Canada

Roger Campbell
Legal counsel, Arbitrator, Mediator, E-discovery Neutral
Candice Chan-Glasgow
Heuristica Discovery Counsel
Molly Reynolds
Torys LLP
Ilan Tsekhman
Heuristica Discovery Counsel
Lynne Vicars
Scotiabank

1. Introduction

The collection, processing, review, disclosure and use of documents in civil litigation, arbitration and regulatory proceedings in Canada is regulated by both federal and provincial/territorial laws and informed by common law developments from provincial/territorial and federal courts.

This chapter provides an overview of the foundational principles that govern the discovery of documents in non-criminal legal proceedings in Canada, examines how those principles have been developed to accommodate technological changes surrounding electronic documents and technological tools to manage electronic documents, and describes certain initiatives aimed at standardising e-discovery practices across Canada.

2. Overview of e-discovery in Canada

Canada is divided into ten provinces and three territories, which have the power under Canada's Constitution to administer justice in their jurisdiction. Each of the provinces and territories has its own rules of civil procedure or rules of court, supplemented by practice directives. With the exception of the province of Quebec, all of the provinces and territories are common law jurisdictions. Quebec uniquely has a civil law tradition. There is also a Federal Court, which deals exclusively with federal matters.

3. Foundational principles of discovery in Canada

3.1 Production of documents

In all provinces and territories except Quebec, a party to civil litigation has an obligation to provide disclosure (typically described as 'production') of documents (or 'records') without being requested to do so. This obligation extends to listing documents formerly in the party's possession and documents withheld for privilege. The party is typically required to provide an affidavit of documents (or an affidavit of records), but in some jurisdictions only a statement or listing of documents in a prescribed form is required.

3.2 Standards for production of documents

The typical criterion for documentary disclosure is relevance. Relevance is not typically further defined. In Alberta, disclosure is required only of documents which are both relevant and material. In British Columbia a party is only initially required to produce documents "that could, if available, be used by any party of record at trial to prove or disprove a material fact",[1] with the party receiving the disclosure having the right to demand disclosure of additional documents by submitting a written demand that identifies the additional documents or classes of documents with reasonable specificity and indicates the reason why such additional documents or classes of documents should be disclosed.

The Federal Court Rules define relevance more narrowly: production of a document is required "if the party intends to rely on it or if the document tends to adversely affect the party's case or support another party's case".[2]

3.3 Production of electronic documents

In all jurisdictions, the obligation to disclose or produce extends to what may generally be described as "electronically stored information" (ESI).

In most of the provinces, the rules or practice directives address production of ESI, and several specifically refer to or incorporate principles from The Sedona Canada Principles Addressing Electronic Discovery, discussed in detail below.

Alberta's Court of Queen's Bench has issued a practice directive[3] that provides guidance as to discovery of records and that applies in any civil proceeding where the parties agree it will apply and sign a protocol to that effect, or where the court so orders. The directive states that the parties are "encouraged to adopt this Practice Note in a proceeding where a substantial portion of the 'Potentially Discoverable Records' consist of 'Electronic Material' or the total number of 'Potentially Discoverable Records' exceeds 1,000 records or more than 3,000 pages".

In British Columbia, a case planning conference may be held if requested by a party or ordered by a court, for which the parties are each required to file a case plan proposal addressing discovery of documents. An order may be made at the conference "respecting discovery, listing, production, preservation, exchange or examination of documents or exhibits, including, without limitation, orders … respecting electronically stored information, and that discovery, listing, production, exchange or examination be limited or otherwise conducted as ordered".[4]

The Yukon Rules provide in Rule 25(18) that "parties may agree to produce documents in electronic form and any party may apply to the court for an order to produce documents in electronic form"; further, "If a document is in electronic form, the party inspecting it should be entitled, upon request, to receive a copy in that form."

The Quebec Code of Civil Procedure (CCP), revised in January 2016, reflecting Quebec's civil law tradition, expressly addresses the disclosure obligation as

1 Supreme Court Civil Rules, Rule 7-1(1).
2 Federal Rules, Rule 222(2).
3 Civil Practice Note 4: Guidelines for the Use of Technology in any Civil Litigation Matter.
4 Supreme Court Civil Rules, Rule 5-3 (1)(f).

extending to "exhibits … in support of a pleading" and disclosure by a party of "evidence it intends to use at trial". The CCP does not specifically address disclosure of ESI, but requires that the parties establish a "case protocol" to cover "the procedure and time limit for pre-trial discovery and disclosure".

All jurisdictions in Canada provide that the court may limit the extent of documentary production, whether as part of the general power of the court or specifically in consideration of proportionality.

3.4 Preservation of electronic documents

Preservation of ESI is not addressed in most provincial or territorial rules, but is addressed in some practice directives. The tort of spoliation is not well developed in Canada. Spoliation of evidence is typically addressed by way of procedural sanctions, including evidence preclusion, adverse inference, and preservation orders.

Courts have wide discretion in awarding costs of proceedings or aspects of proceedings. The general approach when allocating the costs of electronic discovery is that the interim costs should be borne by the party producing the documents pending the final disposition of the court proceeding. Some practice directives, however, allocate costs of e-discovery to the party receiving or requiring the production.

4. The Sedona Canada Principles and their importance in Canadian e-discovery

No consideration of Canadian e-discovery law is complete without an understanding of the importance and significance of The Sedona Canada Principles Addressing Electronic Discovery ("the Sedona Canada Principles").[5]

4.1 The Sedona Conference

The Sedona Conference (www.thesedonaconference.org) is an American non-profit legal think tank dedicated to the study of law and policy related to complex litigation and other topics. Sedona publishes practical recommendations and principles for the bench and bar, and delivers professional development programmes through its Working Group Series. The Sedona Working Group on Electronic Document Retention & Production (Sedona WG1)[6] published the first edition of *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production in the United States* in 2004. These principles, now in their third edition, were first cited by a Canadian court in 2006.[7]

4.2 Sedona Canada Principles

In 2006, a small group of lawyers, jurists and technology specialists formed The Sedona Conference Working Group 7 ('Sedona Canada') in recognition of the growing volume of e-discovery issues in Canada and the lack of a formal Canadian

5 Sedona Conference, The Sedona Canada Principles Addressing Electronic Discovery, 3rd ed (2017), available at https://thesedonaconference.org/publication/The%20Sedona%20Principles.
6 *Ibid*.
7 *Air Canada v Westjet Airlines Ltd*, 2006 CanLII 14966 (ON SC).

framework for lawyers and jurists to follow. In 2008, the first edition of *The Sedona Canada Principles* was published, and soon thereafter it was referenced by the Manitoba Court of Queen's Bench in considering the law of spoliation.[8] A second edition was published in November 2015.[9]

The Court of Queen's Bench for Saskatchewan issued a Civil Practice Directive in September 2009[10] instructing parties to "consult and have regard to" the Sedona Canada Principles, which it incorporated into the court's guidelines.[11] The Principles were incorporated into Ontario's updated Rules of Civil Procedure in 2010.[12]

There is detailed discussion and commentary on the twelve principles in the publication itself, but they are excerpted below.

- *Principle 1:* Electronically stored information is discoverable.
- *Principle 2:* In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account:
  - the nature and scope of the litigation;
  - the importance and complexity of the issues and interests at stake and the amounts in controversy;
  - the relevance of the available ESI;
  - the importance of the ESI to the court's adjudication in a given case; and
  - the costs, burden and delay that the discovery of the ESI may impose on the parties.
- *Principle 3:* As soon as litigation is reasonably anticipated, the parties must consider their obligation to take reasonable and good faith steps to preserve potentially relevant ESI.
- *Principle 4:* Counsel and parties should cooperate in developing a joint discovery plan to address all aspects of discovery and should continue to cooperate throughout the discovery process, including the identification, preservation, collection, processing, review and production of ESI.
- *Principle 5:* The parties should be prepared to produce relevant ESI that is reasonably accessible in terms of cost and burden.
- *Principle 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 ESI that has been deleted in the ordinary course of business or within the framework of a reasonable information governance structure.
- *Principle 7:* A party may use electronic tools and processes to satisfy its document discovery obligations.
- *Principle 8:* The parties should agree as early as possible in the litigation process on the format, content and organisation of information to be exchanged.
- *Principle 9:* During the discovery process, the parties should agree to or seek

8 *Commonwealth Marketing Group Ltd et al v The Manitoba Securities Commission et al*, 2008 MBQB 319 (CanLII). Citing paper by Susan Wortzman, *The Sedona Canada Principles and their Adoption in Canadian Courts* (2008) Vancouver, British Columbia.

9 See: https://thesedonaconference.org/publication/The%20Sedona%20Canada%20Principles.

10 Practice Directive #6 issued September 1, 2009. Reissued as Civil Practice Directive #1 on July 1, 2013. www.qp.gov.sk.ca/documents/english/QBPracticeDirectives/PD06.pdf.

judicial direction as necessary on measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of ESI.

- *Principle 10:* During the discovery process, the parties should anticipate and respect the rules of the forum or jurisdiction in which the litigation takes place, while appreciating the impact any decisions may have in related proceedings in other forums or jurisdictions.
- *Principle 11:* Sanctions should be considered by the court where a party will be materially prejudiced by another party's failure to meet its discovery obligations with respect to ESI.
- *Principle 12:* The reasonable costs of all phases of discovery of ESI should 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.

4.3 Application of the Sedona Canada Principles

Canadian common law jurists have regularly referred to the Sedona Canada Principles in their judgments. Although they have been broadly accepted across common law provinces to date, they do not form part of Quebec's civil law system.

In New Brunswick, a judge cited the Sedona Canada Principles extensively in determining proportionality issues relating to the costs of restoring email from magnetic backup tapes.[13] The New Brunswick Court of Appeal called the Sedona Canada Principles "a national source for discovery of electronic information in the Canadian civil litigation context".[14]

The British Columbia Court of Appeal first cited the Sedona Canada Principles in 2010[15] and the Supreme Court of British Columbia has continued to rely on the principles as a "valuable guideline for litigants and courts".[16]

In Alberta, the Court of Queen's Bench published a practice note, last updated in 2011, setting out guidelines for the use of technology in civil litigation matters. As early as 2008, shortly after the publication of the first edition of the *Sedona Canada Principles*, the Alberta Court of Appeal referred to Sedona Canada having developed a set of principles to guide the development of rules for electronic discovery, including a need for proportionality. The Alberta Court of Queen's Bench has cited the commentary to the Sedona Principles as a "helpful discussion".

Nova Scotia, which was the first province to formally amend its rules to specifically address e-discovery, in its Rule 16 (Disclosure of Electronic Information) sets outs detailed provisions founded largely on the Sedona Canada Principles. The

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11 *Ibid* p2.

12 Rule 29.1.03 (4): Principles re Electronic Discovery. "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."

13 *Murphy & Ors v Bank of Nova Scotia & Ors*, 2013 NBQB 316 (CanLII).

14 *Spielo Manufacturing Inc v Doucet*, 2007 NBCA 85 (CanLII), [2007] NBJ No. 510. See also *Saint John (City) Employee Pension Plan v Ferguson*, 2009 NBBR 74 (CanLII), 2009 NBQB 74.

15 *Dykeman v Porohowski*, 2010 BCCA 36 (CanLII).

16 *Liquor Barn Income Fund v Mather*, 2011 BCSC 618 (CanLII) at para 73. See also *Gardner v Viridis Energy Inc*, 2014 BCSC 204 (CanLII).

commentary to Rule 16 states that it "creates a comprehensive process for preserving, sorting, and disclosing electronic information in litigation".

In both Manitoba[17] and Saskatchewan,[18] practice directives have been issued stating: "Parties in actions which involve e-discovery should consult and have regard to the document titled *The Sedona Canada Principles Addressing Electronic Discovery*." The practice directives provide guidelines based on the Principles.

Numerous Ontario decisions have cited the Sedona Canada Principles since they were introduced, and the province's Rules of Civil Procedure now require them to be applied to civil litigation matters.[19] The application of the Principles in Ontario is discussed in more detail below.

5. ULCC Electronic Document Rules Working Group

As demonstrated by the varied implementation of the Sedona Canada Principles, the current Canadian approach to e-discovery varies by jurisdiction. For example, Ontario's Rules of Civil Procedure[20] require parties to "consult and have regard to" the Sedona Canada Principles,[21] while other jurisdictions refer to the Guidelines for the Discovery of Electronic Documents in Ontario,[22] published by the Ontario Task Force in 2005. Courts in other provinces, like British Columbia[23] and Alberta,[24] have issued practice directives regarding electronic evidence.

As a result of these inconsistent approaches across the country, in 2016 a working group of the Uniform Law Conference of Canada (ULCC) was formed to develop a common Canadian approach to e-discovery. The goal of the working group is to create a framework that applies to proceedings in different forums and jurisdictions, and to allow for transparent discovery planning. The complications arising from different rules and standards are particularly evident in litigation across multiple jurisdictions, or across multiple forums such as administrative tribunals, civil courts and arbitration panels.

The working group's draft rules address the meaning of 'document',

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17 Court of Queen's Bench of Manitoba Practice Direction: Guidelines Regarding Discovery of Electronic Documents.

18 Practice Directive CIV-PD No. 1: E-discovery Guidelines.

19 In *Guestlogix v Hayter*, 2010 ONSC 4384 (CanLII), the court refers to specific principles of proportionality in the Sedona Canada Principles. See also *Gamble v MGI Securities*, 2011 ONSC 2705 (CanLII); *Thompson v Arcadia Labs Inc*, 2016 ONSC 3745 (CanLII); *Kariouk v Pombo*, 2012 ONSC 939 (CanLII); *SA Thomas Contracting v Dyna-Build Construction*, 2017 ONSC 4271 (CanLII); *Palmerston Grain, A Partnership & Ors v Royal Bank of Canada*, 2014 ONSC 5134 (CanLII) where the parties were unable to agree on a discovery plan and the court enumerated the twelve Sedona Canada Principles and held that "[p]arties are required to comply with the Sedona Principles and failing to do so is a breach of the rules"; and *Verge Insurance Brokers v Richard Sherk & Ors*, 2016 ONSC 5656 (CanLII) in which an Ontario judge ordered one party to pay the other substantial indemnity costs for failure to "act reasonably in accordance with the Sedona Principles".

20 Ontario, Rules of Civil Procedure, RRO 1990, Reg 194, R 29.1.03(4).

21 Sedona Conference, *The Sedona Canada Principles Addressing Electronic Discovery*, 2nd ed (2015). Available at: https://thesedonaconference.org/publication/The%20Sedona%20Canada%20Principles.

22 Discovery Task Force, Report of the Task Force on the Discovery Process in Ontario (November 2003) at p104. Available at: www.ontariocourts.ca/scj/files/pubs/rtf/report-EN.pdf.

23 Supreme Court of British Columbia, Practice Direction Re: Electronic Evidence (1 July 2006). Available at: www.courts.gov.bc.ca/supreme_court/practice_and_procedure/practice_directions_and_notices/electronic_evidence_project/Electronic%20Evidence%20July%201%202006.pdf.

24 Court of Queen's Bench of Alberta, Civil Practice Note No. 4: Guidelines for the Use of Technology in any Civil Litigation Matter (1 March 2011). Available at: https://albertacourts.ca/docs/default-source/Court-of-Queen's-Bench/pn4technology.pdf?sfvrsn=0.

'proportionality' and 'reasonableness', and discuss how relevance should be assessed in any given proceeding. The rules encourage cooperation, transparency and the use of technology in discovery planning.

Following a stakeholder comment period and approval by the ULCC, the final proposed rules and interpretation guide will be proposed to each province and territory for adoption into the jurisdiction's rules of procedure.

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