVERVIEW (June 1, 2016), Westlaw 9-575-0765 (describing the general rule in Singapore to be "that the unsuccessful party is usually ordered by the court to pay the successful party's legal costs").

## I. OVERVIEW OF DISCOVERY IN AUSTRALIA, CANADA, GUERNSEY, AND SINGAPORE<sup>15</sup>

### A. Australia

#### 1. System of Discovery

The Australian court system has both a state and federal arm.<sup>16</sup> Within each state, the courts are divided into three levels: lower courts, intermediate courts, and the Supreme Court.<sup>17</sup> The two federal territories also have their own courts—similar to the state courts—but without the intermediate level.<sup>18</sup> The Australian states are New South Wales, Victoria, Queensland, South Australia, Western Australia, and Tasmania.<sup>19</sup> The two territories are the Northern Territory and the Australia Capital Territory.<sup>20</sup> The two main federal courts are the Federal Court and the Family Court. Sitting over all of the courts is the High Court of Australia.<sup>21</sup>

Discovery in Australia is limited to document discovery.<sup>22</sup> There is no provision for oral discovery,<sup>23</sup> although there are mechanisms by which this result can be achieved. Discovery normally commences once pleadings are closed and before witness statements or affidavits are served.<sup>24</sup>

Discovery in Australia can be mandatory (i.e., not predicated on a request from the other party) or dependent on obtaining an order from

15. See *Survey of International Litigation Procedures: A Reference Guide*, FOUND. INT'L ASS'N DEF. COUNS., <http://imis.iadclaw.org/iadcimis/Foundation/Projects/Survey%20of%20International%20Litigation%20Procedures/IADCFoundation/Projects/Survey%20of%20International%20Litigation%20Procedures.aspx> (last visited Sept. 29, 2018) [<https://perma.cc/4CMF-Z96E?type=image>] (providing surveys of the litigation procedures of various countries).

16. *The Law of Australia: Case Law*, JEROME HALL L. LIBRARY, <https://law.indiana.libguides.com/c.php?g=253037&p=1727270> (last updated Dec. 8, 2015) [<https://perma.cc/6RN3-BQPN>] (outlining the Australian court system).

17. *Id.*

18. *Id.*

19. *States, Territories and Local Government*, AUSTL. GOV., <https://www.australia.gov.au/about-government/states-territories-and-local-government> (last visited Sept. 30, 2018) [<https://perma.cc/24BE-FLYJ>] (listing the six states in Australia).

20. *The Law of Australia: Case Law*, *supra* note 16.

21. *Id.*

22. *Survey of International Litigation Procedures: A Reference Guide—Australia*, FOUND. INT'L ASS'N DEF. COUNS. 2 (2014), [https://www.iadclaw.org/securedocument.aspx?file=1/7/SILP\\_Australia.pdf](https://www.iadclaw.org/securedocument.aspx?file=1/7/SILP_Australia.pdf) [<https://perma.cc/MSV3-3W4V>] (noting the “obligations imposed on parties to give discovery of documents”).

23. *Id.* at 3 (acknowledging the lack of a provision for oral examinations for prehearing fact discovery and the general unavailability of depositions in Australia).

24. *Id.* at 2 (“Discovery occurs at the pre-trial stage so that all documents relevant to the case are disclosed by the parties before the hearing commences.”).

the court.<sup>25</sup> It depends on the jurisdiction and the court. In the Northern Territory, Queensland, and South Australia, there is a mandatory duty to identify documents and make them available for inspection. However, it is only in Queensland that this duty extends to producing copies of discoverable documents. In Tasmania, Victoria, and Western Australia, discovery cannot commence until a notice for discovery is served by the requesting party on the party producing discovery.<sup>26</sup> However, for example, in Victoria the court also has the power to either limit or expand the scope of the discovery requested at any stage of a proceeding.<sup>27</sup>

In the Federal Court, the Australian Capital Territory, and New South Wales, an order of the court is required to engage a party's discovery obligations. In the Federal Court, the 2011 Federal Court Rules dictate that the court will not grant discovery to a requestor unless doing so will facilitate the just resolution of the proceeding as quickly, inexpensively, and efficiently as possible.<sup>28</sup> In all jurisdictions, parties may also seek an order for discovery from the court. In practice, however, discovery is a collaborative process that does not eventuate until the parties (and ordinarily the court) have agreed on the scope of document discovery.<sup>29</sup>

If discovery takes place, a party's obligation to produce documents is limited to those documents that are relevant to the factual issues in dispute and which a party has in its possession, custody, or power.<sup>30</sup> The exact wording and scope of this obligation will vary according to the jurisdiction in which proceedings were commenced.<sup>31</sup>

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25. *Federal Court Rules 2011* (Cth) r 20.12 (Austl.) (proclaiming that "(1) [a] party must not give discovery unless the Court has made an order for discovery" and "(2) [i]f a party gives discovery without being ordered by the Court, the party is not entitled to any costs or disbursements for the discovery").

26. *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 29.02 ("Notice for discovery").

27. *Id.* rr 29.05-29.05.2.

28. *Federal Court Rules 2011* (Cth) r 20.11 (Austl.) ("Discovery must be for the just resolution of the proceeding.").

29. AUSTRALIAN REFORM COMM'N, *supra* note 11, at 89 (highlighting the expectation that parties "have discussed and agreed upon a practical and cost-effective discovery plan"); Federal Court of Australia, *Central Practice Note (CPN-1) — National Court Framework and Case Management*, 25 Oct. 2016, 10.3 (emphasizing that "the Court expects the parties and their representatives to take all steps to minimise its burden [discovery]. This involves co-operation between the parties. Informal exchange of documents may minimise the use of formal procedures").

30. FOUND. INT'L ASS'N DEF. COUNS., *supra* note 22, at 2 (discussing the obligation of a party to discover "all documents in its possession, custody or power which are relevant to a matter in issue in the proceedings").

31. For example, Rule 20.14 of the Federal Court Rules provides that "if the Court orders a party to give standard discovery, the party must give discovery of documents: (a) that are directly relevant to the issues raised by the pleadings . . . (b) of which, after a reasonable search, the party is aware; and (c) that are, or have been, in the party's control." *Federal Court Rules 2011* (Cth) r 20.14 (Austl.).

The outcome of discovery is ordinarily an exchange by the parties of lists of discoverable documents.<sup>32</sup> The forms of these lists are prescribed by the relevant court rules.<sup>33</sup> With the exception of Queensland, documents are produced for inspection after the lists have been exchanged.<sup>34</sup> Both the listing and production of discoverable documents are subject to practice guidelines relating to the use of electronic technology.<sup>35</sup>

In all Australian jurisdictions, the discovery obligation is a continuing obligation.<sup>36</sup> A party is required to disclose documents, provided those documents continue to be within a party's possession, custody, or power and are relevant to the issues in dispute.<sup>37</sup> The procedure by which this supplementary disclosure occurs varies according to jurisdiction.

Outside the documentary discovery process, a party wishing to request certain information has two options: service of interrogatories<sup>38</sup> or a notice to admit facts.<sup>39</sup> The use of interrogatories is not routine in Australian civil proceedings. In some Australian jurisdictions, interrogatories may only be delivered with leave of the court. Alternatively—and more commonly—the facts or issues in a proceeding

32. FOUND. INT'L ASS'N DEF. COUNS., *supra* note 22, at 2 (detailing that “[a]ll discovered documents must be listed, and the parties’ lists verified and exchanged”); *see also Federal Court Rules 2011* (Cth) rr 20.16–17 (Austl.).

33. *Federal Court Rules 2011* (Cth) r 20.17(1), Form 38; *Uniform Civil Procedure Rules 2005* (NSW) r 21.3(2) (list of documents must, amongst other things, include a brief description of the documents and specify who is believed to be in possession of the documents); *id.* r 21.4 (list of documents must be supported by a solicitor's affidavit and certificate stating that they have made reasonable inquiries as to the documents referred to in the Court order).

34. *Federal Court Rules 2011* (Cth) r 20.32 (a party may apply to the Court for an order requiring a party to produce any document that is included in the other party's list of documents and that is in that party's control); *Uniform Civil Procedure Rules 2005* (NSW) r 21.5 (within 21 days after the service of the list of documents, the producing party must make available the documents specified in the list, but only on request of the requesting party); *Uniform Civil Procedure Rules 1999* (Qld) reg 214 (a copy of a document included in the list of documents must be produced within 14 days of a request to do by the requesting party).

35. Federal Court of Australia, *General Practice Note (GPN-TECH) — Technology and the Court Practice*, 25 Oct. 2016, pt. 3; Supreme Court of New South Wales, *Practice Note No. SC Gen 7 — Use of Technology*, 1 Aug. 2008, paras. 10–12 (electronic exchange of discovery lists and documents).

36. AUSTRAL. L. REFORM COMM'N, *supra* note 11, at 91 (describing the imposition of discovery as an ongoing obligation)

37. *Federal Court Rules 2011* (Cth) r 20.20 (Austl.) (describing that “a party who has been ordered to give discovery is under a continuing obligation to discover any document: not previously discovered . . . that would otherwise be necessary to be discovered to comply with the order”).

38. *Federal Court Rules 2011* (Cth) r 20.01 (Austl.) (establishing that “[a] party may apply to the Court for an order that another party provide written answers to interrogatories”).

39. *Id.* (expressing that a party may require another party “for the purpose of the proceeding only, to admit the truth of any fact and the authenticity of any document specified in the notice to admit”).

may be further narrowed through a notice to admit facts. Service of a notice to admit invites a party to admit, for the purpose of the proceedings, those facts specified in the notice.<sup>40</sup>

## 2. Costs

In most Australian jurisdictions the court has broad discretion in relation to the awarding of costs.<sup>41</sup> There are two main classes of costs in Australia—those that arise by virtue of the retainer with the client and are governed by contract<sup>42</sup> and those that arise by order of the court (which may either be on an ordinary basis or on an indemnity basis).<sup>43</sup>

Courts are able to make cost orders *before* discovery in the following ways: (1) ordering the party requesting discovery to pay in advance for some or all of the estimated costs of discovery,<sup>44</sup> (2) ordering the party requesting discovery to give security for the payment of the cost of discovery,<sup>45</sup> or (3) making an order specifying the maximum cost that may be recovered for producing discovery or taking inspection.<sup>46</sup>

These cost awards are sometimes payable right away, and other times at the end of the court proceeding (referred to as “costs follow the event”).<sup>47</sup> In *Procter v Kalivis [No 3]*, the court made conditional cost orders that the applicants pay the respondent’s costs of responding to the application for preliminary discovery unless proceedings were instituted within two months.<sup>48</sup> In *ObjectiVision Pty Ltd. v Visionsearch Pty Ltd. [No 3]*, the court ordered that the applicant pay the respondent’s costs of complying with the preliminary discovery order right away.<sup>49</sup> There is no clear practice on when these types of orders will be issued other than that they are always subject to the court’s discretion and are fashioned to the particular facts at hand.<sup>50</sup> If a party

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40. *Id.*

41. *Federal Court of Australia Act 1976* (Cth) s 43(2); AUSTL. LAW REFORM COMM’N, *supra* note 11, at 228.

42. *See* AUSTL. LAW REFORM COMM’N, *supra* note 11, at 248 (stating that attorneys are well-positioned to negotiate costs through the retainer negotiation process).

43. *Federal Court of Australia Act 1976* (Cth) s 43(1).

44. *Id.* s 43(3)(h)(i).

45. *Id.* s 43(3)(h)(ii).

46. *Id.* s 43(3)(h)(iii).

47. *See Ruddock v Vadarlis [No. 2]* (2001) 115 FCR 229, 11 (Austl.) (holding that “it is accepted by decisions in both Australian and English jurisdictions that ordinarily costs follow the event and a successful litigant receives costs in the absence of special circumstances justifying some other order”).

48. *Procter v Kalivis [No. 3]* [2010] FCA 1194 (04 Nov. 2010) (Austl.).

49. *ObjectiVision Pty Ltd. v Visionsearch Pty Ltd. [No. 3]* [2015] FCA 304 (01 Apr. 2015) (Austl.).

50. *See Federal Court of Australia Act 1976* (Cth) s 43(2) (stating that “the award of costs is in the discretion of the Court or Judge”).



is successful in obtaining an order for costs, it will usually be subject to specific terms.

Once a case is over, costs are usually awarded to the successful party.<sup>51</sup> The amount payable is normally on an “ordinary basis” and will either be agreed upon between the parties or, in the Federal Court, assessed according to a scale of “allowable costs” fixed by the court rules.<sup>52</sup> A successful party generally recovers between fifty to sixty percent of the actual costs incurred (which includes lawyer’s fees). Within this, the reasonable costs of reviewing and collating documents for the purposes of discovery will be payable.

In some jurisdictions, cost orders can be made on an “indemnity basis.”<sup>53</sup> Indemnity cost orders are sometimes made against a party that has engaged in unreasonable behavior during the conduct of the proceedings.<sup>54</sup> If made, a successful party can recover one hundred percent of the actual costs incurred (which includes lawyer’s fees).

## *B. Canada*

### 1. System of Discovery

The Canadian court system (like Australia’s court system) has two main arms—provincial/territorial and federal.<sup>55</sup> There are ten provinces and three territories.<sup>56</sup> The provinces are Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, Alberta, and British Columbia.<sup>57</sup> The territories are the Yukon Territory, the Northwest Territories, and Nunavut.<sup>58</sup> The court system is roughly the same across Canada, except in Nunavut.<sup>59</sup> Each province has three levels of courts—a provincial or territorial court, a superior court, and an appellate court.<sup>60</sup> Nunavut

51. *Oshlack v Richmond River Council* (1998) 193 CLR 72 (Austl.).

52. *Federal Court Rules 2011* (Cth) sch 3 (“Costs allowable for work done and services performed.”)

53. *Federal Court of Australia Act 1976* (Cth) s 43(3)(g).

54. *Id.* ss 37N(4), 43(1).

55. See *Canada’s Court System*, CAN. JUD. COUNCIL, [https://www.cjc-cem.gc.ca/english/resource\\_en.asp?selMenu=resource\\_courtsystem\\_en.asp#ptc](https://www.cjc-cem.gc.ca/english/resource_en.asp?selMenu=resource_courtsystem_en.asp#ptc) (last visited Aug. 24, 2018) [<https://perma.cc/7G9V-Q738>] (describing the jurisdiction of the provincial/territorial courts and the federal court).

56. *Provinces and Territories*, GOV’T CAN. (July 25, 2018), <https://www.canada.ca/en/intergovernmental-affairs/services/provinces-territories.html> (last visited Aug. 24, 2018) [<https://perma.cc/4SPX-A58B>].

57. See *id.* (listing the provinces in a table).

58. See *id.*

59. See CAN. JUD. COUNCIL, *supra* note 55 (describing the different characteristics of the court system in the territory of Nunavut).

60. See *id.* (explaining the hierarchical systems of courts in each province).

has a single-level trial court.<sup>61</sup> The courts apply common law principles except in Quebec, where the courts apply the Quebec Civil Code.<sup>62</sup> The federal arm consists of the Federal Court (which specializes in areas such as intellectual property, maritime law, and federal provincial disputes), the Tax Court, and the Federal Court of Appeal.<sup>63</sup> The Supreme Court of Canada is Canada's final court of appeal.<sup>64</sup>

This Section of the Article deals with the common law provinces of Canada. Quebec is discussed in a separate section of this Article.<sup>65</sup>

The document discovery process in Canada commences once pleadings are closed. At this point, the parties are required to list all documents that are relevant to the proceeding that are or have been in the parties' possession, power, or control, even if the documents will not be used at trial. The test for relevance is very broad: if a document contains any information that touches on the issues in the case, it is relevant.<sup>66</sup> Once the lists are provided, the other parties can serve a notice to inspect the documents listed. If the other parties want a copy of the documents listed, they are entitled to obtain copies at their own expense.

In 2015, in response to electronic discovery and the larger volumes of documents being produced, the province of Ontario put in place a rule requiring parties to enter into discovery agreements before any discovery is commenced.<sup>67</sup> The discovery agreement is to include the following: (1) the scope of document discovery; (2) dates for the service of the list of documents; (3) information on timing, costs (including who will pay for discovery), and how documents are to be produced; (4) the names of people intended to be produced for oral discovery; and (5) any other information intended to result in the expeditious and cost-effective completion of the discovery process.<sup>68</sup> Generally, parties state in these discovery agreements that each party

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61. See *id.* (noting that the territory of Nunavut does not follow the traditional hierarchy of courts but has a single court which hears all cases).

62. See Peter Doody et al., *Court System of Canada*, HISTORICA CAN., <https://www.thecanadianencyclopedia.ca/en/article/courts-of-law/> (last updated Feb. 28, 2018) [<https://perma.cc/3KDH-2ZY7>] (stating that the civil code is the relevant source of law in Quebec).

63. See CAN. JUD. COUNCIL, *supra* note 55 (describing the different federal courts); Doody et al., *supra* note 62 (stating that the federal court has jurisdiction over disputes with the federal government, maritime issues, and intellectual property claims).

64. Doody et al., *supra* note 62.

65. See *infra* Section I.C.

66. Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r 30.02 (Can.) (stating that all relevant documents are within the scope of discovery); see also, e.g., Court Rules Act, B.C. Reg. 168/2009 r 7-1 (Can.); Court of Queen's Bench Rules, Man. Reg. 553/88 r 30.02(1) (Can.); N.B. Rules of Court, r 31.02 (Can.).

67. Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r 29.1 (Can.).

68. *Id.*

will bear the cost of producing its own documents, subject to each party being able to potentially recover those costs at the end of the proceeding.

Court rules in Canada are also starting to adopt the principles of proportionality in the discovery process. In Ontario, the Rules of Civil Procedure state that in determining if a party must produce a document, the court is to consider: (1) whether the time required to produce the document would be unreasonable, (2) whether the expense would be unreasonable, (3) whether producing the document would cause the party undue prejudice, (4) whether requiring the party to produce the document would interfere with the orderly progress of the action, (5) whether the document is readily available to the party requesting it from another source, and (6) whether such an order would result in the party having to produce an excessive volume of documents.<sup>69</sup>

Many of the provinces in Canada have adopted the Sedona Canada Principles Addressing Electronic Discovery.<sup>70</sup> Those principles reiterate that the producer of documents pays in the context of discovery of electronically stored information. The principles also allow parties to arrive at a different allocation of costs, subject to a final costs award, either by agreement or by court order.<sup>71</sup>

The discovery obligation is ongoing.<sup>72</sup> If a party discovers additional relevant documents after the initial list is produced, it has an obligation to submit a revised list that includes the new documents.

Production from nonparties is only possible in many provinces if a motion is brought to the court.<sup>73</sup> A court can order production of documents for inspection from a nonparty if the court is satisfied that the document is relevant and it would be unfair to require the moving party to proceed to trial without discovery of the document.<sup>74</sup>

## 2. Costs

The general rule in Canada is that the party in possession or control of the documents is to “produce” (that is, find and list) those documents at its expense. The requestor, however, must pay for copies of those documents.

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69. *Id.* r 29.2 (Can.).

70. *Id.* r 29.1.03(4) (Can.).

71. See PAUL M. PERELL & JOHN W. MORDEN, *THE LAW OF CIVIL PROCEDURE IN ONTARIO* 671 (LexisNexis Canada ed., 2017) (stating that parties are permitted to modify the default assumption that the producer of the document will pay for the cost of production).

72. Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r 29.1.04 (Can.).

73. See P.E.I. Rules of Civil Procedure, r 30.10(1) (Can.).

74. *Id.*

The courts have discretion to depart from the above rule if fairness and justice so require, or if its application would financially prevent a party from presenting its case in the action.<sup>75</sup> Courts in Canada have provided the following guidance as to when they will exercise their discretion and depart from the producer-pays rule.

In *Business Depot Ltd. v. Genesis Media Inc.*, the plaintiff alleged that the defendant had overcharged it between 1992 and 1998 and sought an accounting and reconciliation of all amounts invoiced.<sup>76</sup> The defendant stated that the relevant documents for the years 1992 through 1997 were scattered through 1,099 document storage boxes in a warehouse and were intermingled with other documents.<sup>77</sup> Going through the various boxes and ascertaining the documents relevant to the action would require more than one thousand hours of work.<sup>78</sup> The court stated that the claim was weak and that the request for documents might have been brought to pressure the defendant.<sup>79</sup> As such, the court held that the defendant was to locate and produce the relevant documents, but the cost was to be paid for by the plaintiff.<sup>80</sup>

In *Warman v. National Post Co.*, the defendant sought a mirror image of the hard drive on the plaintiff's personal computer.<sup>81</sup> The court discussed in detail the principle of proportionality and how approaches to discovery need to change.<sup>82</sup> The court agreed that obtaining some of the documents on the plaintiff's hard drive was justified.<sup>83</sup> The court ordered that a mirror image was to be made on a limited number of documents and was to be done by a mutually acceptable expert.<sup>84</sup> The defendant would pay the cost of production, but the trial judge would have the ultimate decision on allocating costs.<sup>85</sup>

In *Descartes Systems Group Inc. v. TradeMerit Corp.*, the plaintiff asked for production and forensic examination of the

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75. See *Veillette v. Piazza Family Tr.*, 2012 CanLII 5414, paras. 18–20 (Can. Ont. Sup. Ct. J.) (asserting that the court has the discretion to depart from the general rule “if its application would financially prevent a party from presenting their case in the action”); *Ho v. O’Young-Lui*, 2002 CanLII 6346, para. 10 (Can. Ont. Sup. Ct. J.) (“[T]he court has a discretion to depart from [the general rule] where fairness and justice so require.”).

76. *Bus. Depot Ltd. v Genesis Media Inc.* (2000), 48 O.R. 3d 402, para. 4 (Can. Ont. Sup. Ct. J.).

77. *Id.* at para. 7.

78. *Id.*

79. *Id.* at para. 29.

80. *Id.* at para. 1.

81. *Warman v. Nat’l Post Co.* (2010), 103 O.R. 3d 122, para. 12 (Can. Ont. Sup. Ct. J.).

82. *Id.* at para. 56.

83. *Id.* at para. 156.

84. *Id.* at para. 161.

85. *Id.* at para. 162.

defendant's computer hard drive.<sup>86</sup> The court held that the plaintiff was to bear the cost since it was evidence required and requested by the plaintiff.<sup>87</sup> If the plaintiff proved its case against the defendants, those costs could be recoverable.<sup>88</sup>

Canadian courts have also provided some guidance on when they will not depart from the producer-pays rule.

In *Gamble v. MGI Securities Inc.*, the plaintiff brought a motion seeking multiple forms of relief, including electronic production.<sup>89</sup> The defendant brought a cross motion ordering the plaintiff to pay for the costs of assembling electronic production.<sup>90</sup> Although the court dismissed the defendant's cross motion and refused to depart from the producer-pays principle, the court provided the following reasons: (1) the defendant ought to have raised the cost issue on the prior refusals motion;<sup>91</sup> (2) the Sedona Canada principles provide that the producing party generally bears production costs;<sup>92</sup> (3) the nature of the case (wrongful termination, substantial damages, and relevance of voluminous production) militated against requiring the plaintiff to "prepay" costs or pay costs on an interim basis;<sup>93</sup> (4) the defendant could easily obtain or identify the relevant documents;<sup>94</sup> and (5) there was no finding regarding the strength or weakness of the case.<sup>95</sup> In summary, courts in Canada will use their discretion to depart from the producer-pays system when justice and fairness require it.

When a case is over the court also has the discretion to award costs.<sup>96</sup> There is a loser-pays cost system for most types of cases (but not for class actions in some provinces). In this type of system, the losing party may be ordered to pay some or all of the winning party's legal costs and disbursements (including lawyer's fees). The basic rule is that costs on a partial indemnity scale follow the event. "Partial indemnity" means that the successful party does not recoup all of its costs but a

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86. *Descartes Sys. Grp. Inc. v. TradeMerit Corp.*, 2012 CanLII 5283, para. 7 (Can. Ont. Sup. Ct. J.).

87. *Id.* at para. 31.

88. *Id.*

89. *Gamble v. MGI Sec. Inc.*, 2011 CanLII 2705, para. 1 (Can. Ont. Sup. Ct. J.).

90. *Id.*

91. *Id.* at para. 25.

92. *Id.* at paras. 26–27.

93. *Id.* at para. 28.

94. *Id.* at para. 32.

95. *Id.* at para. 33.

96. *See Tossonian v. Cynphany Diamonds Inc.*, 2015 CanLII 766, para. 5 (Can. Ont. Sup. Ct. J.) (holding that the winning party pay more than ninety thousand dollars in legal costs to the losing party for the winning party's unreasonable behavior throughout the litigation, an example of the court's discretion).

portion of them.<sup>97</sup> In Ontario, for example, a successful party often recovers twenty-five to thirty-five percent of the actual costs incurred. These costs will include the costs of document discovery.

The court has discretion to depart from this normal rule, however, and order “substantial indemnity” costs, which is meant to more closely match the costs actually incurred by the successful party.<sup>98</sup> Substantial indemnity orders are rare and generally only ordered if the unsuccessful party has engaged in misconduct or has acted in oppressive or vexatious ways.

### C. Quebec

#### 1. System of Discovery

As noted earlier, the province of Quebec is governed by civil law. This stems back to when Quebec was founded by France in 1663 as “New France”. The application of civil law continued even once France ceded sovereignty over Quebec to Britain.

Document discovery in Quebec is set out in the Quebec Code of Civil Procedure (“the Code”) and differs from the rules applicable in common law provinces. One of the notable differences between the two systems is that, in Quebec, there is no general duty to produce or list all relevant documents that have been in a party’s possession, power, or control, especially if they are not intended to be used at trial.<sup>99</sup> For many years in Quebec, parties only had to produce documents they intended to rely on. Parties had to write each other request letters setting out what documents they wanted disclosed.

In 2016, revisions were made to the Code in several areas, including document discovery. The Code now emphasizes the obligation to preserve evidence,<sup>100</sup> cooperate, and communicate diligently. In terms of resource allocation, the Code is still more restrictive than the common law, directing the parties to limit the discovery to only “what is necessary to resolve the dispute.”<sup>101</sup> The Code now provides detailed mechanisms for gathering and collecting evidence before judicial proceedings take place.<sup>102</sup> The parties are required to mutually agree on a fully developed and binding case protocol that covers various issues

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97. Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r 1.03.

98. *Id.*

99. Bradley J. Freedman, *Discovery of Electronic Records Under Canadian Law—A Practical Guide*, 18 INTELL. PROP. J. 59, 63–64 (2004); Kauffman, *supra* note 11, at 26.

100. Code of Civil Procedure, C.Q.L.R., c C–25.01, s 20 (Can.).

101. *Id.* at a 19 (Can.).

102. *Id.* at a 253–57 (Can.).

including the timeline of the pretrial document discovery process as well as its terms, conditions, and foreseeable legal costs. As can be intuited from the above, the parties still have control over the conduct of their proceedings and enjoy significant flexibility in the management of their case as long as they abide by the principle of proportionality<sup>103</sup> This autonomy, however, is not unbridled. Quebec courts can intervene in judicial case management and oversight.

## 2. Costs

Common practice in Quebec is that the producing party must pay for the discovery process and other parties are entitled to obtain copies at their own expense; however, the litigants are free to determine other conditions that suit them. These terms and conditions are discretionary and stem from mutual agreement; the judge intervenes only when the parties are unable to conclude a case protocol.

If the parties do not follow the case protocol, assuming one has been agreed to, the court may issue a cost award against the noncompliant party.<sup>104</sup> When the court must decide on the cost allocation for document discovery, it may consider abuse of procedure, the financial resources of each party, and undue delay.

### *D. Guernsey*

#### 1. System of Discovery

The courts of Guernsey apply customary law and legislation. The principal court is the Royal Court. Additional courts, such as the Magistrate's Court and the Court of Appeal, have been added over the years.

In Guernsey, Part X of the 2007 Royal Court Civil Rules<sup>105</sup> provides for discovery in civil proceedings.<sup>106</sup> There are two general forms of discovery: standard discovery<sup>107</sup> and specific discovery.<sup>108</sup> An

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103. *Id.* at a 18. (Can.)

104. *Id.* at a 148–53 (Can.).

105. *Civil Rules*, ROYAL CT. GUERNSEY, p X (2007), <http://www.guernseylegalresources.gg/CHttpHandler.ashx?id=70635&p=0> [<https://perma.cc/D2PN-CV3G>].

106. Discovery is now referred to as disclosure in Guernsey. However, for purposes of this Article, the term “discovery” will be used for consistency.

107. Royal Ct. Civ. R. 65 (Guernsey).

108. Royal Ct. Civ. R. 71(1) (Guernsey).

order for discovery means standard discovery, unless otherwise specified.<sup>109</sup>

Standard discovery normally takes place at the close of pleadings; however, the parties to proceedings may agree, or the court may order, that standard discovery be dispensed with altogether.<sup>110</sup> If the parties cannot agree on how discovery is to take place, the court can make directions as part of its case management jurisdiction.<sup>111</sup> For example, it is often agreed or ordered that discovery will take place in stages.<sup>112</sup>

During standard discovery, a party must disclose by way of a discovery list all relevant documents. This includes documents that support or do not support its own or another party's case.<sup>113</sup> The term "document" is defined broadly: it includes "anything in which information of any description is recorded."<sup>114</sup> Where a discovery obligation is engaged, a party must disclose all documents in that party's control or which have been in his control.<sup>115</sup> This includes documents which the party does, or did, possess and those documents which it has, or has had, the right to possess, inspect, or copy.<sup>116</sup>

Each party ordered to give standard discovery has a duty to make a "reasonable" search for relevant documents.<sup>117</sup> Reasonableness in this context essentially refers to the proportionality of conducting a search in light of the number of documents involved, the cost of retrieving them, and the nature and complexity of the proceedings.<sup>118</sup> When a party determines that conducting a search would be "unreasonable" in the circumstances, it must assert this in its discovery statement and identify the category or class of documents to which the foregone search relates.<sup>119</sup>

As in Canada (other than Quebec) and Australia, a party's standard discovery obligation is ongoing, meaning that it continues for the duration of the proceedings.<sup>120</sup> In addition, any document referred to in pleadings, affidavits, witness statements, or expert reports is

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109. Royal Ct. Civ. R. 65(1) (Guernsey) ("An order to give [discovery] is an order to give standard [discovery] unless the Court directs otherwise.").

110. Royal Ct. Civ. R. 65(2)–(3) (Guernsey).

111. Royal Ct. Civ. R. 41(2)(a) (Guernsey).

112. Royal Ct. Civ. R. 72 (Guernsey).

113. Royal Ct. Civ. R. 65(4) (Guernsey).

114. Royal Ct. Civ. R. 63(1)(a) (Guernsey).

115. Royal Ct. Civ. R. 67(1) (Guernsey).

116. Royal Ct. Civ. R. 67(2) (Guernsey).

117. Royal Ct. Civ. R. 66(1) (Guernsey).

118. Royal Ct. Civ. R. 66(2) (Guernsey).

119. Royal Ct. Civ. R. 66(3) (Guernsey).

120. Royal Ct. Civ. R. 70 (Guernsey).



treated as having been “disclosed” and may thereafter be inspected by any other party to the proceedings.<sup>121</sup>

Subsequent to the exchange of discovery lists, a party may apply to the court under Royal Court Civil Rule 71 for an order for specific discovery.<sup>122</sup> Specific discovery differs from standard discovery in that it targets specific documents or classes of documents, certain types of document searches, or the extent to which such searches must be carried out.<sup>123</sup> For example, the court will generally order specific discovery of documents which are considered relevant and reasonably available but which have not been disclosed as part of standard discovery.

With extremely limited exceptions<sup>124</sup> (e.g., cases of personal injury or death), it is not possible to obtain pre-action discovery of documents<sup>125</sup> or to obtain orders for discovery of documents from third parties as part of the standard discovery process. However, other forms of relief may be available from the court in the appropriate circumstances. For example, *Systems Design Ltd. v. President of the States of Equatorial Guinea* confirmed that the Guernsey courts have jurisdiction to order third parties to disclose documents where it is “essential and necessary” to assist the plaintiff in achieving justice.<sup>126</sup> Such orders can be made ex parte and in support of both local and foreign proceedings.

## 2. Costs

Royal Court Civil Rule 74 provides that, where a party has a right to inspect documents provided in discovery, the party who disclosed the documents must permit inspection not more than seven days after receiving notice of the other party’s wish to inspect them.<sup>127</sup> However, where the inspecting party requests a copy of the disclosed documents, it must undertake to pay reasonable copying costs before being entitled to the copied documents.<sup>128</sup> This would include the reasonable expense of scanning documents for electronic copies. The

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121. Royal Ct. Civ. R. 73 (Guernsey).

122. Royal Ct. Civ. R. 71(1) (Guernsey).

123. Royal Ct. Civ. R. 71(2) (Guernsey).

124. Royal Ct. Civ. R. 75(1) (Guernsey).

125. GORDON DAWES, LAWS OF GUERNSEY 454 (2003) (“Discovery will not normally take place until after the case has gone en prevue . . .”).

126. *Sys. Design Ltd. v. President of Equitorial Guinea*, 2005–06 GLR 65, 95 (Guernsey Ct. App. 2005), <http://www.guernseylegalresources.gg/ccm/legal-resources/law-reports/Cases/GLR2005/GLR050065.htm> [<https://perma.cc/552Y-KDB6>].

127. Royal Ct. Civ. R. 74(b) (Guernsey).

128. Royal Ct. Civ. R. 74(c) (Guernsey).

requestor would not be required to pay the costs of collating and listing documents, nor for responding to requests for information. However, should the requestor be unsuccessful in the litigation, the court may award costs in favor of the disclosing party, including the costs associated with such discovery (often a very expensive element of the proceedings).

Under Royal Court Civil Rule 82, the court has wide discretion in relation to costs: the court may make any such order as to the costs of the proceedings, or of any stage of the proceedings, as it thinks just.<sup>129</sup> This includes the power to order one party to give security for another party's costs.<sup>130</sup> When made prior to discovery, such orders often take account of a producing party's costs of searching for and collating documents. Security for cost orders may help militate against the potentially oppressive effect of discovery requirements.

In Guernsey, at the conclusion of a civil action, the Royal Court generally awards costs (including a lawyer's fee component) in favor of the party that was *most* successful in the action on an issue-by-issue based assessment.<sup>131</sup> Costs may be ordered on the "standard"/"recoverable" basis or the "indemnity" basis.<sup>132</sup> Where an order for costs is made on the recoverable (as opposed to the indemnity) basis, the 2012 Royal Court Rules impose a cap on hourly rates that is less than commercial rates.<sup>133</sup> Accordingly, an order for recoverable costs typically returns to the successful litigant only a percentage of the costs he has actually incurred. The use of a "recoverable rate" is seen as promoting settlement in civil proceedings due to the usual sunk costs of litigation.<sup>134</sup> Recoverable costs can also include the costs associated with document disclosure.

When determining whether to make an order for recoverable or indemnity costs, the court will consider, firstly, the conduct of the parties. Where a party's conduct in the proceedings (whether in commencing or conducting the proceedings) has been "outside the

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129. Royal Ct. Civ. R. 82(1)(b) (Guernsey).

130. *Id.*

131. *E.g.*, *Jefcoate v. Spread Tr. Co.*, Civ. No. 1563, Judg. 44/2014, at 3 (Royal Ct. Nov. 17, 2014) (Guernsey), <http://www.guernseylegalresources.gg/CHttpHandler.ashx?id=93166&p=0> [<https://perma.cc/2TL5-9UYT>].

132. Royal Ct. Civ. R. 83(1) (Guernsey).

133. *See* No. III Order, Royal Court (Costs and Fees) Rules, 2012, 2.2, <http://www.guernseylegalresources.gg/CHttpHandler.ashx?id=80216&p=0> [<https://perma.cc/ME98-QLTM>] (capping the maximum recoverable "Advocates' fees" at £234 per hour).

134. *Glossary of Legal Terms*, GUERNSEY BAR, <http://www.guernseybar.com/about-the-bar/useful-info/glossary-of-legal-terms.aspx> (last visited Aug. 29, 2018) [<https://perma.cc/DYR6-4B4R>] ("Recoverable costs is the standard rate of costs which the Court allows to be recovered and is very likely to be less than the successful litigant has in fact paid to his own lawyer. This is quite deliberate policy to encourage parties to settle.").

norm,” the court may order that party to pay the other party’s costs of the proceedings on an indemnity basis.<sup>135</sup> In addition, the court will consider any payments made into court or other offers to settle prior to the trial, particularly if such offers match or exceed the amount awarded at trial.<sup>136</sup>

### *E. Singapore*

#### 1. System of Discovery

There are two tiers of courts in Singapore—the state courts and the supreme court.<sup>137</sup> The state courts are comprised of the district and magistrate courts—both of which oversee civil and criminal matters—as well as specialized courts such as the coroner’s courts and the Small Claims Tribunals.<sup>138</sup> Over ninety-five percent of all cases in Singapore are heard by the state courts.<sup>139</sup> The supreme court consists of the Court of Appeal and the High Court.<sup>140</sup> Singapore practices in the common law legal system.<sup>141</sup>

As in other countries canvassed in this Article, parties in Singapore are obliged to produce all documents relevant to the disputed issues and in the party’s possession, custody, or power.<sup>142</sup> The test for relevance is relatively broad and extends to all documents that could “(i) adversely affect [a party’s] own case; (ii) adversely affect another party’s case; or (iii) support another party’s case.”<sup>143</sup>

Aside from pre-action discovery applications,<sup>144</sup> discovery and inspection of documents generally take place after the close of

135. Royal Ct. Civ. R. 83(2) (Guernsey); see e.g., *Investec Tr. (Guernsey) Ltd. & Glenalla Properties Ltd.* (Guernsey Ct. App., 21 Jan. 2015, unreported judgement no. 04/2015, at [15]), <http://www.guernseylegalresources.gg/CHttpHandler.ashx?id=93941&p=0> [https://perma.cc/BMN3-XRTG].

136. *Thompson v. Masterson*, 2003–04 GLR 332, 336 (Royal Ct. Oct. 14, 2003) (Guernsey), <http://www.guernseylegalresources.gg/ccm/legal-resources/law-reports/Cases/GLR2003/GLR030091.htm> [https://perma.cc/U3NK-A3UW].

137. *Singapore Judicial System*, SUP. CT. SINGAPORE, <https://www.supremecourt.gov.sg/about-us/the-supreme-court/singapore-judicial-system> (last updated May 18, 2018) [https://perma.cc/U7YX-ESFX].

138. *Id.*

139. *Jurisdiction of the Supreme Court*, SUP. CT. SINGAPORE, <https://www.supremecourt.gov.sg/about-us/the-supreme-court/supreme-court-jurisdiction> (last updated May 18, 2018) [https://perma.cc/9PM5-2BMN].

140. *Id.*

141. *Our Legal System*, SINGAPORE MINISTRY L., <https://www.mlaw.gov.sg/our-legal-system.html> (last updated June 21, 2018) [https://perma.cc/22VF-7QE2].

142. Rules of Court O. 24, r. 1 (Sing.).

143. *Id.* (emphasis added)

144. A party may apply to the court to grant an order for the pre-action discovery of documents. Rules of Court O. 24, r. 6 (Sing.). The court would apply the same principles

pleadings. However, the obligation to produce relevant documents is ongoing and continues throughout the course of the proceedings.<sup>145</sup>

Once the pleadings are concluded, the court will typically hold a pretrial conference during which it will usually direct parties to file and serve lists of relevant documents in their possession, together with an affidavit verifying these lists.<sup>146</sup> In preparing their respective lists, parties have a duty to conduct adequate searches to ensure that they locate all relevant documents to be disclosed in the discovery process. Should a party locate a document at a later stage in the proceedings, it is required to file supplementary lists in line with its continuing disclosure obligations.<sup>147</sup>

Once the respective parties' lists of documents (or supplementary lists) have been served, their counterparties will technically be allowed seven days to inspect the documents in person and, should they wish to do so, take copies of the relevant documents.<sup>148</sup> In practice, however, it is nowadays more common for parties to simply make requests for copies of the relevant documents they wish to see on the basis of the list of documents alone.

## 2. Costs

The general principle is that the cost of complying with an order for discovery is borne by the party producing discovery, and disbursements incurred in providing copies are to be paid by the party asking for the copies. The court has the power to order a party to pay the whole or part of the costs for discovery if necessary to prevent injustice or to prevent an abuse of the process of the court.

There are not many published cases in which the court has exercised its discretion to allocate costs to the requestor. One example, however, can be found in the case of *Wartsila Ship Design Singapore Pte Ltd v. Liu Jiachun*.<sup>149</sup> In this case, the plaintiff sought an order from the court for certain documents to be retendered by one of the defendants in a different format to that originally submitted in the

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governing discovery to a pre-action discovery application. *See, e.g.*, Ching Mun Fong v Std. Chartered Bank, 4 SLR 185 (July 26, 2012), [http://www.singaporelawwatch.sg/Portals/0/Docs/Judgments/\[2012\]%20SGCA%2038.pdf](http://www.singaporelawwatch.sg/Portals/0/Docs/Judgments/[2012]%20SGCA%2038.pdf) [<https://perma.cc/A6NZ-5ATD>]. Broadly speaking, the party must show the pre-action discovery requested is relevant to the likely issues in the pending proceedings and is also necessary at this stage.

145. Rules of Court O. 24, r. 8 (Sing.).

146. Rules of Court O. 24, rr. 1, 3 (Sing.).

147. Rules of Court O. 24, r. 8 (Sing.).

148. Rules of Court O. 24, r. 9 (Sing.).

149. [2014] SGHCR 13, [http://www.singaporelawwatch.sg/Portals/0/Docs/Judgments/\[2014\]%20SGHCR%2013.pdf](http://www.singaporelawwatch.sg/Portals/0/Docs/Judgments/[2014]%20SGHCR%2013.pdf) [<https://perma.cc/N7X2-N6LP>].

discovery process.<sup>150</sup> Whilst granting the order that the documents be retendered in the format acceptable to the plaintiff, the court ordered that the costs of the retendering be borne by the plaintiff on the grounds that the plaintiff had failed to raise objection to the format of the documents originally tendered within a reasonable time.<sup>151</sup> This had caused the defendant to continue to tender the remaining tranches of the documents in the original (unacceptable) format.<sup>152</sup>

Generally, at the end of a court proceeding, the courts apply the “costs follow the event” principle for most civil actions.<sup>153</sup> Such cost orders may involve the unsuccessful party bearing part of the successful party’s costs (i.e., expenses and lawyer’s fees). The unsuccessful party commonly pays about sixty percent of the actual costs incurred by the successful party but any cost order is ultimately at the court’s discretion.<sup>154</sup> The costs can be quantified as scaled costs, taxed costs, or fixed costs.

## II. EFFECT ON ACCESS TO JUSTICE

Do requestor-pays rules impede access to justice? We asked the contributors to this Article this question.

It is important to keep in mind in this analysis the full import of access-to-justice concerns. The Supreme Court of Canada has expressly stated that access to justice, one of the key imperatives for class actions, requires access to just results, not simply to process (that is, access to the courthouse) for its own sake.<sup>155</sup> Of course, both plaintiffs and defendants are entitled to access to justice.<sup>156</sup> While certain financial burdens in court proceedings can in some cases unduly impede access to justice (such as fees that have to be paid by every claimant in order to get a hearing date, regardless of financial means), not every financial burden in litigation will do so. Importantly, financial burdens that prevent litigants from bringing frivolous claims will not be perceived as unduly impeding access to justice—they may in fact increase efficiency

150. *Id.* at para. 2.

151. *Id.* at paras. 28–29.

152. *Id.* at para. 27.

153. *See, e.g., id.* at paras. 30–32.

154. *See, e.g., id.* at para. 31 (“[T]he Court has discretion to award costs . . . pursuant to Order 59, rule 3(2) . . .”).

155. *AIC, Ltd. v. Fischer*, [2013] 3 S.C.R. 949, para. 6 (Can.), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/13377/1/document.do> [<https://perma.cc/5ZT3-WS4Y>].

156. *Hughes v. Liquor Control Bd. of Ont.*, 2018 CanLII 1723, at para. 121 (Can. Ont. Sup. Ct. J.); *2038724 Ontario Ltd. v. Quizno’s Can. Rest. Corp.*, 2012 CanLII 6549, paras. 17–18 (Can. Ont. Sup. Ct. J.).

and overall access.<sup>157</sup> Even where financial burdens would otherwise impede access to justice, that concern can be managed by giving the court discretion to adjust or eliminate those burdens for persons of little means where there is sufficient merit to the claim.<sup>158</sup> It is with this lens that we examine the systems in the four countries. Set out below is what the contributors to this Article had to say about access to justice in their respective countries.

### *A. Australia*

The issue of requestor-pay rules is of particular moment in Australian class actions, in which there is often extensive (and very expensive) document discovery. In Australian class actions, it is only the lead (named) applicant that is at risk for costs in the event of an adverse outcome. The lead applicant is usually a “person of straw” without sufficient funds to pay for any costs. This means that respondents may be forced to defend an action at considerable costs especially in class actions, with no ability to recover those costs if they are successful, unless there happens to be a litigation funder that is directly liable to the defendant for the plaintiff’s loser-pays costs exposure.

### *B. Canada*

In Canada, the rules have a mix of producer- and requestor-pays components, but there is also the principle of proportionality in discovery which helps to control production and the ability of the court to shift costs both before and after trial. There is also recent encouragement by the Supreme Court of Canada to use motions for summary judgement earlier in proceedings, which could help to end claims with no merit earlier. There are undoubtedly some cases where the discovery burden, both in terms of cost and employee time, has an impact on the settlement of otherwise weak cases, especially in the class action context. But there will be many cases, like commercial disputes between two equally large companies, where it would be difficult to say that access to justice is out of balance. The new proportionality rules in discovery and the discretion in the court to shift costs of discovery in

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157. Trial Lawyers Ass’n. of B.C. v. British Columbia (Att’y Gen.), [2014] 3 S.C.R. 1, at para. 47, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/14375/1/document.do> [<https://perma.cc/U39Z-JXK3>].

158. See *id.* at para. 48 (“[A]s a general rule, hearing fees must be coupled with an exemption that allows judges to waive the fees for people who cannot, by reason of their financial situation, bring non-frivolous or non-vexatious litigation to court.”).

appropriate cases help to provide a better balance. Further research would be needed to consider which types of cases, such as class actions, may call for more shifting of upfront costs to provide a better balance of access-to-justice concerns.

### *C. Quebec*

The reform of the Quebec Code broadly supports the principle of proportionality inducing the parties to narrow the scope of document discovery. Limitations imposed by the new Code and the emphasis placed on a nonantagonistic approach tend to shift “Quebec procedure away from the traditional common law adversarial position.”<sup>159</sup> Since Quebec courts of law are also subject to the recommendations and guidelines provided by the Supreme Court of Canada, the incentives listed above will shape an already evolving justice system. The inclination of civil law judges to customize allocation of document discovery should mitigate adverse effects of those prohibitive costs and address access-to-justice apprehensions.

### *D. Guernsey*

The requestor pays only for the costs of copying documents which it is entitled to inspect, and so the other associated costs are borne by the disclosing party in the first instance. Thus, for example, a defendant to a weak claim is still likely to incur significant outlay by the end of the proceedings, even if the opposing party is ordered to pay the defendant’s costs (since it will usually be on a recoverable basis and thus there will be a shortfall between the costs incurred and those for which payment has been ordered). In that regard, the rules might be deemed insufficient to fully protect a defendant from the costs of disclosure in a weak claim.

### *E. Singapore*

On balance, given the wide discretion of the court to issue a cost-shifting order under Order 92 and Rules 4 and 5 of the Rules of Court if such “*order [is] necessary to prevent injustice or to prevent an abuse of the process of the Court,*” it is felt that the current rules in Singapore do not impede access to justice.<sup>160</sup>

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159. Rosalie Jukier, *The Impact of Legal Traditions on Quebec Procedural Law: Lessons from Quebec’s New Code of Civil Procedure*, 93 CAN. B. REV. 1, 23 (2015).

160. Rules of Court O. 92, rr. 4, 5 (Sing.) (emphasis added).

## III. CLASS ACTIONS

As noted above, there is some concern that in class actions the producer-pays system can impede access to justice by pressuring defendants to settle where there is little or no merit in the case or to settle for higher amounts than the merits of the case would otherwise warrant.<sup>161</sup>

Often in class actions the discovery burden is asymmetrical—the defendant possesses all of the documents and the plaintiff possesses few or none. On top of that, the loser-pays rule is often less effective as a deterrent to discovery abuse in class actions. In some jurisdictions, only the named plaintiff in a class action is responsible for costs and that person rarely has the ability to pay a substantial loser-pays costs award.<sup>162</sup> In other jurisdictions, there is a no-cost rule for class actions.<sup>163</sup> Further, in some jurisdictions, the named plaintiff can get indemnity for the loser-pays cost exposure from a third-party litigation funder.<sup>164</sup> The cost exposure is not practically on the person in control of the litigation, the representative plaintiff, or his or her lawyer, so it has less significance to them. They may accordingly be less concerned with running up the other sides' discovery or other costs.

While reform of class action rules could alleviate some of these concerns, there are other types of cases in which the same concerns would apply. Accordingly, more requestor-pays elements in the rules in these jurisdictions might facilitate more access to justice for defendants. If there are concerns that such rules could prevent cases with merit from coming forward, the court could be given the discretion to shift the costs back to the producer when the plaintiff shows the discovery is needed, the person does not have the resources to pay the producer's costs up front, and the person shows there is sufficient merit in the case to warrant the discovery at the producer's expense.

## CONCLUSION

While there are both producer- and requestor-pays components to the laws in the countries discussed above, it is clear that at least some degree of requestor-pays will not unduly impede access to justice. In

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161. These concerns, however, could also exist in any case in which the defendant faces a significantly higher discovery burden than the plaintiff.

162. Ontario Class Proceedings Act, 1992, S.O. 1992, c 6, s 31(2) (Can.).

163. British Columbia Class Proceedings Act, R.S.B.C. 1996, c 50, s 37 (Can.).

164. Houle v. St. Jude Med. Inc., 2017 CanLII 5129 (Can. Ont. Sup. Ct. J.); Moira Saville & Peta Stevenson, *Ripe for Reform: Improving the Australian Class Action Regime*, U.S. CHAMBER FOR LEGAL REFORM 36 (Mar. 2014), [https://www.instituteforlegalreform.com/uploads/sites/1/RipeForReformUS\\_web1.pdf](https://www.instituteforlegalreform.com/uploads/sites/1/RipeForReformUS_web1.pdf) [https://perma.cc/U4UK-YVTJ].



fact, more elements of a requestor-pays system might help improve access to justice for defendants in class actions and other cases where there are asymmetrical discovery burdens and costs.

The ultimate assessment of the need for more requestor-pays rules will depend on the extent to which there is perceived to be abuse in the discovery system in place in that jurisdiction, the extent to which discovery may be driving “unfair” settlements in cases with little or no merit, and the ability of the court to address the costs of discovery up front or with loser-pays costs awards to the successful party.