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UNIFORM LAW CONFERENCE OF CANADA

ELECTRONIC DOCUMENT RULES
REPORT OF THE WORKING GROUP

Presented by
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1. Introduction

[1] The goal of this project is to develop harmonized rules governing the production of electronic documents in civil and administrative proceedings. Outlined below is a brief description of the background and analysis of why harmonization is beneficial.

[2] This project received ULCC approval at the August 2016 annual meeting and a draft Rule received approval in August 2017. During the last year the draft was distributed to a number of stakeholders across Canada for feedback. The working group reviewed the feedback and revised the draft Rule where deemed appropriate.

[3] This report provides a summary of some of the feedback received and our proposed work plan for the completion of Phase Three of the project.¹ The updated draft Rule the committee has proposed with Commentary is set out in Schedule A to this Report.

Background

[4] Since the early 1990s, the scale and significance of electronically-stored information (“ESI”) in civil litigation matters has increased immensely. However, it was not until the mid-2000s that Canadian courts and provincial legislatures began to address the challenges that ESI poses.

[5] Over the last decade, some jurisdictions have amended civil procedure rules to specifically address ESI. Nova Scotia was the first province to do so in 2008.² Ontario amended its *Rules of Civil Procedure* in 2010.³

[6] Some jurisdictions make reference to the Sedona Canada Principles,⁴ while others direct parties to give consideration to the *Guidelines for the Discovery of Electronic Documents in Ontario*,⁵ published by the Ontario Discovery Task Force in 2005.

[7] In some provinces, where civil procedure rules have seen little or no amendment to address ESI, courts have issued practice directions. The Supreme Court of British Columbia issued the *Electronic Evidence Practice Direction*⁶ in 2006. In 2011, the Court of the Queen’s Bench of Alberta issued an almost identical practice note titled *Guidelines for the Use of Technology in any Civil Litigation Matter*.⁷

[8] In Saskatchewan⁸ and Manitoba⁹, Practice Directives reference the Sedona Canada Principles, but each jurisdiction has prepared its own Guidelines that incorporate the spirit and meaning of the Sedona Canada Principles in slightly different ways.¹⁰

[9] To date, the Canadian approach has been ad-hoc and reactive. The result is an inconsistent patchwork of rules, practice directions and guidelines. Adoption of best practices should not be limited by provincial or territorial borders. This project was approved by the ULCC to provide needed guidance on a common Canadian approach.

[10] The Project Team includes participants from Sedona Canada, the Federal/Provincial/Territorial Working Group (FPT Working Group) on eDiscovery, the Ontario E-Discovery Implementation Committee (EIC), and the International Standards Organization (ISO). The Project Team has been able to effectively draw from and rely on this breadth of experience. The current Project Team is outlined in Schedule B.

Reform Initiative and Goal

[11] The goal is to create a framework that will apply to proceedings in different forums and jurisdictions. A common approach will eliminate the problems differing rules and standards create, such as additional expense, inconvenience, delay, and inconsistency of practice. These problems are particularly significant for parties that routinely face litigation in multiple jurisdictions (e.g. the Federal government and large corporations), or in multiple forums such as securities regulators, other administrative tribunals and civil courts and arbitrations.

[12] Our legal process must evolve to reflect changes in technology. Taking a common approach to the production of ESI that accords with best practices will assist with this evolution. The draft Rule incorporates best practices, and is focused on facilitating speedier, less expensive dispute resolution through the use of technology.

Draft Rule

[13] The draft Rule itself, and explanatory commentaries, are attached at Schedule A. While the draft Rule is framed on civil proceedings, it can be modified to meet the document production goals of different forums, including arbitrations and administrative tribunals.

Stakeholder Feedback

[14] In this phase of the project, our team sought feedback from a variety of stakeholders for broad consultation including the various Law Societies, Bar Associations, The Advocates' Society, Judges, Sedona Canada, the EIC, and multiple local lawyers' associations.

[15] We received input from relevant stakeholders including the Federal Department of Justice, members of Sedona Canada, the EIC, Ontario Bar Association, judges and local trial lawyers' associations.

[16] The feedback obtained was overwhelmingly positive and there was general support for the concept of harmonization and for the need to have a stronger statement on proportionality as an overarching principle. We also received good constructive comments that our working group considered and incorporated where deemed appropriate. Concerns about access to justice and costs were addressed in the commentary as opposed to the enforceable sections of the draft Rule.

[17] More than one stakeholder group raised concerns about the clause regarding publicly available documents and therefore the group decided to remove that particular clause. Specific language was added throughout the commentary regarding the court's ability to consider any imbalances in the resources available to the parties and the inequalities which may exist between parties with different means. Interestingly, many comments simply outlined that the draft Rule was different than what was currently in place. This was expected.

[18] The draft Rule does not incorporate the Sedona Canada Principles in the actual provisions of the Rule. This is intentional. We have however, made reference to the Principles in the Commentary and recommend that all persons involved in electronic discovery consult the Principles. We have also intentionally avoided making reference to specific case law in the Commentary.

[19] There are some outstanding issues which the committee determined would be better dealt with through Practice Directions, rather than a specific enforceable Rule. These include privilege (claw-back agreements), professional competence and cooperation, specific considerations for proportionality and a document exchange protocol.

Next Steps

[20] The next phase of the project involves distributing the draft Rule to the various Rules Committees for discussion and implementation.

[21] The working group would plan to report back to the ULCC in August 2019 to update on the status of those discussions.

[22] September 2018 to August 2019

1. The Project Team will prepare a list of contacts for the various Rules Committees. (September 2018)
2. Members of the Project Team will be assigned as liaisons with the Rules Committees. (September 2018)
3. Correspondence and communiques will be drafted to provide background information, policy goals and detailed rationale for the proposed procedural rule.
4. Meetings will be scheduled with ULCC Jurisdictional Representatives and the Rules Committees to present and discuss the policy and procedural goals with the various Committees to encourage adoption. (November 2018 – June 2019)
5. Report process of discussions and implementation to the ULCC. (August 2019)

Recommendations of the Project Team to ULCC

- [23] The Project Team's recommendations to the Conference are as follows:
1. Approval of the draft Rule for distribution to ULCC jurisdictional representatives and Rules Committees;
 2. Recommendation for implementation; and,

3. Approval of the work plan for the third phase.

Schedule A

1. Definitions

1.1. In this Rule:

- a. “Document” in this Rule means information that is recorded in any form and includes an Electronic Document and includes electronically stored information.
- b. “Electronic Document” means information that is recorded using digital or other technology.
- c. “Electronic Document” includes a document that was originally created in paper format that has been converted through the use of digital or other technologies into an electronic format.

Commentary

The definition of ‘Electronic Document’ is intentionally broad and in no way narrows the definition of ‘document’ contained in existing rules of civil procedure. The definition does not contain specific examples of what ‘document’ includes, to avoid the implication that certain kinds of recorded information do not come within in the meaning of ‘document’, and to allow for the evolution of types of information. Further, the definition is intended to be neutral of the technology used to record information.

An “Electronic Document” can refer to a single record in a database or to the entire database; it can refer to the contents of an electronic file or to the contents of the file together with all of the metadata about that file.

Only ‘recorded information’ comes within the meaning of the word ‘document.’ An example of information that is not recorded, in the sense contemplated by this definition, is oral witness testimony. Information that is stored in permanent or semi-permanent computer memory is considered ‘recorded information’.

The committee considered not using the term “Document”, however, to keep this Rule consistent with all other rules of civil procedure we opted for an expanded definition of the term Document and Electronic Document.

2. Application

- 2.1. This Rule applies to all proceedings that require the disclosure or production of Electronic Documents or in which one or more steps will be conducted with the aid of digital or other technology.

Commentary

The draft Rule is intended to supplement existing rules of civil procedure and apply whenever Electronic Documents will be produced in a proceeding. If a matter contains both paper (or other non-Electronic) documents and Electronic Documents, this Rule will apply to all documents in the proceeding.

It is expected that amendments to the draft Rule may be required to ensure internal consistency within each jurisdiction. For example, the Ontario uses the term “Affidavit of Documents” whereas Alberta uses “Affidavit of Records”.

3. Proportionality

- 3.1. The Court and the parties shall apply this Rule in a manner that is proportionate taking into account
- a. the nature and scope of the litigation;
 - b. the importance and complexity of the issues and interests at stake and the amounts in controversy;
 - c. the relevance of the available ESI;
 - d. the importance of the ESI to the Court's adjudication in a given case; and,
 - e. the costs, burden and delay that the discovery of the ESI may impose on the parties to the importance and complexity of the issues, and the amount in controversy.
- 3.2. The Court may, on consent of the parties or on motion, alter any requirement under this Rule to further the object of proportionality.

Commentary

The draft Rule includes a separate section on proportionality, reflecting its importance as the over-arching principle governing electronic discovery and electronic proceedings.

The reality of electronically stored information (ESI) is that the volume of information has had a significant impact on discovery obligations. As recognized by the *Sedona Canada Principles Addressing Electronic Discovery (Second Edition, 2015)*, (the “Principles” or individually, a “Principle”), without a measured approach, overwhelming electronic discovery costs may prevent the fair resolution of litigation disputes. These Rules are intended to be consistent with the Principles and commentary. All persons involved in the electronic discovery process should have regard to the Principles.

The proportionality principle generally leads to a narrowing of the scope of relevance, not an expansion, of the volume of discovery. In some cases, however, proportionality may require an expansion of the parties’ disclosed or produced documents.

Principle 2 states the Court and the parties should apply this Rule in a manner that is proportionate, taking into account: (i) the nature and scope of the litigation; (ii) the importance and complexity of the issues and interests at stake and the amounts in controversy; (iii) the relevance of the available ESI; (iv) the importance of the ESI to the Court's adjudication in a given case; and (v) the costs, burden and delay that the discovery of the ESI may impose on the parties.

Pursuant to Principle 5, the parties should be prepared to produce relevant ESI that is **reasonably** accessible in terms of cost and burden (emphasis added), and pursuant to 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.

4. Use of technology in proceedings

4.1. The Court may, on motion by a party or on its own motion, order that a proceeding or any step or steps in it be conducted with the aid of technology.

Commentary

This Rule confers on the Court the power to require parties to conduct a proceeding or any part of it, including a hearing or trial, with the assistance of technology. This power extends to ordering parties to produce documents to other parties, and to the Court, in electronic form. In making an order under this Rule, the Court will consider the requirement for proportionality in the proceeding and may take into account any imbalance or inequality in the resources available to any of the parties.

5. Preservation

5.1. As soon as proceedings are reasonably anticipated, a party must make reasonable and good faith efforts to preserve relevant Documents that are in the party's possession, control or power, in a manner that preserves the integrity of the Documents, including, in the case of Electronic Documents, preserving the integrity of the metadata, source location information and Document relationships.

5.2. The Court may order a party, or non-party, to preserve a Document or class or classes of Documents that are in the party's or non-party's possession, control or power.

Commentary

Electronic information is vulnerable to destruction and modification. Intentional destruction and modification can occur through otherwise reasonable business practices as well as through the exercise of bad faith. Unintentional destruction and modification can be the result of incompetence, error or security breaches.

With Electronic Documents, reasonable and good faith preservation efforts will apply to more than just the relevant records themselves. In particular, it is important that metadata, source location information, such as system, repository and folder, and family relationships, such as a (parent) email with its (child) attachments, are also preserved, whether or not such information will ultimately be produced, because of the importance of this information in providing context for the understanding of Electronic Documents and the efficient use of technology for filtering, organizing and reviewing the Electronic Documents.

This Rule does not imply that parties need to preserve each and every Electronic Document: proportionality applies to the scope and determination of what is reasonable and good faith efforts.

Where parties have a right of access to relevant documents in the possession of third parties, they are obliged to make reasonable and good faith efforts to attempt to preserve such Documents, for example, by writing to such third parties and requesting that steps be taken in accordance with this Rule to preserve the Documents.

6. Discovery Planning

- 6.1. The parties shall make best efforts to agree on a Discovery Plan within 60 days of the close of the pleading period.
- 6.2. A Discovery Plan shall be in writing and must:
 - a. define the scope of production of Documents;
 - b. describe how each party will locate and identify Documents to be produced;
 - c. describe those Documents or classes of Documents that will not be disclosed or produced;
 - d. specify dates for the exchange of affidavits/lists of Documents; and,
 - e. specify a protocol for exchanging Documents, including their format.
- 6.3. If the parties are unable to agree on a Discovery Plan, after the close of pleadings, any party may serve on the other parties a list/affidavit of Documents, along with the Documents and an affidavit that describes:
 - a. the parameters used to define the scope of production of Documents;
 - b. how the party located and identified relevant Documents, including the identity of any custodians searched, the search terms used if any, and any other search methodology employed;
 - c. any Documents or classes of Documents that have not been disclosed on the basis that doing so would not be proportionate in the context of the matter; and,
 - d. the steps taken to preserve relevant Documents.
- 6.4. Within 60 days, any party served with Documents pursuant to sub-rule 6.3 must serve its list/affidavit of Documents, along with the Documents and, an affidavit that describes:
 - a. the parameters used to define the scope of production of Documents;
 - b. how the party located and identified relevant Documents, including the identity of any custodians searched, the search terms used if any, and any other search methodology employed;
 - c. any Documents or classes of Documents that have not been disclosed on the basis that doing so would not be proportionate in the context of the matter; and,
 - d. the steps taken to preserve relevant Documents.

- 6.5. The affidavits served pursuant to 6.3 and 6.4 shall be sworn by a person who is knowledgeable about the steps taken by the party to comply with that sub-rule.
- 6.6. A party may apply to the Court for an order compelling another party or other parties to comply with the Discovery Plan or to comply with Rule 6 on those terms the Court may order.
- 6.7. A party does not waive any discovery rights by serving a list/affidavit of Documents, affidavit, and Documents pursuant to Rule 6.
- 6.8. By agreement of the parties or by order of the Court, the Discovery Plan and the obligation to disclose Documents under this Rule may be altered or phased to facilitate the goal of proportionality.

Commentary

Discovery planning is critical to successful electronic discovery and has proven to be particularly helpful in reducing the scope of production. The draft Rule reflects the importance of parties having discussions early in the discovery process to tailor the discovery to the needs of their dispute, having regard to the principle of proportionality. At the same time, the draft Rule ensures that the dispute resolution process will move forward even in the absence of agreement on discovery parameters.

The draft Rule provides that parties have 60 days following the close of pleadings to agree on a Discovery Plan. The requirement to attempt to negotiate a Discovery Plan should not be used to intentionally delay proceedings. If parties cannot agree on a Discovery Plan within that period, a party may serve on the other parties its affidavit/list of documents simultaneously with an affidavit setting out the steps the party took and any further steps that will be taken to comply with the party's obligation to list and produce documents. The affidavit must include parameters defining the scope of production of Documents according to that party, and a description of how the party has identified and intends to further identify, if applicable, relevant Documents. The affidavit must also identify Documents that will not be disclosed on the basis that doing so would not be proportionate to the requirements of the proceeding.

Upon being served with an affidavit/list of documents, in the absence of an agreed Discovery Plan, a party must respond within 60 days. A list of producible Documents and the actual Documents shall be served simultaneously.

Either party may apply to the Court for an order compelling a party to comply with obligations under this sub-rule.

A protocol for exchanging Electronic Documents includes provisions to ensure Electronic Documents and affidavits/lists of documents will be received in useable

formats for their efficient review and that inadvertently produced privileged documents can be returned. A protocol may include:

- a. the format for the production of Documents to the other parties, including the format for the file or files containing the list of Documents and for the file or files containing Electronic Documents;
- b. the format for listing non-privileged and privileged Documents;
- c. any privilege “claw-back” agreement;
- d. the method of access to the Documents being produced;
- e. the fields of metadata to be provided with respect to Electronic Documents that are being produced; and
- f. technical specifications in respect of the Electronic Documents of each party.

It was decided not to include these specific requirements in the draft Rule to keep the rule simple, and to better enable to Rule to respond to evolutions in technology.

Where it is not reasonable or practical to produce a copy of an Electronic Document, the producing party may make an Electronic Document accessible through a secure internet-hosted repository or other means.

7. Obligation to disclose and produce documents

Scope and means of disclosure

- 7.1. Subject to Rule 3, parties have an ongoing good faith obligation to disclose to all other parties, by way of list or affidavit:
 - a. those relevant Documents upon which the producing party intends to rely, and
 - b. all Documents that could be used by any party to prove or disprove a material fact in the pleadings

Disclosure of privileged and other protected documents

- 7.2. Unless otherwise agreed, Documents whose contents are privileged or otherwise protected by law shall be disclosed, including the basis upon which the protection is asserted, and, to the extent possible without compromising the protection, sufficient information to permit the other parties to determine whether or not the claim is proper.

- 7.3. Nothing in this Rule requires a party to waive privilege or to disclose a Document or other information that is protected by a privilege.

Scope and means of production

- 7.4. Parties have an ongoing obligation to produce to all other parties, in a meaningful and accessible format, all Documents disclosed pursuant to sub-rules 7.1(a) and (b).
- 7.5. Upon application to the Court, where the court is satisfied that a relevant Document may have been omitted from a party’s disclosure, or that a claim of privilege may have been improperly made, the Court may,
 - a. order examinations regarding the disclosure of Documents;

- b. order disclosure of a Document, a part of a Document, or a class or classes of Documents;
- c. inspect the Document for the purpose of determining its relevance or the validity of a claim of privilege; and
- d. make any order the Court deems proportionate and just.

Commentary

The draft Rule on disclosure and production strikes a balance between relevance and proportionality by limiting the continuing obligation to disclose only those Documents which could have an impact on material issues, rather than every single relevant Document. To guard against an unfair interpretation of the Rule, there is a “good faith” duty added to the obligation.

Disclosure is to be made by way of list or affidavit and should also include Documents for which a privilege or other legal protection against production is claimed. Enough information must be disclosed about protected Documents to enable the receiving party to determine whether the claim is reasonable. Because creating this “privilege log” can be costly, the parties can agree to dispense with the obligation, for example, when there is no dispute about privilege.

Where a party is using a structured database to organize and review Documents, disclosure should be made electronically and available metadata may be used to identify Documents. Ideally, the disclosure should be accompanied with the produced Electronic Documents and linked to each other for easy reference.

If a party who has received a list of Documents believes that the disclosure is incomplete, the party may apply to Court for an order requiring a “further and better” production. It is anticipated that some jurisdictions may amend this part of the draft Rule to reflect the current practice to compel further Documents.

With respect to production, the Rule provides that all Documents disclosed must also be produced, except those subject to privilege or other legal protection.

8. Costs of document production

Costs

- 8.1. Reasonable expenses incurred by a party to make and receive Document production in accordance with this Rule may be claimed as necessary and proper, including the expense of using internal or external consultants when it is reasonable to do so.
- 8.2. In assessing costs payable to or by a party with respect to Document production, the Court may consider:
 - a. the extent to which a party used technology in a reasonable manner to further the speedy, just and inexpensive determination of the dispute on its merits;
 - b. the terms of the Discovery Plan, if any;

- c. the failure of a party to reasonably agree to a Discovery Plan;
- d. delay by a party in the negotiation or implementation of a Discovery Plan or with respect to any other step under this Rule; and
- e. any other factor that the Court considers appropriate.

Interim Costs

- 8.3. At any time, the Court may make an interim order with respect to costs relating to Document production, including an order that one party must pay, forthwith, all or some part of the costs of another party relating to Document production or to some step or process in the course of making or receiving Document production. In deciding whether to make an order on an interim basis shifting the costs, the court may consider the following factors:
- a. whether the information is reasonably accessible as a technical matter without undue burden or cost;
 - b. the extent to which the request is specifically tailored to discover relevant information;
 - c. the likelihood of finding information that is important and useful;
 - d. the availability of such information from other sources, including testimony, requests for admission and third parties;
 - e. the producing party's failure to produce relevant information that seems likely to have existed but is no longer available from more easily accessible sources, and the reasons for that lack of availability;
 - f. the total cost of production (including the estimated costs of processing and reviewing retrieved documents), compared to the amount in controversy;
 - g. the total cost of production (including the estimated costs of processing and reviewing retrieved documents), compared to the resources available to each party;
 - h. other burdens placed on the producing party, including disruption to the organization, lost employee time and other opportunity costs;
 - i. the relative ability of each party to control costs and its incentive to do so;
 - j. the importance of the issues at stake in the litigation; and
 - k. the relative benefits to the parties of obtaining the information.
- 8.4 Any interim cost award may be varied by the Court on the final cost award in the matter.

Commentary

The draft Rule is intended to dovetail with the current rules and jurisprudence. As with all other aspects of these Rules, the Sedona Canada Principles should be considered. It confirms that the reasonable costs of electronic discovery may be claimed as legal costs, or disbursements where applicable, and that a court has jurisdiction to consider any factors it considers appropriate.

The general practice with electronic Documents is that the producing party bears the cost of the process and production. Specific language was added in 8.3 to expressly

permit the Court to make an interim order for costs or a “cost-shifting” order. Any interim cost award may be varied by the final cost award in the matter.

In making an order under this Rule, the Court can consider the requirement for proportionality in the proceeding and may take into account any imbalance or inequality in the resources available to any of the parties.

Schedule B

2018

PROJECT TEAM MEMBERS

Michael Condé is National Director of the Discovery Services team at Borden Ladner Gervais LLP. He provides e-discovery support and solutions to the firm’s lawyers and clients. Michael was part of the working group that proposed and drafted the document that became the 2006 B.C. Supreme Court Practice Direction re: Electronic Evidence. He subsequently worked with a group of e-discovery professionals to suggest revisions to the original Practice Direction and continues to be actively involved with e-discovery stakeholder groups in BC, including the Litigation Support subsection of the BC Legal Management Association and the BC Litigation Support Professionals group.

Robert Deane is National Leader of BLG’s International Trade and Arbitration Group. He also serves as the Co-National Leader of the Privacy and Data Security Group and as the Vancouver Regional Leader of the Advertising, Marketing and Sponsorship Law Group. Robert practices international and domestic commercial arbitration, commercial litigation, privacy law, intellectual property litigation and advertising/competition law. He is ranked nationally and internationally as a leading lawyer in these areas.

Sedona Canada – Former Chair, Editorial Board

Martin Felsky is Vice President – Electronic Discovery and Information Governance/Fraud Investigation & Dispute Services at Ernst & Young LLP. Martin has been teaching lawyers and judges about legal technology since the 1980s. He brings to EY and its clients a wealth of experience not only as a respected counsel but a cofounder and CEO for nine years of a large e-discovery service provider. The many lessons learned in the areas of strategy, technology and best practices have helped Martin’s clients improve their return on information governance investments.

Who’s Who Legal has dubbed him “the dean of Canadian e-discovery lawyers.” Martin has been an adviser for hundreds of complex e-discovery matters including class actions, cross-border litigation, commercial arbitrations and investigations. Martin has led projects in Canada, the US, UK, Europe and South Africa.

Ontario E-Discovery Implementation Committee – Member

Sedona Canada – Founding Member

Ontario Discovery Task Force, E-Discovery Sub-Committee - Member

CanLII – Past Chairman of the Board

Duncan Fraser Duncan is a senior eDiscovery lawyer and founding partner of noticia LLP, a bilingual eDiscovery, Privacy and technology law firm located in Ottawa. He provides strategic legal and practical advice to law firms, corporations and government. Duncan was formerly General Counsel in Litigation Branch for the Federal Government

and was responsible for advising litigators and senior officials on all aspects of e-Discovery and evidence management in complex litigation, Class Actions, Aboriginal Litigation, and Inquests and Public Inquiries. His practice focus includes reducing risk and controlling cost through the appropriate use of technology in legal practice.

Ontario E-Discovery Implementation Committee – Vice-Chair

Kelly Friedman is National Counsel, Discovery Services at BLG LLP. Kelly has extensive litigation experience in electronic discovery, cybersecurity, privacy and Big Data. Kelly is one of five Who's Who Legal's 2015 "Most Highly Regarded Individuals" in Commercial Litigation E-Discovery Analysis.

Ontario E-Discovery Implementation Committee – Member, Chair Precedent Subcommittee

Sedona Canada – Chair (2010–2104)

Standards Council of Canada – Expert Advisor on International standards on IT security

International Standards Organization – Co-Editor of ISO 27050, an international E-Discovery Standard

Dominic Jaar is a partner in KPMG LLP and its National Leader of Forensic Technology Services, which include Electronic Discovery, Data and Evidence Recovery, Records and Information Management, Data Analytics and Cyber investigations. Prior to joining KPMG, he was the CEO of the Canadian Centre for Court Technology and the president of Ledjit Consulting, Canada's leading eDiscovery readiness and Information Management consultancy.

CanLII – Chairman of the Board

Sedona Canada – Founding member

Quebec Bar – Civil Procedure Committee member, IT Security Committee chair, IT Advisory Committee member

John Keith Q.C. is a partner at the Halifax office of Cox & Palmer. His practice covers Administrative Law, Construction Law, Alternative Dispute Resolution, Commercial Litigation, Securities Litigation, and Financial Services, Banking & Insolvency. He was appointed Queen's Counsel in 2014.

Mona Klinger works as counsel for the National eDiscovery and Litigation Support Services unit, in the National Litigation Sector of the Department of Justice Canada. She has expertise in the areas of e-discovery, litigation readiness and the use of social media in civil litigation. She is the Co-Chair of the Federal/Provincial/Territorial Working Group on eDiscovery and Litigation Readiness. Mona also has a designation as a Canadian Risk Manager (CRM) from Dalhousie University.

Federal/Provincial/Territorial Working Group on eDiscovery and Litigation Readiness – Co-Chair and representative for Justice Canada

William G. MacLeod Q.C. practices in the areas of professional liability, civil litigation, insurance coverage and dispute resolution. He presently serves as a Member of the Audit Committee of the Law Society of British Columbia. He formerly served as a member of the Liability Insurance Committee and the Professional Standards Committee. He has been involved in many organizations related to the practice of law including the Canadian Bar Association, the Defence Research Institute, and the Vancouver Association for Restorative Justice (founding director).

Kathryn J. Manning is a partner at the Toronto commercial litigation boutique DMG Advocates LLP with a broad civil litigation practice that includes large, complex commercial disputes. She previously worked as a litigator at two leading national law firms and as Senior Legal Counsel at a firm specializing in e-Discovery, information governance, and privacy law.

Ontario E-Discovery Implementation Committee – Current Chair and founding member
Ontario Bar Association – OBA Council Member, Toronto Region
Toronto Lawyers Association – Board Member
The Advocates Society – Member

Alex McNabb joined the Mergers Directorate of the Canadian Competition Bureau from a major Bay Street law firm in 2011. A Senior Competition Law Officer, Alex has lead the review of complex mergers across a variety of industries and has acted as a specialist in the directorate regarding the management of Supplementary Information Request and Section 11 production reviews. He is currently the Co-Chair of the Merger and Monopolistic Practices e-Discovery Committee.

Crystal O'Donnell is the CEO and founder of Heuristica Discovery Counsel Professional Corporation is called to the Ontario and Alberta Bars. She has extensive experience as litigation and e-discovery counsel having practiced with a leading litigation firm and the Ministry of the Attorney General (Ontario). Crystal has represented clients in a number of complex matters at all levels of the Ontario courts as well as in regulatory proceedings and investigations. She also has experience with cross-border and conflicts of laws issues which arise in multi-jurisdiction and multi-forum matters. Crystal has been included in *Who's Who Legal* in 2017 for eDiscovery counsel.

Ontario Bar Association – OBA Council Member, Toronto Region
CanLII – Vice-Chairperson of the Board
Ontario E-Discovery Implementation Committee (EIC) – Past Vice-Chair, Member
Sedona Canada – Steering Committee Member

James Swanson is a partner in the Calgary office of Miller Thomson. He began his career as an entertainment and IP lawyer and general civil litigator in 1984. In the early 1990's James became fascinated with technology, intellectual property and Internet law and he ultimately launched a boutique Internet and IP firm, becoming one of Canada's first "cyberlawyers". James is named in The Canadian Leading Lexpert Directory for

Computer & IT Law for 2015 and he has been continuously listed in The Best Lawyers in Canada in the area of Technology Law since 2006.

Sedona Canada – National Co-Chair and founding member

Anne M. Tardif is a litigator and partner at Gowling WLG Canada LLP. She litigates in both official languages, with an emphasis on commercial and public law. Anne has argued before all levels of court in Ontario, the Federal Court and Federal Court of Appeal, the Alberta Court of Queen’s Bench and Court of Appeal, the Tax Court of Canada and several administrative tribunals, including the Patented Medicine Prices Review Board and the Agriculture, Food and Rural Affairs Tribunal.

The Advocates’ Society – Member

Association des juristes d’expression français de l’Ontario – Member

County of Carleton Law Association – Member

Graham Underwood is litigation counsel with the Ministry of Attorney General, Province of British Columbia. He represents the Province in complex commercial matters, multi-party personal injury claims, class actions, and forestry litigation, at all levels of court, and has appeared as counsel in various courts including the Court Martial Appeal Court of Canada, Tax Court of Canada, BC Supreme Court and Court of Appeal, and the Supreme Court of Canada. He is a frequent speaker at conferences and continuing legal education seminars in the areas of expert evidence, electronic evidence, and e-discovery. He is the co-author of “Electronic Evidence in Canada” (with Jonathan Penner), which was published by Carswell in 2010.

Federal/Provincial/Territorial Working Group on eDiscovery and Litigation Readiness – BC representative.

Lynne M. J. Vicars is Senior Legal Counsel – Legal Practice Management and e-Discovery at Scotiabank. She is responsible for Information Governance and Electronic Evidence and heads the Bank’s e-Discovery team, which designed, implemented and continuously improves the Bank’s e-Discovery strategy worldwide. She is also responsible for providing the Bank with legal advice relating to internal investigations, records retention, third-party demands for record production, mutual legal assistance treaties, privacy and response to subpoenas.

Ontario Bar Association President, Chair of the Board, Chair of Compensation & Human Resources Committee

Canadian Bar Association, Member of the Finance Committee

Ontario E-Discovery Implementation Committee – Precedents & Institute

Subcommittees Member

Sedona Canada – Steering Committee Member

ULCC MEMBER

Peter J M Lown QC is the ULCC representative on the Working Group. Peter is the Chair of the Advisory Committee on Program Development and Management, Chair of the International Committee and a member of the Executive. He was formerly Director of the Alberta Law Reform Institute for 28 years. He is now a consultant for the US Uniform Law Commission.

ENDNOTES

¹ The ideas or conclusions set forth in this paper including any proposed rules, comments or recommendations are the views of the Project Team and its participants, and may not reflect the views of their employer organizations.

² Civil Procedure Rules (Nova Scotia), Rules 14, and 16

³ Ontario, *Rules of Civil Procedure*, RRO 1990, Reg 194, R 29.1.03(4). In *Palmerston Grain v Royal Bank of Canada*, 2014 ONSC 5134 (CanLII), the Ontario Superior Court held that because the Sedona Canada Principles are incorporated into the Rules of Civil Procedure through Rule 29.1.03(4), failure to comply with the Principles amounts to a breach of the Rules.

⁴ Sedona Canada, *The Sedona Canada Principles Addressing Electronic Discovery*, 2nd Ed (2015), Online: The Sedona Conference

<<https://thesedonaconference.org/publication/The%20Sedona%20Canada%20Principles>> [Sedona Canada, 2nd Ed]

⁵ Discovery Task Force, *Report of the Task Force on the Discovery Process in Ontario* (November 2003) at 104, online: Ontario Courts <<http://www.ontariocourts.ca/scj/files/pubs/rtf/report-EN.pdf>>

⁶ Supreme Court of British Columbia, *Practice Direction Re: Electronic Evidence* (1 July, 2006), online: Courts of British Columbia

<http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/practice_directions_and_notices/electronic_evidence_project/Electronic%20Evidence%20July%201%202006.pdf>.

⁷ Court of Queen’s Bench of Alberta, *Civil Practice Note No. 4: Guidelines for the Use of Technology in any Civil Litigation Matter* (1 March, 2011), online: Alberta Courts <<https://albertacourts.ca/docs/default-source/Court-of-Queen's-Bench/pn4technology.pdf?sfvrsn=0>>.

⁸ Court of Queen’s Bench for Saskatchewan, *Civil Practice Directive No. 1: E-Discovery* (1 July, 2013), online <<http://www.qp.gov.sk.ca/documents/english/QBPracticeDirectives/PD06.pdf>>.

⁹ Court of Queen’s Bench of Manitoba, *Practice Direction: Guidelines Regarding Discovery of Electronic Documents* (June 20, 2011; came into effect 1 October, 2011), online: Manitoba Courts <http://www.manitobacourts.mb.ca/site/assets/files/1152/qb_disc_of_edocuments.pdf>.

¹⁰ It bears noting that all four practice directives (BC, Alta, Man, Sask) state that parties “should consult and have regard to” the *Sedona Canada Principles* or the *Guidelines for the Discovery of Electronic Documents*. In contrast, Ontario’s Rules of Civil Procedure (Rule 29.1.03) make compliance with the *Sedona Canada Principles* obligatory, stating “parties shall consult and have regard”.