Following the e-trail

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With new protocols established, courts are less reluctant to order parties to produce their hard drives and laptops to retrieve data.

With the integration of the *Sedona Canada Principles* into the rules governing discovery, courts are becoming more willing to order parties to produce their hard drives and laptops. As email and social networking Web sites continue to replace verbal communication, electronic discovery can unearth significant paper trails.

BACKGROUND

Fundamentally, all records relevant and material to the issues in the pleadings must be disclosed and produced. The provincial rules of court include discovery rules that were drafted with respect to paper documents. In most cases, relevant paper records are often standardized — income tax returns, for example — and can be easily identified, retrieved and produced. But information technology has led to fundamental change in the way documents are created, used and stored in both the private and commercial realms. In particular, communications that were traditionally verbal and not recorded are now reduced to writing. The advent of email, instant messaging and social networking forums such as Facebook have led to the unintentional creation of paper trails that can be particularly relevant in insurance litigation. These communications are often "deleted," but remain stored in a computer's electronic memory. Generally they can only be retrieved by forensic data recovery experts who require access to the entire hard drive.

Traditional discovery rules are not easily applied to electronically stored documents. Prior to 2008, courts tended not to order production of a laptop or a hard drive because the relevance of documents that might be found in the hard drive were outweighed by the negative effect it would have on privacy and confidentiality interests.[1]

THE SEDONA CANADA PRINCIPLES

A number of judges, lawyers and government representatives from across Canada collaborated in 2006 to draft a set of recommendations with respect to e-discovery issues. The group is known as "Sedona Canada."[2] In January 2008, Sedona Canada published *The Sedona Canada Principles*. The principles are intended to be a set of guidelines and recommendations for lawyers and courts in establishing a measured approach to e-discovery compatible with the discovery rules in all the Canadian provinces and territories. Since publication, the principles are being incorporated into

revised rules of court and practice directives across Canada.[3]

The principles are designed to strike a balance between the following factors:

• the obligation of litigants to preserve and disclose relevant documents;

• the costs to recover and produce the documents (which can be very high); and

• protection of confidentiality, privacy and privilege.

APPLYING THE SEDONA CANADA PRINCIPLES

In a recent British Columbia Supreme Court case, *Bishop (Litigation guardian of) v. Minichiello*, the defendants sought production of the hard drive of the plaintiff's family computer. The plaintiff alleged the defendants caused a brain injury, which affected his sleeping patterns and ability to work. The defendants' theory was that the plaintiff's ongoing fatigue was caused by his late-night computer use as opposed to the brain injury. Thus, they sought access to the hard drive for the limited purpose of determining when the plaintiff logged in and out of Facebook. The plaintiff argued that various family members used the computer for business and personal purposes, and privacy and confidentiality would not be protected.

The court ordered that the hard drive be produced to an independent forensic data recovery expert that was agreed to by both parties (and appointed by the court if necessary). The expert's fees would be paid for by the defendants. The expert's role was limited to reviewing the hard drive and isolating the information sought by the defendants. In its analysis, the court balanced the numerous factors set out in the principles, and articulated the following general rules:

• electronic data stored on a computer's hard drive are "documents."

• the court has the discretion to deny an application for production of electronic documents in the following circumstances:

• where thousands of documents of only possible relevance are in question; or

• where the documents sought do not have significant probative value and the value of production is outweighed by competing interests such as confidentiality and time and expense required for the party to produce the documents.

• the court must also assess whether the order sought is so broad it has the potential to delve unnecessarily into private aspects of the opposing party's life.

The court took note of the fact the defendants were seeking only the "metadata" stored on the computer's hard drive. "Metadata" is not a document created by a user; rather, it is a report of recorded data that is generated by computer software. It is evidence of what the user does with the computer and when. In this case, that information was particularly relevant. The privacy issues were addressed by placing restrictions on the type of information that could be searched for and produced. The costs involved in obtaining the information would be borne by the defence.

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The Ontario Superior Court applied a similar analysis in 2008. In *Vector Transportation Services Inc. v. Traffic Tech Inc.*, the corporate plaintiff alleged that the defendant, a former senior executive, had stolen the plaintiff's customers in breach of a confidentiality agreement. The motions judge ordered the defendant to produce his personal laptop to the plaintiff's forensic data recovery expert in order to inspect the computer for emails containing the names of the plaintiff's clients or customers. The defendant appealed, and the Superior Court dismissed the defendant's appeal on the basis that the motions judge had correctly taken into consideration the factors set out in The Sedona Canada Principles.

COMMENTS

Electronic discovery is increasingly becoming part of the litigation process. The Sedona Canada Principles are helpful guidelines to manage effectively the competing interests that arise in the process.

However, the issue of cost is a significant hurdle in being able to use the e-discovery process to its full potential. The vast amounts of electronically stored information, created by widespread use of computers and the Internet, has substantially increased the cost and burden of discovery. Forensic data recovery experts are often prohibitively expensive, with fees often reaching the tens of thousands of dollars.

E-discovery will therefore not be fully used in most cases. However, as illustrated in the *Minichiello* case, there may be circumstances in which it makes economic sense to use this process.

1 See for example: Privest Properties Ltd. V. W.R. Grace & Co. – Conn (1992), 74 B.C.L.R. (2d) 353 (B.C.C.A.); Desgagne v. Yuen, 2006 BCSC 955; and Roeske v. Grady, 2006 BCSC 1975.

2 Sedona Canada is associated with an American non-profit law and policy think tank called the "Sedona Conference." Its website is: http://www.thesedonaconference.org/

3 In the preface to the The Sedona Canada Principles, Justices Campbell (Ont. S.C.J.) and Scanlan (N.S.S.C.) state: "Since publication of the initial draft, various jurisdictions have made reference to the principles in projects involving possible changes to the rules or practice notes to accommodate e-discovery. Substantive rule revision in the provinces of B.C. and Nova Scotia over the next year or so is expected to adopt the principles. In Ontario, a recent report on civil justice reform has recommended adoption of a practice direction that would encourage reliance on the principles." I note that in Alberta, the principles have been used in its Court of Queen's Bench practice note dealing with e-discovery.