# COURT OF QUEEN'S BENCH OF MANITOBA

# PRACTICE DIRECTION

# GUIDELINES REGARDING DISCOVERY OF ELECTRONIC DOCUMENTS

## Introduction

While electronic documents are included in the definition of "document" contained in *Queen's Bench Rule* 30.01(1) (a), *Queen's Bench Rule 30* relating to discovery and inspection of documents does not contemplate an electronic discovery ("e-discovery") process. E-discovery refers to the preservation, retrieval, disclosure and production of documents from electronic sources.

Electronic documents differ from paper documents in a number of ways. Electronic documents now outnumber, are easier to duplicate and are more difficult to dispose of than paper documents. Electronic documents are attached to tracking information (metadata) and may be updated automatically, unlike paper documents. In order to access an electronic document, a computer program (which may become obsolete) is required. While paper documents can be maintained in one filing cabinet or banker's box, electronic documents can reside in numerous locations such as desktop hard drives, laptops, servers, handheld digital devices and on storage media like CDs and backup tapes.

Parties in actions which involve e-discovery should consult and have regard to the document titled "The Sedona Canada Principles Addressing Electronic Discovery." The Sedona Canada Working Group, composed of lawyers, judges and technologists, spent sixteen months carefully studying issues relating to e-discovery in Canada and, from that careful study, developed and produced this comprehensive document which can be found at: ***http://www.lexum.org/e-discovery/documents/SedonaCanadaPrinciples01-08.pdf***. A brief statement of the Principles is attached at Appendix A**.**

The following Guidelines incorporate the Sedona Canada Principles Addressing Electronic Discovery.

The objective of these Guidelines is to guide lawyers, parties and the judiciary in the e-discovery process. It is hoped that the Guidelines will provide an appropriate framework to address how to conduct e-discovery, based on norms that the bench and bar can adopt and develop over time as a matter of practice.

The Guidelines are not intended to be enforceable directly, as are the *Queen's Bench Rules*, although they may support the enforcement of agreements between the parties or provide the basis for court orders. At this stage, mandating how e-discovery is conducted through the enactment of detailed rules could be counter-productive. In due course, as experience is gained in this area in Manitoba and in other jurisdictions in Canada, rules specific to e-discovery may be developed.

# Guidelines

## Scope

**Principle 1: In general, and subject to the following principles, electronic documents that are relevant to any matter in question in the action must be disclosed in accordance with *Queen's Bench Rule* 30.**

**Commentary:**

Electronic documents are included in the definition of "document" contained in *Queen's Bench Rule* 30.01(1) (a) and must therefore be disclosed in accordance with *Queen's Bench Rule* 30.

**Principle 2: The obligations of the parties with respect to discovery and inspection of electronic documents, including the cost associated with locating electronic documents, should be proportionate to the importance and complexity of the issues, and to the amount involved, in the action.**

**Commentary:**

The concept of proportionality is a central tenet of The Sedona Canada Principles Addressing Electronic Discovery, which is intended to address delays and costs impeding access to justice. This principle is consistent with Queen's Bench Rule 1.04(1), and the objective of securing the just, most expeditious and least expensive disposition of litigation on its merits.

The application of this principle of proportionality depends, in the first instance, on the parties who should confer about the concept of proportionality and attempt to agree upon its application to an action. If the parties are unable to agree, and a party can demonstrate that the likely probative value of a document is outweighed by the cost associated with locating the document, the party should not be obliged to locate the document at issue.

**Principle 3: In most cases, the primary location in which to search for electronic documents should be the parties' active data and any other information that was stored in a manner that anticipated future business use, and that still permits efficient searching and retrieval.**

**Commentary:**

The scope of searches required for relevant electronic documents must be reasonable. It is neither reasonable nor feasible to require that litigants immediately or always canvass all potential sources of electronic documents in the course of locating, preserving and producing them in the discovery process.

For most litigation, the relevant electronic documents will be those which are available to or viewed by computer users and those which are exchanged between parties in the ordinary course of business (active data). This principle also includes archival data (electronic documents organized and maintained for long-term storage and record keeping purposes) that is still readily accessible.

**Principle 4: A party should not be required to search for, review or produce documents that are deleted or hidden, or residual data such as fragmented or overwritten files, absent agreement or an order based on demonstrated need and relevance. In certain actions, a party may satisfy its obligations relating to discovery and inspection of electronic documents by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify the documents that are most likely to contain relevant data or information.**

**Commentary:**

Only exceptional cases will turn on deleted or discarded electronic documents. As such, residual or replicant data need not be preserved or produced absent agreement or an order of the Court. In an action where deleted or residual electronic documents may be relevant, the parties should communicate this information to one another early in the process to avoid unnecessary preservation, inadvertent deletion and/or claims of spoliation.

Large computer systems contain vast amounts of information, much of which is likely to be irrelevant. In some actions, it may therefore be impractical or too expensive to review all of the information for relevance. In such circumstances, it is reasonable for parties to use targeted electronic techniques to search within electronic document sources, in collecting the materials that will be subject to detailed review for relevance. The objective should be to identify a subset or

subsets of the available electronic documents for detailed review, that are most likely to be relevant.

The application of this principle depends, in the first instance, on the parties who should confer about and attempt to agree upon the use of targeted electronic search techniques, including search criteria to be used to extract relevant electronic documents.

## Preservation

**Principle 5: As soon as litigation is contemplated or threatened, parties should immediately take reasonable and good faith steps to preserve relevant electronic documents.**

- **Parties should discuss the need to preserve metadata as early as possible. If a party considers metadata relevant, it should notify the other party immediately.**

**Commentary:**

The obligation to preserve relevant electronic documents applies to both parties as soon as litigation is contemplated or threatened; however, the obligation is not unlimited. The scope of what is to be preserved and the steps considered reasonable may vary widely depending upon the nature of the claims and documents at issue. A reasonable inquiry based on good faith to identify and preserve active and archival data should be sufficient.

"Metadata" is electronic information that is recorded by the system about a particular document, concerning its format, and how, when, and by whom it was created, saved, accessed, or modified. Parties should confer about and attempt to agree upon the need to preserve metadata as early as possible.

Depending on the circumstances of the case, particular metadata may be critical or it may be completely irrelevant. For example, there will be situations where metadata is necessary to authenticate a document or establish facts material to a dispute. In most cases, however the metadata will have no material evidentiary value; for instance, it does not usually matter when a document was printed or who typed the revisions.

**Principle 6: Because of the nature of electronic documents, parties should consider whether third parties may be in possession of relevant electronic documents and may wish to consider placing any such third parties on notice with respect to preserving electronic documents as early in the process as possible, as electronic documents may be lost in the ordinary course of business.**

**Commentary:**

Where a party anticipates that a specific electronic document does or may exist in the possession of a third party that is relevant to an action and that is liable to be deleted or modified in the ordinary course of business, the party may wish to consider notifying the third party of that fact and requesting that appropriate steps be taken to preserve the electronic document.

## Production

**Principle 7: Where an electronic document has been preserved in electronic form, it may be producible in electronic form where this would (i) provide more complete relevant information, (ii) facilitate access to the information in the document, by means of electronic techniques to review, search, or otherwise use the document in the litigation process, (iii) minimize the costs to the producing party, or (iv) preserve the integrity and security of the data.**

**Commentary:**

Parties should confer about and attempt to agree as early as possible on issues relating to production of electronic documents.

Parties must produce an electronic document in electronic format if, for any reason related to the litigation, it is not sufficient to produce a printout or scanned version of the document.

Parties are encouraged to agree to the production of documents in electronic format whenever it might lead to the more efficient conduct of the litigation, including where:

(a) a substantial portion of the discoverable documents consists of electronic documents; or
(b) the total number of discoverable documents exceeds 1,000 documents or 3,000 pages.

For guidance about formats and standards for the production of documents in electronic format, parties should refer to the Practice Direction entitled "Guidelines for the Use of Technology in Civil Litigation" which can be located at the Court's website at ***www.manitobacourtsw.mb.ca/notices.ntml#gb***.

## Costs

**Principle 8: In general, the interim costs of preservation, retrieval, review, and production of electronic documents will be borne by the party producing them. The other party will be required to incur the interim cost of making a copy, for its own use, of the resulting productions. In special circumstances, it may be appropriate for the parties to agree and/or for the Court to order a different allocation of costs on an interim basis.**

**Commentary:**

This principle accords with the existing practice followed in Manitoba in relation to the costs associated with the disclosure and production of documents. The special circumstances referred to in this principle could include situations where disclosure involves extraordinary cost for the producing party such as disclosure requiring forensic searches, disclosure requiring extensive backup restoration work or disclosure requiring the creation of subsets of data that do not exist in the normal business environment.

## Confer

**Principle 9: Parties should confer as soon as practicable and on an ongoing basis and, in any event, prior to examinations for discovery, regarding the location, preservation, review and production of electronic documents (including measures to protect privilege and confidentiality and other objections to production of electronic documents) and should seek to agree on the substance of each party's rights and obligations with respect to e-discovery, and on procedures required to give effect to those rights and obligations.**

**Commentary:**

Conferring early is one of the keys to effective e-discovery for all parties. By identifying and attempting to resolve disputes about e-discovery issues at an early stage in an action, parties can avoid costly collateral litigation relating to these disputes.

In recognition of the central importance of this principle, the obligation to confer is referenced throughout the commentaries to the other principles set out above. Parties should confer and attempt to agree on all substantive and procedural issues relating to e-discovery, including but not limited to (i) the concept of proportionality and its application to an action, (ii) the relevance of and the need to preserve deleted or residual electronic documents and metadata and the need to preserve and/or produce specific electronic documents in electronic format, (iii)

the use of targeted electronic search techniques, (iv) issues relating to production of electronic documents including the format for document numbering and production, and (v) any proposed change to the normal allocation of costs.

Parties should also confer and attempt to agree on issues surrounding the use of technology for the preparation and management of civil litigation in the Court. In so doing, they should again refer to the court's Practice Direction entitled "Guidelines for the Use of Technology in Civil Litigation" referred to in the Commentary to Principle 7 above**.**

Any agreement reached should be reduced to writing for future reference.

**Principle 10: Where parties are unable to agree on the substance of each party's rights and obligations with respect to e-discovery and on procedures required to give effect to those rights and obligations, the parties may, on motion, seek an order or direction from the court to address these issues. Such motions should be heard by the master in the first instance in accordance with *Queen's Bench Rule* 37.02(2).**

**Commentary:**

The parties' obligation to confer on issues relating to e-discovery is a real obligation. Parties are expected to actually confer and to genuinely attempt to agree on substantive and procedural issues relating to e-discovery before bringing a motion as described in this principle.

## Coming into effect

This Practice Direction comes into effect on October 1, 2011.

**ISSUED BY:**

***Original signed by:***

***"G.D. Joyal"***
**The Honourable Chief Justice Glenn D. Joyal**
**Court of Queen's Bench (Manitoba)**

**DATE: June 20, 2011**

## *Appendix A*

### *The Sedona Canada Principles Addressing Electronic Discovery*

1. Electronically stored information is discoverable.

2. In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically stored information; (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.

3. As soon as litigation is reasonably anticipated, parties must consider their obligation to take reasonable and good faith steps to preserve potentially relevant electronically stored information.

4. Counsel and parties should meet and confer as soon as practicable, and on an ongoing basis, regarding the identification, preservation, collection, review and production of electronically stored information.

5. The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.

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.

7. A party may satisfy its obligation to preserve, collect, review and produce electronically stored information in good faith by using electronic tools and processes such as data sampling, searching or by using selection criteria to collect potentially relevant electronically stored information.

8. Parties should agree as early as possible in the litigation process on the format in which electronically stored information will be produced. Parties should also agree on the format, content and organization of information to be exchanged in any required list of documents as part of the discovery process.

9. During the discovery process parties should agree to or, if necessary, seek judicial direction on measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronic documents and data.

10. During the discovery process, parties should anticipate and respect the rules of the forum in which the litigation takes place, while appreciating the impact any decisions may have in related actions in other forums.

11. Sanctions should be considered by the court where a party will be materially prejudiced by another party's failure to meet any obligation to preserve, collect, review or produce electronically stored information. The party in default may avoid sanctions if it demonstrates the failure was not intentional or reckless.

12. The reasonable costs of preserving, collecting and reviewing electronically stored information will generally be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.