

The Law On Discovery and Production of Electronic Evidence: Where Are We Now? Where Are We Going?

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BARRISTERS

- Discovery
 - On January 1, 2010, Rules will be amended by adding the following Rules immediately after the heading “Discovery”:
 - Rule 29.01 Discovery Plan
- Definition
 - 29.1.02 In this Rule,
 - “document” has the same meaning as in clause 30.01(1)(a).
O. Reg. 438/08, s. 25.

- Subrule 1.03(1) of Regulation 194 of the Revised Regulations of Ontario, 1990 is amended by adding the following definition:
 - “timetable” means a schedule for the completion of one or more steps required to advance the proceeding (including delivery of affidavits of documents, examinations under oath, where available, or motions), established by order of the court or by written agreement of the parties that is not contrary to an order. (“calendrier”)

- Discovery Plan
 - Requirement for Plan
 - 29.01.03(1) Where a party to an action intends to obtain evidence under any of the following Rules, the parties to the action shall agree to a discovery plan in accordance with this rule:
 - Rule 30 (Discovery of Documents).
 - Rule 31 (Examination for Discovery).
 - Rule 32 (Inspection of Property).
 - Rule 33 (Medical Examination).
 - Rule 35 (Examination for Discovery by Written Questions).

- Timing
 - (2) The discovery plan shall be agreed to before the earlier of,
 - (a) 60 days after the close of pleadings or such longer period as the parties may agree to; and
 - (b) Attempting to obtain the evidence.

- Contents

- (3) The discovery plan shall be in writing, and shall include,

- (a) The intended scope of documentary discovery under rule 30.02, taking into account relevance, costs and the importance and complexity of the issues in the particular action;
 - (b) Dates for the service of each party's affidavit of documents (Form 30A or 30B) under rule 30.03;
 - (c) Information respecting the timing, costs and manner of the production of documents by the parties and any other persons;

- (d) The names of persons intended to be produced for oral examination for discovery under Rule 31 and information respecting the timing and length of the examinations; and
- (e) Any other information intended to result in the expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action.

- Principles re Electronic discovery
 - (4) In preparing the discovery plan, the parties shall consult and have regard to the document titled “The Sedona Canada Principles Addressing Electronic Discovery” developed by and available from The Sedona Conference.

- 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.

- Duty to Update Plan
 - 29.01.04 The parties shall ensure that the discovery plan is updated to reflect any changes in the information listed in subrule 29.01.03(3).

- Failure to Agree to Plan
 - 29.1.05 On any motion under Rules 30 to 35 relating to discovery, the court may refuse to grant any relief or to award any costs if the parties have failed to agree to or update a discovery plan in accordance with this Rule.

- Rule 1.04 of the Regulation is amended by adding the following subrule:
 - Proportionality
 - (1.1) 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.

- Rule 29.2 Proportionality in Discovery
 - Definition
 - 29.2.1 In this Rule,
 - “document” has the same meaning as in the clause 30.01 (1)(a).

- Application

- 29.2.02 This Rule applies to any determination by the court under any of the following Rules as to whether a party or other person must answer a question or produce a document:

- Rule 30 (Discovery of documents).
 - Rule 31 (Examination for Discovery).
 - Rule 34 (Procedure on Oral Examinations).
 - Rule 35 (Examination for Discovery by Written Questions).

- Considerations

- General

- 29.2.3 (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.

- Subrules 30.02 (1) and (2) of the Regulation are amended by striking out “relating to any matter in issue” whether it appears and substituting in each case “relevant to any matter in issue”.

- Rule 29.1 Discovery Plan

- Non-Application of Rule

- 29.1.01 This Rule does not apply to parties who are subject to a discovery plan established by the court under clause 20.05 (2)(d).

- Definition

- 29.1.02 In this Rule,

- “document” has the same meaning as in clause 30.01 (1)(a).

RULE 30 DISCOVERY OF DOCUMENTS

Interpretation

- 30.01(1) In Rules 30.02 to 30.11,
 - (a) “document” includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and data and information in electronic form; and
 - (b) a document shall be deemed to be in a party's power if that party is entitled to obtain the original document or a copy of it and the party seeking it is not so entitled.

E-DISCOVERY STAGES

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

CLIENT PLANNING

1. Planning & Identification of Data

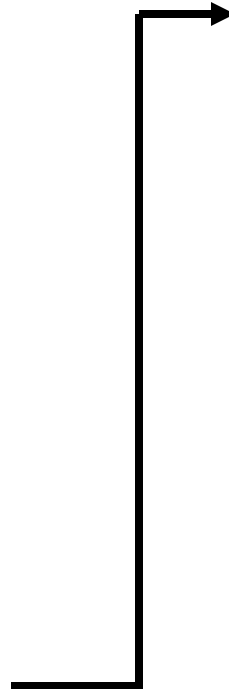
- who is involved?
- what are the sources?
 - in-house counsel
 - IT staff
 - talk to your expert/consultant

2. 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?

3. Collection Plan & Strategy

- decide on scope and why
- project your costs
- do you need to preserve chain of evidence for authentication at trial
- do you need expert/consultant? determine how to identify relevant data
- determine the likely location of all relevant data
- co-ordinate the systematic and uniform collection and production of data from all locations



CLIENT PLANNING

4. Process & Review the Data

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

5. Production

- 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 interest as incomplete production
- manually reviewing all ESI is cumbersome, time-consuming and expensive, so automated search tools should be utilized in appropriate cases.

REFERENCES

- The Sedona Canada Principles Addressing Electronic Discovery (Jan. 2008) - <http://www.thesedonaconference.org>
- Guidelines for the Discovery of Electronic Documents in Ontario http://www.oba.org/en/pdf_newsletter/E_DiscoveryGuidelines.pdf
- National Model Practice Direction for the Use of Technology in Civil Litigation: [http://www.cjc-ccm.gc.ca/cmslib/general/JTAC%20National%20Model%20Practice\(1\).pdf](http://www.cjc-ccm.gc.ca/cmslib/general/JTAC%20National%20Model%20Practice(1).pdf)