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Conquering the Tower of e-Discovery Babel: New Age Discovery for the 21st Century

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Abstract

The authors argue that the paperless world of discovery has arrived, and it is time for all litigators to consider "signing up" for the "Discovery Training Camp". If your law firm represents cross-border businesses or companies, you need to be aware of the substantial changes in the US affecting electronic information in legal and regulatory matters, as well as the new Canadian requirements promulgated at the provincial and federal levels. This article offers a vital insight into this area.

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1. Introduction

The rush of hearing the crowd yell, "Score!" is often heard in a hockey arena, not a courtroom, but to quote a song from the Lake Okanagan hockey camp, "the times, they are a changing". Litigation can be as brutal and challenging as hockey, with trial outcomes often dependant on pre-trial disclosure (or discovery).[1] Litigators who diligently pursue discovery – like chasing pucks into the corner – will likely receive a much better outcome for their clients.[2] Scoring for our clients is often the goal, and racking up the score can be a sign of an accomplished and well-prepared litigator sending missiles into his opponent's case.[3]

But winning in the courtroom arena requires knowing as much as possible about the facts of the case,[4] and the arena is becoming more demanding, with litigators facing monumental discovery "body-checks".[5] In the past – the days of learning hockey on the backyard rink (apologies to Rogatien "Rogie" Vachon who was served well by the backyard rink)[6] – lawyers would make discovery demands on opposing counsel and would be handed boxes of paper and/or shown to a warehouse with teetering boxes.[7] But, "the times, they are a changing". The paperless world of discovery has arrived, and it is time for all litigators to consider "signing up" for the "Discovery Training Camp". More specifically, the "E-Discovery Training Camp!"[8] If your law firm represents cross-border businesses or companies, you need to be aware of the substantial changes in the US affecting electronic information in legal and regulatory

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[1] M Chan, "Paper Piles to Computer Files: A federal Approach to Electronic Records Retention and Management" (2004) 44 *Santa Clara Law Review,* 805-809.

[2] See: *DE Technologies, Inc v Dell, Inc*, [2007] WL 128966 (WD Va Jan 12, 2007); *Diabetes Centers of America, Inc v HealthPia America, Inc*, [2008] US Dist LEXIS 8362 (SD Tex Feb 5, 2008); *Eckhardt v Bank of America*, NA, 2008 US Dist LEXIS 5172, [2008] WL 111219 (WDNC Jan 9, 2008); R Acello, "E-mail to Lawyers: E-Discovery Rules on the Way" *ABA Journal E-Report* (7 Oct 2005).

[3] See: *In re Intel Corp Microprocessor Antitrust Litig*, [2008] WL 2310288 (D Del Jun 4, 2008); *Eckhardt v Bank of America*; *Emmerick v S&K Famous Brands, Inc*, [2007] US Dist LEXIS 59147 (ED Tenn Aug 6, 2007); *Fresenius Medical Care Holdings, Inc v. Brooks Food Group and Brooks Food Group Employee Benefits Plan*, [2008] ES Dist LEXIS 5030 (WDNC Jan 18, 2008).

[4] See, e.g.: *Margel v EGL Gem Lab Ltd*, [2008] WL 2224288 (SDNY May 29, 2008); *Analog Devices Inc v Michalski*, [2006] WL 3287382 (NC Super Nov 1, 2006).

[5] See, e.g.: *Columbia Pictures, Inc v Bunnell*, [2007] WL 2702062 (CDCal Aug 24, 2007); *Google Inc v Am Blind & Wallpaper Factory, Inc*, [2007] WL 1848665 (NDCal Jun 27, 2007); *Toshiba Am Elec Components, Inc v The Superior Court of Santa Clara County*, 21 Cal Rptr 3d 532 (Cal Ct App 2004); *Sempra Energy Trading Corp v Brown*, [2004] WL 2714404 (NDCal Nov 30, 2004).

[6] See: J Lambrinos and T Ashman, "Salary Determination in the National Hockey League: is Arbitration Efficient?" (2007) 8(2) *Journal of Sports Economics*, 192-201.

[7] C Holland, "E-Mail Analytics Eases Burden on Discovery" *Legal Technology* (3 Oct 2006) available at http://www.law.com/jsp/legaltechnology/PubArticleFriendlyLT.jsp?id=1159792526769 (accessed 27 June 2008).

[8] *National Instrument 31-103*, available at

http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part3/rule_20080424_31-103_proposedregreq.Pdf (accessed 27 June 2008).

matters,[9] as well as the new Canadian requirements promulgated at the provincial and federal levels.[10]

2. Canada: A Changing Landscape

With respect to legal and regulatory investigations, several recent developments indicate that Canada is beginning to modify its legal framework regarding the management, production, preservation, and retention of electronic information at the federal and provincial levels.[11] The Canadian Securities Administrators (CSA) have proposed *National Instrument 31-103* ("*NI 31-103*"),[12] which addresses electronic preservation requirements. In June 2008, Nova Scotia became the first province to amend their *Civil Procedure Rules* to specifically address e-discovery issues.[13] While Ontario,[14] British Columbia,[15] Quebec, and Alberta[16] have not yet amended their laws, they have adopted directions or practice guidelines in an attempt to address similar issues surrounding the unique characteristics of electronically stored information. Each of these provinces will likely implement their own set of rules regarding e-discovery in the near future.

As such, Canadian companies must pay particular attention to a changing, and potentially conflicting, e-discovery landscape. The jurisdiction in which a litigant files her suit will determine the e-discovery framework for the case. For example, a company that operates primarily in Montreal but is party to litigation in Ontario will be subject to the e-discovery requirements set forth by the Ontario province. To comply with these e-discovery requirements, and therefore avoid sanctions, the Montreal company must understand the Ontario Bar Association's "best practices" manual, which contains thirteen principles (the "Ontario Principles"). These are broken down into six categories: discovery of electronic documents; preservation of electronic documents; pre-discovery discussion between counsel; defining the scope of e-discovery obligations; production of electronic documents; and privileges and

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[9] *Ibid.*

[10] The Task Force on the Discovery Process in Ontario adopted *Guidelines for Discovery of Electronic Documents in Ontario* in October of 2005, available at http://www.oba.org/en/pdf_newsletter/E-discoveryguidelines.pdf (accessed June 30, 2008).

[11] *Ibid.*

[12] *National Instrument 31-103* (see note 8 above).

[13] Source: http://www.courts.ns.ca/Rules/rules_table_of_contents_08_06_20.htm (accessed 27 June 2008).

[14] Task Force on the Discovery Process in Ontario, *Guidelines for Discovery of Electronic Documents in Ontario* (2005) available at http://www.oba.org/en/pdf_newsletter/E-discoveryguidelines.pdf (accessed 30 June 2008).

[15] Supreme Court of British Columbia, *Practice Direction re: Electronic Evidence* (2006) available at http://www.courts.gov.bc.ca/sc/ElectronicEvidenceProject/Practice%20Direction%20-%20Electronic%20Evidence%20-%20July%201,%202006.pdf (accessed 30 June 2008).

[16] Court of Queen's Bench of Alberta Civil Practice, *Note No. 14: Guidelines for the Use of Technology in Any Civil Litigation Matter* (2007) was issued on 30 May 2007 and came into force on 4 September 2007 (available at http://www.albertacourts.ab.ca/qb/practicenotes/civil/pn14technology.pdf (accessed 30 June 2008)).

costs.[17] As a result, the Montreal company litigating in Ontario will be expected to implement a "litigation hold" (i.e. preserve all electronically created documents), and follow the Ontario standards which include the "burden versus benefit" test.[18] Furthermore, the company will have to operate under the constraints of existing data sampling. The Ontario Principles also encourage litigants to "meet and confer" in order to address complex and potentially costly issues such as scope and the format in which documents are produced.[19] This "meeting of the minds" parallels the US Federal Rules of Civil Procedure, and attempts to streamline and advance the litigation system.

Another set of guidelines, referred to as "practice directions", have been adopted by the British Columbia (BC) Supreme Court and the Alberta Court of Queen's Bench. Unlike the Ontario Principles, BC's practice directions apply in limited circumstances: upon agreement by the parties in civil proceedings or upon order of the court.[20] Notwithstanding certain distinctions, the purpose of both is to provide guidance for the "reasonable" discovery of electronically stored information.[21]

Nova Scotia was the first province to formally change its *Civil Procedure Rules*, and these new rules may take effect as early as 1 January 2009.[22] Companies doing business in Nova Scotia, or subject to suit in Nova Scotia, should review their policies, procedures and technology systems to ensure that they are synchronised and in compliance. Companies without adequate e-discovery solutions will almost certainly incur significantly higher discovery costs. If they fail to meet these new requirements, they risk potential judicial sanctions, adverse inferences from the court, and even dismissal of the case (i.e. the other side could win). While formal adoption of rules governing the identification, disclosure and production of electronically stored information (ESI) has been limited to Nova Scotia, it will likely be only a matter of time until the remaining provinces and federal government apply analogous rules. Litigators must be proactive and on their game. If they wait to become familiar with the demands of e-discovery or pending rule modifications the game will pass them by.

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[17] See n 14 above.

[18] Principle 1 states that "electronic documents containing relevant data and information are discoverable pursuant to Rule 30." Principle 5 states that, "as soon as litigation is contemplated or threatened, parties should immediately take reasonable and good faith steps to preserve relevant electronic documents. However, it is unreasonable to expect parties to take every conceivable step to preserve all documents that may be potentially relevant." See, also, Principle 10 for the "burden versus benefit" test. All available at http://www.oba.org/en/pdf_newsletter/E-discoveryguidelines.pdf (accessed 30 June 2008).

[19] *Ibid*, Principle 11.

[20] Supreme Court of British Columbia, *Practice Direction re: Electronic Evidence* (adopted on 1 July 2006) available at http://www.courts.gov.bc.ca/sc/ElectronicEvidenceProject/Practice%20Direction%20-%20Electronic%20Evidence%20-%20July%201,%202006.pdf (accessed 30 June 2008).

[21] *Ibid*.

[22] Part 5 of the *Civil Procedure Rules of Nova Scotia* deals with disclosure and discovery (available at http://www.courts.ns.ca/Rules/civil_procedure_rules_08_06_20/part_5_june_08.pdf (accessed 30 June 2008)).

While companies might be concerned by the evolving rules of discovery, some are applauding the changes. Much like a salary cap, the proposed electronic discovery rules could "even the playing field" for small firms taking on large firms and the companies they represent. If provinces adopt rules similar to the Ontario Principles, firms should be able to save both time and money by being able to locate requested electronic evidence easier, and by being able to receive it in the form they request.[23] Cost sharing is being considered for the production of electronic evidence,[24] but even if requesting parties are held responsible for part of the expenses incurred by companies producing the evidence, they will still be in a much better position than they would be without the proposed changes (keep in mind that storage warehouse filled with teetering boxes).

2.1 Canadian Reforms and the Financial Services Industry

Financial service companies in Canada should pay particular attention to proposed *NI 31-103* which sets forth specific requirements for the preservation of any electronic information, including e-mail.[25] Although the comment period for *NI 31-103* ended on 29 May 2008, the Canadian Standards Association (CSA) has not disclosed whether any portion of *NI 31-103* will be amended. In the form initially proposed, the statute will require Canadian financial service firms to retain "any record" – which includes email – in a durable form for two years after its creation, and to retain "relationship records" for seven years after the termination of any client relationship.[26] If *NI 31-103* is approved in its current form, it could take effect as early as 1 January 2009. Even if *NI 31-103* is amended to reflect any comments received during consultation, it seems inevitable that Canadian financial service companies will soon be required to adhere to specific requirements regarding the archival of electronic information.

Current Canadian laws have enabled companies to address e-discovery issues on an ad-hoc basis. It is evident from recent developments that Canadian provinces are taking affirmative steps to provide companies with additional clarification regarding e-discovery issues, and attempting to achieve consistency and better cost predictability.[27] The language and scope of rules may vary from province to province, and will likely be revised or amended in the near future. It is therefore more important than ever that Canadian companies and their lawyers review their existing information policies and underlying technologies to ensure that they are in compliance and operating effectively and efficiently. In short, have a game plan. Canadian Judges have expressed a need for establishing e-discovery best practices. As any good hockey player knows, when the referee issues an order or strong suggestion, it is best you listen up or you might get the penalty box. Companies that fail to do so may find themselves facing judicial or regulatory sanctions for discovery violations.

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[23] See n 14 above.

[24] *Ibid.*

[25] *NI 31-103* (n 8 above) s 5.16(1).

[26] *Ibid*, s 5.16(4)(b).

[27] *Ibid*, s 5.16(1).

3. The United States

Like Canada, the US has been adjusting to the new changes on the ice, and it has addressed e-discovery along the same lines. While the federal law has adopted set standards for the preservation and production of ESI,[28] states have dealt with e-discovery in various ways. Many states, including California, have proposed rules for electronic discovery and have put them out for comment.[29] So if companies aren't able to fall under the jurisdiction of the Federal Court they will have to deal with the uncertainty surrounding electronic evidence. Until the states (and the Canadian provinces) adopt set standards for dealing with e-discovery, litigators on both sides of the border will have to remain game-ready and continue to adjust to their surroundings, no matter the jurisdiction.

4. Europe

"Across the pond", Europe is playing the same game, but with different rules. Unlike Canada and the US, European countries in the EU adopted the *European Commission Directive of Data Protection* ("the *Directive*"), which has been in place since 1998.[30] The Directive regulates the collection, recording, organisation, storage, adaptation, retrieval, consultation, use, dissemination, and destruction of electronically stored information, using the ambiguous term of "processing" to cover all of these terms in the data protection context.[31] While it seems that North America has very liberally found ESI discoverable, the EU has gone the opposite way, blocking off the entire goal. One of the main concerns the EU has addressed is the protection of "personal data". While many Canadian and American courts agree that individual, private information should not be discoverable against a corporation, few would go so far as to include the correspondences, documents and e-mails of that corporation's employees as private and therefore non-discoverable. This unique version of "non discovery" seems to be what the EU has done with its directives and local supervisory authorities. The different interpretation of the words "private and individual" adopted by the EU afford employees and employers dramatically more protection than what would be found across the Atlantic.

Even though the EU guards data very strictly, there are still ways to score. In actions concerning disputable private information, the EU suggests that companies seeking such data request the consent of relevant private parties to review their data.[32] Without consent, local EU advisory committees review the information sought and decide if it is protected under privacy regulations, or contractually bound to be given by such companies. Even if these advisory committees find the ESI discoverable, there is likely to be a lengthy delay of game-to-decision time. In addition, the advisory committees will almost certainly restrict the data that can be researched in order to

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[28] *Federal Rules of Civil Procedure* 26(a)(1), 33, 34.

[29] Available at http://www.courtinfo.ca.gov/presscenter/newsreleases/NR20-08.PDF (accessed 30 June 2008).

[30] See *Council Directive 95/46*, arts 28 & 32, 1995 OJ (L281) 31 (EC) (available at http://europa.eu.int (accessed 30 June 2008)).

[31] *Ibid*, art 2(b).

[32] *Ibid*, art 7.

further protect quasi-private information.[33] Companies thinking that they can bypass these discovery defences by incorporating ESI clauses into contracts when dealing with companies from the EU still could find the puck (ESI) out of their reach. The *Directive* gives reviewing advisory committees the power to void contractual agreements relating to discovery if they find that the data sought is too private.[34] The best lesson to learn here is to – whenever possible – try and obtain consent to ESI; it is a faster process, and greatly reduces the involvement of local advisory committees from the EU.

Not all EU countries interpret the word "private" so loosely. Germany has argued that when employers give permission to ESI, that permission also extends to their employees and does not require those individual employees' consent.[35] This approach is analogous to the US, which relies on other techniques to protect ESI from being discoverable. Through the *Federal Rules of Civil Procedure* (FRCP), and similar state rules, the US has relied on privileges, exceptions, and requirements of specificity in the request of ESI to limit the amount of information sought from companies.[36] "Work product" or "trial preparation materials" claims are just two types of protection that companies can try to use to fend off discovery requests.[37] Even though the "trial preparation materials" (adopted by the FRCP in 1970) require the information sought to be protected to be "tangible", ESI has still been widely interpreted to meet this obligation.[38] Depending on the facts of the dispute, many other forms of privilege can be offered to present shelter for litigator's clients.

The differences in approach to ESI noted thus far have severely crippled the sharing of data between countries. The *Directive* excludes the transfer of ESI to countries that differ from its policies of protection for information that could be found as "private".[39] Such regulation could harm business by making companies from different countries very hesitant in executing deals for the worry that they would not be afforded the opportunity of full recourse and discovery if the deal was later found to have not been what was anticipated. To address this worry, companies in separate countries are able to contractually agree on concerns regarding the transfer and eventual use of ESI by the recipient.[40] While this would appear to be an effective "trick play" to avoid adopting the *Directive*'s policies on protection of ESI, it is still a much regulated procedure.[41] The EU has made sure that the agreement is a "boilerplate" contract that must be followed precisely – without room for

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[33] *Ibid*, art 8.

[34] *Ibid*.

[35] See: *Bundersdatenschutzgestz* (German Federal Data Protection Law) of 20 December 1990 (BGB1 I 1990, s 2954), amended by law of 14 September 1994 (BGB1 I, s2325) (available at www.fas.org/irp.world.germany.docs.bdsg.htm (accessed 30 June 2008)).

[36] *Federal Rule of Civil Procedure* 34(b).

[37] *Ibid*, 26(b)(3).

[38] See, e.g.: *Garcia v Berkshire Life Ins Co of Am*, [2007] US Dist LEXIS 86639, 2007 WL 3407376 (D Colo Nov 13, 2007).

[39] See *Council Directive 95/46* (n 30 above), arts 28 & 32.

[40] *Ibid*, art 18.

[41] *Ibid*, art 7.

interpretation or change. Consequently, even if the *Directive* is not adopted, its policies will be followed. Even though these rules regarding exportation of ESI may seem harsh, their requirement for strict adherence is not unique. The country that holds the information being sought for review has the power to govern the rules for that information's transfer. The retained ability of a country to limit and otherwise govern the rules for information transfer is an additional reason for a company's legal council to be fully educated regarding the regulations of a host country in which their client company chooses to locate their business.

5. Conclusion

No matter what continent the law firm or business is located, e-discovery is becoming more and more complex (bigger, faster, stronger), and few people understand all of its intricacies. A smart emerging trend is firms looking to outside counsel who specialise in electronic discovery in the hope that they will be able to have a "power-play" and be more prepared to deal with ESI than their adversaries. While further counsel from these specialised firms is advisable, it is important to use local firms where the dispute is being adjudicated. As mentioned, the rules regarding ESI vary depending on the jurisdiction. This is additionally recommended because courts are prepared to hand out sanctions for abuse of the new rules, and these penalties seem to carry much more weight than the penalty boxes of the past.[42]

Regardless of the location – Canada, the US or Europe – litigators would best be served by going to "camp" so that they might "glide effortlessly" into the courtroom – well prepared for the "rough" game, a game which is changing too fast (with regard to e-discovery) to permit effective competition without constantly consulting the local rules. Scoring is the goal, and being sent to the penalty box is to be avoided. Even if you think you might be the "Wayne Gretzky of the courtroom", gliding around scoring like crazy, natural talent can only be enhanced by good equipment (i.e. thorough e-discovery). If you have trained hard, maybe you'll "score one" for your client, which is an achievement in any game well played.

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[42] See: *Qualcomm Inc v Broadcom Corp*, [2008] WL 66932 (SD Cal Jan 7 2008) (awarding Broadcom $8,500,000 in discovery sanctions against Qualcomm for its "monumental and intentional discovery violation" in failing to produce more than 46,000 "critically important" emails until after trial of the patent infringement case brought by Qualcomm.)