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Proportionality, Relevancy and the Production of Documents

Jeffrey P. Hoffman
Dale & Lessmann LLP

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Concerns regarding access to justice and, in particular, the cost and time that it took to get a civil action to trial, led to a culture shift in order to create an environment that promoted the timely and affordable access to justice.

This paper is intended as a resource, to provide an explanation of the principles underlying the move to streamline the civil justice system in order to make it more affordable and flexible in order to meet the needs of litigants. These principles, proportionality and relevancy, ought to inform lawyers and law clerks at every stage in the litigation process, including preserving, disclosing and producing documents and the scope of oral examinations for discovery, in order to better utilize the resources of the court and litigants alike.[1]

Proportionality – General Principles

The adoption of proportionality requirements are a signal to participants in the legal system of the need for new approaches to litigation that do better to advance the general principle of securing the "just, most expeditious and least expensive determination of every proceeding on its merits."[2] Proportionality requires that litigation be consistent with the principles of good faith and balance between litigants and must not abuse the public service provided by the institutions of the civil justice system.[3] Production and discovery efforts ought to be focused on the information necessary to resolve the case and not on finding every piece of superficially relevant

[1] The author is grateful to Braden Skippen, student-at-law, for his research on this project and preparing the initial drafts of this paper.
[2] *Abrams v. Abrams*, [2010] O.J. No. 1928, 2010 ONSC 2703 (Ont. S.C.J.), leave to appeal to Ont. Div. Ct. refused [2010] O.J. No. 787 (Ont. Div. Ct.).
[3] *Marcotte v Longueuil (City)*, [2009] S.C.J. No. 43, 2009 SCC 43 (S.C.C.), *in obiter* comments regarding the principle of proportionality found in art. 4.2 of the Quebec Code of Civil Procedure.

evidence. In *GE Canada Real Estate Financing Business property Co. v. 1262354 Ontario Inc.*,[4] the court stated that the principle of procedural proportionality requires:

- taking account of the appropriateness of the procedure;
- its cost and impact on the litigation; and
- its timeliness, given the nature and complexity of the litigation.

In any proceeding, the parties ought to ensure that steps taken in the discovery process are proportionate, taking into account:

- the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake;
- the relevance of the available physical and electronic documents;
- its importance to the court's adjudication in a given case; and
- the costs, burden and delay that may be imposed on the parties.[5]

Under the proportionality principle, relevance is one of several factors and no longer the single determinant of which information ought to be produced. Proportionality means that records must be both relevant and material to be disclosed. The other main factors (cost of production, importance of the records, importance of the case, amount of money at issue) are more concerned with pragmatism than with legal rules.

Discretion of the Court

Demands to produce massive amounts of unnecessary but minimally relevant information undermine principles of documentary production provided for in the Rules. The court has an important role to play in discouraging this type of counter-productive conduct. The court has

[4] [2014] O.J. No. 835, 2014 ONSC 1173 (Ont. S.C.J.).
[5] Archibald, Todd, Killeen, Gordan, and Morton, James C., *Ontario Superior Court Practice, 2017* (LexisNexis Canada Inc.: Toronto, 2016), at 1235-1236.

discretion to refuse disclosure where information is only of minimal importance but the search for it might compromise other important values.[6] The court ought to consider relevance, privilege and the principle of proportionality throughout the discovery process and specifically when being asked to determine if a document is required to be produced. Competing values, including privacy, access to justice, and the efficient use of scarce judicial resources, may sway a court to exercise its discretion to limit disclosure.

The principle of proportionality, as reflected in the Rules, may relieve a party from an obligation to produce documents and compels the court to consider whether:

- the time, expense, or undue prejudice justifies that a question be answered or a document be produced;
- answering a question or producing a document would interfere with the progress of action;
- the information is readily available from another source; and
- any order would result in the excessive production of documents.[7]

Nowadays, the vast amounts of electronic information created can make documentary production extremely onerous. Accordingly, courts may apply the notion of proportionality to civil disclosure obligations and decline to order production where it would be unnecessarily costly, oppressive or of minimal relevance.

Scope of Discovery

The scope of discovery was narrowed in the 2010 reform of the *Rules of Civil Procedure*. The "semblance of relevance" test was replaced with a narrower standard of "relevance." The

[6] *Vector Transportation Services Inc. v Traffic Tech Inc.* [2008] O.J. No. 1020 (Ont.S.C.J.).
[7] *Supra*, note 4, at pp. 1235-1236.

phrase “relating to any matter in issue” was changed to “relevant to any matter in issue” (see Rules 30, 31 and 76).

This reform signals the need for reasonableness and restraint in the discovery process. It also emphasises the important considerations of cost and efficiency. The reform will discourage and punish those who abuse the discovery process through unreasonable or unnecessary inquiries.

Discovery Plan

The principle of proportionality is a helpful guide for determining the degree of detail required in a discovery plan or discovery agreement. In cases involving a limited number of documents or a small dollar value it may not be appropriate to enter into a detailed discovery agreement. One option would be for counsel, following a meet and confer session, to send a letter setting out the discovery plan.

In preparing the plan, parties must consider the Sedona Canada Principles (the “**Principles**”) regarding electronic discovery (rule 29.1.03(4)). The Principles emphasize the importance of good faith, collaboration, proportionality, focus and demonstrable relevance.[8] The Principles make the following recommendations:

- Parties should meet and confer as soon as possible regarding identification, preservation, collection and production of electronic documents.
- Parties should be prepared to disclose all relevant electronic documents that are reasonably accessible in terms of cost and burden.
- Parties should agree as early as possible on the format in which electronic information will be produced.

[8] *Andersen v St. Jude Medical Inc*., [2008] O.J. No. 430 (Ont. S.C.J.).

- Parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, (ii) 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.

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

- 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.

E-Discovery

Discovery and production of electronically stored information (generally referred to as electronic discovery or "e-discovery") have created new problems and challenges for the legal community. The Rules require litigants to disclose all "documents" relating to the matters in issue. The Rules define "document" broadly to include "data and information in electronic form," and electronic to include anything "created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means" (see r. 1.03(1)).

The problem with Electronically Stored Information ("**ESI**") is that parties are often unaware of both the amount of their ESI and where it is located. Parties may have a general idea about which server, personal computer, hard-drive, or other storage device the information is on. However, "without a great deal more information, it is very difficult for them to know how much

documentation will be revealed by searches of the media on which their ESI is stored, how much it is going to cost to search for it and what the end result is going to be."[9]

There are four key issues relating to e-discovery:

- **Scope of electronic documents**: when fulfilling an obligation to search and disclose documents to what extent must a party search for and disclose information found in all electronic sources (e.g., computer hard drives, floppy disks, CDs, back-up tapes, and personal devices)?

- **Preservation of electronic documents**: What measures should parties involved in litigation, or imminent litigation, follow to ensure that all relevant electronic data is preserved to ensure that it is available to be discussed and produced and to avoid claims of spoliation?

- **Review of electronic documents**: What procedures should be adopted to review, efficiently and cost-effectively, electronic documents to determine which documents are relevant and which are not?

- **Production of documents in electronic form**: Under what circumstances should parties produce documents electronically (rather than in hard copy)? In what electronic format should they be produced? Should documents in hard copy be produced electronically?[10]

In *Warman v. National Post Co.*,[11] the court established an eight-factor proportionality test requiring counsel to consider the following:

1) specificity of the discovery requests;

2) likelihood of discovering critical information;

3) availability of such information from other sources;

4) purposes for which the responding party maintains the requested data;

5) relative benefit to the parties of obtaining the information;

6) total cost associated with production;

[9] Supra, note 4, at 1236.
[10] Supra, note 4, at 1224.
[11] [2010] O.J. No. 3455, 103 O.R. (3d) 174 (Ont. Master).

7) relative ability of each party to control costs and its incentive to do so; and

8) resources available to each party.

In e-discovery the scope of the obligation to preserve and produce electronic records varies depending upon:

- the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake;
- the relevance of the available ESI;
- its importance to the court's adjudication in a given case; and
- the costs, burden and delay that may be imposed on the parties to deal with ESI.

What is crucial is that parties consider e-discovery issues and tailor discovery plans and agreements to meet the needs of their case.[12]

Computer Hard Drives

Computer hard drives "contain a good deal of stored data that is neither relevant nor material to a lawsuit and which contains information that is private or confidential and ought not to be produced."[13] Electronic documents ought to be treated the same as paper documents. As such, a hard drive can be viewed as the digital equivalent to a filing cabinet. It seems obvious that all relevant information contained in a filing cabinet is subject to production but the cabinet itself is not. Similar thinking applies to a hard drive, so that all relevant and material information stored on a computer hard drive is subject to production, but the hard drive itself is not.[14] In exceptional circumstances a court may require that a hard drive be produced in order to be examined by an expert. However, a court ought to exercise this discretion "only where the

[12] Justice Campbell, "The Sedona Canada Principles: Addressing Electronic Discovery" (January 2008).
[13] *Supra*, note 4, at 1248.
[14] *Innovative Health Group Inc. v Calgary Health Region* [2008] A.J. No. 615 (Alta. C.A.), leave to appeal to S.C.C refused [2008] S.C.C.A. No. 380 (S.C.C)).

evidence established that a third party was intentionally deleting relevant and material information."[15]

Metadata

This is information stored on a computer relating to that computer's usage. Metadata does not conform to traditional understandings of what a document is. The nearest analogy may be that of the information contained on the front of an envelope or a "fax header" that indicated the time/date of faxing and receipt.[16] The production of metadata does not include the contents of the documents; rather it consists of the information showing how a party has used his or her computer. This may be useful, for example in a personal injury action, where "the information may be desired in order to enable a defendant to assess a plaintiff's computer functionality after the accident. All of the recorded information would therefore be relevant."[17] Given its unique nature, metadata requires separate analysis from typical electronic documents.[18] In determining whether metadata ought to be produced it is important to consider the competing factors cost and efficiency. A party ought to ask itself whether "there is sufficient evidence to justify undertaking the significant effort and expense necessary to attempt to recover such information."[19] Once a party has determined that a particular document is relevant, the metadata in relation to such a document ought to be produced.[20]

[15] *Ibid*., see also *Desgagne v. Yuen*, [2006] B.C.J. No. 1418, 2006 BCSC 955 (B.C.S.C.), where the court stated that the principles related to the granting of an Anton Piller order could apply to an order to search a computer hard drive. See also *Borst v. Zilli*, [2009] O.J. No. 4115 (Ont. S.C.J.)).
[16] *Hummingbird v. Mustafa*, [2007] O.J. No. 3624 (Ont. S.C.J).
[17] Supra, note 4, at 1248.
[18] *Desgagne v. Yuen*, [2006] B.C.J. No. 1418, 2006 BCSC 955 (B.C.S.C.).
[19] *Supra*, note 4, at 1250.
[20] *Warman v. National Post Co*. [2010] O.J. No. 3455 (Ont. Master).

Costs of Production

The Sedona Canada Principle 12 provides that the reasonable costs of preserving, collecting and reviewing electronically stored information will generally be borne by the party producing it unless extraordinary effort is needed to access the electronic information and data. A party in possession of documents may object to production on the basis of proportionality, costs or marginal relevance. The objecting party may also request for a production cost sharing arrangement. The party ought to provide "an itemization or isolation as to the costs directly attributable to the production of the supposedly relevant documents."[21] To ensure a producing party manages the production process efficiently, the party seeking production ought to be required to pay for the reasonable costs of loading those documents determined to be relevant.[22]

Model Documents

The following helpful model documents have been made publicly available by the Ontario E-Discovery Implementation Committee (EIC):

- Annotated E-Discovery Checklist (with suggestions on how to minimize e-discovery costs)
- Preservation letters
- Discovery plans and discovery agreements
- Guidance documents on how to carry out e-discovery and minimize costs
- Preservation order
- E-trial checklist and overview

[21] *Supra*, note 4, at 1248.
[22] *Gamble v. MGI Securities Inc.*, [2011] O.J. No. 1928, 2011 ONSC 2705 (Ont. Master).

Nova Scotia Rule 16

The Nova Scotia judicial system has recently introduced a noteworthy approach to tackling the issue of e-discovery. The *Nova Scotia Rules of Civil Procedure* were reformed to include a new rule focused on e-discovery, Rule 16.. Rule 16, which bears a close resemblance to the Principles, is "tailored to the realities of e-discovery in a manner that the procedural rules of other jurisdictions are not, since the latter rely on a broad definition of "document" and older discovery principles which do not always smoothly integrate with electronic information."[23] In contrast to other province's procedural rules, Rule 16 contains separate definitions of "document", "electronic information", and "storage medium" and addresses issues regarding the production of metadata. Rule 16 imposes three duties on parties to litigation:

- to search for relevant electronic information;
- to preserve data by making copies of it, which is a continuing obligation throughout the litigation; and
- to disclose relevant information to other parties.[24]

Relevancy – General Principles

As previously mentioned relevancy is one of several factors to consider during discovery and production of documents. Relevance is not a legal concept. Rather, it is a rational method of fact-finding based on logic, common sense and experience.[25] The term "relevance" deals with the relationship between the evidence and the issues in the case. Evidence can be said to be

[23] Sopinka, John, Sidney N. Lederman, and Alan W. Bryant. *The Law of Evidence in Canada.* 4th ed. (Lexisnexis Canada Inc.: Markham, 2014) at para. 18.97.
[24] *Supra*, note 22, at para. 18.97.
[25] *Supra*, note 22, at para. 12.50.

relevant if it "tends to prove the proposition for which it is advanced."[26] A traditionally accepted definition of relevance is that in Sir J.F. Stephen's *A Digest of the Law of Evidence*, where it is defined to mean[27]:

> … any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.

More recently, Rothstein J. in *R. v. White*[28] stated:

> In order for evidence to satisfy the standard of relevance, it must have some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would be in the absence of that evidence.

Relevance is not determined by a legal test. Instead, it is an exercise in the application of experience and common sense.[29] Doherty J.A. in *R. v Watson*[30] stated that relevance:

> … requires a determination of whether as a matter of human experience and logic the existence of "Fact A" makes the existence or non-existence of "Fact B" more probable than it would be without the existence of : "Fact A". If it does then Fact A is relevant to "Fact B." As long as "Fact B" is itself a material fact in issue or is relevant to a material fact in issue in the litigation, then "Fact A" is relevant and *prima facie* admissible.

There are two factors to examine when determining relevancy, they are materiality and probative value. Materiality is a legal concept and is determined by examining the applicable substantive law, procedural rules, law of evidence, and the pleadings in the case. The party in a civil proceeding must identify the material issue(s) in dispute with precision. A simple question

[26] *Supra*, note 22, at para. 12.58.
[27] *Supra* note, 22, at para. 2.42.
[28] [2011] 1 S.C.R. 433, [2011] S.C.J. No. 13 (S.C.C.).
[29] *Supra*, note 22, at 2.42.
[30] (1996), 30 O.R. (3d) 161, 50 C.R. (4th) 245, [1996] O.J. No. 2695 (Ont. C.A.).

to ask to determine materiality is "whether the proposed document must be tendered to prove the existence or non-existence of a material fact or matter in issue, otherwise it is immaterial."[31]

Probative value is the second aspect of relevance. To be relevant, evidence ought to "make the existence or non-existence of any fact that is material to the determination of the case more probable or less probable than it would be without the evidence."[32] Relevant evidence ought to logically probe an issue that is required to be proved in the particular case. A fundamental principle of the law of evidence is that all irrelevant evidence is non-admissible.

Issues to consider when determining if a document may be relevant include:

- Is the document factually relevant: does it make the fact being proved more or less likely to be true?
- Is the fact being proved by the document material: how is the fact linked to the legal issues at play in the case?
- Is the document being tendered to prove the truth of its contents?[33]

If the final question is answered in the affirmative the hearsay rule will be triggered. At this point, the document will only be admissible if it falls into one of the exceptions to the rule. One such exception is the admission of business records.

Relevance Distinguished from Materiality

Evidence is material if it is offered to prove or disprove a disputed fact in the case. For example, "evidence offered by a plaintiff in a conversion action to prove a loss of profit is not material since loss of profits cannot be recovered in such an action, and evidence that an accused

[31] *Supra*, note 22, at para. 11.45.
[32] *Supra*, note 22, at para. 11.47.
[33] *Supra*, note 22, at para. 18.9.

charged with forcible entry is the owner of the land is immaterial since the offence cannot be committed by an owner."[34] Regardless of whether this evidence is material, it is inadmissible because it is irrelevant. In the above example a review of the case law would demonstrate that the evidence lacks the necessary "probative connection between the fact to be proved and the facts in issue."[35] In contrast, materiality involves a focus the issues in the case and whether or not the relevant evidence will reasonably assist a party to advance its cause.

Relevancy and Discovery

The discovery rules must be read in a manner that discourages tactics and encourages full and timely disclosure.[36] The Rules require a party to produce all documents that are relevant to the issues that are pleaded in a proceeding. The concept of relevancy applied at the discovery stage in a proceeding is broader than the test for admissibility applied at the trial stage. Accordingly, regardless of whether a document may be admissible at trial it may still be considered relevant and therefore producible during discovery. A consideration of relevancy always commences with the pleadings.[37]

Social Media

In order to prove that ESI being sought is relevant, a party must first adequately demonstrate that another party's disclosure is missing relevant evidence. This is not an issue where an individual has a fully public profile on his or her social media account. A public profile is one where there are no viewing restrictions on third parties. In these circumstances, the

[34] *Supra*, note 22, at para. 2.57.
[35] Supra, note 22, at para. 2.57.
[36] *Ceci v Bonk*, [1992] O.J. No. 380, 7 O.R. (3d) 381(Ont CA).
[37] *Hopps-King Estate v. Miller*, [1998] O.J. No. 5556, 20 CPC (4th) 23 (Ont. Master).

opposing party can access all information on the social media profile and may themselves submit any relevant information to the court.

However, in a situation where an individual has a private or semi-private account (i.e. viewing restrictions on third parties) that may contain relevant information, the party seeking the access to the information must demonstrate sufficient relevance in the public portion of the profile for the court to infer that the private portions contain similar relevant content.[38] In *Shuster v Royal & Sun Alliance Insurance Co. of Canada*,[39] Price J. held that:

> [w]hat is determinative in my opinion, when drawing an inference as to whether there is relevant information in the private pages of a litigant's Facebook account is whether there is relevant information in their public profile.

As previously mentioned, the court has discretion to refuse to order the disclosure of documents, even if they may be relevant. Prior to ordering disclosure the court must balance the competing interests of the potential prejudicial effect and the probative value. The New Brunswick Queen's Bench concluded that:

> The success of an application to retrieve an individual's electronic computer data principally depends upon the degree of intrusion into the private lifestyle choices and electronic activity of the internet user as well as the probative values of the information sought.[40]

In *Leduc v. Roman* [41] and *Murphy v. Peter*,[42] the court concluded that because the purpose of social media is inherently social:

> it is not used as a means by which account holders carry on monologues with themselves … [and is] not designed to function as [a] diar[y].

[38] *Conrad v. Caverley*, 2014 NSSC 35 at para 24, 1077 APR 183.
[39] (2009), CarswellOnt 6586, 83 CPC (6th) 365 (Ont. Sup. Ct.), at para. 37.
[40] *Carter v. Connors*, 2009 NBQB 317 at para 36, 355 NBR (2d) 235.
[41] (2009), 308 DLR (4th) 353, 73 CPC (6th) 323 (Ont. S.C.J.).
[42] (2007) Carswell 9439, 67 CPC (6th) (Ont. S.C.J.).

The case law has established that the expectation of privacy on social media is very limited, whether protected by privacy settings or not. Effectively, with this low threshold, all relevant content on the Facebook account of a particular litigant is likely admissible.

Appendix "A"

Sedona Canada Principles Addressing Electronic Discovery, 2nd Edition

The Sedona Canada Principles
Addressing Electronic Discovery
Second Edition
November 2015

When the first edition of the Sedona Canada Principles was published in 2008, it was immediately recognized by federal courts as an authoritative source of guidance in the area of electronic discovery for Canadian practitioners and was explicitly referenced in the Ontario Rules of Civil Procedure and practice directives that went into effect in January 2010. The Canadian e-discovery environment has matured significantly since then, and the Sedona Canada Working Group now publishes this second edition to address notable developments in this ever-changing area.

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: (i) the nature and scope of the litigation; (ii) the importance and complexity of the issues and interests at stake and the amounts in controversy; (iii) the relevance of the available electronically stored information; (iv) the importance of the electronically stored information to the Court's adjudication in a given case; and (v) the costs, burden and delay that the discovery of the electronically stored information may impose on the parties.

Principle 3: As soon as litigation is reasonably anticipated, the parties must consider their obligation to take reasonable and goodfaith steps to preserve potentially relevant electronically stored information.

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 electronically stored information.

Principle 5: The parties should be prepared to produce relevant electronically stored information 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 electronically stored information 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 documentary discovery obligations.

Principle 8: The parties should agree as early as possible in the litigation process on the format, content and organization of information to be exchanged.

Principle 9: During the discovery process, the parties should agree to or seek judicial direction as necessary on measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronically stored information.

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 electronically stored information.

Principle 12: The reasonable costs of all phases of discovery of electronically stored information 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.

The opinions expressed in this publication, unless otherwise attributed, represent consensus views of the members of The Sedona Conference Working Group 7. They do not necessarily represent the views of any of the individual participants or their employers, clients, or any other organizations to which any of the participants belong, nor do they necessarily represent official positions of The Sedona Conference.

The full text of The Sedona Canada Principles Addressing Electronic Discovery, Second Edition, November 2015 Version is
available free for individual download from The Sedona Conference website at
https://thesedonaconference.org/publication/The%20Sedona%20Canada%20Principles

Appendix "B"

Ontario *Rules of Civil Procedure:*

INTERPRETATION

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

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 29.1 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).

DISCOVERY PLAN

Requirement for Plan

29.1.03 (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:

1. Rule 30 (Discovery of Documents).
2. Rule 31 (Examination for Discovery).
3. Rule 32 (Inspection of Property).
4. Rule 33 (Medical Examination).
5. Rule 35 (Examination for Discovery by Written Questions). O. Reg. 438/08, s. 25.

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.

DUTY TO UPDATE PLAN

29.1.04 The parties shall ensure that the discovery plan is updated to reflect any changes in the information listed in subrule 29.1.03 (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 29.2 PROPORTIONALITY IN DISCOVERY

DEFINITION

29.2.01 In this Rule,

"document" has the same meaning as in 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:

1. Rule 30 (Discovery of Documents).

2. Rule 31 (Examination for Discovery).

3. Rule 34 (Procedure on Oral Examinations).

4. Rule 35 (Examination for Discovery by Written Questions).

CONSIDERATIONS

General

2.03 (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.

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.

(2) In subrule 30.02 (4),

(a) a corporation is a subsidiary of another corporation where it is controlled directly or indirectly by the other corporation; and

(b) a corporation is affiliated with another corporation where,

(i) one corporation is the subsidiary of the other,

(ii) both corporations are subsidiaries of the same corporation, or

(iii) both corporations are controlled directly or indirectly by the same person or persons.

SCOPE OF DOCUMENTARY DISCOVERY

Disclosure

30.02 (1) Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document.

Production for Inspection

(2) Every document relevant to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in rules 30.03 to 30.10, unless privilege is claimed in respect of the document.

Appendix "C"

Sample Preservation Letter*
(To be sent to opposing counsel)

[Date]

BY EMAIL

[Address]

Dear:

RE: [Style of cause] (the "Action")

- **Preservation of relevant records**

We are the solicitors for [name of party sending letter]. The purpose of this letter is to confirm the obligation of [name of party receiving letter] to take reasonable steps to preserve all documents relevant to the Action.[43]

The term "document" as used in the Ontario *Rules of Civil Procedure* has a very broad scope, referring to any form of recorded communication.[44] It includes electronically stored information.[45]

Preservation of documents means taking reasonable steps to:

(a) ensure that relevant documents (including electronically stored information) are not destroyed, lost or relinquished to others, either intentionally, or inadvertently such as through the implementation of an ordinary course document retention/destruction policy;

(b) ensure that relevant documents are not modified – an issue that arises particularly in the case of electronically stored information (which may be modified by the simple

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[43] Principle #3 of the *Sedona Canada Principles* states that "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." However, it is recognized that "it is unreasonable to expect organizations to take every conceivable step to preserve all electronically stored information that may be potentially relevant."

[44] This portion of the letter and other references to the Ontario *Rules of Civil Procedure* will need to be modified in the event the litigation is in Federal Court or this document is to be used in another jurisdiction.

[45] An alternative approach in this part of the letter is to list examples of the many different types of records that may require preservation. This approach is not recommended, because it adds nothing to the preservation obligation, and can give the preservation letter a disproportionately onerous tone. However, if there are distinctive types of records that may be relevant to the particular proceeding and that should be identified for purposes of preservation because they might not otherwise be preserved for purposes of the litigation (e.g., voice mail, backup media, etc.), this can be done here.

act of accessing the information), and in the case of documents used on an ongoing basis in the operation of the business; and

(c) ensure that relevant documents remain accessible – again, an issue that arises particularly in the case of electronically stored information, which may require particular forms of software or hardware to remain readable.

[Name of party sending letter] specifically requests and requires that [name of party receiving letter] take all reasonable steps to preserve all documents in its possession, power and control that are relevant to the Action. This includes preservation of documents stored on your client's behalf by third parties (such as banks, professionals (e.g., accountants or lawyers), insurers, third party service providers, affiliated companies, data warehouses or internet service providers). In the case of electronically stored information, please ensure that relevant data is preserved intact and unmodified in its original electronic form.[46]

[Name of party sending letter] is specifically concerned about certain classes of records that may be destroyed or disposed of, inadvertently or otherwise, in the short term. Specifically, [insert explanation of the concern - e.g., re imminent destruction of backup media,[47] records being generated in real time, deleted files, etc.]. Please take immediate steps to ensure that these classes of documents are preserved [in the following manner:].[48]

We believe that at least the following persons possess, authored or received relevant documents:

[name]

[name]

[name]

As part of the broader process of preserving relevant documents, please ensure that reasonable steps are taken to preserve these individuals' relevant documents including, in the case of electronically stored information, relevant metadata.[49] Please ensure that your client

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46 Principle #5 of the *Sedona Canada Principles* states that "The parties should be prepared to produce all relevant electronically stored information that is reasonably accessible in terms of cost and burden." This incorporates the concept of proportionality. As noted in Comment 5.a, a cost benefit analysis should be undertaken which weighs "the cost of identifying and retrieving the information from each potential source against the likelihood that the source will yield unique, necessary and relevant information". Counsel are encouraged to exercise judgement based on a good faith inquiry and analysis. The more costly and burdensome the effort required to access a particular source, "the more certain the parties need to be that the source will yield responsive information".

47 Consider carefully whether to require preservation of backup media. Relying upon backup media in order to locate relevant records is generally costly and inefficient. Backup media should be preserved only where they contain unique information that cannot otherwise be obtained, or where other special circumstances apply. Comment 3.f of the *Sedona Canada Principles* notes that extreme preservation measures are not necessarily required, and Comment 3.i states that "Generally, parties should not be required to preserve short-term disaster recovery backup media created in the ordinary course of business."

48 This paragraph and the following paragraph should be deleted if inapplicable.

49 If metadata is known to be important to the case, counsel may wish to address in more detail the need to preserve metadata, including fields to be preserved, the method of preservation, etc.

immediately notifies these individuals of the need to preserve relevant documents, in the course of implementing its litigation hold.[50]

We will be relying upon this letter in court to evidence our request and notification of your client's preservation obligations.

We would like to arrange a meeting to discuss discovery issues in the Action, with a view to reaching agreement on a discovery plan addressing what records should be preserved and produced, the method of exchange of documents, examinations for discovery, and various related matters.[51] [In this regard, please see the attached list of proposed topics for discussion/please see the attached draft agreement on documentary discovery issues.][52] Please contact me at your earliest convenience to discuss.

We thank you in advance for your anticipated co-operation.

Yours very truly,

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50 Comment 3.d of the *Sedona Canada Principles* states that "Upon determining that litigation has triggered a preservation obligation, the party should communicate to affected persons the need for and scope of preserving relevant information in both paper and electronic form. …The notice also may include non-parties who have in their possession, control or power information relating to matters in issue in the action." Counsel should consider expanding the request to specifically name third parties who may have relevant electronically stored information.

51 Principle #4 of the *Sedona Canada Principles* states that "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." Rule 29.1 of the Ontario *Rules of Civil Procedure* requires parties to agree upon a written discovery plan for the action that addresses the intended scope of documentary discovery taking into account proportionality issues, dates for service of affidavits of documents, information regarding the timing, costs and manner of production of documents, the names of discovery witnesses, information regarding the timing and length of examinations for discovery, and 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. The rule requires parties to consult and have regard to the *Sedona Canada Principles* in preparing the discovery plan.

52 For a list of topics for discussion at the meet and confer session (set out in the form of a model discovery agreement), see Model Document #1: Discovery Agreement, Model Document #9: Checklist for Preparing a Discovery Plan and Model Document #9A: Discovery Plan (Long Form).

Appendix "D"

Memorandum to Corporate Client regarding Documentary Discovery*

MEMORANDUM

Privileged and Confidential

TO:	**[Corporate client] (the "Company")**	DATE:
FROM:	**[Name of lawyer/firm]**	
SUBJECT:	[***Case Name***]	

- Preservation, disclosure and production of documents

I. PURPOSE OF THIS MEMORANDUM

The purpose of this memorandum is to:

(a) describe the Company's obligations with respect to potential documentary evidence in this litigation;

(b) outline the essential steps in implementing a litigation hold in order to preserve potentially relevant documents; and

(c) identify key issues in fulfilling the obligations to preserve, disclose and produce documents in a strategic, proportionate and cost effective manner.

A guiding principle in the documentary discovery process is proportionality. The Company's approach to preserving, disclosing and producing documents must be proportionate, taking into account, among other things, the importance and complexity of the case, the amounts and interests at stake, and the costs, delay, burden and benefit associated with each step.

The goal of this memorandum is to help the Company in navigating through the documentary discovery process efficiently and without undue burden, but also effectively, in a manner that is strategically optimal and that satisfies all of the Company's legal obligations.

Section II of the memo provides an overview of key strategic issues.

Sections III, IV and V provide a detailed review of how the discovery process should be implemented in order to meet the Company's obligations in an effective and proportionate manner. Note that some of the tasks discussed in this detailed review may not be required in this litigation, depending upon a number of factors that we can discuss with you.[53]

II. OVERVIEW OF KEY ISSUES

Three obligations: The existence of litigation (or reasonably anticipated litigation) creates unique

[53] If counsel knows at the time of sending a memorandum to the client that some of the tasks identified in the memorandum need not be undertaken, the memorandum can be revised accordingly.

obligations for the Company with respect to its documents[54], both paper and electronic. There are three discrete obligations:

(a) the obligation to preserve potentially relevant documents;

(b) the obligation to disclose all relevant documents in an affidavit of documents; and

(c) the obligation to produce copies of relevant documents that are not privileged.

The duty to preserve and the risk of spoliation sanctions: The Company's most important legal obligation with respect to documents is the obligation to preserve all documents that are potentially relevant to the litigation. There are significant risks involved if early and effective preservation measures are not taken. Where potentially relevant documents are destroyed or lost, the Company may face allegations of spoliation of evidence. The consequences of spoliation can be very serious. The court may dismiss a claim or strike a defence, it may draw an adverse inference from the destruction of the documents, or it may require payment of some of the opposing parties' costs, among other things.[55] It is reasonable to expect such sanctions to be applied in Ontario in an appropriate case. We can advise you regarding steps to be taken to preserve potentially relevant documents, as discussed below.

E-Discovery: Documentary discovery involves disclosing and producing not only paper documents but also electronically stored information. In today's technological environment, the majority of a company's documents are now electronically stored, and thus the discovery of these records ("e-discovery") has taken on an added importance. Although the basic rules of discovery are the same whether a record is paper or electronic, the nature of electronic records is such that they raise a number of unique preservation and production issues, which are addressed in this memorandum.

Benefits of early and effective discovery: It is generally more cost effective on a net basis to take a thorough approach to locating and collecting potentially relevant documents at the outset of the litigation. Usually, too, it is to the Company's strategic advantage to locate and review all potentially relevant documents as soon as possible.

Proportionality: A key guiding principle in the documentary discovery process is proportionality, taking into account, among other things, the importance and complexity of the case, the amounts and interests at stake, and the costs, delay, burden and benefit associated with each step.

In some cases, it is not appropriate to require that costly steps be taken to preserve and review all potentially relevant records, where the likelihood of important documents being found is low or

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[54] The term "document" as used in the civil litigation process is defined very broadly, as explained below in Section III.B.

[55] Principle #11 of the *Sedona Canada Principles* states in part that "Sanctions should be considered by the court where a party will be materially prejudiced by another party's failure to meet any obligation 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." Comment 11.a states that "[t]he role of the court is to weigh the scope and impact of non-disclosure and to impose appropriate sanctions proportional to the culpability of the non-producing party, the prejudice to the opposing litigant and the impact that the loss of evidence may have on the court's ability to fairly dispose of the issues in dispute."

unknown. In other cases, a more intensive documentary discovery process will be required. Judgment calls may need to be made. The documentary discovery process may require the Company to make difficult decisions that involve weighing the costs and benefits of pursuing a more exhaustive approach to discovery.[56] One purpose of this memorandum is to identify the issues that require discussion and strategic decision making.

Importance of case-specific analysis: Every litigation matter is different, and raises unique considerations. We will discuss with you the approach that is most appropriate for this case. The remainder of this memorandum provides detail on the nature of the Company's obligations and the logistics of the process.

III. THE OBLIGATIONS TO PRESERVE, DISCLOSE AND PRODUCE

A. What Documents Must Be Preserved: Every party to litigation must implement a litigation hold (also known as a preservation hold) promptly as soon as litigation is reasonably anticipated, in order to preserve potentially relevant documents. This preservation obligation applies to a broader range of documents than does the obligation to disclose and the obligation to produce. The Company is required to preserve, in their original format, all documents that could reasonably be expected to be potentially relevant to the litigation, until such time as their actual relevance to the litigation can be determined.[57]

B. What is a "Document"?: It is important to understand the very broad scope of the term "document" as used in the Ontario *Rules of Civil Procedure*.[58]

The term "document" includes virtually any form of recorded communication, including correspondence, internal memoranda, memos to file, diary entries, handwritten notes, rough notes, agreements, invoices, telegrams, bills, securities, vouchers and books of account. A "document" also includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey and data and information in electronic form.

"Documents" include all originals, copies and drafts of the same document. Often there will be more than one copy of a document, sometimes with minor variations or annotations, sometimes not. If relevant, copies and drafts must be preserved, disclosed and produced.

Potentially relevant documents must be preserved whether they are located on company-owned, personally owned, or third-party owned devices, provided the documents are within the Company's possession, control or power.[59]

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[56] Proportionality issues may operate differently for an individual litigation than for a corporation, and counsel may wish to modify this paragraph accordingly to suit the individual case. In many cases, the cost and burden for an individual litigant in locating, preserving and disclosing their documents will be modest, because the quantity of documents is relatively small and their location is easily identified.

[57] Principle #3 of the *Sedona Canada Principles* provides, "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."

[58] This portion of the memorandum and other references to the Ontario *Rules of Civil Procedure* will need to be modified in the event the litigation is in Federal Court or this document is to be used in another jurisdiction.

[59] It may be appropriate to supplement these paragraphs in some cases, to address unique types of documents relevant to the particular proceeding, any agreements with opposing counsel regarding classes of documents to be preserved or produced, or Court directions regarding the scope of the obligation to preserve or produce.

C. Electronically Stored Information: Importantly, as noted, the category of "documents" includes "data and information in electronic form". The obligation to produce documents extends to all electronically stored information, stored on any kind of electronic media.

The possible forms of electronically stored information include not only emails and word processing documents, but also spreadsheets and other accounting data, and the contents of databases and websites. In some instances, relevant electronically stored information may include electronically-stored voice mail records, archived and deleted files, auto-recovery files, web-based files such as internet history logs, temporary internet files and "cookies", and metadata.[60] We will discuss with you which forms of electronically stored information are relevant to this case.

The media where electronically stored information may be stored include computer hard drives and servers, backup media, USB storage devices, CDs and DVDs, laptop computers, and personal digital assistants (including devices like Blackberries or Palm Pilots), among others.

Electronically stored information bears important differences from paper documents, and the obligation to produce electronically stored information often will not be satisfied by producing a printout.[61] For example, some records, such as spreadsheets, may not be meaningful without access to the electronic formulae used to generate the data. Other records, such as databases, need to be accessed electronically in their original electronic form in order to view the data in their proper context. In some cases, the metadata associated with an electronic record may be relevant, and metadata is not accessible in the printed version of an electronic record. At the preservation stage, therefore, it is essential to ensure that potentially relevant electronic records are preserved intact and unmodified in their original electronic form, until counsel has had an opportunity to assess the relevance of the records and the appropriate means of production of the records to opposing parties.

D. Required Preservation Steps: Preservation means taking reasonable steps to:

(a) ensure that potentially relevant documents (including electronically stored information) are <u>not destroyed, lost or relinquished to others</u>, either intentionally, or inadvertently such as through the implementation of an ordinary course document retention/destruction policy;

(b) ensure that potentially relevant documents are <u>not modified</u> – an issue that arises particularly in the case of electronically stored information (which may be modified by the simple act of accessing the information); and

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[60] Metadata is information generated by a software program about a particular document or data set, which describes how, when and by whom it was created, accessed and modified, and how it is formatted. Some metadata, such as file dates and sizes, can easily be seen by users. Other metadata can be hidden or embedded and unavailable without the assistance of a person who is technically adept. Some metadata, such as the "date last accessed" or "date last modified" information, can be changed by the simple act of a user opening or accessing the electronic record. In cases where this very information is relevant to the litigation, it is critical to take special steps to preserve this metadata. This may involve retaining the services of a third party forensic consultant.

[61] A helpful description of the differences between paper and electronic records is found in Section 3 of the Introduction to the *Sedona Canada Principles* ("How are Electronic Documents Different from Paper Documents?").

(c) ensure that potentially relevant documents remain accessible – again, an issue that arises particularly in the case of electronically stored information, which may require particular forms of software or hardware to remain readable.

Note that the Company must preserve (and disclose the existence of) both privileged and non-privileged documents. However, privileged documents will not be produced to any opposing party.

Implementing a litigation hold does not entail freezing all of the Company's records or interfering unreasonably with the operation of the Company's business. Rather, the Company's preservation obligation requires freezing, temporarily, only the appropriate subset of electronically stored information, and preserving hard copy documents, that are potentially relevant to the issues in the action. The general obligation to preserve evidence must be balanced against the Company's right to continue to manage its electronic information in an economically reasonable manner. The Company is not required to take every conceivable step to preserve all electronically stored information that may be potentially relevant. Thus, to take one example, if overwriting electronically stored information is part of the Company's established and reasonable practice, this practice should be permitted to continue after the commencement of litigation, provided electronically stored information potentially relevant to the case, and not otherwise available through other documents, is preserved and not overwritten.[62]

E. What Documents Must Be Disclosed: The Company is required to individually identify to opposing parties in the litigation all relevant documents, whether privileged or not. The obligation to disclose is satisfied by providing the opposing parties with a sworn affidavit of documents (that we will prepare on the Company's behalf) that lists all relevant documents in the Company's possession, control or power. In the affidavit of documents, a representative of the Company must swear that he or she has caused thorough searches to be done of the Company's records and documents and made all appropriate inquiries, so as to ensure that all documents that are relevant to the issues in the action, and that are within the Company's possession, control or power, are listed in the affidavit. Documents that are relevant but not privileged are listed in Schedule A to the affidavit of documents. It is these documents that will need to be produced to opposing parties. Privileged documents are listed in Schedule B to the affidavit of documents. These documents will not need to be produced as long as the assertion of privilege is valid and privilege is not waived. Finally, relevant documents that are no longer in the Company's possession, control or power are to be listed in Schedule C to the affidavit of documents.

F. What Documents Must Be Produced: The obligation to produce documents to opposing parties applies only to relevant, non-privileged documents listed in Schedule A to the affidavit of documents. Privileged documents are not produced unless privilege is waived. Irrelevant documents do not need to be produced. As noted, therefore, the documents that are produced to the opposing parties will be only a subset of the broader category of potentially relevant documents initially subject to the obligation to preserve. Opposing parties are required to pay the cost of making a copy of the productions, although generally not the cost of preserving them and identifying them as relevant.

Documents must be disclosed even though they may assist adverse parties and may be harmful to the disclosing party's case. The documentary disclosure process is designed to ensure that the Court

[62] See the *Sedona Canada Principles*, Principle #3 and Comments 3.a and 3.h.

and all parties to the litigation are made aware of all relevant documents pertaining to the issues in the case.

In identifying the documents that the Company is obliged to preserve, disclose or produce, if there is any doubt as to the possible relevance of a particular document or class of document, please contact us so that we can consider it. It is critical that in the first instance all documents that could in any way be relevant are brought to our attention.

G. What Documents are Within the Company's "Control or Power": The Company is required to disclose and produce not only documents that it possesses, but also those within its "control or power". The affected documents include any documents that the Company has the power to possess or to obtain from others, such as from employees, banks, professionals (such as accountants or lawyers), the government, insurers, third party service providers and, in some circumstances, affiliated companies.

IV. PRESERVATION – IMPLEMENTING A LITIGATION HOLD

The obligation to preserve all potentially relevant documents requires the implementation of a litigation hold as soon as the Company reasonably anticipates that litigation will occur.

A. Review of Existing Litigation Hold Policy: The Company may already have a litigation hold policy as part of its document retention policy. This is the recommended practice. If that is the case, the policy should be implemented immediately. At the same time, please provide us with a copy of the policy promptly so that we may ensure that it addresses all document preservation requirements applicable to this case.

B. Steps in a Litigation Hold: The Company should ensure, at a minimum, that it takes the following steps to preserve documents potentially relevant to the litigation.

1. Immediately consider whether to stop ordinary course document destruction: The first step is to determine whether there are potentially relevant documents that will be destroyed through the operation of the Company's ordinary course document destruction or recycling policies. If so, the Company must determine promptly what steps should be taken to preserve copies of the documents. It will ordinarily be necessary to ensure that:

    (i) potentially relevant hard copy documents in storage that are scheduled to be destroyed based on the expiry of a retention period in a retention schedule are isolated and not destroyed;

    (ii) consideration is given to whether any backup media contain potentially relevant documents that are not located elsewhere (such that the backup media likely contain the Company's only existing copy of the documents); if so, these backup media must be isolated and not recycled; and

    (iii) if the Company has an automatic email deletion program (*e.g.*, the contents of email inboxes are deleted after a specified number of days) that will cause the deletion of potentially relevant emails, the affected emails are copied or segregated before deletion.

2. Address any other urgent issues that require immediate attention: For example, if there are departing employees or other circumstances that could give rise to the loss of potentially relevant documents or information in the short term, immediate preservation steps should be taken. Advice from legal counsel should be sought on these issues.

3. Appoint one individual to implement the litigation hold: The Company should, as soon as possible, appoint one reliable senior employee to assume overall responsibility, in consultation with the legal department (if the employee is not a member of the legal department) and external legal counsel, for the implementation of the litigation hold.

4. Meet to identify preservation issues: The employee responsible for implementing the litigation hold should meet promptly with legal counsel, employees with knowledge of the facts in the litigation, records management personnel and senior IT personnel to determine what specific steps need to be taken to preserve potentially relevant documents.

5. Identify preservation issues: Steps required to determine appropriate preservation measures should be taken quickly, to avoid the inadvertent loss of potentially relevant documents. These steps will generally involve:

    (a) identifying the individuals likely to have generated or stored relevant documents, including assistants, archivists, and third parties;

    (b) identifying the timeframe within which the events at issue in the litigation occurred, so as to narrow the search for potentially relevant documents;

    (c) identifying the software likely to have been used to generate relevant electronically stored information;

    (d) identifying the likely locations of relevant documents, taking into consideration geography, operations, workflow and technology in use;

    (e) identifying the personnel within the Company whose assistance is required to meet discovery obligations;

    (f) determining whether it will be necessary or useful to use electronic search tools or methodologies (e.g., key word searches) in order to locate potentially relevant documents;[63]

    (g) determining whether it is necessary or appropriate in the context of the litigation to take steps to preserve or restore backup media,[64] deleted electronic data,[65] or

[63] Principle #7 of the *Sedona Canada Principles* states that "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 and/or the use of selection criteria to collect potentially relevant electronically stored information." Comment 7.a indicates that as it may be impractical or prohibitively expensive to review all information manually, parties and counsel should where possible agree in advance on targeted selection criteria. Comment 7.b suggests various processing techniques to use in searches including filtering, de-duplication, sampling and validation.

metadata (relevant factors here include the likelihood that these records would include potentially relevant documents, as well as proportionality concerns – weighing the cost and other burdens of preservation against the likelihood of locating relevant documents, the importance of the documents, the value and complexity of the case, and other factors);

(h) determining the appropriateness of taking forensic copies of the Company's potentially relevant electronic data to avoid the possibility of the data being modified or overwritten;[66]

(i) determining whether there is electronically stored information that is relevant to the litigation but that continues to be actively used in the course of the Company's business and, if so, determining what steps should be taken to preserve one or more forensic or non-forensic copies of the electronically stored information at particular points in time;

(j) determining whether there are potentially relevant documents created using older forms of software or stored in older media that are no longer accessible using the Company's current IT system and, if so, determining appropriate means of accessing these documents; and

(k) determining whether it is necessary or appropriate to retain a third party consultant to assist in identifying and preserving relevant electronically stored information and, if so, identifying the required areas of expertise.[67]

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[64] Comment 3.i of the *Sedona Canada Principles* states that, "[g]enerally, parties should not be required to preserve short-term disaster recovery backup media created in the ordinary course of business. When backup media exist to restore electronic files that are lost due to system failures or through disasters such as fires, their contents are, by definition, duplicative of the contents of active computer systems at a specific point in time. Provided that the appropriate contents of the active system are preserved, preserving backup media on a going-forward basis will be redundant." However, where a party retains its backup media for a considerable period of time, or uses them for archival purposes, this may result in relevant documents that are not in the active system being available only in the backup media. In that case, "steps should promptly be taken to preserve those archival media that are reasonably likely to contain relevant information not present as active data on the party's system."

[65] Principle #6 of the *Sedona Canada Principles* states that "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." Comment 6.a suggests that deleted or residual data that can only be accessed through forensic means should not be presumed to be discoverable and ordinarily, searches for electronically sorted information" will be restricted to a search of active data and reasonably accessible online sources. The "evaluation of the need for and relevance of such discovery should be analyzed on a case by case basis" as "only exceptional cases will turn on "deleted" or "discarded" information".

[66] Comment 4.c of the *Sedona Canada Principles* suggests that "[w]hile the making of bit-level images of hard drives is useful in selective cases for the preservation phase, the further processing of the total contents of the drive should not be required unless the nature of the matter warrants the cost and burden. Making forensic image backups of computers is only the first step in a potentially expensive, complex, and difficult process of data analysis. It can divert litigation into side issues involving the interpretation of ambiguous forensic evidence." Note that it is difficult in practice to make a forensic copy of a server, as servers are typically not able to be brought out of service for copying.

[67] Counsel may wish to identify appropriate third party consultants to assist the client in ensuring that all available sources of potentially relevant documents have been canvassed, if the client does not have the necessary resources in-house.

Most of these issues should be discussed with external legal counsel. In many cases, it will not be necessary to take some of these steps.

6. Issue litigation hold notices: The Company should promptly inform all involved employees, contract workers and third parties who may be custodians of potentially relevant documents of the need to preserve these documents in their original format without modification.[68] The list of custodians may include IT personnel and others who may have control over documents they did not themselves create. The custodians should be instructed not to destroy, delete or modify electronically stored information in any way, including by accessing files that are otherwise inactive (which may alter the metadata) or by packing, compressing, purging, disposing of files or parts of files, or automatic overwriting. Each individual should be asked to specifically identify the places in which potentially relevant documents may be located (including filing cabinets, portable computers, PDAs, and home offices), and to outline their personal document handling practices (such as whether they generally delete emails upon receipt, store them in subject-matter folders *etc*.). Attached as Appendix "A" is a sample litigation hold notice, which may be modified as appropriate. This notice should be sent by a senior officer of the Company, and should make clear to the custodians that their failure to preserve and produce all relevant documents could have serious consequences.[69]

7. Maintain an audit trail: It is important to keep detailed records of all preservation steps, including decisions made, search parameters used, locations searched, and custodians contacted. The Company should also consider the need to keep chain of custody logs for electronically stored information that is preserved and transmitted to third party consultants or legal counsel. It may become necessary later in the litigation process to establish the chain of custody of certain electronic records, in order to demonstrate their authenticity and reliability.

8. Meet and confer with opposing parties: Counsel (possibly with a representative of the Company) should confer with opposing counsel early in the litigation to discuss preservation issues and an agreed discovery plan.[70] The implementation of an agreed plan may help to guide the Company in conducting its preservation steps, and to protect the Company against allegations of spoliation.[71] One additional purpose of the discovery

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[68] It may be helpful for counsel to provide to the client a list of known custodians who should receive the litigation hold notice.

[69] See Comment 3.d of the *Sedona Canada Principles* and the discussion of the need to communicate preservation notices not only to employees of the parties, but also to non-party custodians. As regards employees, the notice need reach only those reasonably likely to maintain documents potentially relevant to the litigation or investigation. Comment 3.j notes the possibility, though, that there may be shared areas in a company's IT system that are not regarded as belonging to any specific employee. Such areas should be identified and appropriate steps taken to preserve any relevant documents.

[70] As noted, Principle #4 of the *Sedona Canada Principles* states that "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." Principle #8 states that "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."

[71] In this regard, see Model Document #1: Discovery Agreement, Model Document #2: Preservation Agreement, Model Document #9A: Discovery Plan (Long Form), Model Document #9B: Discovery Plan (Short Form) and Sample Document #1: Letter Confirming Discovery Agreement.

planning (or "meet and confer") session may be to negotiate the allocation of costs associated with preserving and reviewing certain classes of potentially relevant documents. Discovery planning sessions will be mandatory in Ontario effective January 1, 2010.[72] We should discuss the Company's approach to a possible discovery planning session in this case.

9. Collect the documents: Based on the various determinations made about what documents should be preserved, and about the proper method of preservation, the Company should proceed to collect the potentially relevant documents, or to have them collected by a third party, as appropriate. We will discuss with you the appropriate process for this collection stage.

10. Send further litigation hold notices: In appropriate cases, the Company should issue further litigation hold notices to document custodians throughout the course of the litigation. Sending additional notices is particularly important where the Company's current, active documents are relevant to the litigation, in which case the need for employees to be reminded of their preservation obligation may be greater. Litigation hold notices should also be issued to any new employees who have access to relevant documents.[73]

C. Proportionality in the Litigation Hold: Many preservation steps involved in implementing a litigation hold could be relatively costly, or otherwise burdensome for the Company. In complex cases involving significant dollar values, these costs and other burdens may be relatively minor when compared to the importance of preserving and collecting all potentially relevant documents. In many cases, though, a balancing must take place between taking reasonable preservation steps and keeping the costs of preservation within a reasonable range, in light of the nature and dollar value of the case, uncertainty regarding the scope of the factual and legal issues in the case, and other factors.[74]

As noted above, it is appropriate for legal counsel to be involved in the initial discussions between the employee implementing the litigation hold, relevant employees and the Company's IT personnel at which the required preservation steps are identified. We will be able to advise you on preservation steps you should consider in the circumstances of this case, and on the

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[72] Rule 29.1 of the Ontario *Rules of Civil Procedure* requires parties seeking discovery to agree upon a written discovery plan for the action that addresses the intended scope of documentary discovery taking into account proportionality issues, dates for service of affidavits of documents, information regarding the timing, costs and manner of production of documents, the names of discovery witnesses, information regarding the timing and length of examinations for discovery, and 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. The rule requires parties to consult and have regard to the *Sedona Canada Principles* in preparing the discovery plan.

[73] Counsel may wish to advise the client on a recommended time period for reminder notices.

[74] As noted above, Principle #2 of the *Sedona Canada Principles* states that "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."

associated risks if these steps are not taken.[75]

Depending on the outcome of those discussions, we may be able to recommend certain modifications to the broad preservation and production obligations set forth in this memorandum.[76]

V. DISCLOSURE AND PRODUCTION

A. Arrangements for Processing Documents: We will discuss with you the appropriate arrangements for processing the Company's documents for the purposes of review by counsel and disclosure and production to the opposing parties. Generally speaking, in cases involving a large volume of documents, particularly electronic documents, we recommend retaining a third party litigation support vendor to scan or input the documents into a litigation support software program, and to "code" the documents, which involves inputting identifying information about the documents (author, recipient, date, document source, etc.) into the same program. In cases involving smaller volumes of documents, we may recommend performing the document processing tasks internally.

B. Document Review: Once the documents are collected and have been inputted into the litigation support software program, they will need to be reviewed for relevance, privilege and, in some cases, confidentiality or privacy. It is our role as legal counsel, in coordination with you, to make these determinations of relevance and privilege, in order to identify which documents must be disclosed and produced. We will discuss with you the arrangements we propose to make for reviewing the documents.

C. Privilege: As noted above, the existence of documents that are subject to a claim of privilege must be disclosed in the affidavit of documents, but copies of the documents need not be produced. The most common types of privilege are solicitor-client privilege, litigation privilege, settlement privilege and common interest privilege. Solicitor-client privilege generally protects all communications between a party and its legal counsel with respect to the giving and receiving of legal advice. Litigation privilege generally protects documents which are produced or brought into existence for the dominant purpose of aiding in the conduct of litigation. Settlement privilege protects communications made on a without prejudice basis with a view to resolving the dispute giving rise to the litigation. Common interest privilege protects communications made in some circumstances where two parties share a common goal in opposition to other parties, such as where two defendants communicate in furtherance of making a common defence to the plaintiff's case.

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[75] Principle #5 of the *Sedona Canada Principles* states that "The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden." Comment 5.a suggests that given the volume and technical challenges associated with the discovery of electronically stored information, the parties engage in a cost benefit analysis, weighing the "cost of identifying and retrieving the information from each potential source against the likelihood that the source will yield unique, necessary and relevant information". Counsel are encouraged to exercise judgment based on a reasonable good faith inquiry having regard to the location and cost of recovery or preservation. The more costly and burdensome the effort that will be required to access a particular source "the more certain the parties need to be that the source will yield responsive information". Comment 5.a suggests that, if potentially relevant documents exist in a format that is not "readily usable", cost-shifting may be appropriate.

[76] See Comment 3.a of the *Sedona Canada Principles*: "The general obligation to preserve evidence extends to electronically stored information but must be balanced against the party's right to continue to manage its electronic information in an economically reasonable manner, including routinely overwriting electronic information in appropriate cases." See also Comment 3.c, and the discussion of the need for parties to take reasonable and good faith steps to preserve information relevant to issues in an action.

We will review all potentially relevant documents to determine whether a claim of privilege should properly be asserted. In some cases, it may be necessary to produce a document that contains relevant, non-privileged information, but to redact (*i.e.*, blacken out) certain privileged text in the document.

D. Ongoing Obligations: The obligation to preserve, disclose and produce relevant documents is ongoing during the litigation. Steps should be taken to ensure that any policy regarding destruction of documents on a routine basis does not result in the loss of relevant documents over time. All relevant documents created or obtained in the future need to be provided to us on an on-going basis so that they can be disclosed and produced as appropriate.

E. Restrictions on Adverse Party's Use of Documents: With certain limited exceptions, documents and information produced by a party in a lawsuit may be used only for purposes of the lawsuit, and may not be used for any other purpose, including in any other lawsuit. This restriction applies to information disclosed by the Company and by opposing parties during oral discovery (and to the transcripts of oral discovery) as well as to documents produced. Accordingly, the parties must take steps to ensure that documents and information obtained from other parties in the course of the lawsuit are not disclosed to other persons or used for other purposes. A court can relieve a party from the burden of the confidentiality obligation. Further, notwithstanding the confidentiality obligation, there is a risk of public disclosure of otherwise private information. Accordingly, if you have any concerns regarding the possible disclosure of your confidential documents or information, please discuss those concerns with us.

VI. CONCLUSION

We should discuss as soon as possible the preservation steps that the Company proposes to take in implementing its litigation hold, as well as the appropriate process for collecting and processing the documents. We should also discuss the overall timing of the steps in the documentary discovery process and of the Company's production of its relevant documents.

If you have any questions or concerns regarding the documentary discovery process, please let us know.

All of the EIC's model documents and other publications are available on the Ontario Bar Association's website at:

http://www.oba.org/En/publicaffairs_en/E-Discovery/model_precedents.aspx