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Ensuring Cost Effective
and Compliant E-Discovery



BARRISTERS

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WHAT IS A GIGABYTE?

More than 90 percent of all business information is electronic in origin, and the majority of that is never printed, and if it was, it would fill boxcars. One laptop computer with a 60 gigabyte hard drive only half-filled would generate 2.25 million pages, or 1000 bankers' boxes if its contents were printed. The explosive growth in the volume of potentially discoverable information in litigation presents tremendous challenges including: How to deal with huge volumes and different types of electronic data, without incurring expense so disproportionate to the value of the case, that it can no longer be litigated.

CANADIAN E-DISCOVERY PROTOCOLS

- The Sedona Canada Principles and Commentary (draft)
- Ontario Guidelines
- B.C. Practice Direction
- Several provinces are proposing amendments to their *Rules*

THE SEDONA CANADA PRINCIPLES ADDRESSING ELECTRONIC DISCOVERY – At a Glance

1. Electronically stored information is discoverable.
2. In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account,
 - (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake;
 - (ii) the relevance of the available electronically stored information;
 - (iii) its importance to the court's adjudication in a given case; and
 - (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.

3. As soon as litigation is reasonably anticipated, parties must consider their obligation to take reasonable and good faith steps to preserve potentially relevant electronically stored information.
4. Counsel and parties should meet and confer as soon as practicable, and on an ongoing basis, regarding the identification, preservation, collection, review and production of electronically stored information.
5. The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.
6. A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information.

7. A party may satisfy its obligation to preserve, collect, review and produce electronically stored information in good faith by using electronic tools and processes such as data sampling, searching or by using selection criteria to collect potentially relevant stored information.

8. Parties should agree as early as possible in the litigation process on the format in which electronically stored information will be produced. Parties should also agree on the format, content and organization of information to be exchanged in any required list of documents as part of the discovery process.

9. During the discovery, process parties should agree to or, if necessary, seek judicial direction on measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronic documents and data.

10. During the discovery process, parties should anticipate and respect the rules of the forum in which the litigation takes place, while appreciating the impact any decisions may have in related actions in other forums.

11. Sanctions should be considered by the court where a party will be materially prejudiced by another party's failure to meet any obligations to preserve, collect, review or produce electronically stored information. The party in default may avoid sanctions if it demonstrates the failure was not intentional or reckless.

12. The reasonable costs of preserving, collecting and reviewing electronically stored information will generally be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.

e-DISCOVERY STAGES

- Planning
- Identification
- Preservation
- Collection
- Review
- Production

Client Planning



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graph TD; CP[Client Planning] --> ID[Identification of Data]; ID --> PD[Preservation of Data]; ID --> S[Strategy]; S --> PDP[Process the Data];
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Identification of Data

- who is involved?
- what are the sources?
 - in-house counsel
 - IT staff
 - talk to your expert/consultant



Preservation of Data

- even if e-discovery is not a certainty, simple steps can be taken to prevent inadvertent destruction
- who will do it? IT staff? Are they qualified? Use an expert?

Strategy

- decide on scope and why
- project your costs
- preserve chain of evidence for authentication at trial
- expert/consultant?



Process the Data

- what is the volume?
- what tools are best suited?
 - in-house or service provider?
- do the math on time and costs

Meet and Confer



Seek agreement on:

1. the format of production
2. privilege
3. costs



No Agreement = Court Order

SCOPE OF PRODUCTION/CONDUCT OF REVIEW

- Inherent nature and cost of e-discovery may require scope of production to be narrowed
- Over-production or irrelevant ESI may be as damaging to a party's interests as incomplete production
- Manually reviewing all ESI is cumbersome, time-consuming and expensive, so automated search tools should be utilized in appropriate cases



PRESERVATION OF ELECTRONICALLY STORED DOCUMENTS (1)

- Electronic documents or media containing them may be considered obsolete by the client in terms of its current business systems, but may nevertheless be recoverable to a readable form by specialized forensic methods
- Relevant meta-data may exist at the time an electronic document or source is located, but may be altered or lost simply in the process of making a copy of the relevant electronic files for litigation purposes

The collection plan should be designed to accomplish the following:

- a) determine the likely location of all relevant data;
- b) determine how to identify relevant data;
- c) organize, review and catalogue the data once it is identified; and
- d) co-ordinate the systematic and uniform collection and production of data from all locations.



TO LIMIT YOUR COST EXPOSURE CONSIDER THE FOLLOWING CATEGORIES

The cost of:

- a) The use of a expert's technologist or forensic specialist(s);
- b) Identifying, locating, and collecting electronic information;
- c) Privilege review;
- d) Duplication (use of automated deduplication);
- e) Quickly identify irrelevant data;
- f) Limiting the search for electronic data (ie. the pleading);
- g) Using only the specific time period for the information you are searching;

- h) Obtaining the native data file only if required;
- i) Create concept folders so reviewer can examine data in context to allow you to move from document review to context review;
- j) Preparation for discovery using third party services;
- k) Converting electronic database for use in standard litigation software;
- l) Conducting discovery in an electronic format;
- m) The cost to obtain information in an electronic format, than to scan paper, code and/or use optical character recognition software to convert the information to an electronic format.

TAKE CONTROL OF YOUR CASE FROM THE BEGINNING

Consider the following:

- The use of a expert's technologist specialist(s);
- The use of a expert's forensic specialist(s);
- Identifying, locating and collecting electronic information
- Privilege review
- Converting electronic database for use in standard litigation software



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RESOURCES:

WEBSITES FOR eDISCOVERY PUBLICATIONS

Publications		Website
The Sedona Canada Principles and other Sedona publications		www.thesedonaconference.org Click on Publications / WG7:Sedona Canada
Guidelines for the Discovery of Electronic Documents in Ontario		www.oba.org Click under Quick Links / Electronic Discovery Guidelines
National Model Practice Direction for the use of Technology In Civil Litigation / National Generic Protocol		www.cjc-ccm.gc.ca Click on Publications / Technology Issues
Canadian Case Law on e-discovery issues		www.lexum.umontreal.ca/e-discovery Click on Canadian E-discovery Case Law Digests (Common Law)
Model e-Discovery Precedents		www.oba.org/En/publicaffairs_en/E-Discovery/model_precedents.aspx
Electronic Discovery – A Reading List		www.practicepro.ca/practice/eDiscovery_Rlist.asp



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