

# PRESERVATION OF E-DOCUMENTS: THE LEGAL OBLIGATION

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## **I. Introduction**

By now, we have all been inundated with fears of *Zubulake*-type damages if we don't properly preserve and produce metadata; or our client's claim will be struck if we don't advise them to preserve the back-up tapes to their computer system. "E-discovery is changing the landscape of litigation", the fear-mongers shout. Well, yes and no.

It is undeniable that the proliferation of electronically stored information ("ESI") in today's business environment makes your 3-hole punch a less utilized tool than it was 10 years ago. And it is incumbent on all counsel to be aware of the differences associated with the preservation and production of ESI vs. paper records. But, like many issues in the law, once you decode the jargon, you will find that the basic legal principles are not that different. At their core, the preservation obligations for ESI mirror the conventional obligations for paper records. You just need to be attuned to the characteristics of ESI that demand earlier and more detailed attention than the dusty boxes of documents sitting in your client's warehouse.

The purpose of this paper is to highlight the preservation obligations of ESI according to the most recent guidelines and judicial pronouncements. It will describe the potential sanctions for failing to properly preserve relevant ESI. Finally, the paper addresses the best practices to avoid any such sanctions.

## **II. The "Old School" Preservation Obligations**

In Alberta, litigants' obligation to preserve documents is governed by the *Alberta Rules of Court* and the common law.

Rules 186 - 87 of the *Alberta Rules of Court* provide the obligation for parties to produce "records" in the "possession, custody or power" of the party that are "relevant and material" to the issues in a lawsuit.

These rules also govern the production of ESI. Rule 186 defines "record" as including "... the physical representation or record of any information, data or other thing that is or is capable of being represented or reproduced visually or by sound, or both".

Rules 190 and 190.1 set out the sanctions for the failure to file an Affidavit of Records which accords with Rule 187. Those sanctions range from the payment of costs to the striking out of pleadings of the party in default.

In addition to the Rules, regard must be had to the case law regarding spoliation of evidence. As described by Mr. Justice Clarke:<sup>1</sup>

Spoliation is the destruction or material alteration of evidence, or potentially the failure to preserve property for another's use as evidence in litigation that is pending or reasonably foreseeable.

A similar statement is found in the Saskatchewan Court of Appeal decision of *Schatz v. Doust*:<sup>2</sup>

The integrity of the administration for justice in both civil and criminal matters depends in a large part on the honesty of parties and witnesses. Spoliation of relevant documents is a serious matter. Our system of disclosure and production of documents in civil actions contemplates that relevant documents will be preserved and produced in accordance with the requirements of the law ... A party is under a duty to preserve what he knows, or reasonably should know, is relevant in an action. The process of discovery of documents in a civil action is central to the conduct of a fair trial and the destruction of relevant documents undermines the prospect of a fair trial.

Thus, even outside of the context of ESI, the law has long since held firm to the notion of, and provided tools for the enforcement of, the proper preservation and retention of documentary evidence.

### **III. Why All the Fuss About ESI?**

If the Rules of Court and the common law have developed mechanisms for ensuring the preservation and retention of documents, what is there to talk about in the context of ESI?

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<sup>1</sup> North American Road Ltd. v. Hitachi Construction Machinery Co., 2005 ABQB 847, at para. 16.

<sup>2</sup> (2002), 227 Sask. R.1; 2002 SKCA 129, at para. 27.

In answering this question, I refer (and not for the last time) to the January, 2008 paper produced by Working Group No. 7 of the Sedona Conference, titled The Sedona Canada Principles: Addressing Electronic Discovery (the “*Sedona Canada Principles*”).<sup>3</sup>

The Sedona Conference is a think tank headquartered in Arizona comprised of leading jurists, lawyers, experts, academics and others at the cutting edge of issues in the area of anti-trust law, complex litigation and intellectual property rights. Beginning in 2002, Working Group 1 of the Sedona Conference turned its attention to the development of principles and best practices recommendations for electronic document retention and production in the United States. It has since published two editions of principles and guidelines for U.S. practitioners. In 2006, Working Group 7, Sedona Canada, began meeting in an effort to publish the *Sedona Canada Principles*.

The authors of the *Sedona Canada Principles* identified six categories of differences between paper documents and ESI:

1. Large volume and ease of duplication: ESI has become the preferred method of communication and information storage in Canadian business (indeed, perhaps in Canadian households); the ease of communication has resulted in an extraordinary inventory of information; which is exacerbated by the fact that many electronic records are so easily duplicated (e.g., email users frequently send the same email to many recipients, which then gets forwarded on to even further recipients).
2. Persistence: E-documents are hard to dispose of: information can remain on an electronic storage device until it is overwritten by new data, all the while remaining available for discovery. We have all heard the adage that a “deleted” email is not really extinguished.
3. E-documents are attached to the tracking information (metadata): electronic documents are accompanied by information created by the operating systems or application about a file that can show creation and edit dates, authorship, edit history, and hundreds of other pieces of information used in system administration.
4. E-documents are often updated automatically: paper documents do not typically change over time (at least through inadvertence), whereas electronic records may change over time without the user even being aware of the changes taking place.

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<sup>3</sup> A complete copy of the paper can be found at [www.thesedonaconference.org](http://www.thesedonaconference.org).

5. Electronic data need a computer program, which may become obsolete: unlike paper, some electronic data may be incomprehensible when separated from its native application.
6. E-documents are searchable, and may be dispersed in many locations: e-documents are so easily transported (not requiring boxes in a moving van), that they can be stored in any number of different media. That makes locating the records problematic. On the other hand, ESI can typically be searched quickly and fairly accurately by automated means, permitting lawyers to search through far more documents than they could hope to review manually.

For all of these reasons, it has been determined that Courts and litigants need standards tailored to electronic discovery and ESI generally.

#### **IV. What Resources Exist and What Do They Say About Preservation?**

Published in 2008, it is expected that the *Sedona Canada Principles* will become the standard employed by Canadian Courts with respect to e-discovery obligations. The *Sedona Canada Principles* have been approved to by the Alberta Court of Appeal<sup>4</sup> as well as the Ontario Superior Court of Justice.<sup>5</sup>

In addition, counsel should be aware of the “Guidelines for the Discovery of Electronic Documents in Ontario”, the British Columbia “Practice Direction Re: Electronic Evidence” and, of course, Alberta Court of Queen’s Bench Civil Practice Note 14. The latter two documents are more logistical than substantive. The Ontario Guidelines provided the blueprint for the *Sedona Canada Principles*.

#### **V. The *Sedona Canada Principles* and Commentary on Preservation**

*Sedona Canada Principle 3* provides 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.”

The commentary provides, among other things, that:

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<sup>4</sup> Innovative Health Group Inc v. the Calgary Health Region, 2008 ABCA 219, para. 26.

<sup>5</sup> Vector Transportation Services Inc. v. Traffic Tech Inc., [2008] OJ no. 1020, at paras. 19-24; Andersen v. St. Jude Medical Inc., [2008] OJ no. 430, at para. 28.

1. The obligation to preserve evidence must be balanced against the party's right to continue to manage its electronic information in an economically reasonable manner, including routinely overwriting ESI in appropriate cases.
2. Parties should have a records retention policy which provides 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.
3. Parties should take reasonable and good faith steps to meet their obligations to preserve information relevant to the issues in an action.
4. Once it is determined that a preservation obligation has been triggered, the parties should communicate to affected persons the need for and scope of preserving relevant information in both paper and electronic form. The notice should describe in detail the kinds of information that must be preserved, and should mention the volatility of ESI and that particular care must be taken not to alter, delete or destroy it.
5. Parties should not be required to search for or preserve information that is deleted, fragmented or overwritten unless the party is aware of relevant information that could only be obtained from such sources or there is a specific agreement or court order.
6. If a party's established and reasonable practice results in a loss or deletion of some ESI (as distinct from a deliberate or negligent destruction of evidence), it should be permitted to continue that practice after the commencement of litigation, as long as the practice does not result in the overriding of ESI relevant to the case that is not preserved elsewhere.

## **VI. Sanctions for Failure to Comply With the Preservation Obligations**

Prior to the widespread use of ESI, cases on spoliation of evidence were relatively uncommon. Surveillance tapes of media barons loading car trunks full of boxes of allegedly incriminating documents - while a litigator's dream - just don't arrive that often. The bulk of, and the effort required to move, thousands of pages of paper seemed to deter wholesale eradication of evidence. Undoubtedly, the odd document "fell between the cracks". Parties seem less inhibited about expunging relevant ESI. Replacing hard drives appears to be a favourite mechanism.

The advent of ESI has brought with it a proliferation of cases involving allegations of spoliation of, or, at least a failure to produce relevant records. The consequences can be

severe. We have all read or heard about the US cases. *Zubulake*<sup>6</sup> is probably the most notorious. In a workplace, sexual discrimination case, the Judge wrote six opinions on the preservation and production of relevant evidence, including electronic records. This case is important to counsel, even in Canada, because, in the course of her reasons, the Trial Judge held that:

“Counsel has a duty to effectively communicate to her client its discovery obligations so that all relevant information is discovered, retained and produced”.<sup>7</sup>

The Defendant did not produce certain documents which the Trial Judge knew existed. She gave an adverse inference jury instruction due to the Defendant’s destruction of the e-mail. The jury awarded \$29.2 million in damages.

Although Canadian courts have not matched the enthusiasm of the *Zubulake* jury for punishing destruction of documents or ESI, a couple of recent decisions indicate that the consequences can still be very severe.

In *Brandon Heating & Plumbing (1972) Ltd. v. Max Systems Inc.*,<sup>8</sup> the Plaintiff sued the Defendant over dissatisfaction with accounting software, a program called Abacus. At Examination for Discovery, questions were asked and undertakings obtained about the network and the computers upon which the Plaintiff had attempted to run the Abacus program. However, the Plaintiff made changes to its hardware and software after the Examination for Discovery without regard to the undertaking given or the potential harm it would have to the Defendant’s ability to respond to the allegations. The Chambers Judge found that the destruction and loss of such crucial and relevant evidence warranted the extraordinary remedy of striking the Plaintiff’s claim.<sup>9</sup>

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<sup>6</sup> *Zubulake v. U.B.S. Warburg LLC*, 2003 US Dist. LEXIS 18771 (SDNY 2003) “Zubulake IV”; 2004 US Dist. LEXIS 13574 (SDNY 2005) “Zubulake V”.

<sup>7</sup> I am not aware of any Canadian Court adopting this description of Counsel’s duty; but the entire e-discovery field has been a case of Canada following – with modifications – the U.S. experience.

<sup>8</sup> 2006 MBQB 90.

<sup>9</sup> Although the court referred to a specific Manitoba rule permitting such remedy from failure to answer a question or to produce any document it is required to produce, there is no reason to expect that an Alberta court would not have the jurisdiction to make the same ruling.

In *Dreco Energy Services Ltd. v. Wenzel*,<sup>10</sup> the Chambers judge ordered payment of thrown away costs in the amount of \$136,146.27 plus payment of a fine of \$75,000 (in the event that the subject computer files could not be retrieved) where the Defendants destroyed computer files as part of a sale transaction, in circumstances which the Chambers Judge found was done for the purpose of destroying evidence which would have been relevant and admissible in the litigation.

The penalties can be severe, but should be avoidable.

**VII. Best Practices to Avoid ESI Preservation Disaster: Document Retention Policy And The Litigation Hold**

There is no need to cite studies or surveys for the proposition that business communication is becoming increasingly electronic. Yet, as electronic data begins to pile up on hard drives and on servers, decisions on what ESI to retain, and what ESI to destroy (to the extent that any conscious decision is made) are, in many cases, being left to the individual record keeper. This is a litigator's dream (or nightmare, depending on which side of the table you happen to be sitting on).

The best practice for avoiding a *Zubulake*-type result is the implementation and enforcement of a coherent document retention (and destruction) policy, and the proper use of a litigation hold. Document retention policies are the subject of a separate presentation in this seminar, and will not be commented upon in this paper. However, it is important to note the standards recommended by the *Sedona Canada Principles* on sanctions for failure to properly preserve ESI, and how to avoid them.

Principle 11 provides that:

Sanctions should be considered by the court where a party will be naturally 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.

The Commentary adds the following:

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<sup>10</sup> 2006 ABQB 356.

1. The role of the court is to weigh the scope and impact of the non-disclosure; and to impose sanctions that are proportional to the culpability of the non-producing party, the prejudice to the opposing litigant, and the impact upon the court's ability to fairly dispose of the issues in dispute.
2. There are indications that Canadian Courts are becoming more willing to use extraordinary remedies in the performance of their discovery obligations: see *Brandon Heating, supra*.
3. The factors to be considered in determining the appropriate sanction include: (i) the quantity and quality of the abusive acts; (ii) whether the abusive acts flow from neglect or intent; (iii) the impact on the opposing party's ability to prosecute or defend the action; (iv) the merits of the abusive party's claim or defence; (v) the availability of sanctions short of dismissal that will address the question of prejudice; and (vi) the likelihood that a sanction short of dismissal will end the abusive behaviour.
4. Compliance with a reasonable records management policy, or justifiable inadvertent destruction or non-production of relevant documents should not, in the ordinary course, constitute sanctionable conduct. (underlining added)

As earlier noted, a party must be able to modify its document retention policy to account for reasonably anticipated litigation. Moreover, it is likely that counsel has a duty to ensure that is done. The best tool for counsel (outside or in-house) is to issue a timely and comprehensive litigation hold letter or memorandum. It must be delivered early enough to ensure that no relevant data is destroyed. Put this at the top of the list of things to do when you become aware of impending litigation (whether your client is to be a plaintiff or a defendant).

A litigation hold is notification to all affected departments, employees or consultants that are involved in the dispute that certain categories of information must be preserved for the purposes of actual or anticipated litigation. The keys to a proper litigation hold are:

1. identify all departments or individuals who you (with the help of your client) expect or suspect have records that may be relevant to the dispute;
2. remember that your duty to preserve may be broader than your duty to produce: i.e., you can't produce what you failed to preserve;
3. be clear as to why documents are being preserved, and the possible sanctions for destruction;

4. list the types of documents to be captured by the hold: i.e., emails; word processing documents; spreadsheets; databases; calendars; telephone logs; internet usage files; and network access information; depending upon the circumstances of the litigation, the hold may specify particular types of documents, including: drawings, drafts of contracts, etc.;
5. cover the various sources of electronic records, i.e., desktop computers, home computers, laptops, blackberry's, voicemail, pda's, etc.;
6. engage the client's IT or Systems Departments to assist with or supervise the hold;
7. consider the circumstances of the litigation to determine the extent of the steps required to preserve the information: e.g., in some cases it may be appropriate to mirror the hard drive of individual computers;
8. specify a time frame for the preservation: i.e., how far back and whether ongoing;
9. if hold is ongoing, re-issue the notice periodically.

### **VIII. Conclusion**

The nature of ESI has not so much changed as heightened the importance of being diligent in your (counsel and client's) obligation to preserve relevant evidence. The *Sedona Canada Principles* provide an excellent resource for all of your e-discovery obligations. It is 40 pages long, and should be read by all litigators and in-house counsel who deal with claims.

Being aware of, and being diligent in fulfilling, your obligations will ensure you are not the subject of a paper at the 3<sup>rd</sup> Annual E-Discovery Seminar.