

# **Electronic Discovery: Beyond the Courtroom**

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# History of The Sedona Canada Principles

- Recommendation in Ontario Discovery Task Force “to participate in processes to establish national standards for electronic discovery”
- Team who developed Ontario eDiscovery Guidelines joined lawyers, judges, in-house counsel and technical experts from across Canada
- Drew on Ontario Guidelines and work of The Sedona Conference®
- Initial meeting in May 2006, with public comment draft published in February 2007 (French version in May)
- Refined from comments and discussions at second WG7 meeting in September 07
- Published in January 2008 (French version following in April)

# Why are they important?

- Created with input from lawyers and judges from across Canada, including both in-house counsel and litigators
- Cited directly by the Honourable Coulter Osborne in his recommendations related to the Civil Justice Reform Project (published November 2007)
- Cited in case law in a number of jurisdictions, most recently by Perell J. in his March 17, 2007 decision to uphold an order which allowed a plaintiff's expert to recover and search data from a defendant's personal computer. Perell J. considered Principle 2.

## Fact Scenario

You are retained by a small Swiss Airline called Swiss Jet who flies out of New York Calgary Toronto, Montreal and most major European cities. A class action has been initiated against Swiss Jet and 30 other multi-national airline carriers alleging that all the carriers have conspired to fix business class ticket prices. Class actions have been started in New York, British Columbia, Ontario and Quebec. Swiss Jet has approximately 40 employees spread out between Montreal and Vancouver. It has been served not only with a Statement of Claim, but with a letter from counsel demanding preservation and production of all their electronic data.

# Opponents are asking for....



- Cessation of rotation of all backup tapes (everywhere)
- Images of all executives' workstations at work and at home
- All email traffic (unbounded by time or location or role)
- All pin-to-pin communications and instant messaging
- Website usage statistics
- Copy of the full content management system used to manage the website
- All financial data for the last 10 years – capital and operating
- All financial modelling statistics for all routes

# What are we looking for?

- Communications among airline executives
  - Email traffic
  - Blackberry messaging
  - Calendar entries for meetings
  - Telephone call tracking / voicemail messages
- Published fares
  - Websites as they appeared at points in time
  - Other marketing materials
- Capacity and loads during critical periods
  - Flight schedules for all airlines including aircraft seat capacity on links
  - Typical loads on flights at different times and routes
- Financial data used to establish fares
  - Market forecasts
  - Models used to select price points for different routes and schedules

# Applying the Sedona Canada Principles

- P1 – Electronic information is discoverable.
- P2 – Proportionality – Balancing cost and burden of discovery against
  - The amounts at stake in the litigation
  - The relevance and uniqueness of the information
  - Its importance to the court’s adjudication
- P3 – Preservation
  - “reasonable and good faith steps”
  - “A party’s preservation obligation should therefore not require freezing of all electronically stored information, but rather the appropriate subset of electronically stored information that is relevant to the issues in the action.”
- P5 – Producing relevant and “reasonably accessible” information
  - “marginal utility: Will the quantity, uniqueness and/or quality of data from any particular type or source of electronically stored information justify the cost of the acquisition of that data?”

## Mutterings from IT staff dealing with e-discovery

- What do users do when they hit their email storage limit?
- What should I do with these old backup tapes I found in a bin in the server room?
- What did our website look like on March 2, 2006?
- We're migrating to a new storage area network.
- Where did we put Fred's email when he retired last year?
- Which server is Jane Doe on?
- Nobody told us we needed to log all changes to the website...
- We don't know how the marketing people figure out the fare schedules...
- What do you mean we have to turn on Blackberry logging?

## Resources

- Electronic Discovery – A Reading List  
[http://www.practicepro.ca/practice/eDiscovery\\_Rlist.asp](http://www.practicepro.ca/practice/eDiscovery_Rlist.asp)
- E-Discovery Canada  
<http://www.lexum.umontreal.ca/e-discovery/>
- The Sedona Conference®  
<http://www.thesedonaconference.org/>
- EDRM.net  
[http://www.edrm.net/wiki2/index.php/Main\\_Page](http://www.edrm.net/wiki2/index.php/Main_Page)

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