E-Discovery: It's not all about "US"

Comparison of Canada's and U.S.'s Approach to E-Discovery

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Late September 2007. The conference hall of a trendy hotel on a narrow street called Rue-St-Paul Ouest, a block from *L'Ancienne Maison de la Douane*, and a block from a cathedral called *Notre-Dame*.

Speakers from around the world, including several from the U.S.[2], address the audience of 100 lawyers and paralegals about electronic discovery. Though all presentations are in English, we are in a large sophisticated mostly French-speaking city – Montréal.

Canada – where the civil litigation system mostly looks remarkably like ours[3]. I've lived and worked on both sides of this border. The similarities outnumber the differences. One commonality is the same broad scope of discovery. Read these two provisions.

> *"Every document relating to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested . . . unless privilege is claimed in respect of the document."*

> *"In General. Parties may obtain discovery regarding any matter, not privileged, . . . relevant to the claim or defense of any party, including… any books, documents..."*

The first of these is Ontario Rule 30.02. The second is Fed. R. Civ. P. 26(b)(1). Pretty much the same, *n'est-ce pas*?

So "up there," the legal profession and the courts have also been struggling with the information explosion and how to fit it into an adversarial civil litigation system with broad discovery.

Why is this important to a U.S. litigator? Because statistically, this is where the international actions will likely be. If I asked any random ten people reading this "Who is the largest trading partner of the U.S.?," I'd get nine wrong answers. The correct answer: Canada.

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The total of U.S. imports from and exports to Canada for 2006 is $501 Billion[4]. China and Mexico are distantly in second and third place; for the foreseeable future Canada will remain this country's largest trading partner, as it has been for many decades. So while in California we may find the occasional need to deal with double-byte character sets because of litigation involving Korea or China, the most fertile ground for any litigation with a trans-national aspect is where the most trade occurs: Canada.

A Canadian company suing or being sued in U.S. courts will usually find itself in a U.S. Federal Court. Not so the other way around. If your client is involved in a Canadian lawsuit, don't expect the word "Federal" anywhere in the court documents. The Federal Court system in Canada is restricted to certain subject matters. For most litigation, expect a provincial superior court. In Canada the provincial superior court judiciary enjoys the same respect as the U.S. Federal bench.

In the three largest English-speaking provinces, the highest trial courts are the Ontario Superior Court of Justice, the Alberta Court of Queen's Bench, and the British Columbia Supreme Court. Appeals go to each province's Court of Appeal, and from there, to Supreme Court of Canada. No side-steps through a parallel Federal Court. No province has yet formally amended its rules of Civil Procedure regarding electronic information, but these three have issued Practice Guidelines or Directions.

The Basic Premise: No matter how clearly existing rules may have already defined documents to include electronic data, and no matter how clearly leading cases stated that electronic data were subject to discovery, both the U.S. and these Canadian jurisdictions now state this explicitly, in the U.S. by adding the words "or electronically stored information" after "documents" in Fed. R. Civ. P. 34(a), in Canada by stating it as the first Principle in the Ontario Guidelines, which reads: "Electronic documents containing relevant data and information are discoverable pursuant to Rule 30."

Proportionality, Balancing, Burden: In the U.S. we have amended Fed. R. Civ. P. 26(b)(2)(B) to read: "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. . . . "

Ontario covers this in Guidelines Principle 2: "The obligations of the parties with respect to e-discovery are subject to balancing, and may vary with (i) the cost, burden and delay that may be imposed on parties; (ii) the nature and scope of the litigation, the importance of the issues, and the amounts at stake; and (iii) the relevance of the available electronic documents, and their importance to the court's adjudication in a given case."

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Alberta and British Columbia make a similar statement in their Practice Directions at paragraph 6.1.4.1.

Preservation, and Consequences of Failure to Preserve. Fed. R. Civ. P. 26(f) instructs that at the Meet and Confer the parties should discuss preservation of electronic data. This is new terminology, the first time the concept of preservation has ever appeared. Electronic data is easily deleted, overwritten, or otherwise destroyed.

Due to concerns that an unanticipated automated process might destroy relevant electronically stored information, the Fed. R. Civ. P 37(f) "safe harbor" provision was inserted to limit the court's power to impose sanctions for failing to produce electronically stored information lost as a result of the routine, good faith operation of an electronic information system. In Canada, neither the Ontario Guidelines nor the BC and Alberta Directions specifically mention sanctions for loss of data, either pro or con, though the courts have inherent jurisdiction to impose them.

Meet and Confer. Fed. R. Civ. P. 26(f) mandates that the parties meet and confer at an early date to discuss the preservation of electronically stored information and the form or forms in which it should be produced to one another.

Ontario Guidelines Principle 8 reads: "Counsel should meet and confer, as soon as practicable and on an ongoing basis, regarding the location, preservation, review and production of electronic documents. . . . " The BC and Alberta Directions encourage the same in paragraph 6.1.3.

Data Sampling and Searching. Between 1999 and 2004, the number of business e-mails exchanged in the U.S. increased from 400 Billion to 3.2 Trillion. A case in 1999 might have been a size where all of the data collected from the involved personnel could be affordably processed and reviewed one-by-one. A similar case by 2004 might spawn several times that volume of electronic data. Litigants and vendors turned to automated techniques to cull down data volumes by the use of keyword or concept searches; commentators, think tanks, and courts gave this their blessing.

Zakre v. Norddeutsche Landesbank Girozentrale, 2004 WL 764895 (S.D.N.Y. 2004) adopted Sedona Principle 11: "A responding party may satisfy its good faith obligation to preserve and produce potentially responsive electronic data and documents by *using electronic tools and processes, such as data sampling, searching, or the use of selection criteria*, to identify data most likely to contain responsive information."

Ontario Guideline Principle 10 adopts this verbatim.

Use of culling techniques is not specifically codified anywhere in the Federal Rules of Civil Procedure, but is mentioned in various places throughout the Rules Commentary.

Format of Production. Paper was paper and was produced to the other side as such. Electronic data is not so simple. In the U.S., Fed. R. Civ. P. 34(b) reads: "the request may specify the form in which the electronically stored information is to be produced . . . [the responding party may object] to the requested form, stating the reasons, and the form it intends to use [instead] . . . ii) if a request does not specify, the responding party must produce in the form it is ordinarily maintained or in an electronically searchable form."

In Ontario, Principle 11: "Parties should agree early in the litigation process on the format in which electronic documents will be produced. Such documents 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 documents in the litigation process, (iii) minimize the costs to the producing party, or (iv) preserve the integrity and security of the data." Alberta and BC in paragraph 4.1.2 of their respective Directions actually provide a detailed default standard for electronic production (TIFF images with certain basic fields) but parties may agree to other protocols instead.

Who Bears the Costs? In both the U.S. and Canada[5] the producing party is *prima facie* responsible for its own costs of meeting its obligations in the discovery process. This means the costs of preserving, retrieving, processing, reviewing, and producing the electronic documents.

The similarity between Canada and the U.S. ends there. In most instances in Canada, these costs will be part of the cost-shifting that occurs at the end of the litigation, at which time the unsuccessful party may be required to contribute in whole or in part towards the costs of the successful party. In the United States litigation usually does not involve cost-shifting at the end, so there is more emphasis on interlocutory cost-shifting. Here, the courts have some latitude to depart from the "producing party bears own costs" rule under Fed. R. Civ. P. 26(b)(2)(C).[6]

Conclusion. The final night of the conference. Before dinner overlooking the St. Lawrence River, we were given a tour of an archeological site dating back to the founding of Montréal in 1642. Among the ruins, a wall built in the 1700's as protection from the British. It never served that purpose. After the fall of Québec at the Battle of the Plains of Abraham in 1759, the British marched into Montréal peacefully in 1760. France lost much of what it had held on the North American mainland, and in 1803 sold the rest to the U.S. in the Louisiana Purchase[7]. The British lost the United States, in the 1776-1781 War of Independence, but left behind on this breakaway country the firm imprint of English Common Law. Britain also implemented English Common Law in the part of North America it still held, the future Canada[8]. In 1867, Canada gained its independence from Britain, and these two neighboring legal systems in North America remained in place, "*Children of a Common Mother*"[9]. Down to this day, this is partly why our two countries' civil litigation rules are so remarkably similar. And it also makes an interesting story.

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2 Alice Burns of Baker Robbins, Tom Howe of Legal Technology Group, George Socha of Socha Consulting, and myself. The conference was organized by Commonwealth Legal, Canada's largest e-Discovery service company. It was attended by representatives of most of Canada's leading law firms and several major corporations.

3 The province of Québec being a notable exception.

4 The United States International Trade Commission. http://dataweb.usitc.gov/scripts/cy_m3_run.asp

5 Ontario Guidelines Principle 13: "In general, . . . pending any final disposition of the proceeding, the interim costs of preservation, retrieval, review, and production of electronic documents will be borne by the party producing them."

6 The leading U.S. cases to discuss the cost allocation factors are *Rowe Entertainment Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002), AFF'D 2002 WL 975713 (S.D.N.Y. May 9, 2002) and *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) ("Zubulake I") and *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) ("Zubulake III").

7 Picture the shape and form of North America if this little transaction hadn't happened! By the way, France still holds the two tiny islands of St-Pierre and Miquelon, 12 miles off Newfoundland.

8 Though Britain left the French legal system intact in the part that later became the province of Québec.

9 This is the inscription on the arch at the British Columbia - Washington state border, near Blaine, WA.