



Record Retention, eDiscovery, Spoliation: Issues for In-House Counsel

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Introduction

- Introductory remarks
- Issues of record retention, eDiscovery and spoliation in context
- Investigation into deliberate deletion of emails by government staff



Record Retention

Some Statistics

- 1,600+ mobile devices currently in use
- 50% of employers to require employees to supply their own digital devices for work purposes
- 60 billion emails being created and sent each day

Record Retention...cont'd

- Record retention is not about saving everything forever
- 75% of records retained by corporations have no current value
- Costs associated with retaining everything

Risks of Having No Policy

- Destroying records that corporation is required to keep
- Keeping records that corporation should be destroying
- Potential court sanctions

What You Need to Consider

- What does employer do and how is it organized
- Legislation and regulatory instruments
- Record retention requirements under *Income Tax Act* or employment law



Record Retention...cont'd

- Limitation periods
- Contractual obligations of employer
- Confidentiality and privilege

Benefits of a Good Policy

- Retention of useful and relevant business records
- Useful roadmap in the event of litigation or regulatory review



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Record Retention...cont'd

Litigation Hold



Record Retention...cont'd

- Be rigorously enforced from top management down
- Be created in conjunction with the IT and legal departments
- Be easy to understand
- Be periodically updated
- Be easy to implement
- Address how employees store data
- Be flexible enough to suspend
- Address the possibility of a litigation hold
- Explain the company's IT systems
- Name the custodian(s)

Precedents

- Ultimate Corporate Counsel Guide (CCH)
- American Bar Association
apps.americanbar.org/lpm/lpt/articles/sampledecretionpolicy.pdf
- Sedona Conference Publications (Applicable law)
www.thesedonaconference.org/content/miscFiles/publications_html
- Ontario eDiscovery Implementation Committee (Discovery/eDiscovery)
www.oba.org/En/publicaffairs_en/E-Discovery/model_precedents.aspx

eDiscovery

- Staggering amount of documents in litigation
- Electronically stored information is discoverable
- Sedona Canada Principles, #1

- Scope of discovery generally found in rules of procedure
- Every document relevant to any matter in issue that is or has been in possession, control or power is discoverable
- Documents stored with third party vendors

- Cross-border discovery issues
- Sedona Canada Principles, #10: During the discovery process, the parties should anticipate and respect the rules of the forum or jurisdiction in which the litigation takes place, while appreciating the impact any decisions may have in related proceedings in other forums or jurisdictions.

- Local laws may prevent cross-border discovery
- Impact of privacy laws in foreign jurisdictions
- Microsoft search warrant case

Discovery Planning

- Sedona Canada Principles, #4
- Ontario Rules of Civil Procedure, r. 29.1
- A co-operative process by which parties are expected to “meet and confer”

- Revisiting the litigation hold
- Proper communication of the hold notice to affected persons, providing advice on the need for and scope of preserving relevant information
- Recommendations under Sedona Canada Principles, #3

A Checklist

- Collect all relevant document retention, backup, archiving and destruction policies
- IT to describe all automated documentation management systems
- All relevant staff to cease or suspend destruction or modification activities
- Engage outside expert to create forensic copies of data sources
- Cease or suspend overwriting backup tapes and activities that would normally result in destruction of relevant documents in the ordinary course of business

- Impact of proportionality on eDiscovery
- *Siemens Canada Ltd. v. Sapient Canada Inc.*
- *Farrell v. Kavanagh*

Sedona Canada Principles, #2

Steps in discovery process should take into account:

- Nature and scope of litigation;
- Importance and complexity of issues and interests at stake and amounts in controversy;
- Relevance of the available ESI;
- Importance of ESI in Court's adjudication
- Costs, burden and delay that discovery of ESI may impose on parties



eDiscovery...cont'd

- Utilizing TAR to ensure proportionality
- Current state of the law in U.S. v. Canada



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eDiscovery...cont'd

Costs of discovery and cost shifting





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Spoliation



Spoliation...cont'd

- Definition: Spoliation is the destruction or material alteration of evidence, or potentially the failure to preserve property for another's use as evidence in litigation that is pending or foreseeable.
- Rule of evidence or a tort?
- *St. Louis v. Canada* (1896), 25 S.C.R. 649

Spoliation...cont'd

- Spoliation is generally a rule of evidence in Canada
- British Columbia: *Endean v. Canadian Red Cross* and *Sangha v. Reliance Investment Group Ltd.*
- Alberta and Ontario: *Spasic Estate v. Imperial Tobacco Ltd.*

- Usual remedy is drawing of adverse inference
- Test which must be met:
 1. There was an intentional destruction of relevant evidence;
 2. Destruction occurred when litigation was existing or pending; and
 3. Reasonable to draw inference that evidence was destroyed to influence outcome of litigation

- Potential test for spoliation as a tort:
 1. Existence of a potential lawsuit;
 2. Defendant must have knowledge of potential lawsuit;
 3. Destruction, mutilation or material alteration of evidence
 4. Intent on part of litigant to disrupt or defeat lawsuit
 5. Causal relationship between the act of spoliation and the inability to prove lawsuit; and
 6. Damages

Spoliation...cont'd

- Other sanctions under rules of civil procedure
- Inability to utilize favourable documents at trial
- Dismissal of action: *Zelenski v. Jamz* and *iTrade Finance Inc. v. Webworx Inc.*
- Orders related to affidavit of documents

- Nova Scotia has special rules related to eDiscovery sanctions
- Abuse of process and Contempt
- Effect of Sedona Canada Principles, # 11:
“Sanctions should be considered by the Court where a party will be materially prejudiced by another party’s failure to meet its discovery obligations with respect to electronically stored information.”

- U.S. experience – more than just a rule of evidence in a minority of U.S. jurisdictions
- Critical comments by court result in potential embarrassment to in-house lawyers
- *Day v. LSI Corp.*, 2012 U.S. Dist. Lexis 180319 (D. Ariz, December 2012)

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Spoliation...cont'd

- Cost sanctions and significant punitive damage awards
- Lawyers are not immune from cost sanctions being awarded against them personally
- *Robert G. Swofford v. Donald Eslinger*, Florida

Spoliation...cont'd

- Potential for imprisonment
- Criminal sanction under U.S. law
- Potential criminal sanction under Canadian law for obstruction or breach of trust

Spoliation...cont'd

- Spoliation may lead to sanction by the Law Society of Upper Canada: *De Souza*
- Rules of professional conduct in the United States changing to address eDiscovery obligations
- Referral to State Bar for investigation: *Qualcomm*
- Rules of professional conduct in Canada dealing with competency



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Questions

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Further Information

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