When is a document not just a document? Well, as most litigators know, when it’s (among other things) a sound recording, videotape, database, or other piece of information that finds itself in electronic form.

How to treat this electronic information in the context of litigation has been the catalyst for much debate and deliberation. Consider this: a large corporation can generate and receive millions of e-mails and electronic files each day. Electronic documents are easily duplicated and can be sent — inadvertently or voluntarily — to any number of recipients and are more difficult to dispose of than paper documents, in that, even once they’re deleted, information can remain on a storage device until it’s overwritten by new data.

More and more, it’s these “documents” that are being requested and produced at the discovery stage of litigation, where in the past only paper documents had been exchanged.

They’re at the core of e-discovery: a phenomenon that is quickly changing the way litigation is conducted in Canada, the basis of which is quite simply that electronically stored information is discoverable. This means that every employee e-mail, every web site and instant message, every Word document, Excel spreadsheet, and company database can be drawn into the discovery process.

And for in-house counsel, e-discovery presents a unique set of challenges that starts light years before a claim is even issued or a litigation hold-letter received. It starts with the onerous and seemingly unfulfilling prospect of creating a document retention policy — and developing the infrastructure to make sure people follow it. But where to begin?

Released earlier this year, the Sedona

Guiding principles for e-discovery

The recently released Sedona Canada Principles offer in-house counsel a detailed road map to e-discovery issues.

By Heather Capannelli
Canada Principles Addressing Electronic Discovery provides a clearly worded, unadulterated guide to understanding the fundamentals of e-discovery in Canada. Its 12 principles take into account issues such as the proportionality of the request for electronic information in relation to the nature of the claim, costs, burden, and delay; the responsibility on counsel to confer on an ongoing basis as to the preservation, collection, review, and production of electronically stored information; and the discharge of responsibility in having to search for or collect deleted or residual electronically stored information.

The report is complete with commentary, case law, and definitions, and can help even the technological neophyte understand the principles of electronic documents, what’s expected of counsel and clients regarding their retention and disclosure during the discovery process, and how e-documents are different from their paper counterparts.

By all accounts it’s a great springboard into the discussion around internal policy on electronically stored information.

“The principles are very simple. They fit on one sheet,” says Glenn Smith, partner of the Toronto litigation firm Lenczner Slaght Royce Smith Griffin LLP and founding member of Working Group 7.

“Anyone can read them, and you can learn something from it if you’re technologically sophisticated or if you’ve never thought about electronic data before in your whole life.”

In May 2006, a small group of lawyers, judges, and technologists met at Mont Tremblant, Que. to embark on the “process of dialogue to grapple with the phenomenon of electronic discovery.” Calling themselves the Sedona Conference Working Group 7, “Sedona Canada” formed out of the growing recognition that the discovery of electronically stored information could no longer be seen as a peculiarity of litigation in the U.S.

Working from the perspective that e-discovery was quickly becoming a factor in all Canadian civil litigation, and not just a function of complex commercial lawsuits, the group set out to produce some guiding principles that would be universally acceptable in addressing the disclosure and discovery of electronically stored information in Canadian civil litigation.

After much consultation and consideration, this first edition of the Sedona Canada Principles was released. Now the effort shifts to educating people about what it’s all about and how it can help lawyers and their clients deal with the often-overwhelming experience of e-discovery.

“One unfortunate way to educate people about e-discovery is to have them involved in the e-discovery process. After that, they understand why they need to keep their inbox clean,” said Dominic Jaar, counsel for Bell Canada. He says the Sedona Canada Principles will give in-house counsel a context or a goal to reach that will help build a company’s infrastructure around information management, but that it needs to be approached in three parts: policy, infrastructure, and education.

“One cannot go without the other,” says Jaar. “In order to have effective e-discovery and protect metadata, you need a map of your whole IT infrastructure.”

Taking stock of a company’s inventory of laptops, desktops, PDAs, and software can be a thankless and prolonged task, but Jaar says it’s the only place to start. “Obviously the easiest way to get management to take it seriously is to get sued,” he says, but that’s not the best way.

He says that after taking stock of the infrastructure, an umbrella policy should be created, under which there are policies on document retention, deletion, internet use, and education, for instance. The Sedona Canada Principles can guide the development of these policies by explaining what will be required, technologically speaking, in the event of litigation in general, and e-discovery specifically.

Martin Felsky agrees.

“This report should be a very helpful and useful document for in-house counsel. It’s not the answer to all of your questions but it is a very good road map.”

— MARTIN FELSKY, COMMONWEALTH LEGAL
“After discussions with the vice president of IT in the U.S., it looked like we have two terabytes of backup data, plus active server data.” (A terabyte is one trillion bytes and, in terms of text, can fill a stack of paper almost 50 km high.)

Felsky says Commonwealth Legal would use the Sedona Canada Principles to help determine a plan of action for the case. The principles allow for a document-searching technique known as sampling, which Felsky used to cull some nine million documents down to 11,000 before handing it over to the lawyers, who were then able to winnow it down to 1,100 in no time.

Robert Castonguay echoes this sentiment. Having spent 20 years with the computer forensics unit of the RCMP in Quebec City, he learned about electronic documents before the term “e-discovery” had been coined.

In 2003, he left the RCMP and is now vice president of KPMG Forensic and head of infrastructure and production for e-discovery services in Montreal. He and his team recently completed a client project, paring down 1.5 terabytes of information to 500 gigabytes for the legal team to review. He shares Jaar’s view that being without an e-discovery plan “is a risk-management disaster waiting to happen.”

Castonguay says that in-house counsel play an important role in the company when it comes to electronic information. “They’re the ones who are involved first,” he says.

Sought out by the directors, these are the people who need to understand electronic information and how to handle it. As far as the costs associated with implementing policies and educating employees, he is convinced any class action or complex litigation case will undoubtedly exceed them and that it’s best to be proactive.

The Sedona Canada Principles, Castonguay says, are a great place to start. He concludes that “…you simply can’t say, ‘I’ll write up an e-discovery plan’ when you’re faced with a litigation hold-letter.”

“The principles Are very simple.
They fit on one sheet.”

— GLENN SMITH, LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP