

Electronic Discovery in Alberta

Applying the Rules and Standards: From Collection to Exchange

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ELECTRONIC DISCOVERY IN ALBERTA

I. INTRODUCTION

The Court of Queen's Bench of Alberta Civil Practice Note No. 14 has provided much needed guidance to the Alberta legal profession with respect to the collection and exchange of electronic records. Practice Note No. 14, however, does not provide a complete framework for electronic record exchange. Accordingly, Alberta practitioners have looked to the courts for assistance in defining the boundaries of the obligations for disclosure in the seemingly infinite electronic space.

This paper seeks to provide some practical tips for the application of electronic discovery rules and standards, particularly with respect to the stages of electronic discovery, as well as a brief overview of some of the recent case law in the area. This is not intended as a comprehensive review, but rather a starting point for practitioners who wish to become familiar with some of the practical issues around electronic discovery. While the paper is focussed mainly on complex litigation, the principles identified are also relevant for any type of litigation where electronic discovery is contemplated.

II. PLANNING

Irrespective of the scope of a litigation and the electronic sophistication of the parties involved, documentary discovery can be a huge and daunting process. Recent years have brought all manner of new technology which only serves to further complicate the issues around electronic records. Therefore, a key to successful electronic discovery is planning: proper planning will assist you and your client in creating a process whereby you can efficiently and accurately identify custodians, locate records, and review them in an efficient and responsible way.

The starting point for defining a record in Alberta is Rule 186 of the *Rules of Court, Alta. Reg. 390/68*:

In this Part, "record" includes 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.

All electronically created information is potentially a record, and the list of types will likely continue to grow. To date, electronic records are comprised of e-mails, documents on computer

hard drives, corporate servers, text messages, entire databases, metadata, deleted or partially destroyed data, and other information captured from computers and devices of any kind, including cameras, cell phones, mp3 players, and external memory devices. This poses unique challenges as parties are required to consider both the vast amount of electronic information available and the media on which it is stored.

Given the above, key planning in the initial stages of a litigation should involve consideration and diligent documentation of the following (not necessarily in this order):

- a. Process for Collection and Review of Records
- b. The Importance of Preservation of Records
- c. Proportionality

Implicit in each of the above is the notion that ongoing communication with opposing counsel on these matters will go a long way toward avoiding discovery difficulties later on in the litigation. Each of these issues will be examined in turn below.

III. PROCESS FOR COLLECTION AND REVIEW

Define Search Terms

Once pleadings have closed a suggested first step in the collection process is to identify all legal issues at play (sometimes referred to as the “who, what, where, when, why and how” of the case). This will assist in assessing the scope of the record collection that must be undertaken in order to comply with Rule 187.1 of the Alberta *Rules of Court*, which requires that the parties in a litigation disclose all relevant and material records. The importance of this step cannot be overstated, and practitioners are encouraged to thoroughly consider and document how they have ultimately determined the scope of production for their client.

Once search terms have been developed it is important to work with the client to identify the types of information to be gathered and the media in which it may be found. Of course, the magnitude of electronic information being stored by a client may be astounding—your job is to identify a way to electronically sort through this so that your client is in compliance with the Alberta *Rules of Court* without producing mountains of irrelevant information (as this can