COURT OF KING'S BENCH FOR SASKATCHEWAN

CIVIL PRACTICE DIRECTIVE #1

E-DISCOVERY GUIDELINES

REFERENCE: CIV-PD #1

Former reference: Practice Directive #6 issued September 1, 2009

Effective: July 1, 2013

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Introduction

1. While electronic documents are included in the definition of "document" contained in Rule 17-1 of *The King's Bench Rules,* this Practice Directive sets out relevant principles relating to e-discovery of electronically stored information. E-discovery refers to the preservation, retrieval, disclosure and production of documents from electronic sources and in electronic form.

2. Parties in actions which involve e-discovery should consult and have regard to the document titled "The Sedona Canada Principles Addressing Electronic Discovery, Third Edition", which can be found at: https://thesedonaconference.org/publication/The_Sedona_Canada_Principles

3. In accordance with King's Bench Rule 5-7, the Guidelines outlined in "Appendix A", which incorporate the Sedona Canada Principles, apply to the disclosure, discovery and inspection of electronically stored information, except where they specifically conflict with *The King's Bench Rules*.

4. The objective of the Guidelines is to guide lawyers, parties and the judiciary in the e-discovery process. It is intended that the Guidelines provide an appropriate framework to address how to conduct e-discovery, based on norms that the bench and bar can adopt and develop over time as a matter of practice.

Chief Justice M.D. Popescul
Court of King's Bench for Saskatchewan

APPENDIX A

GUIDELINES FOR ELECTRONIC DISCOVERY

Principle 1: Subject to the following principles, electronically stored information that is relevant to any matter in question in the action must be disclosed in accordance with Part 5 of *The King's Bench Rules*.

Commentary:
Electronically stored information [ESI] is included in the definition of "document" contained in Rule 17-1 of *The King's Bench Rules* and must therefore be disclosed in accordance with Part 5 of *The King's Bench Rules*.

Typical forms of ESI include, but are not limited to, email data, word processing files, spreadsheets, web pages, video and sound recordings, chat and text messages, digital photographs, information on web pages and social media, mobile device data, location data, biometric data, and the Internet of Things (a catchall term used to describe a broad array of electronic devices, such as computers, refrigerators, lights, etc., that are connected to the internet and may collect, store, and/or share information).

Principle 2: In any proceeding, the obligations of the parties with respect to discovery and inspection of electronic documents, including the cost associated with locating electronic documents, should be proportionate, taking into account:

- **(i) the nature and scope of the litigation;**
- **(ii) the importance and complexity of the issues and interests at stake;**
- **(iii) the amount involved in the action;**
- **(iv) the relevance of available ESI;**
- **(v) the importance of the ESI to the court's adjudication; and**
- **(vi) the costs, burden and delay that the discovery of ESI may impose on the parties.**

Commentary:
The concept of proportionality is a central tenet of both *The King's Bench Rules* (Rule 1-3(4)) and *The Sedona Canada Principles Addressing Electronic Discovery*, Third Edition. The concept of proportionality has been introduced into the rules of procedure of most superior courts in Canada and has been described as a reaction to delays and costs impeding access to justice.

In the context of e-discovery, proportionality is the "reasonableness" principle applied to the question of how much time and effort a party should have to expend with respect to production of ESI in light of all the relevant factors.

The application of this principle depends, in the first instance, on the parties, who should confer about the concept of proportionality and attempt to agree upon its application to an action. If the parties are unable to agree, and a party can demonstrate that the likely probative

value of a document is outweighed by the cost associated with locating the document, the party should not be obliged to locate the document at issue.

Principle 3: As soon as litigation or investigation is anticipated, parties must consider their obligation to take reasonable and good-faith steps to preserve electronically stored information.

Commentary:
The obligation to preserve relevant ESI applies to both parties as soon as litigation is contemplated or threatened, however, the obligation is not unlimited. The scope of what is to be preserved and the steps considered reasonable may vary widely depending upon the nature of the claims and documents at issue. A reasonable inquiry based on good faith to identify and preserve active and archival data should be sufficient.

"Metadata" is electronic information that is recorded by the system about a particular document, concerning its format, and how, when, and by whom it was created, saved, accessed, or modified. In most actions, metadata will not be relevant. For this reason, a party should be entitled to assume that its metadata is not relevant (and need not be preserved) unless it knows that its metadata is relevant.

Principle 4: Counsel and parties should cooperate in developing a joint discovery plan to address all aspects of discovery including the identification, preservation, collection, processing, review, and production of electronically stored information. Counsel and parties should continue to cooperate throughout the discovery process.

Commentary:
The purpose of discovery planning is to identify and resolve discovery-related issues in a timely fashion. Parties should confer about and attempt to agree upon the need to preserve ESI as early as possible. Conferring early is one of the keys to effective e-discovery for all parties. By identifying and attempting to resolve disputes about e-discovery issues at an early stage in an action, parties can avoid costly collateral litigation relating to these disputes.

The scope of searches required for relevant electronic documents must be reasonable. It is neither reasonable nor feasible to require that litigants immediately or always canvass all potential sources of electronic documents in the course of locating, preserving and producing them in the discovery process.

The application of this principle depends on the parties who should confer about and attempt to agree upon about the use of targeted electronic search techniques, including search criteria to be used to extract relevant electronic documents, including search terms, selected metadata fields, de-duplication, email threading, assisted review or active learning techniques.

Parties should confer and attempt to agree on all substantive and procedural issues relating to e-discovery, including but not limited to (i) the concept of proportionality and its application to an action, (ii) the relevance of and the need to preserve deleted or residual electronic documents and metadata and the need to preserve and/or produce specific electronic

documents in electronic form, (iii) the use of targeted electronic search techniques, (iv) issues relating to production of electronic documents including the format for document numbering and production, and (v) any proposed change to the normal allocation of costs.

Any agreement reached relating to e-discovery should be reduced to writing for future reference when necessary.

Principle 5: The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.

Commentary:
For most litigation, the relevant ESI will be that which is reasonably accessible in that it can be accessed or viewed by computer users and which is exchanged between parties in the ordinary course of business (active data). Traditionally, this includes emails and electronic files. This principle also includes archival data (electronic documents organized and maintained for long-term storage and record keeping purposes) that is still readily accessible.

In most cases, the primary location in which to search for ESI should be the parties' active data and any other information that was stored in a manner that anticipated future business use, and that still permits efficient searching and retrieval.

Principle 6: A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information that has been deleted in the ordinary course of business or within the framework of a reasonable information governance structure.

Commentary:
Only exceptional cases will turn on deleted or discarded ESI. As such, residual or replicant data need not be preserved or produced absent agreement or an order of the court. In an action where deleted or residual ESI may be relevant, the parties should communicate this information to one another early in the process to avoid unnecessary preservation, inadvertent deletion and/or claims of spoliation.

Principle 7: A party may use electronic tools and processes to satisfy its discovery obligations.

Commentary:
Parties to litigation should discuss and agree on the implementation of appropriately targeted selection criteria to limit the preservation and collection of unnecessary data. Consideration should be given to employing an e-discovery methodology or technology to target the identification, preservation and collection of information. However, when using technology, procedural safeguards should be developed to ensure the technology is used consistently and effectively.

Principle 9: In general, the interim costs of preservation, retrieval, review and production of electronic documents will be borne by the party producing

them. The other party will be required to incur the interim cost of making a copy, for its own use, of the resulting productions. In special circumstances, it may be appropriate for the parties to agree and/or for the court to order a different allocation of costs on an interim basis.

Commentary:
This principle accords with the existing practice followed in Saskatchewan in relation to the costs associated with the disclosure and production of documents. The special circumstances referred to in this principle could include situations where a party requests disclosure that involves extraordinary cost for the other party such as disclosure requiring forensic searches, disclosure requiring extensive backup restoration work or disclosure requiring the creation of subsets of data that do not exist in the normal business environment.

Principle 10: Where parties are unable to agree on the substance of each party's rights and obligations with respect to e-discovery and on procedures required to give effect to those rights and obligations, either party may make an appearance day application to the court in accordance with Subdivision 3 of Part 6 of *The King's Bench Rules* to address these issues.

Commentary:
The parties' obligation to confer on issues relating to e-discovery is a real obligation. Parties are expected to actually confer and to genuinely attempt to agree on substantive and procedural issues relating to e-discovery before completing a joint request for a post pleadings conference as described in this principle.

Principle 11: Where parties are unable to agree on issues surrounding the use of technology for the preparation and management of civil litigation in the court, they should be governed by the default standard specified in the Canadian Judicial Council's National Generic Protocol on the Use of Technology in Civil Litigation.

The Guidelines are intended to apply to actions which involve e-discovery in Saskatchewan but do not address the use of electronic evidence.

Parties should confer and attempt to agree on issues surrounding the use of technology for the preparation and management of civil litigation in the court. Where parties are unable to agree, they should be governed by the default standard specified in the Canadian Judicial Council's National Generic Protocol on the Use of Technology in Civil Litigation which can be found on CanLII at 2008CanLIIDocs 710, subject to amendments by order of the court or by further agreement of the parties.