

Comparing E-Discovery in the United States, Canada, the United Kingdom, and Mexico¹

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Although recent amendments to the federal rules governing disclosure of electronic data have focused US lawyers on the importance of e-discovery in domestic litigation, the rise of e-discovery has not been restricted to the United States. Most foreign jurisdictions are in the process of developing their own e-discovery rules that will impact US entities engaged in litigation in those jurisdictions. Although it is not possible to provide a complete analysis of e-discovery rules around the world, this article endeavors to provide a brief overview and comparison of the e-discovery rules of the United States, Canada, the United Kingdom, and Mexico.

The e-discovery rules in these four jurisdictions share a certain degree of similarity. But what is most likely to be of interest to all commercial and business lawyers, whether in-house or outside counsel and whether located within or outside the United States, are the differences among the jurisdictions. The differences are of two types. *First*, there are conceptual differences regarding the general role of discovery or disclosure in civil litigation. *Second*, there are more concrete differences regarding the physical preservation and production of electronic data. E-discovery in Canada and the United Kingdom is as a general matter, somewhat comparable (although lesser in scope) than it is in the United States. In Mexico, a civil law country, the approach is completely different from that in the United States. Nevertheless, recent developments suggest that these three jurisdictions may be leaning closer toward (albeit still substantially distinguishable from) the US rules.

In the text below, we summarize the highlights of each jurisdiction's e-discovery rules, with particular emphasis on those aspects of e-discovery that give rise to the most extreme differences and are most likely to generate additional attention in the future. The chart accompanying this article is intended to serve as a foundation for detailed individual analysis of, and comparative analysis among, each jurisdiction's e-discovery rules. It is organized by jurisdiction, identifies the major issues encountered during e-discovery, and includes additional sources to consult for greater detail.

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UNITED STATES (FEDERAL)²

Discussion of US e-discovery rules begins with the principle that any and all non-privileged information relevant to the parties' claims and defenses (and in some circumstances, the subject matter of litigation) must be produced if responsive to particularized requests. As a result, parties are required to take as soon as litigation is reasonably anticipated, necessary steps to preserve potentially relevant data – including suspending the operation of at least some, if not all, routine electronic data deletion systems. US courts have not hesitated to impose sanctions in the form of adverse inference instructions, monetary penalties, and even dismissal, for electronic data spoliation.

The Federal Rules of Civil Procedure provide as a default that a responding party need not produce non-privileged, responsive electronic data if such data is not reasonably accessible because of undue burden or cost. However, a requesting party may file a motion seeking to compel the production of not reasonably accessible data. A court is likely to grant the motion if the requesting party can establish “good cause” in light of the proportionality factors applicable to all discovery under US law. Not surprisingly, there has been much debate over the meaning of accessibility in this context. The most widely-accepted sources of not reasonably accessible electronic data are back-up or legacy tapes that are unorganized, incapable of search functions, or otherwise unintelligible. Of course, what is not reasonably accessible today may be readily accessible tomorrow; this virtually guarantees continued debate about accessibility.

A requesting party is generally entitled to receive electronic data only in one format (*i.e.*, either as a paper copy or electronic version). If the requesting party does not specify any precise format, the Federal Rules of Civil Procedure require a responding party to produce electronic data either in the format in which it is ordinarily maintained or in a reasonably usable format. US courts are increasingly being presented with discovery disputes where the requesting party argues that electronic data should be produced as a native file (*i.e.*, the format in which it is ordinarily maintained and that allows for easy access to certain metadata), but the responding party argues that the data should be produced as a digitally imaged file (*i.e.*, a reasonably usable format that preserves the integrity of the original data). This, too, promises to be an area for significant future debate.

As evidenced by recent, well-publicized discussion by both courts and legal commentators, sharing of what are often astronomical costs associated with the production of electronic data also promises to remain an area for debate. Parties are generally required under US law to bear the costs of their own productions. Although cost-shifting is not addressed in the statutory rules governing e-discovery, US courts have developed various multi-factor tests for determining when a requesting party may be

² The US e-discovery rules discussed in this article apply solely to those disputes subject to the Federal Rules of Civil Procedure. Other sources, such as state common and statutory laws, should be consulted for the e-discovery rules applicable to other disputes.

required to share the costs of producing not reasonably accessible data. These tests are fact-specific and inevitably lead back to the ongoing debate over accessibility.

The Federal Rules of Civil Procedure also place heavy emphasis on early communications between the parties about the parameters of e-discovery. This emphasis reflects an effort to identify and resolve both timely and efficiently the various issues giving rise to debates. For example: (i) the parties are required to confer about various aspects of e-discovery at least three weeks before their first scheduling conference with the court; (ii) the court's case management order can establish deadlines and procedures relating to e-discovery; and (iii) the parties are required to describe in their initial disclosures before any discovery requests are served all potentially relevant sources of electronic data by category and location. It is thus fair to say that, under US law, lawyers and judges alike are expected to possess a working knowledge of the technologies underlying parties' complex electronic information systems – a knowledge that often can be obtained only through retention of third-party experts.

CANADA³

As in many other areas of jurisprudence, the case law related to e-discovery is not nearly as developed in Canada as it is in the US due to the lack of reported cases on the issue. In addition, there have been no statutory revisions in Canada to provide guidance. That being said, a Working Group of the Sedona Conference (“Sedona Canada”) has been convened and published draft principles (the “Sedona Canada Principles”) for public comment in February. In addition, the Ontario E-Discovery Sub-Committee of the Discovery Task Force has recently released guidelines for the discovery of electronic documents (the “Guidelines”) and a model e-discovery order (the “Model Order”). The Sedona Canada Principles, Guidelines and Model Order, combined with the existing case law, provide substantial guidance on the application of e-discovery in Canada.

The types of documents covered by e-discovery in Canadian cases are almost identical to those provided for under the US e-discovery rules. Consistent with recent US developments, metadata is now generally producible although it is not specifically referred to in the Sedona Canada Principles. It is simply dealt with by encouraging parties to produce documents in a format which preserves metadata, unless it is agreed that metadata will not be relevant.

As in the United States, parties in Canada have a similar duty to take reasonable and good faith steps to preserve relevant electronic documents. The Model Order defines preservation as “taking reasonable steps to prevent the partial or full destruction,

³ In Canada most cases are governed by Provincial rules of civil procedure which are very similar in most jurisdictions, except Quebec, but are by no means uniform.

alteration, testing, deletion, overwriting, shredding, incineration, wiping, relocation, migration, theft, or mutation of Documents, as well as negligent or intentional handling that would make Documents incomplete or inaccessible.”

Canadian case law is divided on whether parties have an obligation to provide software and hardware to the requesting party. Courts may order that the responding party take steps to enable access to electronic material produced where the requesting party is not reasonably able to access them, but this does not include the provision of a licensed copy of software if a license can be obtained elsewhere by the requesting party. In addition, parties will not normally be required to produce hardware media such as hard drives unless the opposing party obtains an injunction similar to a Mareva order.

Although costs are dealt with in a similar manner to the United States, with each party bearing the expense of collecting, reviewing and producing its own electronic documents while the requesting party bears the cost of copying those productions, the Canadian cost regime differs in that it is a “loser pays” system. As a result, while it is possible to obtain cost-shifting orders, it is less common as a significant portion of the “proper and reasonably necessary” costs of production will be recovered by the successful party.

There is not yet any jurisprudence in Canada considering e-discovery issues involving non-parties, but it is most likely that general law of third-party discovery will apply. In Canada non-parties are generally only required to produce documents if: *(i)* the documents are not obtainable from a party to the litigation; *(ii)* the documents have been requested from the non-party and it has refused to produce the documents; and *(iii)* the requesting party can establish that the documents are necessary in order for it to prosecute/defend the action.

Although the requesting party is normally required to pay for some of the costs of the non-parties in making production, it is normally much less than the actual costs associated with production. Courts in Canada appear to be less inclined to grant sanctions as a result of claims of spoliation. The Courts are divided on whether a separate tort of spoliation exists, and even in regards to discovery-related issues rarely grant sanctions. When sanctions are granted, they are generally similar to those granted by US Courts. In addition, the Sedona Canada Principles provide a safe harbour provision that is not found in the Sedona US Principles. This provision provides that a party can avoid sanctions if it demonstrates the failure was not intentional or reckless.

UNITED KINGDOM (ENGLAND AND WALES)⁴

The UK Court rules were changed in October 2005 to incorporate new requirements for the disclosure of electronic documents. Like Canada, however, there are few reported cases in the United Kingdom relating to e-discovery, and the English jurisprudence in this area is much less developed than in the United States. The approach to electronic discovery in the United Kingdom is underpinned by the country's attitude to discovery in general for hard copy and electronic documents. As a result, probably the biggest conceptual difference between the United Kingdom and the United States is in the scope of what is discoverable.

With the introduction in 1999 of new court rules largely devised by leading English judges, "discovery" was renamed "disclosure" and its scope was substantially reduced. Gone was the need to produce volumes of neutral background documents, as was the need to produce documents which did not themselves affect the issues in the case (but which could lead to a "train of enquiry" to potentially relevant documents). Instead, the disclosing party is now usually required only to undertake "standard disclosure" and produce the non-privileged documents (i) on which it intends to rely, (ii) which adversely affect its case or another party's case, or support another party's case, and (iii) those required by a relevant practice direction.

In addition, all procedural steps, including disclosure, are subject to the court's overriding objective to do justice. One of the key factors in assessing what is just is the concept of proportionality. While the receiving party can apply for specific disclosure orders, the court normally requires such orders to be proportionate in terms of the likely importance of the documents, the amount in dispute, the ease and cost of production, and the financial positions of the parties. This means in practice that English judges (and the parties' lawyers) tend to limit the scope of electronic disclosure very much more than they do in the United States and (to a lesser extent) than in Canada. Most standard disclosure in the United Kingdom is limited to online or active electronic documents created during a specified time period by specified personnel, and often to those documents identified by key word searches. Each party is, however, required to specify the scope of its searches for electronic documents. Searches for metadata, embedded data or deleted files are relatively rarely undertaken when providing standard disclosure; when sought pursuant to a specific disclosure order, the applicant normally needs to focus its request to a limited type of electronic data and show that its production is strictly necessary for the fair disposal of the case.

As in the United States and Canada, litigants in the United Kingdom are under a duty to preserve documents at least from the time when litigation commences, and

⁴ The United Kingdom comprises three separate legal jurisdictions: England & Wales, Scotland and Northern Ireland. This article relates to by far the largest jurisdiction – England & Wales – where the main rules governing e-discovery are contained in the Civil Procedure Rules ("CPR"), which govern all civil proceedings. New rules updating the section on electronic disclosure were introduced in October 2005.

probably from when litigation is in contemplation. Litigants are also under a duty to cooperate with regard to the disclosure of electronic material; if there are disagreements, they are expected to be raised at the first case management conference.

Like Canada, the United Kingdom has a “loser pays” costs regime. Each party pays its own costs initially in producing its own disclosure and inspecting that of the other parties. But the winning party normally recovers a good proportion (on average, about two-thirds in commercial cases) of its costs overall, including its costs of disclosure and inspection. This has made e-discovery costs-shifting orders less frequent in the United Kingdom than in the United States, although the English court retains a wide discretion as to the award of costs. It can order that specified electronic materials (including inaccessible data) be disclosed, and that the receiving party pay some or all of the disclosing party’s costs of production.

MEXICO

As a civil law country, Mexico’s e-discovery process is very different from that in the United States, Canada, and the United Kingdom. One of the biggest differences is that the scope of discovery is, comparatively speaking, much narrower in Mexico. This is because the civil procedure rules provide that only specifically-identified documents must be produced to a requesting party. (Documents include paper and electronic information.) Thus, a requesting party cannot simply ask for the production of all documents relevant to any particular fact or issue, and a counterparty need not produce any document – no matter how relevant – if the requesting party has not previously identified the document with specificity as to both content and location. The same principle applies to the production of documents in support of foreign litigation; Mexico’s civil procedure rules prohibit Mexican courts from recognizing “generic” requests for information ordered by a foreign court.⁵

Notably, Mexico’s Commercial Code recently has been amended to establish rules and regulations for the preservation of electronic information. The new provisions require merchants to maintain all of their electronic correspondence and data for at least 10 years in particular formats and subject to particular procedures.⁶ The amendments also require merchants to make all relevant electronic information available upon judicial request.⁷

The party seeking to offer electronic information as evidence has the burden of proving its existence. Accordingly, when electronic information is offered, it usually must be accompanied by an expert witness opinion verifying existence and authenticity.

⁵ See Article 337 bis of the Civil Procedures Code for the Federal District.

⁶ See NOM-151-SCFI-2002, Commercial Practices-Requirements that should be observed for the conservation of data messages (issued March 22, 2002).

⁷ See Articles 49, 50 and 1243 of the Commercial Code (Federal Law).

Court inspections also may be requested to confirm location or source of the electronic information. Additionally, the party offering the evidence is required to identify (and, if necessary, to provide) both the court and the counterparty the proper media needed to review the electronic information. While these steps are not inexpensive, the production and use of electronic information clearly is not likely to be as high as that in common law jurisdictions.

Like Canada and the United Kingdom, Mexico also has a “loser pays” costs regime. In Mexico, the final judgment will order the losing party to reimburse all of the winning party’s properly supported reasonable costs and expenses, as well as attorneys’ fees.

Even though the scope of discovery is much more limited in Mexico, spoliation is a serious issue under Mexican law. Under the civil procedural rules, a party who destroys, deletes or alters electronic information may be subject to pecuniary and/or criminal sanctions. The party may face an additional sanction if the court decides to accept as true the allegations that the spoiled evidence would have supported.

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