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UNIFORM LAW CONFERENCE OF CANADA

ELECTRONIC DOCUMENT RULES

REPORT OF THE WORKING GROUP

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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. A description of the background of the project and progress is outlined in the Working Group's August 14, 2018 report and will not be repeated for the purpose of this report.

[2] The purpose of this report is to discuss the amendments to the draft Rule in response to questions and feedback received at the ULCC meetings in Quebec City. This report will also outline the Working Group's plan to move forward with this project.

2. Revisions

[3] The Working Group is appreciative of the feedback received during the presentation, most of which is incorporated in the revised draft. The revisions are described briefly by Rule below. Quebec provided helpful feedback regarding the terminology used. The updated draft Rule with Commentary is set out in Schedule A to this Report.

Rule 1

[4] The phrase "other technology" was removed, and language similar to what was used in Saskatchewan's Electronic Information and Electronic Documents Act:

> "electronic" means created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means;

Rule 2

[5] The "Proportionality Rule" was moved to the first of the substantive rules after the definitions to better reflect that it is an overarching Rule applicable to all of the Rules. The reference to "ESI" was removed, reference to third parties was added to 2.1 (e), and, 2.1 was revised to read:

> The Court and the parties shall apply this Rule in a manner that is proportionate to:
>
> 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 Electronic Documents;
d. the importance of the Electronic Documents to the Court's adjudication in a given case; and,
e. the costs, burden and delay that the discovery of the Electronic Documents may impose on the parties or third parties, to the importance and complexity of the issues, and the amount in controversy.

Rule 3

[6] The Application Rule was moved to after "Proportionality" and was revised to make it clearer that it applied to all proceedings that require the disclosure or production of electronic documents, including proceedings with both "paper" or other non-electronic evidence.

Rule 4

[7] Rule 4 was moved to follow the "Application" rule and the words "on consent" were added to address the concern raised that it should be clear the parties could consent. The commentary was modified to specify that the "steps" included both discovery and hearing stages.

Rule 5

[8] As suggested, we added the phrase "or could reasonably be anticipated" to provide for an objective standard. The phrase "in the case of Electronic Documents" was removed as redundant.

Rule 6

[9] Along with proportionality, discovery planning is a critical component of the proposed harmonized Rule. Proper planning is the most effective way of minimizing cost and disputes with Electronic Documents. It is important to keep in mind that simple, lower dollar value matters can have simple plans. Planning does not increase cost or

complexity. Planning reduces costs, and if there are disputes regarding the scope of production, they should be dealt with early to avoid the extraordinary expenses of having to "re-do" any aspect of the discovery process.

[10] While the rule requires the parties to make best efforts, the proposed approach ensures the matter can proceed, removing the ability to intentionally stall the proceeding because the parties do not have a discovery plan.

[11] Minor revisions to this rule include adding "or produce" to subrule 6.8 and "relevant" to 6.3(c) and 6.4(c).

[12] To address the concern that parties will bring motions purely on the question as to whether "best efforts" were used to agree to a plan where documents are produced pursuant to subrule 6.3, subrule 6.6 was revised to read as follows:

> 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. Parties may not bring a motion on the question as to whether "best efforts" were used to develop a discovery plan when documents are produced by any party pursuant to sub-rule 6.3.

[13] In the event parties produce documents pursuant subrule 6.3 and 6.4, parties are still able to bring a motion to compel a plan for other aspects of the discovery or proceeding, or to challenge the approach a party took to produce documents without a plan. The failure to reasonably develop a plan can be considered by the court when dealing with costs. (See subrule 8.2 (c)).

Rule 7

[14] The phrase "subject to Rule 3" (the proportionality rule) was removed from subrule 7.1 to address the concern that specifically referring to proportionality on this one subrule could be interpreted to mean that it was intentionally not referred to in the other subrules. The intent is that proportionality be an overarching principle for the entire set of rules, not just Rule 7.

[15] Similar to Rule 6, rule 7 was also revised to add the word "produce" to subrule 7.3 and removed the word "relevant" from subrule 7.1(a) as it was redundant.

Rule 8

[16] No revisions were made to Rule 8, as no comments were provided during the presentation.

Resolutions

[17] The resolutions passed in August were:

> THAT the report of the working group be accepted as modified by the direction of the Civil Section; and
>
> THAT the recommendations in the report and the directions of the Civil Section be incorporated into the Uniform Rule and commentaries, and circulated to the jurisdictional representatives. Unless two or more objections are received by the Projectors Coordinator by November 30, 2018, the *Uniform Electronic Documents Rules* should be taken as adopted as a Uniform Rule and recommended to the jurisdictions for adoption.

Next Steps

[18] Once the proposed *Uniform Electronic Documents Rules* are adopted, our group will continue working to distribute the draft Rule to the various Rules Committees for discussion and implementation. This work will include correspondence and communiques to provide background information, policy goals and detailed rationale for the proposed procedural rule.

[19] In addition, our working group will work to raise awareness and support for the proposed Rule through professional education conferences, social media, speaking engagements and presentations.

[20] The Working Group understands that the jurisdictional representatives did not want to pass resolutions regarding the implementation phase. The Working Group is hopeful however that jurisdictional representatives will support the ongoing work of the Working Group through introductions to known Rules Committees.

[21] Our Working Group plans going forward include:

1. The Working Group will prepare a list of contacts for the various Rules Committees.

2. Members of the Working Group will be assigned as liaisons with the Rules Committees.

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 the Rules Committees to present and discuss the policy and procedural goals with the various Rules Committees to encourage adoption.

Recommendations of the Project Team to ULCC

[22] The Project Team's recommendations to the Conference are as follows:

1. Approval of the draft Rule;

Schedule A

1. Definitions

1.2. In this Rule:

a. "Document" in this Rule means information that is recorded in any form and includes an Electronic Document and electronically stored information.

b. "Electronic Document" means information that is recorded in an electronic format

c. "Electronic Document" includes a document that was originally created in paper format that has been converted through the use of digital technologies into an electronic format.

d. "Electronic" means created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means.

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 Electronic Document.

2. Proportionality

2.1. The Court and the parties shall apply this Rule in a manner that is proportionate to:

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 Electronic Documents;
d. the importance of the Electronic Documents to the Court's adjudication in a given case; and,

e. the costs, burden and delay that the discovery of the Electronic Documents may impose on the parties or third parties, to the importance and complexity of the issues, and the amount in controversy.

2.2. The Court may, on consent of the parties or on motion, alter any requirement under this Rule to further the objective 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.

3. Application

3.1. This Rule applies to all proceedings that require the disclosure or production of Electronic Documents.

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".

4. Use of technology in proceedings

4.1. The Court may, on motion by a party or on its own motion, or on consent of the parties, order that a proceeding or any step or steps in the proceeding 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 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.

It is intended that this be applied to a civil proceeding, as they are defined in any particular jurisdiction. The step or steps in the proceeding is intended to include steps such as any part of the discovery process (disclosure of documents and oral examinations/questioning), motions, pretrial, hearing or trial.

5. **Preservation**

5.1. As soon as proceedings are reasonably, or should reasonably be 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, preserving the integrity of the metadata, their provenance 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, provenance (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, the parties 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 and affidavits/lists, 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 steps taken to preserve relevant Documents;
b. the parameters used to define the scope of production of Documents;
c. 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; and

d. any relevant Documents or classes of relevant Documents that have not been disclosed on the basis that doing so would not be proportionate in the context of the matter.

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 steps taken to preserve relevant Documents;
b. the parameters used to define the scope of production of Documents;
c. 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; and,
d. any relevant Documents or classes of relevant Documents that have not been disclosed on the basis that doing so would not be proportionate in the context of the matter.

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. Parties may not bring a motion on the question as to whether “best efforts” were used to develop a discovery plan when documents are disclosed or produced by any party pursuant to subrule 6.3.

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 or produce 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. Parties have an ongoing good faith obligation to disclose to all other parties, by way of list or affidavit:
   a. those 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 privilege or protection is asserted and, to the extent possible without compromising the privilege or 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 or produce 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 again 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 disclosure and production, the Court may consider:

a. the extent to which a party used technology in a reasonable manner to further the speedy, just and least expensive 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 interim order with respect to 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.