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Updated Guidance on Electronic Discovery

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On January 21, 2022, The Sedona Conference and its Working Group 7 (Sedona Canada) announced the publication of *The Sedona Principles Addressing Electronic Discovery, Third Edition*. DMG Partner Kathryn Manning was on the editorial board of *The Sedona Principles Addressing Electronic Discovery, Third Edition*. Kathryn is currently the Chair of Sedona Canada.

Previous editions of the *Sedona Canada Principles* were published in 2008 and 2015. Since then, the *Sedona Canada Principles* have been recognized throughout the Canadian legal landscape as an authoritative source of guidance for Canadian practitioners on electronic discovery. They are expressly referenced in the *Ontario Rules of Civil Procedure* and have been adopted across the country via practice directions and court decisions.

This edition of the *Sedona Canada Principles* remains focused on the core values of proportionality and cooperation between litigation parties when dealing with voluminous and complex information that is stored electronically.

The *Sedona Canada Principles* have also been updated to account for recent developments and innovations in electronic discovery and the management of electronically stored information that have occurred since 2015.

For example, the use of ephemeral data and the popularity of chat tools have both increased dramatically in recent years. Consequently, both are playing bigger roles in electronic discovery than ever before. The COVID-19 pandemic

has also resulted in a growing need to collect data for electronic discoveries remotely. Improvements in machine learning technology have increased the role that technology-assisted review can play to ensure efficient and effective electronic discoveries. Finally, developments in privacy law continue to have a profound effect on the ways in which data can be harvested and used. The *Sedona Principles Addressing Electronic Discovery, Third Edition* addresses all of these developments and more.

New additions to the *Sedona Canada Principles* also include:

- Updated case law and illustrations regarding the discoverability of electronically stored information and the importance of proportionality.
- Commentary on the duty to preserve documents in the context of an investigation.
- Commentary on how privacy laws and regulations affect the preservation, processing, and collection of personally identifiable information for the purposes of electronic discovery.
- New recommendations encouraging litigants to use technology throughout the litigation process, consider phased or tiered discovery in cases where data is harder to collect or process, and collaborate in instances where parties are unevenly matched from a technological perspective.
- Updated commentary on the duty to produce, including the role of Information Governance and Records Management in facilitating the discovery process.
- New case law regarding the use of backup media to collect relevant data where standard data collection methods are not possible.
- New case law regarding data stored in cloud-based platforms or with third-party vendors.
- Best practices for the remote collection of data.

- Extensive updates detailing how new technology can be used to reduce the length and cost of electronic discovery.
- A list of pros and cons regarding the use of keyword searches to collect relevant data.
- Recommendations discouraging the use of keyword searches to identify privileged or confidential information and encouraging the use of technology-assisted review and modern redaction tools.
- Amendments to the discovery planning principle to focus on the scope rather than the substantive content of document production.
- Recommendations encouraging litigants to agree on the scope of production and help each other better manage and understand large document productions.
- New privacy case law regarding social media and the European Union's General Data Protection Regulation.
- A new section examining the interplay between ephemeral messaging and privacy law.
- The incorporation of *The Sedona Canada Commentary on Privacy and Information Security for Legal Service Providers* into sections on privacy and data security.
- Updated commentary on multi-jurisdictional litigation, including a detailed look at how the discovery and privilege regimes of various provinces and other jurisdictions differ from one another.
- Updates addressing data transfer prohibitions from certain jurisdictions such as the European Union.
- An examination of the impact that the collection, review, and production of data in one forum can have on the disclosure of evidence in another forum in the context of cross-border litigation.
- Incorporation of the ADR Institute of Canada Arbitration Rules.
- New sections discussing spoliation and negligent destruction of evidence and new case law analyzing the corresponding remedies courts grant.

- Updated commentary to reflect the rising costs and risk of liability associated with the discovery of electronically stored information.
- An assessment of how costs and liability risks of electronic discovery are impacted by the increase in technology use caused by COVID-19 and the sheer increase in the magnitude of digital information used worldwide.

The *Sedona Principles Addressing Electronic Discovery, Third Edition* is available for free individual download from the Sedona Conference website: https://thesedonaconference.org/publication/The_Sedona_Canada_Principles.

A French translation is to be published in March 2022.