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Evidence in the electronic age: the rise of the Sedona Canada Principles

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Overview

The world is moving from print toward electronically stored information (ESI), and the legal profession is no exception. Since ESI is discoverable, lawyers must understand the effects ESI can have on their discovery process. Drafted in 2008 and updated in 2016, the Sedona Canada Principles sought to provide reasoned guidance on how to handle the vast amounts of discoverable ESI during litigation and investigations, generally known as eDiscovery. Just as "snail mail" was eventually usurped by electronic methods, so too is traditional paper-based discovery. Since 2010, Ontario's Rules of Civil Procedure included by reference the Sedona Canada Principles[1] As two recent cases show, these principles are having an increasingly important effect on the costs of eDiscovery and access to information.

As a system developed in a print-based era is forced to adapt, lawyers can either stay ahead of the curve or pay the costs. As the gap between technical and legal competency will continue to grow, lawyers need to either develop a second skill set or recognize that information technology experts are indispensable to their work.recognize that information technology experts are indispensable to their work.

Case 1: Verge Insurance v Daniel Sherk[2]

This decision from March 20, 2017, dismisses an appeal to the Ontario Superior Court of Justice Divisional Court. In the initial 2016 decision,[3] Justice Turnbull (Turnbull J) found that the appellant, Verge, had failed to comply with its documentary discovery obligations. The case illustrates the extent to which disregarding proper handling of ESI can have costly penalties.

In 2012, the parties exchanged "hold letters." Instead of giving its employees instructions to save copies of documents that might be relevant, Verge allowed its documents to accumulate to an undifferentiated mass of 79 so-called "backup tapes," each of which contained thousands of documents.

Though Verge claimed to have produced all relevant documents, the opposing party was not convinced. It sought and received an order for a sample of the backup tapes to undergo forensic analysis by a consultant, Deloitte. Since the appellants were claiming that they had already reviewed the backup tapes for relevant documents, the order provided that the opposing party was to pay the costs of the forensic audit. However, the Deloitte review identified 144 documents from 13 of the backup tapes that were, in fact, deemed relevant. Thus, the opposing party brought a further motion seeking an order to recover costs for the Deloitte review and for this motion amounting to $200,000.

In the 2016 decision, Justice Turnbull found that the Sedona Principles applied to the case. These principles make it clear that electronic information is discoverable; and that as soon as litigation is reasonably anticipated, each party must take reasonable and good faith steps to preserve potentially relevant electronically stored information. Given these principles, the motion judge found that any costs that resulted from Verge's failure to archive potentially relevant information on one file that could be reviewed and produced to the respondents were the responsibility of Verge.

The Court upheld Turnbull's order to indemnify the respondent for the $200,000 it had already incurred for the Deloitte review. It also found that the appellants had not complied with their production obligations pursuant to the Sedona Principles and the Rules of Civil Procedure. And it awarded the

[1] *Rule 29.1 of Ontario's Rules of Civil Procedure*

[2] *Verge Insurance Brokers Limited et al. v Daniel Sherk et al., 2017 ONSC 1597*

[3] *Verge Insurance Brokers v. Richard Sherk et al., 2016 ONSC 5656*

[4] *Hamilton Health Sciences (Re), Order PO-3167, Appeal PA15-558*

[5] *Hamilton Health Sciences (Re) at para 1*

respondent the substantial indemnity costs of the motion and the costs of the appeal.

Case 2: Hamilton Health Sciences (Re)[4]

On March 31, 2017, the Information and Privacy Commissioner of Ontario (IPC) upheld on appeal that Hamilton Health Sciences had justified its $4,800.00 price estimate for a request for information under the Freedom of Information and Protection of Privacy Act (the Act or FIPPA).

Hamilton Health Sciences (a hospital) received a request from a journalist under FIPPA "regarding two aboriginal children refusing chemotherapy at McMaster Children's Hospital and the resulting Ontario court family division case."[5] In compliance with section 57(1) of the Act, the hospital provided a fee estimate for processing the request in the sum of $4,800.00, which reflected a waiver of 80 percent of the estimated fee. The requester (now the appellant) appealed the hospital's fee.

The appealing journalist argued the fee was so high that it amounted to a barrier to access. She submitted that the costs should be lower because the records should be easily searchable; 20 hours of search time for slightly over one years' worth of records is much too high. She concluded by stating the hospital was charging for an unreasonable amount of redaction. should be easily searchable; 20 hours of search time for slightly over one years' worth of records is much too high.[6] She concluded by stating the hospital was charging for an unreasonable amount of redaction.[7]

In its reply, the hospital went into more detail on its processes for searching for documents and redacting them. After receiving the request, the hospital worked with staff, senior management, external and internal legal counsel to define the scope of its response. Upon its search, the hospital found that an estimated 3,500 pages of records would be disclosed, all of which will require some redaction of personal health information (PHI).[8] The preparation of the redactions accounted for $3,500.00, roughly 73 percent of the total estimate. The hospital followed an iterative searching process as described in the Sedona Canada Principles.

The Commissioner upheld the hospital's fee estimate and dismissed the appeal in all circumstances. He found that the appellant's request was broad and that the range and volume of the possible responsive records was the basis for the "large" search fee of $600.00.[9] Furthermore, he found $3,500 for preparation and $700 for photocopying to be appropriate costs for 3,500 pages of records.

The Commissioner concluded by reflecting on the nature of fees in such a request. Considering that information (such as email) pertaining to a broad search will likely be dispersed though an institution, he said, "It is therefore the scope of the request and not the method of calculating the estimated fee that results in the amount to be charged for processing the request."[10]

Commentary

These cases present an opportunity to reflect on the gap between presuppositions and current realities of eDiscovery. With ESI, the nature of the discovery game has changed – and so have the rules. When faced with the limited availability and difficulty of searching paper documents, asking for everything can be a logical reaction. However, applying this logic to ESI creates more work and fails to take advantage of its inherent benefits." Given the

[4] *Hamilton Health Sciences (Re), Order PO-3167, Appeal PA15-558*

[5] *Hamilton Health Sciences (Re) at para 1*

[6] *Hamilton Health Sciences (Re) at para 45*

[7] *Hamilton Health Sciences (Re) at para 47*

[8] *PHI is defined at section 4 of the Personal Health Information Protection Act, 2004, S.O. 2004, c. 3, Sched. A.*

[9] *Hamilton Health Sciences (Re) at para 49*

[10] *Hamilton Health Sciences (Re) para 54*

vastness of ESI, this same approach creates more work and fails to take advantage of the inherent benefits of electronic documents. It is more important than ever to make reasoned decisions about what to ask for in legal proceedings. Otherwise, one ends up with 3,500 documents that all contain PHI. Or worse, a large bill for improperly handling ESI.

Concerns about reducing the scope of a request, or of having to linearly review every document, are likely holdovers from a paper-based world. The challenge is no longer to put eyes on every piece of material, but "to convert raw data into real knowledge."[11] It is a major problem when one spends time and money reviewing documents only to find the parties still have not gained any knowledge relevant to their case.

Both Hamilton Health Sciences and Verge v. Sherk reflect how the challenges lawyers face to keep pace with technology are much broader than adopting any particular tool. Beyond matters of practice efficiency and artificial intelligence (AI)-assisted legal research, the very nature of how information is organized and stored is changing. As Richard Susskind points out in his book The Future of the Professions, the dominant means by which information is stored and communicated has shifted from print to digital[12] Seeing as many law firms and courts still handle large amounts of paper documents we are still in a transitional phase.

The above cases illustrate the growing pains of this transition. Susskind notes how, as we progress into the technology-based internet society, "the quantity and complexity of materials will be hidden from users."[13] Though it is tempting, the inevitable results of disregarding this increasing complexity of handling ESI are misunderstandings and court fees. Familiarizing oneself with the Sedona Principles is a good starting point for lawyers interested in staying current on discovery best practices.

Discovery processes need to reflect the sheer complexity of ESI in our technology-based internet society. Lawyers and law societies are recognizing the need to stay abreast. The Federation of Law Societies of Canada has proposed to amend its Model Rules of Professional Conduct to include technical competency as a component of the definition of competency.[14]

Still, a large part of competency (and perhaps why lawyers are so resistant to it) is recognizing the limits of one's own ability. Lawyers are trained identify documents relevant to certain issues, but not to navigate the technical collection and processing of hundreds of gigabytes. Savvy lawyers must learn when to turn to outside experts for assistance in making these types of decisions.

Conclusion

Both matters above deal with costs. More than the literal costs, they deal with the cost of overlooking a changing world. The fact that a client could have several hard drives of discoverable material and not have them reviewed suggests there was a problem. The fact that the journalist involved in the HHS case is exasperated about the costs of retrieval shows it is not only lawyers who are struggling to adapt. Even something apparently simple like identifying responsive emails involves specialized expertise and processes.

It is not simply that the practice of law is changing; the world is changing. Lawyers need to keep pace in order continue to add value. It is not simply that computers may soon be reviewing documents better than humans; the documents – and humans – themselves are increasingly reliant on computers. Electronic discovery promises to massively change the practice of law; yet it reflects something much larger. The way all information is organized – all potential evidence – is undergoing the biggest substantive change since the printing press.

[11] *Frazer, Roe & Jenkins, Marc. "The Future of eDiscovery in Tennessee" Belmont Law Review Vol 1:181 (2014) at 182*

[12] *Susskind, Richard & Susskind, Daniel The Future of the Professions (Oxford UP: 2016) at 146*

[13] *Susskind at 151*

[14] *Goyal, Monica "Do Lawyers and Law Students Have the Technical Skills to Meet the Needs of Future Legal Jobs?" (June 29, 2017) http://www.slaw.ca/2017/06/29/do-lawyers-and-law-students-have-the-technical-skills-to-meet-the-needs-of-future-legal-jobs/*