



Why All the Fuss About Document Retention?

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I. Introduction

- Businesses have always had an obligation to retain or preserve business records which may be relevant to anticipated litigation.
- What is new is that business information today is predominantly created and stored in electronic (vs. paper) format.
- Recent estimates suggest that upwards of 90% of all business information is created in electronic format.
- “Old” rules and practices were not intended to and were not sufficient to account for differences between paper records and electronically stored information (“ESI”).

Introduction (cont'd)

- Some of the differences between paper records and ESI include:
 - i. Ease of communication and duplication of ESI, resulting in extraordinary inventories of data.
 - ii. ESI is persistent; it can remain on a electronic storage device until it is overwritten by new data.
 - iii. ESI is accompanied by it own tracking information (metadata), that can show creation and edit dates, authorship, edit history, and hundreds of other pieces of information.
 - iv. Paper documents do not change over time; whereas ESI can be updated, sometimes without the author being aware of the changes.
 - v. Some ESI may become incomprehensible when separated from its native application.
 - vi. ESI can be stored in several media; locating all relevant ESI can be problematic.

II. Principles and Best Practices

- Sedona Conference is a think tank headquartered in Arizona.
- In 2002, Working Group I turned its attention to the development of principles and best practices for the retention and production of ESI in the United States.
- In 2007, Sedona Canada began work on principles and best practices for Canada.
- Published in 2008, The Sedona Canada Principles have been approved by Alberta and Ontario Courts as the proper standard to be applied to questions regarding the retention and production of ESI.
- There can be serious consequences and Sanctions for failing to properly preserved and produce ESI (Zubulake Pension Committee, Brandon Heating and Plumbing cases).

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 [ESI]

The Commentary to Principle 3 provides that:

- obligation to preserve evidence to be balanced against the right to continue to manage ESI in a economically reasonable manner;
- parties should have a records retention policy providing guidelines for the retention and routine destruction of ESI;
- once determined that a preservation obligation has been triggered, a proper litigation hold must be instituted.

Balance / Proportionality

Sedona Canada Principle 2:

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, interest 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.

Spar Aerospace¹ per Veit.J:

'It appears to be accepted in Canadian practice that the obligation of discovery is tempered by the application of proportionality or cost/benefit ratio: in Alberta, this means that records must be only be disclosed if they are not only relevant, but also material. Although this is a principle of general proportionality that is articulated in the Rules of Court, I accept that there is an implicit requirement that limits production to those records which are reasonably accessible.

¹ *Spar Aerospace Ltd. v. Aeroworks Engineering In., 2007 ABQB; affirmed 2008 ABCA47*

Records Retention Policy

- Sedona Canada Principle II deals with sanctions for failure to retain relevant ESI.
- The Commentary, however, points to the importance of a proper records retention policy:

“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.”
- The details of what constitutes a “reasonable records management policy” depends upon the particular industry.
- At a minimum, it must:
 - i. be written;
 - ii. be followed;
 - iii. take account of statutory retention periods for various categories of records.

Litigation Hold

The keys to a proper litigation hold are to:

1. Act as soon as litigation is reasonably anticipated. For a plaintiff this will be before a claim is commenced. Although defendants cannot always anticipate a claim, in some instances where there is an on-going dispute, the obligation may start for the defendant before the claim is issued.
2. Identify all departments or individuals who you expect or suspect have records that may be relevant to the dispute. This includes departments and individuals involved in the dispute and general record keeping departments. Remember: your duty to *preserve* casts a wider net than what is covered by your eventual duty to *produce*.
3. Designate a representative from the IT department who can identify sources of data and design and oversee the actual preservation and eventual collection of data. (Ideally, the affected employees – i.e., witnesses – should not be left in charge of preserving and collecting the data.)
4. Specifically direct that records are to be preserved. Be clear as to why records are being preserved, and highlight the volatility of electronically stored information and the particular care that must be taken not to alter, destroy or delete the data. You should also list the possible sanctions for failure to comply.
5. List the types of records to be captured by the preservation hold: emails, letters, text messages, instant messages, spreadsheets, databases, calendars, telephone logs, internet usage files, drawings, contracts, drafts of drawings, correspondence, contracts, etc.

Litigation Hold (cont'd)

6. Identify the sources of records subject to the preservation hold: desktop computers, home computers, laptops, blackberry, smart phone, voicemail, etc.
7. Where possible, preserve data in its native format. Simply having employees forward their emails to counsel may not suffice, as relevant data may be altered or destroyed in the process.
8. Specify a time frame to which the preservation hold applies. (i.e. historical period or a period including all currently generated information). Clearly note that the preservation hold is in place until the recipient receives written instructions that the hold has been lifted.
9. Confirm compliance with the preservation hold by verifying receipt of the notice and confirming agreement to comply.
10. Document the steps you have taken.
11. Re-issue the notice of the preservation hold and instruction periodically. Revisions may be necessary as new issues emerge. Ensure new staff are aware of preservation holds in place.
12. Release the hold when the matter is completed.

Litigation Preparedness

Evolution of Business

- Majority of documents are in an electronic format
- Volume of documents has increased
- Document storage methods have changed

Litigation Preparedness (cont'd)

Implications of Litigation

- Document is defined by all provincial jurisdictions to include forms of electronic information and data
- These documents still need to be identified and produced from multiple storage locations

Historical Storage Methods

Production of large volumes of well maintained and organized materials would be time consuming but relatively straight forward



Electronic Storage

Electronic storage introduces new considerations



E-Discovery Process

The e-discovery process consists of the following phases:

- Identification
- Preservation
- Collection and Processing
- Reviewing
- Production

Insurer Response

First Dollar E-Discovery Consultant Services:

- For any Securities Claim, no Retention shall apply to the first \$25,000 in Defence Costs incurred as E-Discovery Consultant Services

Insurer Response (cont'd)

Introduction of e-discovery consultant is an attempt to:

- Control overall defence costs
- Preserve limits
- Minimize exposure from mismanagement discovery process

Insurer Response (cont'd)

Effectively utilizing the e-discovery consultant:

- Vendor Selection
- Mandate
- Budget
- Monitoring

Insurer Response (cont'd)

Retention policies as a tool for litigation preparedness:

- Contemplate electronic documents
- Understand IT Infrastructure
- Map data sources
- Reduce material
- Coordinate with Key Data Stewards

III. Special Issues of Interest

A. Storage Mechanics

How long should you keep records?

- Consider:
 - Nature and class of record
 - Business need
 - Likelihood record may be relevant to pursue or defend litigation
 - Minimum legal requirements – specific legislative requirements (ex. Income Tax Act (Canada)) and general limitation periods (ex. Limitations Act (Alberta))
 - Maximum legal requirements – Personal Information Protection Act (Alberta) (“PIPA”) – reasonably required (s. 35)
 - Costs of searching and returning information for litigation

A. Storage Mechanics (cont'd)

Where should you keep records?

- Where records must be kept may be legislated (ex. corporate records at registered office)
- If not, consider onsite versus offsite storage
- If an organization uses a third party to store records, the organization will ultimately be responsible for the third party's compliance with legal requirements (s. 5(2) PIPA)
- If an organization uses a service provider outside Canada to store personal information on its behalf, the organization must develop and follow policies and practices which include information regarding the countries where the storage is occurring and the purposes for which the service provider has been authorized to deal with personal information (s. 6(2) PIPA)
- Cloud Storage?

A. Storage Mechanics (cont'd)

How should you keep records — paper or electronic?

- Originally – best evidence rule made secondary evidence inadmissible if an original document was available
- Now – best evidence rule can usually be satisfied with electronic records
 - *Electronic Transactions Act (Alberta)* – facilitates e-commerce and recognizes electronic signatures and documents
 - *Establishes that an electronic document will be equivalent to an original document*
 - *Exceptions include: wills and codicils; trusts created by wills or codicils; enduring powers of attorney and personal directives; records that create or transfer interests in land including mines and minerals; personal guarantees; negotiable instruments and prescribed records*
 - *Prescribed records are set out in the Electronic Transaction Act General Regulation – contains a number of additional exceptions including “any information or records arising from related to or connected with an employee-employer relationship” – maintaining electronic copies only of employment related records will not be sufficient*
 - *Amendments to the Canada Evidence Act and the Alberta Evidence Act – best evidence rule is satisfied with an electronic document upon proof of its integrity*
- Business considerations – space, cost, accessibility

B. Privacy Issues

- In Alberta, PIPA governs the collection, use and disclosure of personal information by organizations
- For public bodies – *Freedom of Information and Protection of Privacy Act* (Alberta)
- Two common categories of records where this is an issue – employee records and customer information
- PIPA tries to find a balance between the right of individuals to have their personal information protected and the need of organizations to collect, use and disclose personal information for purposes that are reasonable

B. Privacy Issues (cont'd)

Reasonableness under PIPA

- PIPA requires organizations to protect personal information in its custody or under its control by making reasonable security arrangements against risks such as unauthorized access, collection, use, disclosure, copying, modification, disposal or destruction (s. 34)
- PIPA also contains certain notification requirements when an incident occurs involving the loss of or unauthorized access to or disclosure of personal information where a reasonable person would consider that there exists a real risk of significant harm to an individual (s. 34.1 and s. 37.1)
- Retention and destruction – organization may retain personal information only for as long as it reasonably requires the personal information for legal or business purposes
- Once no longer required, organization must destroy or render personal information non-identifying

B. Privacy Issues (cont'd)

How can you protect your organization from privacy issues?

- Policies – develop and **follow**
- Document retention
- Employee policies – ex. confidential information, internet use
- Insurance

C. Documents Worth Saving / Obtaining

- The obligation to preserve records is triggered when litigation is reasonably anticipated;
- When a claim is reasonably anticipated, immediate steps should be taken to determine what records might be relevant and material in the anticipated lawsuit;
- What records might be relevant and material is dependent on what type of claim might be advanced;
- Create an "Anticipation of Litigation" Folder with the intent that these records will be sent to a lawyer when litigation is commenced;
- Keep in mind that not all of these records may be ultimately produced in the litigation as some of the records might be privileged.

C. Documents Worth Saving / Obtaining (cont'd)

1. Issues with the Timing of Litigation

- Often lawsuits are not commenced until nearly two years after an incident that gives rise to the lawsuit occurs;
- Lawyers are often retained after the lawsuit is commenced several years after the fact;
- Memories fade and documents and records are not as easily located by that time;
- Early investigation and document preservation will assist a lawyer and the company in advancing or defending the claim

C. Documents Worth Saving / Obtaining (cont'd)

2. Workplace Injury Incidents

- Immediately contact the company's insurer to put the insurer on notice of a potential claim;
- Arrange for photographs to be taken of the injury scene;
- Identify any potential employees of the company who may have witnessed or have been involved in the circumstances that give rise to the anticipated lawsuit;
- Retain a list of the employees who witnessed the event or were involved with the event;
- Arrange for statements to be taken from these individuals close to the date of the incident so that the statements given are fresh;
- Retain copies of any statements given by employees of the company to third parties such as the company's insurance company (Incident Report), Occupational Health and Safety or Workers' Compensation Board etc.
- Retain relevant training policies for employees in force at the time of the loss;
- Retain safety brochures for employees in force at the time of the loss;
- Retain the personnel files of the employees involved in the incident;
- Retain any other relevant and material records which may relate to the incident.

C. Documents Worth Saving / Obtaining (cont'd)

3. Product Liability Claims

- Immediately contact the company's insurer to put the insurer on notice of a potential claim;
- Arrange for photographs to be taken of the product at issue;
- Retain all contracts/records relating to the manufacture of the product;
- Retain all contracts/records relating to the distribution of the product;
- Retain all contracts/records relating to the sale of the product;
- Retain any other relevant and material records which may relate to the incident.

C. Documents Worth Saving / Obtaining (cont'd)

4. Motor Vehicle Claims Involving Company Vehicles

- Immediately contact the company's insurer to put the insurer on notice of a potential claim;
- Arrange for photographs to be taken of the damage to the vehicles involved in the accident;
- Arrange for photographs to be taken of the scene of the accident;
- Arrange for a statement to be taken of the employee operating the vehicle;
- Retain a copy of the police collision form;
- Retain copies of any statements given by the employee driving the vehicle to the police;
- Retain the personnel file of the employee operating the vehicle;
- Retain any driving training documentation or certifications the employee may have obtained;
- Retain any estimates or invoices of damage to the company vehicle.

C. Documents Worth Saving / Obtaining (cont'd)

5. Employment Claims

- Retain the employment contract;
- Retain the personnel file;
- Retain any performance evaluations;
- Retain any documentation/communications exchanged between the employee and management regarding employment expectations;
- Retain any documentation/records which relate to the dismissal of an employee;
- Retain payroll records.

C. Documents Worth Saving / Obtaining (cont'd)

6. Breach of Contract Claims

- Retain all records relating to the contract entered into between the parties;
- Retain all relevant invoices and payment records;
- Retain all relevant correspondence between the parties to the contract;
- Retain any other relevant and material records which may relate to the contract and/or the breach of the contract.

IV. Questions

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Thank you

