



THE SEDONA CANADATM
COMMENTARY ON
PRACTICAL APPROACHES
FOR COST CONTAINMENT:
*Best Practices for Managing the
Preservation, Collection, Processing,
Review & Analysis of Electronically
Stored Information*

A Project of The Sedona Conference®
Working Group 7 (“Sedona CanadaTM”)

APRIL 2011

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THE PRESERVATION, COLLECTION, PROCESSING, REVIEW & ANALYSIS
OF ELECTRONICALLY STORED INFORMATION

A Project of The Sedona Conference® Working Group 7 (“Sedona Canada™”)

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Table of Contents

Preface	ii
Foreword.....	iii
I. Introduction.....	1
II. Best practices to contain cost.....	3
A. At the pleading stage, focus on what information is needed to resolve the dispute	3
B. Dialogue with opposing counsel from the beginning	4
C. Narrow the scope of collection.....	5
1. Limiting the search to key sources and timeframes.....	5
D. Use the Rules.....	6
E. Adopt “best practices” around lawyer review (the largest chunk of cost in e-discovery)	6
1. New approaches to privilege review	7
2. Review team options.....	8
3. Quality assurance.....	8
F. Think of the Discovery Plan as an Action Plan	8
G. Use automated tools where appropriate for the job	9
H. Know when to call for help from e-discovery consultants (number of sources and/or custodians, complexity)	13
I. Improve document retention/destruction policies.....	14
III. Conclusion.....	16
Appendix A—Project Management.....	17
Appendix B—Cost Containment Checklist	22
Appendix C—Standards & Best Practices	26
Appendix D—Pleading and Relevance in the Rules of Civil Procedure in Canadian Jurisdictions (November 2010)	29

Preface

Welcome to another major publication in The Sedona Conference® Working Group SeriesSM (WGSSM): *The Sedona Canada™ Commentary on Practical Approaches for Cost Containment: Best Practices for Managing the Preservation, Collection, Processing, Review, and Analysis of Electronically Stored Information.*

This effort is a product of our Sedona Canada™ Working Group (WG7) and represents the collective expertise of a diverse group of lawyers and IT professionals, offering the perspectives of the private sector, the public sector, trial lawyers, and inside counsel. This Commentary was conceived in 2009 as one of a series of Commentaries expanding upon the release of *The Sedona Canada™ Principles* in 2008. A Working Group was formed and a meeting was held in Vancouver in September 2009. There was general consensus that persons involved in litigation could benefit from additional guidance regarding particular ways in which the costs of electronic discovery can be controlled and, in particular, maintained at a level proportionate to what is at stake in a particular case. An extensive process of consultation, dialogue, and drafting then ensued throughout 2010, culminating in the current version of the Commentary.

On behalf of The Sedona Conference®, I want to thank the drafting team, the Editorial Board, and all WG7 members whose comments contributed to this Commentary and for all of their efforts to make this work product as helpful as possible. I especially want to acknowledge the contributions to the overall success of this project made by Mr. Justice Colin L. Campbell, Robert J.C. Deane, Peg Duncan, and Karen B. Groulx, who assumed lead roles in the development of this Commentary.

As with all of our WGSSM publications, this Commentary is first being published as a “public comment version.” After sufficient time for public comment has passed, the editors will review the public comments, and to the extent appropriate, make revisions. The Commentary will then be re-published in “final” version, subject, as always, to future developments in the law that may warrant a second edition.

We hope our efforts will be of immediate and practical assistance to lawyers, judges, and others involved in the legal system. If you wish to submit a comment, please utilize the “public comment form” on the download page of our website at www.thesedonaconference.org. You may also submit feedback by emailing us at rgb@sedonaconference.org.

Richard G. Braman
Board Chair
The Sedona Conference®
April 2011

Foreword

Production of documentary evidence is the cornerstone of litigation. However, in an environment in which most documents are created and stored electronically in the form of electronically stored information (“ESI”) the costs associated with this step in the litigation process can be significant.

The Ontario Civil Justice Reform Project recognized that electronic discovery poses new problems and complications for litigants, their counsel, and the judiciary that are not confined to large litigation files. Issues such as the breadth of the obligation to preserve ESI and the costs of preserving and producing marginally relevant ESI impact greatly even smaller cases such as wrongful dismissal disputes involving a closely held family corporation with only a small number of employees.

There have been developments on several fronts in response to these pressures. New civil practice rules recognize the principle of proportionality in the discovery process and the need for parties to meet and confer to develop discovery plans, all in an effort to better control costs. Sedona Canada™ has published for public comment its *Commentary on Proportionality in Electronic Disclosure & Discovery*. As litigants, legal departments of organizations, and external legal counsel focus on understanding their total discovery costs, they are also becoming more effective in negotiating reduced e-discovery costs from vendors and lawyers and in convincing the courts to make more specific orders for production that place smaller burdens on the parties.

The following *Commentary on Practical Approaches for Cost Containment* is intended to complement these developments by outlining concrete best practices for managing the costs of the electronic discovery process, and in applying *The Sedona Canada™ Principles*. It offers practical guidance in building a defensible yet cost-effective process for identifying, preserving, collecting, processing, analyzing, reviewing, and producing ESI, not only in the mega cases that have attracted so much attention, but as importantly in the more-typically sized cases where costs must be kept in proportion to what is at stake.

It is hoped that this Commentary will help to guide litigants, in-house, and outside counsel in managing efficiently their own discovery obligations, and in preparing for meet-and-confer sessions with opposing parties and their counsel. A collaborative approach to e-discovery as encouraged by *The Sedona Canada™ Principles* and illustrated by this Commentary serves to help reduce costs and save time, both of which are required if the civil justice system is to remain of service to litigants.

Mr. Justice Colin L. Campbell
Superior Court of Justice
Toronto, Ontario

I. Introduction

The discovery of electronically stored information (“ESI”) can be one of the largest uncontrolled costs in litigation, as the Ontario Civil Justice Reform Project observed.¹

This is so even though many provinces have updated or are currently updating their rules of civil procedure or rules of court to reflect the technological realities of the new millennium,² and to incorporate the general principle of proportionality.³ Courts have also recently focused on proportionality considerations and actual relevancy in decisions denying broad production requests and substituting narrower and more specific orders for production that place smaller burdens on the parties.⁴

Direct costs consist of data preservation and retrieval by internal or third-party computer technicians as well as lawyer review. Indirect costs involve the interruption of routine business processes while employees search for relevant information, and the risk to organizations of disclosure of confidential information and privileged legal communications.⁵ Moreover, there is the risk associated with failing to preserve relevant ESI that could lead to the indirect costs associated with adverse judgments and sanctions.

Some of the steps recommended in this Commentary to contain costs may have no application to the standard and small cases. While both lawyers and clients should be encouraged to consider the suggested approaches to contain costs, they should also be encouraged to consider modifying their approach where both the dollar amount and the issues at stake do not warrant a slavish application of the rules or the practices and approaches outlined in this Commentary.

For example, in terms of using the Rules of Civil Procedure, many lawyers still insist on the delivery by the opposing party of a sworn and complete affidavit of documents “in accordance with the Rules” as a prerequisite to seeking any interlocutory relief from the courts. However, in many cases a partial affidavit as opposed to a complete and comprehensive affidavit of documents listing all documents relevant to the issues set out in

¹ Ontario Civil Justice Reform Working Group, *Civil Justice Reform Project* by the Honourable Coulter A. Osborne, Q.C. (Toronto: Ministry of the Attorney General, 2007), online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>>. See also the British Columbia Civil Justice Reform Working Group, *Effective and Affordable Civil Justice* (Vancouver: British Columbia Justice Review Task Force, 2006), online: British Columbia Justice Review Task Force <http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf>.

² The Sedona Conference®, *The Sedona Canada™ Principles Addressing Electronic Discovery* (Phoenix: The Sedona Conference®, Jan. 2008).

³ A requirement of proportionality has been imposed on the discovery process. The right to ask questions or demand documentary productions may be limited if the associated costs are out of proportion to the amount in dispute or the information sought has marginal utility to the resolution of the issues: See Ontario, Rule 29.2, Proportionality in Discovery, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. See also The Sedona Conference®, *The Sedona Canada™ Commentary on Proportionality in Electronic Disclosure & Discovery* (Phoenix: The Sedona Conference®, Oct. 2010) (Public Comment Version).

⁴ See *Vector Transportation Services Inc. v. Traffic Tech Inc.* (2008), 58 C.P.C. (6th), 364; [2008] O.J. No. 1020; (Ont. Sup. Ct.) and *Mathieson v. Scotia Capital Inc.*, [2008] O.J. Mp./ 3500 (Ont. Sup. Ct.).

⁵ The Sedona Conference®, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, 2d ed. (Arlington, Va.: BNA Books, 2007) at 37-38 ff. Comment 2b (“Balancing need for and cost of electronic discovery”).

the pleadings may make more sense, depending upon the issues at stake, the dollar value of the claim, and other factors. Parties may wish to consider mediating e-discovery and other procedural disputes in appropriate cases. Increasingly, case management conferences (that can be argued over the telephone) are being used to deal with procedural issues including e-discovery disputes. Clients, lawyers, and the courts should be encouraged to tailor their approach to the steps involved in e-discovery to reflect the realities of modern day litigation and the prevailing goal that the cost of litigation and ultimately justice, should not be put beyond the average litigant.

The good news is that the costs of e-discovery are finally coming down. New approaches and technologies have helped to reduce these costs, including better crafted pleadings, cooperation among counsel, early case assessment, and discovery planning. The practices outlined in this Commentary are intended to assist counsel, courts and litigants in furthering these developments.

II. Best Practices to Contain Cost

A. At the pleading stage, focus on what information is needed to resolve the dispute.

Every jurisdiction in Canada has some variation of Rule 174 of the *Federal Court Rules* that states:

Every pleading shall contain a concise statement of the material facts on which the party relies, but shall not include evidence by which those facts are to be proved.⁶

In *National Trust Co. v. Furbacher*,⁷ the Court stated that “the function of pleadings is to:

- (i) define with clarity and precision the question in controversy between the litigants;
- (ii) give fair notice of the precise case which is required to be met and the precise remedies sought; and
- (iii) assist the Court in its investigations of the truth and the allegations made.”

While pleadings are allegations of facts, discovery provides for the gathering of evidence to support or refute allegations or defences pleaded.⁸

Counsel and client should gather information about the sources needed to support or refute the allegations, and understand how likely each is to yield relevant information and how much disruption and cost would be involved in preserving and collecting them.

By their nature, some facts are more difficult to prove than others and can expose the client to expense or intrusiveness while not contributing much to the resolution of the dispute.

Illustration: The opposing party in a personal injury suit defending against a claim of psychological suffering may request information and postings from social networking sites like Facebook as well as all personal email.

Although how expensive or intrusive the discovery might be should not be the only factor in selecting allegations or defences to pursue, the implications for time-consuming discovery should be considered in deciding on what claims or defences to advance.⁹ Counsel should advise parties to avoid allegations or defences that cannot be substantiated or justified, since courts can and will take unfounded claims into account when awarding costs.¹⁰

⁶ *Federal Courts Rules*, online: Department of Justice <<http://laws.justice.gc.ca/en/F-7/SOR-98-106/index.html>>.

⁷ [1994] O.J. No. 2385.

⁸ *Seascope 2000 Inc. v. Canada (Attorney General)*, 2009 NLTD 195 (CanLII).

⁹ *Air Canada v. WestJet Airlines Ltd.*, 2004 CanLII 66339 (ON S.C.) at para. 7.

¹⁰ *Lewis v. Cantertrot Investments Limited*, 2010 ONSC 5679 (CanLII), *Ault v. Canada (Attorney General)*, 2010 ONSC 1423 (CanLII). *Lewis* surveys the law in paras. 76 and 77.

Thinking early about information sources allows a party to consider likely custodians and arrange for whatever steps might be needed to preserve their data. It also clarifies what types of information may contain relevant information (e.g., financial records, images, voice logs, metadata, communications, etc.) and whether the party's computer systems team needs to take action to capture files (such as shared drives) that may not have any identifiable custodian.

B. Dialogue with opposing counsel from the beginning

Much has been written elsewhere about the value and necessity of meeting and conferring with opposing counsel. Cooperating and exchanging information with opposing counsel and other parties can reduce wasted effort, avoid misunderstandings about what information needs to be preserved, collected, and produced, and helps to focus the search for relevant information.

At the initial discussion, parties should agree on steps required to preserve information

Illustration: based on its internal investigation, a party makes a unilateral decision about which 20 custodians have information relevant to the dispute and arranges the preservation. After production, the opposing parties argue that another five custodians have relevant information, but their information has since been altered or deleted from active stores, requiring a search of backup tapes. The opposing parties may also disclose that they did not care about the documents of 10 custodians and the producing party could have avoided the cost associated with preserving, collecting and reviewing all those records.

Parties should discuss what information is really relevant, material, and probative of the issues in dispute. Not all sources are going to be as valuable as others, and some will be more expensive to produce because they are difficult to process or because they result in large volumes of duplicative and irrelevant information that must be culled and reviewed. Having a good sense of the value of different sources of information allows for give-and-take in the negotiation with opposing counsel. The trade should not be unbalanced - both should come out of the discussion with most of what they want.

Illustration: In response to a request for the production of emails of a former employee, the responding party explains that the email stores of a former employee are no longer available in active storage but that the other custodians would have copies of emails they sent to or received from that employee. The opposing party accepts that there is a low probability of finding additional relevant information in the backup tapes that contain the former employee's mailbox. The backup tapes are set aside as part of the preservation effort and are available to be searched if there turn out to be gaps in the email records.

Before the actual collection, parties should agree on how to focus the search for relevant information to reduce the quantity of irrelevant information. Parties need to balance the need for particular forms of ESI that are relevant and material to the issues in dispute against the cost of retrieving it. As such, parties should inform themselves of the costs involved in retrieving the information being sought by the opposing party. They may agree on the names of key custodians and restrict the collection to specific date ranges; they may go further and agree on what kinds of information can be excluded from production as being

clearly irrelevant, such as emails from and to individuals known not to have been involved in any way with the events. Finally, they may agree to phase production so that documents meeting narrow search criteria will be examined by both sides to see what kinds of information is missing and still required.

C. Narrow the scope of collection

E-discovery costs can be reduced at the collection stage by eliminating certain types of ESI that are typically irrelevant to a proceeding. By way of example, vendors often receive all the information contained in a server or workstation hard disk for processing, including the operating system files, application software, utilities, as well as actual documents or data.¹¹

Illustration: A Microsoft Exchange Server contains the email accounts of key custodians in a dispute. Rather than collecting the entire server, the team uses a forensically sound process (called deNISTing) to extract only the email files, leaving behind the Exchange software, Windows operating system, anti-virus software, and other utilities.

Illustration: Opposing counsel has asked for all files on the laptops and workstations of the key custodians. After clarification, it turns out that the opponent is interested in information and documents that have been created or modified by the custodians and has no interest in image files, Temporary Internet Files, music and video files or software.

1. Limiting the search to key sources and timeframes

Parties can achieve the goal of reasonably limiting discovery and lowering costs by collecting ESI from repositories used by key individuals and applying date ranges.¹²

Illustration: Interviews with the party's IT staff reveal that the accounts belonging to the key custodians reside on two of the party's eight Novell GroupWise servers. The team uses a forensically sound process to extract only the email data for the named custodians that was sent or received between the date boundaries.

Illustration: Interviews with a custodian reveals he carefully files all emails into subject folders. All folders are preserved, but the team proposes to collect and review only the folder created for the subject relevant to the litigation, as would have been done with the paper files in his cabinet. Again, the remaining folders are still available if information is found to be missing.

When requested by opponents for further production involving keyword searches of the information collected from the key sources,¹³ a party should run a test search to look at the

¹¹ Peg Duncan & Susan Wortzman, "E-Discovery: The Costs Are Coming Down" at 2 (Paper presented at the Second Annual Sedona Canada™ Program on Getting Ahead of the E-Discovery Curve, 16-17 Sept. 2009).

¹² The Sedona Conference®, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, 2d ed. (Arlington, Va: BNA Books, 2007) at 115 ff. Comment 6b ("Scope of collection of electronically stored information").

¹³ *Markson v. MBNA Canada Bank*, 2011 ONSC 871 (CanLII) at para. 37. See also *Air Canada v. Westjet Airlines Ltd.*, 2006 CanLII 14966 (ON S.C.) at para. 9, *Golden Capital Securities Ltd. v. Investment Industry Regulatory Organization of Canada*, 2010 BCCA 359 (CanLII) at para. 17, *GRI Simulations Inc. v. Oceaneering International Inc.*, 2010 NLTD 85 (CanLII) at para. 51.

overall volume of documents returned in the search, and the percentage of relevant documents found in a sample, and estimate the time and costs that would be involved in the processing and review. If party can demonstrate that the search would result in large volumes that are mostly irrelevant and duplicative of what has already been collected/produced, it should be possible to negotiate a more focused set of search terms.

D. Use the Rules

Most jurisdictions have altered their rules or their practice directions to strike a balance between the need for information to prove or disprove a claim or defence, and the cost, burden, delay, or other impact that the producing party might face in its production. More recently, courts have demonstrated a willingness to restrict burdensome discovery in the name of proportionality unless it is essential to determine the outcome.

In cases where the pleadings are not clear enough to guide the preservation or selection of relevant information, it is reasonable to ask (and provide if asked) particulars about each allegation or defence to direct what information is needed. The rules also allow for parts of pleadings to be struck, as was recently done in *Javitx v. BMO Nesbitt Burns Inc.*,¹⁴ where the court said:

In my view, these portions of the pleading should be struck on a number of grounds. These allegations will greatly expand the breadth, complexity and expense of the litigation in circumstances where the corresponding probative value is minimal. Discovery of the massive fraud including other customer accounts would be required. An examination of the circumstances of each fraud and what Nesbitt knew of each of them and disclosure of detailed, confidential financial information of other Nesbitt customers would be required. As Molloy J. stated in *Brodie v. Thomson Kernaghan & Co.*¹⁵ on the issue of an investment advisor's conduct relating to other investors:

It adds very little to the plaintiff's claim and its absence could not deprive her of a cause of action or reduce any compensatory damages to which she might be entitled. On the other hand, allowing the pleading to stand will result in a far more expensive and complex proceeding. Production and discovery will be considerably more protracted and complicated. There will likely be numerous interlocutory motions in respect of confidentiality issues and the rights of non-parties to protect their privacy.¹⁶

E. Adopt “best practices” around lawyer review (the largest chunk of cost in discovery)

The important driver of e-discovery costs is the cost of lawyer review time required. Not all information in the collection will be produced, and some of it can be eliminated from review based on its likelihood of not yielding unique relevant information.

¹⁴ 2011 ONSC 1332, at para. 23.

¹⁵ [2002] O.J. No. 1850.

¹⁶ *Ibid*, at para. 33.

Illustration: As agreed in the discovery plan, the collection includes all messages received and sent by key custodians within a timeframe. The messages include communications among the key custodians as well as with others who were known to have played no role in the events in dispute, including notifications from news services, spam, and other unsolicited material. Most if not all of these communications can be excluded from the beginning.

The remainder includes communications among the key custodians and others who played a lesser role. The exchanges among the key custodians will include duplicates, appearing both in inboxes and in sent boxes. If there are no grounds to believe that the messages would have been deleted, it may be reasonable to exclude the messages from key custodians in the inboxes of other key custodians, as a means to avoid reviewing duplicates. Because the complete mailbox is still available, a further search in the inboxes is possible if gaps are suspected. Duplicates are less likely in messages exchanged with others whose mailboxes were not collected yet who might have played a lesser role.

The approach described above works for small collections being reviewed by one person at a time – for example, first by a paralegal or junior lawyer to find all potentially relevant documents and then by a more senior lawyer to confirm the relevant material. All assumptions and decisions need to be documented in case they are challenged by the opponents.

Larger collections involving more custodians, larger volumes, and teams of reviewers benefit from automated tools and a more structured process. A combination of electronic tools and trained lawyers is the best approach for an effective and efficient review and is endorsed by *The Sedona Canada™ Principles*. Counsel should select appropriate review tools to minimize the cost of the review and to ensure that the review is effective.

Advance planning and organization contribute to the success of the review phase.¹⁷ A coding manual or coding process developed with the input of the e-discovery team members will result in more accurate and consistent results. Initial training and ongoing communication with the document review team will ensure compliance with the coding scheme. Quality control systems, such as a second review of a selected set of documents by means of a different reviewer for privilege, confidentiality, and as a general quality check should also form part of the review process.

1. New approaches to privilege review

The cost and burden associated with privilege review is more typically associated with cases dealing with large volumes of information involving organizations with multiple offices, located across many jurisdictions having both internal and external lawyers. As such, many of the standard cases will not face the significant costs associated with privilege review. The authors of *The Facciola-Redgrave Framework*¹⁸ submit that the majority of cases should adopt a

¹⁷ The Sedona Conference®, *The Sedona Conference® Commentary on Achieving Quality in the E-Discovery Process* (Phoenix: The Sedona Conference®, May 2009) at 17-18 (Public Comment Version).

¹⁸ Hon. John M. Facciola & Jonathan M. Redgrave, “Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework” (Nov. 2009) 4 Fed. Cts. L. Rev. 1. “The volume of information produced by electronic discovery has made the process of reviewing that information, to ascertain whether any

new approach that is premised on counsel's agreement about what categories of information will be eliminated from any privilege review because the information is clearly not privileged. On the other hand, information that is so clearly privileged, such as emails between counsel and the instructing client in the litigation, will likely be accepted as privileged by the opposing party. Counsel should try and reach an agreement with respect to the categories of information that must be reviewed. This process involves the formal and informal exchange of information to substantiate the categories, with the goal of eliminating many potential disputes. The authors propose detailed descriptions of the information falling within the categories to be reviewed to keep disputes to a minimum. They argue that the approach will be more useful and, in effect, much less burdensome because the number of documents that must be read has been reduced to a minimum.

2. Review team options

Ideally, the review will be conducted by a highly trained, experienced group of lawyers who are dedicated to one file at a time. A focused team is better positioned to ensure confidentiality, provide consistency, and work within a designated timeline, at reasonable rates. If off-shore reviewers are being considered as a lower cost alternative, counsel will need to offer more supervision and think through any implications for privileged or private/confidential information.

3. Quality assurance

In addition, there should be a second level review for quality control. Experienced review lawyers should review a sample of the results of each reviewer to assess compliance with the standards and to ensure consistency of application. The team and its productivity need to be carefully managed throughout the review process to prevent cost overruns and/or a flawed analysis.

F. Think of the Discovery Plan as an Action Plan

A key recommendation of the Ontario Civil Justice Reform Project was that parties “develop a written discovery plan addressing the most expeditious and cost-effective means of completing the discovery process in a manner that is proportionate to the needs of the action.”¹⁹ In January 2010, Ontario introduced Rule 29.1 Discovery Planning that formalizes the requirement for a discovery plan and grants the court the power to “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.” A good example is the agreement between counsel attached by the court to its endorsement in *Enbridge Pipelines Inc. v. BP Canada Energy Company*.²⁰

of it is privileged from disclosure, so expensive that the result of the lawsuit may be a function of who can afford it. ... The authors submit that the majority of cases should reject the traditional document-by-document privilege log in favor of a new approach that is premised on counsel's cooperation supervised by early, careful, and rigorous judicial involvement.”

¹⁹ Ontario Civil Justice Reform Working Group, *Civil Justice Reform Project* by the Honourable Coulter A. Osborne, Q.C. (Toronto: Ministry of the Attorney General, 2007), online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>>.

²⁰ 2010 ONSC 3796 (CanLII).

Apart from the content defined generally in sub-Rule 29.1.03 (3),²¹ the discovery plan should be in proportion to the size and nature of the case. As the court observed in *Enbridge*, “(n)ot every action will in my view require the detailed type of plan as set out in this Agreement. Many different types of action need only an informal agreement between counsel.” The Ontario E-Discovery Implementation Committee has published models of a short and long discovery plan as well as a Checklist for Preparing a Discovery Plan, all available on the Ontario Bar Association (OBA) website.²²

Planning, even in smaller, less complex cases, benefits the parties by exposing any different assumptions about what information is required and how much time and effort will be required to carry out discovery. In thinking about facts, timeframes, custodians, sources and the steps required to complete the process, parties can uncover any barriers (such as missing information) and deal with them at the beginning of the case.

Since it is usually less expensive to settle earlier rather than later, the planning process allows the party and its counsel to evaluate the strength or weakness of its case on its merits and decide how much discovery is really needed.

Appendix A provides a more detailed discussion of discovery planning suitable for complex projects involving numerous custodians, multiple issues, and large volumes.

G. Use automated tools where appropriate for the job

The National Model Practice Direction For the Use of Technology in Civil Litigation, published by the Canadian Judicial Council in 2008, encourages the use of automated tools where “a substantial portion of the Potentially Discoverable Documents consist of Electronic Material; the total number of Potentially Discoverable Documents exceeds 1,000 Documents or 3,000 pages; there are more than three parties to the proceeding; or the proceedings are multi-jurisdictional or cross-border.”²³

Software tools in the e-discovery market offer essentially three types of functionality that can aid in the control of costs:

- Analyses of the content and metadata of the universe of information to help with the selection of relevant information
- Removal of irrelevant and duplicative information
- Progress reporting, performance metrics, audit logs and dashboards to help with the management of the process

²¹ Ontario, *Rules of Civil Procedure*, O. Reg. 575/07, s. 6 (1), online: Government of Ontario <http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm>.

²² Model E-Discovery and E-Trial Precedents, online: Ontario Bar Association <http://www.oba.org/En/publicaffairs_en/E-Discovery/model_precedents.aspx>.

²³ *National Model Practice Direction for the Use of Technology in Civil Litigation*, online: Canadian Judicial Council <[http://www.cjc-ccm.gc.ca/cmslib/general/JTAC%20National%20Model%20Practic\(1\).pdf](http://www.cjc-ccm.gc.ca/cmslib/general/JTAC%20National%20Model%20Practic(1).pdf)>.

In selecting processes and tools, organizations should consider the size of the case, the volume and type of information, and the variety of sources, the related cost, burden on and disruption of normal business activities, and whether the selected process is reasonable and justifiable if put to the test of objections from the opposing side.

A discussion of the full range of electronic discovery and litigation support technologies is beyond the scope of this commentary, but the following section looks at how certain technologies can be used to bring down the costs in large and complex cases, and sometimes even in more standard litigation.

Early Case Assessment (ECA) technology allows for a critical front-end look at the important documents in the holdings to help with the assessment of the probable success of the claim or defence. In addition, ECA technology can generate an analysis of the sources of information, the overall volumes belonging to each custodian, the type of information held by the custodian, and possible problem spots, all of which can be used to estimate the likely time, effort, and burden involved in the collection, processing, review, and production. Some forms of ECA technology generate a report with statistics about the content that can be analyzed by counsel and the client to identify information that will be important. This report will show volume of email by date for each custodian, and patterns of correspondence with others, which help to illustrate who is “talking” to whom. Counsel can then identify correspondence between key players at critical periods of time, together with the volume, number of attachments, and type of attachments. After the custodians are identified, the related information can be assessed for content related to the context of a legal case. The context will yield other custodians and, in some cases, additional data sources.

There are a number of ECA tools on the market.²⁴ The parties should assess which tools are best suited for their needs using the input of experienced e-discovery help.

Illustration: In a dispute alleging wrongful solicitation and misappropriated contracts by a direct competitor, a party would most likely seek information related to contracts, customers, and financial performance. Having narrowed the search to email, customer lists and financial information, the parties will still face the prospect of sorting through and receiving mass amounts of data. The analytics report highlights who was involved in email communications related to the customers in question – that is, to or from whom the key player sent or received email related to those customers. Review of a sample of those emails may point to another important player whose information stores should be collected. For individual players, the analytics can also identify senders and addressees whose emails would be irrelevant – for example, news feeds and email subscriptions to industry information services, or personal exchanges with family members.

Collection technologies apply some forensic techniques to the capture of information, to ensure that the information maintains its integrity and is not altered. They typically gather information from any source that is connected to the corporation’s network, from servers

²⁴ Joshua Konkle, *Early Case Assessment Tools for E-Discovery* (30 May 2008), online: Search Storage Channel <<http://searchstoragechannel.com>>. Note that the products referenced are cited as examples only. No endorsement is implied.

through to desktops and media such as USB keys that are attached. Operators can target specific file types and exclude others, or select only information belonging to key custodians. Email messages are unpacked from their containers (such as PSTs and “zipped” files). Some collection tools suppress duplicates as an option during the capture. Metrics report on the progress of the collection, the number of custodians processed, the volume of objects collected, and any problems that require intervention, such as encrypted, password protected, or corrupted files.

Illustration ii: In examining a report of all the information that has been collected to date, the team determines that the email sent by one of the key players during a critical time period has not been included, indicating that it has not yet been found.

Culling technologies remove unwanted information from the collection. “DeNISTing” refers to the exclusion of files such as operating system, utilities, multi-media, etc., based on their signature (or characteristics); the NIST is a list of the signatures belonging to certain file types and is maintained by the National Institute of Standards and Technology. “De-duplication” refers to the process by which identical documents are excluded from the collection, while a place holder and pointer shows where the other instances are in the collection. Metrics detailing the volumes of different types of excluded data and document types are produced along with indicators of the reduction in the collection resulting from the cull.

Review support tools use analytics to determine what data needs to be reviewed and what data can be ignored in the review and analysis process, based on indices generated from the content and the metadata in the collection.²⁵ These indices can include date and addressee information, along with information about individual emails such as the format of each attachment or incorporated email.

As pointed out earlier, an analytics tool can show who is communicating about what with whom, making it possible to identify the most highly relevant connections and topics, and ranking the remainder. Some counsel share these reports in their discussions with opposing counsel, to help explain the decisions to include and exclude sources and communications, and to assist in devising a “phased” approach to productions. This transparent approach to planning the discovery can improve cooperation with opposing counsel, or, in the absence of cooperation from the opponent, approval from the bench.

Illustration iii: In the same dispute alleging wrongful solicitation and misappropriated contracts by a direct competitor, the defendant’s counsel brings the reports from the analysis of the collection to the discovery planning session to explain and get agreement on some processing decisions. The analytics report highlights the number of emails that mentioned the names of the customers who allegedly were wrongfully solicited and graphically shows the volume of emails with the key customers by date. The customer is referred to by various company names, including some misspellings. In some cases only the name of the customer’s senior officer appears. The plaintiff’s counsel agrees that the set of emails including all variations of the customer company

²⁵ Peg Duncan & Susan Wortzman, “E-Discovery: The Costs Are Coming Down” (Paper presented at the Second Annual Sedona CanadaSM Program on Getting Ahead of the E-Discovery Curve, 16-17 Sept. 2009).

name as well as those mentioning the customer's senior officer can be tagged as relevant for further processing.

Illustration iv. The analytics report displays the volume of emails and other documents in the various tranches identified by the defendant, from highly relevant to mostly irrelevant. Defendant's counsel believes the third and lower tranches contain mostly irrelevant information, or information that, if relevant, would not affect the outcome, yet these lower tranches include the bulk of the collection. Being in financial difficulties, the defendant is unwilling to expend the resources to process and review the lower tranches. Defendant's counsel forecasts the cost of processing and review of this material, and invites the opponent to pay, acknowledging that those costs may still be borne by his client if the defence loses the case, the search yields important information that affected the outcome, and the costs associated with that search are considered reasonable.

Linear review versus clustering approaches. Although the universe of data will have been reduced through targeted collection and processing, reviewing the remaining ESI can represent up to 70 percent of litigation costs.²⁶ However, there are approaches that can improve the consistency and speed of the review.

Various software review tools streamline the review process by grouping documents relating to identical or similar topics so that they can be reviewed together. Clustering review tools analyze the statistical or linguistic patterns to assist the recognition of relevant information and increase consistency, and can reduce the time it takes to review ESI by as much as two thirds.²⁷

An example of such technology includes the email trace, which provides the user with an instant view of an email thread communication to determine to whom emails were sent and at what time. The emails can be colour-coded to indicate the original email, replies, and forwarded emails, to allow the user to quickly navigate the online conversation, to zoom in on relevant communications. At any point, a user can check on the respective line to see the actual email.

A scenario involving a linear document review compared to an approach using conceptual/analytic software helps to illustrate the advantages gained through the use of clustering technology in the review process. A linear type of review for 500,000 documents at a document review rate of 50 document decisions per hour requires 10,000 hours at a "typical New York lawyer" contract billing rate of roughly \$65 per hour.²⁸ This translates into a review cost of \$650,000. In comparison, a conceptual review of 500,000 documents at 200 document decisions per hour takes only 2,500 hours. At \$65 per hour, the total cost is

²⁶ Government Technology, News Release, "E-Discovery Webinar Available on Demand" (11 March 2008), online: Government Technology <<http://www.govtech.com/security/E-Discovery-Webinar-Available-On-Demand.html>>.

²⁷ Ronni D. Solomon & Jason R. Baron, "Bake-offs, Demos and Kicking the Tires: A Practical Litigator's Brief Guide to Evaluating Early Case Assessment Software and Search and Review Tools" at 3 (Paper presented at Third Annual The Sedona Conference® Institute (2009), online: King & Spalding LLP <http://www.kslaw.com/Library/publication/BakeOffs_Solomon.pdf>.

²⁸ The rates are taken from an article entitled "Achieve Savings by Predicting and Controlling Total Discovery Cost," and do not reflect the opinion of and are not endorsed by The Sedona Canada™ Working Group. See Chris Eagan & Glen Homer, "Achieve Savings by Predicting and Controlling Total Discovery Cost" (1 Dec. 2008), online: The Metropolitan Corporate Counsel <<http://www.metrocorpccounsel.com>>.

\$162,500, a reduction of 75%. The dramatic difference in the rate of review is possible because the conceptual software organizes documents of similar content into groups which enable reviewers to identify similarities and differences between documents more efficiently.²⁹

Documents originating in hard copy that have been OCR'd may be less susceptible to clustering technologies since the characters on the page may have been imperfectly recognized. Electronic filtering that depends on document metadata, such as the addressee, and the subject and header information in email, will not be effective against a collection of paper documents. These and similar limitations should be considered in selecting review approaches.

Determining the total costs of e-discovery associated with a particular review platform requires an analysis of the up-front costs associated with the review tools,³⁰ review rates, volume to be reviewed, project duration, team size, and other factors. The assistance of professional e-discovery vendors and experts can help to identify the best approach for the e-discovery project at hand given the needs of the particular case.

H. Know when to call for help from e-discovery consultants (number of sources and/or custodians, complexity)

Clients are often unwilling to spend money on external consultants if they have internal IT resources. However, it may be more cost effective to bring in an e-discovery consultant, if only for a short period, to complete the planning and collection in a timely fashion. Often the resources in the IT department are fully occupied with their regular duties, which cannot be put aside if the network is to continue functioning, so they complete the work as and when they have time.

If the client has little experience with discovery, a consultant can provide much needed support to ensure that preservation efforts are defensible but not overly inclusive, that the collection is targeted at the likely sources of relevant information, that the process is completed as quickly as is practical, and the documentation that might be needed if the collection is challenged is produced.

Whether the processing stage is completed by a third party vendor, or internally by an organization, it is essential that the instructions for processing the data are thoughtfully provided by counsel. At this stage, counsel will need to consider how to conduct the de-duplication and culling of the data. It is not appropriate at this (or any) stage to “leave it to the vendor” to make these decisions. These steps are critical and may significantly affect the output, namely, the production set, including the ESI that was collected. For example, if the wrong search terms, search criteria or search methodology are used, many relevant records could possibly be excluded from the production set.

²⁹ An analysis of the benefits received from using a conceptual review platform is set out in an article which appeared in a publication by *The Metropolitan Corporate Counsel*. The described scenario called for the legal team to provide an analysis of the e-discovery costs (including the cost of processing, hosting, and review) involved with 100 gigabytes of Outlook.pst files, including de-duplication and key word searching, using either a linear or a conceptual review platform. The estimated e-discovery cost for the linear review option was \$1,011,250 compared to a \$416,625 cost for the conceptual review option – a 60% difference. See *ibid*.

³⁰ Software licences, hardware, technical support, training, among others.

I. Improve document retention/destruction practices

As a result of our global dependence on the use of computers, the Internet, email, and social networking tools such as Facebook and LinkedIn, huge volumes of information are now available to litigants.

However, the costs of identifying potentially relevant ESI can, in many cases, be reduced in circumstances where an organization has a well-designed and implemented Information Management and Records Retention Policy (“Records Management Policy”). Such a policy can serve as a guide in identifying the type, nature, and location of information (including ESI) that is relevant to the legal proceeding as well as the potential sources of data.

A Records Management Policy could also include:

- Information about an organization’s information management structure as reflected in a data map³¹
- Guidelines for the routine retention and destruction of ESI as well as paper, and account for necessary modifications to those guidelines in the event of litigation
- Processes for the implementation of legal holds, including measures to validate compliance
- Processes for auditing IT practices to control data proliferation (redundant backups, use of links to documents rather than attachments, etc.) and to institutionalize other good record-keeping practices, and
- Guidelines on the use of social media in the business context.

It should also be noted, however, that in cases involving allegations of fraud, conspiracy, misappropriation of funds, or unlawful disclosure of confidential information, the relevant ESI (which would likely include the metadata) may not fall under the category of a business record listed in the Records Management Policy. Thus, while a Records Management Policy should be consulted at the identification and the preservation stage of e-discovery, the examination and consideration of such a policy should not limit the level of inquiry to only those types of records listed in the Records Management Policy.

³¹ A data map is a visual reproduction of the ways that electronically stored information (ESI) moves throughout organizations, from the point it is created to its ultimate destruction as part of the organization’s information management and document retention program. Data maps address how people within the organization communicate with one another and with others outside the organization. A comprehensive data map provides legal and IT departments with a guide to the employees, processes, technology, types of data, and business areas, along with the physical and virtual locations of data throughout the organization. It includes information about data retention policies and enterprise content management programs and identifies servers that contain data for various departments or functional areas within the organization.

Effective records management policies will enable the parties to present a more accurate picture of the cost and burden to the court when refusing further discovery requests, or when applying for orders shifting costs to the receiving party in appropriate cases. A detailed discussion of information management and records retention policies is beyond the scope of this paper. Readers are encouraged to consult *The Sedona Guidelines: Best Practices Guidelines & Commentary for Managing Information & Records in the Electronic Age*.³²

³² The Sedona Conference®, *The Sedona Guidelines: Best Practices Guidelines & Commentary for Managing Information & Records in the Electronic Age*, 2d ed. (Phoenix: The Sedona Conference®, Nov. 2007).

III. Conclusion

The volume of information available to litigants through the proliferation of ESI and the complexities associated with the e-discovery process have served to focus the attention of the courts, the judiciary, and the litigants themselves on improving efficiency and cost effectiveness. The parties themselves have a vested interest in ensuring that the costs of the e-discovery process do not become the drivers of the litigation and that the issues in the litigation remain the focus for the tiers of fact. The use of experienced project managers with a focused e-discovery team and the collaboration of the litigants themselves will only serve to help the parties achieve this goal.

Appendix A—Project Management

Project Management

Project management has been defined as “the discipline of organizing and managing resources (e.g., people) in such a way that the project is completed within defined scope, quality, time, and cost constraints.”³³ The e-discovery team will often be led by the designated external counsel, but in large complex cases it may be appropriate to delegate planning, scheduling, and coordination functions to a dedicated project manager, who in any case will be a less expensive resource. The e-discovery team leader works with the client to define the project’s scope, timeline, and funding constraints, and the project manager develops the plan within this “iron triangle”. Good project planning contributes to cost containment through avoidance of wasted effort, and produces realistic cost and time estimates that can inform the client in making settlement decisions and the court in considering motions for further production.

In drafting a project plan, the project manager should consider:

- Scope of the information to be collected, processed, reviewed, and produced, and any decisions about staging³⁴ production
- Structure of the project team for each of the main activities (collection, processing), including description of skills required
- Resourcing – internal resources combined with external contracts, and their availability
- Budget for external resources, services, and tools
- Roles and responsibilities of the members of the team
- Governance – who makes decisions about scope, budget, resources, and timeframes
- Assumptions (e.g., volumes expected from sources, rates of collection, processing and review, availability of internal resources, time required for tool acquisition, among others)
- Risks (e.g., new allegations or defences added to pleadings, unexpected problems with degraded or encrypted media or files) that could threaten delivery of the project within budget and schedule, and mitigation strategies
- Documentation to be developed – such as coding and processing manuals, instructions for review for relevance and privilege, etc.

³³ Kathy Schwalbe, *Information Technology Project Management*, 5th ed. (Boston: Thomson 2007) at 30. See generally “Project Management” (July 2010), online: Wikipedia <http://en.wikipedia.org/wiki/Project_Management> as cited in The Sedona Conference[®], *The Sedona Conference[®] Commentary on Achieving Quality in the E-Discovery Process* (Phoenix: The Sedona Conference[®], May 2009).

³⁴ During the meet and confer, counsel for the parties may agree to focus the first production on the information most relevant to the key issues in the litigation. The scope of that first production could be limited to the communications of the key players during the time period understood to be critical from discussions with their clients.

- Work breakdown structure of the tasks, their dependencies, who is assigned to each, and the schedule
- Quality control – processes used to ensure integrity and completeness, and conformance with scope for collection and processing, and compliance with instructions for review,³⁵ and
- Communications, including progress reporting, exception reporting, and problem tracking and resolution.

The e-Discovery Team

The e-discovery team typically comprises in-house counsel, the IT manager, external counsel, key members of the client organization, and possibly other external e-discovery vendors and experts. In-house counsel and client staff can supply knowledge of how the client's computer systems operate, the sources and locations of potentially relevant discoverable ESI, and the identification of personnel with knowledge about the issues. External resources provide missing expertise and capacity. The following table³⁶ lists possible members of the team:

<i>Team Member</i>	<i>Skills and Knowledge</i>
Litigators and external counsel	<ul style="list-style-type: none"> • Discovery rules and processes • Legal analysis and risk assessment • Settlement negotiations • Courtroom advocacy
Inside counsel	<ul style="list-style-type: none"> • Specialist legal knowledge – e.g., securities, patent, regulation, contract, employment • Knowledge of the corporation's management structure and internal workings – how decisions get made, how it is governed • Knowledge of nature of litigation typical in the industry and specific to the corporation • Legal risk management • Management of "legal holds"

³⁵For a comprehensive discussion of quality control measures in e-discovery, see The Sedona Conference®, *The Sedona Conference® Commentary on Achieving Quality in the E-Discovery Process* (Phoenix: The Sedona Conference®, May 2009) at 6 (Public Comment Version).

³⁶Susan Wortzman, Peg Duncan & Dominic Jaar, Reproduced from "New Roles and New Teams to Manage E-Discovery Successfully" (Paper presented at the First Annual Sedona Canada™ Program, Toronto, 23-24 Oct. 2008), online: The Sedona Conference® <http://www.thosedonaconference.org/conferences/tsci/20081023/conference_papers>.

*Team Member**Skills and Knowledge*

Client – senior staff in unit related to matter

- Facts in the case – the “story” that led up to the suit, and the chronology of events
- Insight into the issues at stake
- Familiarity with the opposing party (depending on nature of suit) and the reasons for the allegations
- Knowledge of the internal players and their role in the matter
- Knowledge of what kind of information is going to be needed to prosecute or defend the case, and who the custodians would be

CFO and staff

- Keeper of the “war chest”
- Financial risk management
- Cost accounting techniques for calculating direct and indirect costs associated with processing different sources of electronically stored information (ESI)
- Tracking budget “burn”

CEO and senior officers

- In “bet the company” litigation, decisions about funding, instructions to counsel
- Support for the preservation and collection efforts, ensuring compliance

Records and Information Management

- The formal records where relevant information will be found
- Management of electronic information, and archives of electronic information
- Retention/destruction policies and practices
- How compliance with retention/destruction policies and practices is verified

<i>Team Member</i>	<i>Skills and Knowledge</i>
Information Technology	<ul style="list-style-type: none">• Applications used in the creation of “documents” – office processing, electronic mail, collaboration software, content management systems, intranet and Internet sites• Specialized business software such as computer-aided design or manufacture (CAD/CAM)• Databases and data repositories that may be relevant depending on the nature of the case• Location of information – where custodians’ email and office documents would be stored• Whether users can copy files to offline devices such as CDs, USB keys• Policies and practices regarding work done on home computers• Email management, particularly retention/destruction, inbox limits, archive management, email stores belonging to former employees• Disaster recovery practices, particularly practices related to retention of backup copies• History of changes to office software, database applications, technical architecture, archive systems, backup systems throughout relevant time periods
Human Resources	<ul style="list-style-type: none">• Who worked for the units involved, their position, and responsibilities in the organization, timeframe if no longer an employee, contact information• Personnel records, including employee evaluations, which may be important in employment cases
E-discovery specialists	<ul style="list-style-type: none">• Project management• Discovery planning• Practical experience with the preservation, collection, processing, and production of information from electronic sources• Techniques for managing the legal hold• Documenting and tracking collection and processing to ensure authenticity• Responding to e-discovery motions• Estimating burden in terms of direct costs, time, level of effort, and indirect costs (lost time during search for documents, tying up internal resources)• Search methodologies and use of e-discovery tools for culling and filtering

Team Member

E-discovery vendors

Skills and Knowledge

- Collection and extraction of information from difficult sources (older media, older formats)
- Forensic retrieval
- Processing (de-duplication, culling, filtering)
- Hosting services

E-Discovery is a Process

In its *Commentary on Achieving Quality in the E-Discovery Process*, The Sedona Conference® Working Group on Best Practices for Document Retention and Production specified requirements for the development of a well thought-out process for dealing with ESI, including:

- Leadership. The process should be led by a person with the assigned responsibility for ensuring that the e-discovery process is complete and accurate.
- Tailoring. The e-discovery process should be tailored to the specific circumstances taking into account the size, importance, complexity, and risks associated with the case.
- Expertise. The appropriate level of expertise should be utilized to accomplish the goal of a complete and accurate e-discovery process that is both timely and cost-effective.
- Adaptability. The process should be flexible and have the ability to adapt to changes in approach and direction as the e-discovery project evolves.
- Measurement. Where appropriate, elements of the project should incorporate a method of measuring the progress and quality of results.
- Documentation. The overall process must be documented to ensure coordination, communication, measurement, and defensibility of the e-discovery process.
- Transparency. The selection, design, implementation, and measurement of a process should be able to be explained in a clear and comprehensive way to the relevant fact-finder, decision-maker, tribunal, or regulator as well as to opposing counsel as may be appropriate.³⁷

³⁷ The Sedona Conference®, *The Sedona Conference® Commentary on Achieving Quality in the E-Discovery Process* (Phoenix: The Sedona Conference®, May 2009) at 6 (Public Comment Version).

Appendix B—Cost Containment Checklist

<i>Stage</i>	<i>Checklist</i>
<i>Preservation</i>	<ul style="list-style-type: none">• Timely communication of the litigation hold to custodians• Early discussion of issues relating to preservation of ESI with the opposing side• Identification of types of documents that may contain relevant information (e.g., financial records, images, voice, logs, metadata, communications, etc.)• Identification of potential sources of such documents, considering the relevant custodians and timelines• Focusing the scope of preservation on known issues and reaching an agreement with all parties on the timing and extent of preservation, taking into consideration reasonable cost and burden• Using the most cost-effective method of preservation that still ensures compliance given the type of media, nature of data, format of data, the need for native files, etc., as well as the technical feasibility and realistic costs of various preservation methodologies• Using the organization’s internal IT resources subject to the required skills, technology, and experience, and• Installing a process for maintaining and operating computer systems or files falling within the scope of the preservation obligation that have no identifiable custodian or owner.
<i>Collection</i>	<ul style="list-style-type: none">• Who will do the collection? Can in-house IT personnel adequately manage the project or is the assistance of external consultants and vendors required? Evaluation of vendors’ software and services should include the defensibility of the process in the litigation context as well as the cost and the experience of the vendor.• Are both manual and automated procedures for collection appropriate?• Will the collection process capture all relevant ESI?• Is it appropriate to use sampling techniques to limit the burden of searching voluminous sources of ESI? (By reviewing an appropriate sample of a large body of ESI, parties can determine if a particular source is likely to yield responsive results and whether a more comprehensive review is required.)• Whether the collection procedure will prevent the inadvertent destruction or alteration of ESI.

*Stage**Checklist*

- What are the costs and risks³⁸ associated with the process selected for collected ESI?
- What kind of audit trail will the collection team create to ensure that the collected ESI is authentic and that a proper chain of custody has been maintained?
- What quality assurance programs should be put in place? Validation may involve the use of sampling techniques, the use of business taxonomy or standardized business vocabulary, or other means by which a detailed point by point inspection is conducted of the data set to determine if the output is reliable, accurate, and trustworthy.³⁹
- What documentation is required to accurately describe the steps taken regarding the validation and other quality control measures that are appropriate to the needs of the particular case? Well-documented collections enable an organization to respond to challenges to the collection process. The documentation of the collection process should describe what is being collected, the procedures employed and the steps taken to ensure the integrity of the information collected as well as to establish that the parties have engaged in the meet and confer process.⁴⁰

Processing and Review

- Treatment of duplicates – both exact and near.
- Avoid “linear review” approaches
- Use a combination of electronic and lawyer review
- Cull the collection – look critically at what can be excluded
- Analyze the review statistics – if only 1 of every 100 documents reviewed is classified as relevant, there’s probably a need for further culling
- Automated tools increase consistency and decrease time

Production and Presentation

- The cost of producing ESI in a particular format
- The format most useful to the producing party and its

³⁸ Leaving the collection to the parties/custodians themselves risks creating a collection that is not complete or accurate and possibly the parties’ inability to demonstrate (through the use of independent experienced counsel or vendors) the integrity and thoroughness of the collection. Other risks associated with using the parties themselves to collect the relevant ESI include inadvertent collection and production of ESI that is subject to confidentiality claims or privilege claims.

³⁹ See the explanation of the need to measure quality in e-discovery by means of independent testing and sampling as set out in The Sedona Conference®, *The Sedona Conference® Commentary on Achieving Quality in the E-Discovery Process* (Phoenix: The Sedona Conference®, May 2009) at 8-12 (Public Comment Version).

⁴⁰ The Sedona Conference®, *The Sedona Conference® Commentary on Achieving Quality in the E-Discovery Process* (Phoenix: The Sedona Conference®, May 2009) at 6 (Public Comment Version).

*Stage**Checklist*

sustainability over time

- The suitability of the producing party's in-house review technology for working with native files
- The procedures required to create scanned images and extracted text for searching
- The conversion of the scanned images to preservation and access copies (such as PDF⁴¹ and JPEG2000⁴²) for storage and access cost-savings
- The producing party plans to use any of these documents as productions or trial exhibits that require a fixed, Bates-numbered version of produced materials, and
- The stated preferences of the opposing parties.

The analysis should not be limited to comparing the cost of producing material in a variety of different formats. Instead, the parties should try to reach an agreement on a methodology of production that

- Preserves the metadata if required, and allows it to be produced where relevant
- Communicates accurately the content
- Protects the integrity of the information
- Allows for the creating of a version that can be redacted
- Assigns a unique production identification number to each data item, and
- Can be readily imported into any industry-standard litigation review application.⁴³

Other factors to be taken into account at the production stage include:

- The need for a document list, including the types of information to be provided in the document list

⁴¹ ISO 32000-1, Document management – Portable document format – Part 1: PDF 1.7.

⁴² ISO/IEC 15444-1:2000, Information technology -- JPEG 2000 image coding system -- Part 1: Core coding system.

⁴³ The Sedona Conference®, *The Second Canada Principles Addressing Electronic Discovery* (Phoenix: The Sedona Conference®, Jan. 2008) at 30-31 ff. “Principle 8, Comment 8b.” See also British Columbia, *Electronic Evidence Project Practice Direction* (July 2006); Alberta, *Civil Practice Note*, No. 14 (May 2007); *National Model Practice Direction for the Use of Technology in Civil Litigation*, online: Canadian Judicial Council <[http://www.cjc-ccm.gc.ca/cmslib/general/JTAC%20National%20Model%20Practic\(1\).pdf](http://www.cjc-ccm.gc.ca/cmslib/general/JTAC%20National%20Model%20Practic(1).pdf)>; *National Generic Protocol for Use with the National Practice Direction for the Use of Technology in Civil Litigation*, online: Canadian Judicial Council <[http://www.cjc-ccm.gc.ca/cmslib/general/JTAC%20National%20Generic%20Proto\(1\).pdf](http://www.cjc-ccm.gc.ca/cmslib/general/JTAC%20National%20Generic%20Proto(1).pdf)>.

Stage

Checklist

- Authenticity issues such as the need for metadata in the production set
- Measures to protect privilege, privacy, trade secrets, and other confidential information
- The need for privilege logs for voluminous ESI
- The ability to electronically search the ESI in its chosen production format, and
- The creation or use of ESI repositories for collaboration and review with co-counsel and efficient management of ESI in repeat or related litigation.

Appendix C—Standards & Best Practices

Standards & Best Practices

The following is a compilation of sources setting out standards and best practices associated with the identification, collection, processing, production and presentation of ESI.

All businesses, regardless of their size or their nature, can use, re-purpose or adapt the guidance and best practices to their own situation. Although these documents might seem technical in their approach, they are, in fact, geared towards providing best practices and advices to business managers, litigators and external counsels, and people at all levels.

CANADIAN

International Organization for Standardization (ISO) is listed since the Standards Council of Canada (SCC) facilitated the development and use of these international standards.

These standards can be purchased at the SCC website store at
<<https://www.standardsstore.ca/eSpecs/index.jsp>>.

CAN/CGSB 72.34-2005, “Electronic Records as Documentary Evidence,” online:
Canadian General Standards Board
<<https://www.standardsstore.ca/eSpecs/SearchFormAction.do?page=1&searchValue=Electronic%20Records%20as&searchKey=TITLE&organizations=CGSB&language=en>>:

This standard applies to those who receive, create, capture, maintain, use, store or dispose of records electronically and applies to both businesses and government and is intended to ensure that the recorded information is trustworthy, reliable and recognized as authentic.

“Email Management in the Government of Canada,” online: Library and Archives Canada
<<http://www.collectionscanada.gc.ca/government/news-events/007001-630500-e.html>>:

This guideline provides a number of related recommendations for the management of email in the Government of Canada.

“Directive on Recordkeeping,” online: Treasury Board of Canada <<http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=16552>>:

This policy instrument from the Government of Canada can be used to ensure effective recordkeeping practices in creating, acquiring, capturing, managing and protecting the integrity of information resources of business value.

“Electronic Information Management,” online: Province of Alberta
<<http://www.im.gov.ab.ca/index.cfm?page=imtopics/eim.html>>:

Resources providing guidance on managing electronic information in the Government of Alberta.

ISO 15489-1:2001, Information and documentation — Records management — Part 1: General.

This document provides guidance on managing records of originating organizations, public or private, for internal and external clients

ISO/TR 15489-2:2001, Information and documentation — Records management — Part 2: Guidelines.

This document is supplementary to ISO 15489-1:2001, and provides further explanation and methodology for the implementation of the standard.

ISO/TS 23081-2:2007, Information and documentation — Records management processes — Metadata for records — Part 2: Conceptual and implementation issues.

This document establishes a framework for defining metadata elements consistent with the principles and implementation considerations outlined in ISO 23081-1:2006.

ISO/TR 26122:2008, Information and documentation — Work process analysis for records.

This document provides guidance on work process analysis from the perspective of the creation, capture and control of records.

ISO 16175-3:2010, Information and documentation -- Principles and functional requirements for records in electronic office environments -- Part 3: Guidelines and functional requirements for records in business systems

This document provides general requirements and guidelines for records management and gives guidelines for the appropriate identification and management of evidence (records) of business activities transacted through business systems.

ISO 16175-1:2010, Information and documentation -- Principles and functional requirements for records in electronic office environments -- Part 1: Overview and statement of principles.

This document provides principles of good practice, guiding principles, implementation guidelines and lists risks and mitigations for the purpose of enabling better management of records in organizations.

Model E-Discovery and E-Trial Precedents, Ontario E-Discovery Implementation Committee, online: Ontario Bar Association

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

This website provides guidance documents and commentaries on e-discovery and e-trials, issued by the E-Discovery Implementation Committee, a joint committee established by the Ontario Bar Association and The Advocates' Society and composed of litigators from both the private and public sectors, and members of the judiciary in Ontario.

“Policy on Information Management,” online: Treasury Board of Canada

<<http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12742>>:

This policy instrument from the Government of Canada can be used as guidance to achieve efficient and effective information management within organizations; foster informed decision making; facilitate accountability, transparency, and collaboration; and preserve and ensure access to information and records for the benefit of present and future generations.

“Retention Guidelines for Common Administrative Records of the Government of Canada,” online: Library and Archives Canada

<<http://www.collectionscanada.gc.ca/government/products-services/007002-3100-e.html>>.

These guidelines provide advice to Government of Canada institutions on the establishment of minimum retention periods for records that support the five common administrative functions of the Government of Canada, namely General Administration, Real Property Management, Materiel Management, Comptrollership, and Human Resources Management.

The Sedona Conference®, “The Sedona Canada™ Principles: Addressing Electronic Discovery,” online: The Canadian E-Discovery Portal <<http://www.lexum.ca/e-discovery/>>:

This web portal contains relevant information relating to e-discovery in Canada and case law digests.

NON-CANADIAN

ANSI/ARMA 16-2007, The Digital Records Conversion Process: Program Planning, Requirements, Procedures, online: AIIM International <<https://www.arma.org/standards/index.cfm>>:

This American National Standard provides guidance in ensuring that electronic records remain authentic and trustworthy as they are converted from one digital recordkeeping system to another. Though it does not address digital preservation, there is a substantial link between conversion and digital preservation, as many preservation strategies involve some type of conversion process.

The Sedona Conference® “The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age,” online: The Sedona Conference® <<http://www.thesedonaconference.org/dltForm?did=Guidelines.pdf>>:

This document suggests basic guidelines, commentary and illustrations to help organizations develop sound and defensible processes to manage electronic information and records.

Appendix D—Pleading & Relevance in the Rules of Civil Procedure in Canadian Jurisdictions (November 2010)

<i>Jurisdiction</i>	<i>Pleading</i>	<i>Relevance</i>
Federal ⁴⁴	FC 174. Every pleading shall contain a concise statement of the material facts on which the party relies, but shall not include evidence by which those facts are to be proved.	Rule 222(2) For the purposes of rules 223 to 232 and 295, a document of a party is relevant if the party intends to rely on it or if the document tends to adversely affect the party's case or to support another party's case.
British Columbia ⁴⁵	3-1 (2) A notice of civil claim must do the following: (a) set out a concise statement of the material facts giving rise to the claim	7-1(1) ... each party of record to an action must, ..., (a) prepare a list of documents in Form 22 that lists a. all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact, and b. all other documents to which the party intends to refer at trial, and (b) serve the list on all parties of record.
Alberta ⁴⁶	13.6 A pleading must state any of the following matters that are relevant: (a) the facts on which a party relies, but not the evidence by which the facts are to be proved.	5.1(1) Within the context of rule 1.2, the purpose of this Part is: a) to obtain evidence that will be relied on in the action, b) to narrow and define the issues between parties, c) to encourage early disclosure of facts and records, d) to facilitate evaluation of the parties' positions and, if possible, resolution of issues in dispute, and e) to discourage conduct that unnecessarily or improperly delays proceedings or unnecessarily increases the cost of them.

⁴⁴ *Federal Courts Rules*, online: Department of Justice <<http://laws.justice.gc.ca/en/F-7/SOR-98-106/index.html>>.

⁴⁵ British Columbia, *Supreme Court Civil Rules*, online: BC Laws <<http://www.bclaws.ca/>>.

⁴⁶ Alberta, *Alberta Rules of Court*, online: Alberta Courts <<http://www.albertacourts.ab.ca/Home/Spotlight/tabid/310/Default.aspx>>.

<i>Jurisdiction</i>	<i>Pleading</i>	<i>Relevance</i>
Saskatchewan ⁴⁷	139(1) Every pleading shall contain and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which the facts are to be proved. A pleading shall be as brief as the nature of the case will permit.	212(1) Parties to an action shall, ..., serve on each opposite party a statement as to the documents which are or have been in his possession or power relating to any matter in question in the action. Principle 1 of Practice Directive No. 6 (E-Discovery Guidelines) ⁴⁸ In general, and subject to the following principles, electronic documents that are relevant to any matter in question in the action must be disclosed in accordance with Rule 212 of <i>The Queen's Bench Rules</i> .
Manitoba ⁴⁹	25.06(1) Every pleading shall contain a concise statement of the material facts on which the party relies for a claim or defence, but not the evidence by which those facts are to be proved.	Rule 30.01(1)(c) a relevant document is one which relates to any matter in issue in an action.
Ontario ⁵⁰	25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. R.R.O. 1990, Reg. 194, r. 25.06 (1).	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.
Québec ⁵¹	76. In their written pleadings, the parties must state the facts that they intend to invoke and the conclusions that they seek.	N/A
New Brunswick ⁵²	27.06 (1) Every pleading shall contain a concise statement of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved.	Rule 31.02(1) Every document which relates to a matter in issue in an action and which is or has been in the possession or control of a party or which the party believes to be in the possession, custody or control of some person not a party, shall be disclosed as provided in this rule, whether or not privilege is claimed in respect of that document.

⁴⁷ Saskatchewan, *Queen's Bench Rules*, online: Government of Saskatchewan <<http://www.qp.gov.sk.ca/documents/English/Rules/qbrules.pdf>>.

⁴⁸ Saskatchewan, *Court of Queen's Bench Practice Directive No. 6* at 488, online: Government of Saskatchewan <<http://www.qp.gov.sk.ca/documents/English/Rules/practice.pdf>>.

⁴⁹ Manitoba, *Court of Queen's Bench Rules*, online: Government of Manitoba <<http://web2.gov.mb.ca/laws/rules/qbr1e.php>>.

⁵⁰ Ontario, *Rules of Civil Procedure*, online: Government of Ontario <http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm>.

⁵¹ Québec, *Code of Civil Procedure*, online: CanLII <<http://www.canlii.org/en/qc/laws/stat/rsq-c-c-25/latest/rsq-c-c-25.html>>.

⁵² New Brunswick, *Rules of Court*, N.B. Reg. 82-73, online: CanLII <<http://www.ijcan.com/en/nb/laws/regu/nb-reg-82-73/latest/nb-reg-82-73.html>>.

<i>Jurisdiction</i>	<i>Pleading</i>	<i>Relevance</i>
Nova Scotia ⁵³	38.02 (3) Material facts must be pleaded, but the evidence to prove a material fact must not be pleaded.	<p>Rule 14.01</p> <p>(1) In this Part, “relevant” and “relevancy” have the same meaning as at the trial of an action or on the hearing of an application and, for greater clarity, both of the following apply on a determination of relevancy under this Part:</p> <p>...</p> <p>(b) a judge who determines the relevancy of a document, electronic information, or other thing sought to be disclosed or produced must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the document, electronic information, or other thing relevant or irrelevant;</p> <p>(c) a judge who determines the relevancy of information called for by a question asked in accordance with this Part 5 must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the information relevant or irrelevant.</p> <p>(2) A determination of relevancy or irrelevancy under this Part is not binding at the trial of an action, or on the hearing of an application.</p>
PEI ⁵⁴	25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for his or her claim or defence, but not the evidence by which those facts are to be proved.	<p>Rule 30.02(1)</p> <p>Every document relating 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.</p>
Nfld Labrador ⁵⁵	14.03. Every pleading shall contain a statement in a summary form of the material facts on which the party pleading relies for a claim or defence, but not the evidence by which the facts are to be proved, and the statement shall be as brief as the nature of the case admits.	<p>Rule 32.01. (1) ..., a party to a proceeding shall, ..., file and serve on the opposing party a list in Form 32.01A of the documents of which the party has knowledge at that time relating to every matter in question in the proceeding and file in the Registry the list without a copy of any document being attached thereto.</p>

⁵³ Nova Scotia, *Annotated Civil Procedure Rules*, online: Nova Scotia Barristers Society <<http://nslaw.nsbs.org/nslaw/>>.

⁵⁴ Prince Edward Island, *Supreme Court Annotated Rules of Civil Procedure*, online: Government of Prince Edward Island <<http://www.gov.pe.ca/courts/supreme/rules/index.php3>>.

⁵⁵ Newfoundland and Labrador, *Rules of the Supreme Court*, online: Government of Newfoundland and Labrador <<http://www.assembly.nl.ca/legislation/sr/regulations/Rc86rules.htm>>.

<i>Jurisdiction</i>	<i>Pleading</i>	<i>Relevance</i>
Yukon ⁵⁶	20 (1) A pleading shall be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved.	Rule 25(3) Every document relating 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 this rule whether or not privilege is claimed in respect of the document.
Nunavut	Follows the Rules of the Supreme Court of the Northwest Territories	
NWT ⁵⁷	106. A pleading must contain only a statement in a summary form of the material facts on which the party pleading relies for his or her claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.	Rule 219 Every document relating 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 this Part, whether or not privilege is claimed in respect of the document.

⁵⁶ Yukon Territory, *Rules of Court*, online: Yukon Courts
<<http://www.yukoncourts.ca/courts/supreme/ykrulesforms.html>>.

⁵⁷ Northwest Territories, *Rules of the Supreme Court*, online: Department of Justice
<http://www.justice.gov.nt.ca/pdf/REGS/JUDICATURE/Rules_Supr_Crt_NWT_Pt_1.pdf>.

The Sedona Conference® Working Group SeriesSM & WGSSM Membership Program

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”

The WGSSM begins with the same high caliber of participants as our regular season conferences. The total, active group, however, is limited to 30-35 instead of 60. Further, in lieu of finished papers being posted on the website in advance of the Conference, thought pieces and other ideas are exchanged ahead of time, and the Working Group meeting becomes the opportunity to create a set of recommendations, guidelines or other position piece designed to be of immediate benefit to the bench and bar, and to move the law forward in a reasoned and just way. Working Group output, when complete, is then put through a peer review process, including where possible critique at one of our regular season conferences, hopefully resulting in authoritative, meaningful and balanced final papers for publication and distribution.

The first Working Group was convened in October 2002, and was dedicated to the development of guidelines for electronic document retention and production. The impact of its first (draft) publication—*The Sedona Principles: Best Practices Recommendations and Principles Addressing Electronic Document Production* (March 2003 version)—was immediate and substantial. *The Principles* was cited in the Judicial Conference of the United State Advisory Committee on Civil Rules Discovery Subcommittee Report on Electronic Discovery less than a month after the publication of the “public comment” draft, and was cited in a seminal e-discovery decision of the Southern District of New York less than a month after that. As noted in the June 2003 issue of Pike & Fischer’s *Digital Discovery and E-Evidence*, “*The Principles*...influence is already becoming evident.”

The WGSSM Membership Program was established to provide a vehicle to allow any interested jurist, attorney, academic or consultant to participate in Working Group activities. Membership provides access to advance drafts of Working Group output with the opportunity for early input, and to a Bulletin Board where reference materials are posted and current news and other matters of interest can be discussed. Members may also indicate their willingness to volunteer for special Project Team assignment, and a Member’s Roster is included in Working Group publications.

We currently have active Working Groups in the areas of 1) electronic document retention and production; 2) protective orders, confidentiality, and public access; 3) the role of economics in antitrust; 4) the intersection of the patent and antitrust laws; (5) *Markman* hearings and claim construction; (6) international e-information disclosure and management issues; and (7) e-discovery in Canadian civil litigation. See the “Working Group SeriesSM” area of our website www.thesedonaconference.org for further details on our Working Group SeriesSM and the Membership Program.

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