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E-Discovery News – Sedona Canada Principles Launched

Date: January 5, 2008

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The Sedona Canada Working Group has launched its authoritative guide to electronic discovery in Canada. The Principles should play an important role in advancing electronic discovery practice in Canada.

THE CONTEXT FOR CHANGE

The increasing cost of litigation and preserving access to justice is of critical concern to lawyers, individuals and businesses. The cost of locating and producing records given that businesses now have huge stores of electronic records can make litigation unaffordable for even large businesses, and there are risks associated with electronic records that further complicate the discovery process.

The Principles have been launched in this context, shortly after the Ontario government released a summary report authored by The Honourable Coulter Osborne on civil justice reform. One of the important principles stressed in the Osborne Summary Report is that of “proportionality” – the principle that the time and expense of any proceeding should be proportionate to the amount in dispute and the importance of the issues at stake. This concept is expressed in a number of the Sedona Canada Principles.

WHAT ARE THE SEDONA CANADA PRINCIPLES?

The Sedona Canada Principles are ten non-binding statements of principle intended to facilitate electronic discovery in Canada. Together with developing case law, they will provide authoritative guidance in the resolution of electronic discovery disputes. The Principles are not a process map, but do speak indirectly to the process that businesses and their legal counsel should follow in moving from record preservation, to retrieval, to processing, to review and finally to production.

The Sedona Conference is a leading research and educational institute dedicated to the advancement of law and policy in the areas of antitrust law, complex litigation and intellectual property rights. Its “Sedona Canada” working group is composed of lawyers, judges and technologists from across Canada. Beginning in the spring of 2006 the group started a process of developing the Principles, partly based on the earlier-developed *Guidelines for the Discovery of Electronic Documents in Ontario*. For those familiar with the Guidelines, the Principles are similar but are national in application.

The Principles are available at the LexUM website and the Sedona Conference website. Both sites include other excellent electronic discovery resources.

THE PRINCIPLES

1. Electronically stored information is discoverable.
2. In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interests and amounts at stake; (ii) the relevance of the available electronically stored information; (iii) its importance to the court’s adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.
3. 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.
4. Counsel and parties should meet and confer as soon as practicable, and on an ongoing basis, regarding the identification, preservation, collection, review and production of electronically stored information.
5. The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.
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.
7. A party may satisfy its obligation to preserve, collect, review and produce electronically stored information in good faith by using electronic tools and processes such as data sampling, searching or by using selection criteria to collect potentially relevant electronically stored information.
8. Parties should agree as early as possible in the litigation process on the format in which electronically stored information will be produced. Parties should also agree on the format, content and organization of information to be exchanged in any required list of documents as part of the discovery process.
9. During the discovery process parties should agree to or, if necessary, seek judicial direction on measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronic documents and data.

10. During the discovery process, parties should anticipate and respect the rules of the forum in which the litigation takes place, while appreciating the impact any decisions may have in related actions in other forums.

For More Information Please contact your Hicks Morley litigation lawyer for more information about your legal obligations pertaining to electronic discovery and for information on proactive approaches to managing information to control discovery-related costs in litigation. Also, members of our information and privacy practice group have significant experience in representing clients in document search and production disputes based on our longstanding public sector access to information practice. They have helped clients develop legally compliant records management policies and procedures and have played an important advisory role on our most document intensive litigation files.
