



The Current State of the Law in Canada and the U.S.: Key E-Discovery Decisions

Brett Harrison, McMillan LLP

Overview

- Recent Canadian e-Discovery Case Law and its implications
- Latest US Case Law and its potential impact on Canadian e-Discovery jurisprudence

Recent Canadian e-Discovery Case Law and its Implications

- New Canadian e-discovery cases largely center on:
 - o Cost Shifting
 - o Production
 - o Proportionality
 - o Preservation
 - o Privacy
- Social networking media is a recent e-discovery phenomenon. First cited in 2007 and since then there have been over 100 cases that mention Facebook or other social networking sites.

Cost Shifting - Canadian Case Law – I

Reginald Barker, et al v. Elliott Thompson Barker, Gary J. Meier and Her Majesty the Queen in Right of Ontario, 2007 CanLII 13700 (ON S.C.)

A Motion for costs pertaining to a suit by 37 current and former inmates at the Mental Health Centre at Penatanguishine.

Issue:

Should the cost of putting old paper documents in electronic format be shared between the parties?

Decision:

Where the benefits of the conversion accrue to both parties and substantially improve the efficiency of the litigation process, an order for shared costs is appropriate.

Cost Shifting - Canadian Case Law – II

St. John (City) Employee Pension Plan v. Ferguson, 2009 NBQB 74.

A Motion for costs of production within a defamation action.

Issue:

Who should bear the cost of the retrieval and production of electronic documents held by a non-party?

Decision:

The pension plan was ordered to pay costs on the basis that it was “inextricably” linked with the City.

Production - Canadian Case Law – I

Anderson v. St. Jude Medical, [2008] O.J. No. 430.

- The main action is a class action suit for damages related to the production of allegedly defective artificial heart valves.
- This case arose from the plaintiff's request for "a complete copy" of a research database and related information maintained by a third party.
- Master MacLeod, in granting the motion in part, held that "[a] database is a document under our rules and therefore the data is to be transmitted to the plaintiff's expert in its native format.

Production - Canadian Case Law – I

(cont'd)

Anderson v. St. Jude Medical, [2008] O.J. No. 430.

Issue:

How much database information must be produced?

Decision:

As the database at issue is a “document” or series of documents within the “possession, power or control” of the defendant, the rules provide that a party is entitled to inspect the original document. If the defendant’s attempts to provide redacted data “fails to place the plaintiff’s expert on a level playing field” then the expert “must have access to the unaltered and unredacted information.”

Production - Canadian Case Law – II

Ritchie v. 830234 Ontario Inc., 2008 CarswellOnt 648.

- A Motion set within an action for wrongful dismissal.
- The plaintiff sought a very broad order – “the creation of an image copy of all computers, mobile handheld devices and other electronic devices of every kind used by the defendant.”
- Citing a lack of any evidence that electronic documents existed, Shaw J. refused to grant the plaintiff’s “broad order” as sought, ordering instead that the defendant “use its best efforts” to retrieve and produce the one e-mail known to have existed and known to have met the “semblance of relevance test.”

Production - Canadian Case Law – III

Vector Transportation Services Inc. v. Traffic Tech Inc. and Brendan Cox, [2008] 58 C.P.C. (6th) 364.

Issue:

When should a court order the inspection of a party's computer to determine whether relevant documents might reside there?

Decision:

To order an inspection of a computer the court must conclude either (a) that there was evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents or (b) otherwise determine through balancing a variety of factors that an inspection should be ordered.

Production - Canadian Case Law – IV

Innovative Health Group Inc. v. Calgary Health Region, [2008] A.J. No. 615.

Issue:

Is the production of a computer hard drive part of a party's obligation to produce records?

Decision:

“A computer hard drive, being a mixed storage facility, like a diary, is not producible *in specie*. It is the duty of the party preparing the affidavit of records, however, to disclose all relevant information found on it.”

Production - Canadian Case Law – V

Kourtesis v. Joris, [2007] O.J. No. 5539

- Photos gathered from Facebook admitted as evidence
- “the photos have a probative value out weighing potential prejudice”
- Ordered the Defendant to produce any other “website information” relevant to the action

Production - Canadian Case Law – VI

Leduc v. Roman, [2009] O.J. No. 681

- a party who maintains a private Facebook account stands in no different position than one who maintains a publicly accessible profile and to permit a party to hide behind privacy controls on a website designed to share social information is to deprive the other party of material relevant to ensuring a fair trial.
- it is reasonable to infer from the presence of content on the party's public profile that similar content likely exists on the party's private profile.”
- “it is now incumbent on a party's counsel to explain to the client, in appropriate cases, that documents posted on the party's Facebook profile may be relevant to allegations made in the pleadings.”

Production - Canadian Case Law – VII

Kent v. Laverdier, [2009] O.J. No. 1522

A Motion for the production of a large number of Facebook pages undertaken within an action for damages in relation to a dog attack.

Issue:

Did the emergence of Facebook evidence justify additional time for discovery and the delay of a set trial date?

Decision:

There is nothing unique about Facebook from a legal perspective; accordingly, the Master remains without jurisdiction to interfere with a fixed trial date. In addition, Leduc cannot be applied unless the pleading or the evidence discloses some connection between the matters in issue and the documents sought.

Production - Canadian Case Law – VIII

Wice v. Dominion of Canada General Insurance Co., [2009] O.J. No. 2946.

Issue:

Whether, or to what extent, should a further Affidavit of Documents list productions from the Plaintiff's Facebook account?

Decision:

Wice's Facebook profile contained information and photographs related to his participation in social activities from which an inference could be drawn about his ability to function in certain circumstances. Accordingly, information from Wice's Facebook profile was to be produced.

Production - Canadian Case Law – IX

Bishop (Litigation Guardian of) v. Minichiello, [2009] B.C.J. No. 692.

Issue:

Are Facebook usage records producible as a document?

Decision:

Facebook usage is discoverable on the basis that it may have significant probative value in relation to a Plaintiff's past and future wage loss.

Production - Canadian Case Law – X

Carter v. Connors, [2009] N.B.J. No. 403.

Issue:

Can a party compel production of internet and Facebook usage records from the party's internet service provider?

Decision:

If relevant, the production of internet and Facebook usage records can be ordered as they do not, of themselves, reveal the “intimate details and personal choices” of an individual.

Privacy - Canadian Case Law – I

Murphy v. Perger, [2007] O.J. No. 5511.

Issue:

Are the photographs displayed on the “private” portion of a Facebook site producible?

Decision:

“any invasion of privacy is minimal and is outweighed by the defendant’s need to have the photographs in order to assess the case.”

“The plaintiff could not have a serious expectation of privacy given that 366 people have been granted access to the private site.”

Preservation - Canadian Case Law – I

Schuster v. Royal & Sun Alliance Insurance Co. of Canada,
[2009] O.J. No. 4518.

Issue:

What is the scope of an interim order for the preservation of documents contained in a party's Facebook webpage?

Decision:

An order that a party produce for inspection the information from her Facebook profile is consistent with documentary discovery obligations under Rules 30.01(1) and 30.02(2). However, an order requiring a party to provide a username and password was clearly beyond the scope of the Rules.

Summary of Developments in Canadian Case Law

Recent US e-Discovery Case Law and its Implications

- New Canadian e-discovery cases largely center on:
 - o Preservation and Spoliation
 - o Production
 - o Privilege

Preservation and Spoliation – US Case Law - I

Goodman v. Praxair Services Inc., 632, F.Supp.2d 494.

- Typical contract dispute between an independent contractor and an environmental technology company.
- Defendant alleged to have spoliated evidence by failing to instigate a litigation hold and by wilfully destroying data.
- Grim J. authored a comprehensive opinion on the law and the history of spoliation as it relates to contract disputes.

Preservation and Spoliation – US Case Law - I *(cont'd)*

Goodman v. Praxair Services Inc., 632, F.Supp.2d 494.

Issues:

1. When does the duty to preserve arise?
2. Does the duty to preserve extend to third parties?
3. When does the destruction of a computer containing e-evidence warrant summary judgment as a sanction?

Preservation and Spoilation – US Case Law – I *(cont'd)*

Goodman v. Praxair Services Inc., 632, F.Supp.2d 494.

Decisions:

1. The duty to preserve arises not only upon the receipt of a demand letter, but also when a party anticipates litigation;
2. The duty to preserve does not extend to third parties where the Defendant lacks the legal authority or practical ability to ensure preservation.
3. The destruction of a computer does not warrant summary judgment *provided that* it was not destroyed in bad faith and provided that it does not deny the other party the ability to advance or defend its case; the appropriate sanction is an adverse instruction to the jury.

Preservation and Spoliation – US Case Law - II

Phillip M. Adams & Assoc., LLC v. Dell, Inc et al.,
2009 WL 910801 (D. Utah Mar. 30, 2009)

- Reverse engineering patent case.
- ASUS, a party to the dispute, produced virtually no evidence to support its claim that it invented its FDC solution independently – claiming that it simply did not retain records very long.
- Adams alleged that ASUS spoliated evidence that would have conclusively demonstrated the manufacturers piracy.

Preservation and Spoliation – US Case Law – II *(cont'd)*

Phillip M. Adams & Assoc., LLC v. Dell, Inc et al.,
2009 WL 910801 (D. Utah Mar. 30, 2009)

Issues:

1. When does the duty to preserve arise?
2. Are the defendants culpable for the loss of data related to the claim?

Decisions:

1. A duty to preserve does not arise solely from the commencement of legal proceedings; it can be found from the “industry environment” and the existence of similar litigation.
2. “Questionable information management processes” can support a culpability finding.

Impact of US Preservation and Spoliation Cases on Canada

- May push back point at which the duty to preserve commences
- Ignorance is no excuse (new!)
- “Best Practice” industry standards for document creation and handling may become required as “litigation insurance”

Privilege – US Case Law – I

Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251
(D. Md. 2008)

- 165 privileged documents were inadvertently produced
- Defendants sought to recall the documents
- Court held privilege waived:
 - o “Clawback” agreement not sought
 - o Keywords not disclosed
 - o Keywords alone may not be adequate
 - o No sampling performed to test effectiveness.

Privilege – US Case Law – II

re: Fannie Mae. Securities Litigation, 552 F.3d 814 (D.C. Cir. 2009)

- Third-Party Subpoena on the Office of Federal Housing Enterprise Oversight (OFHEO) requesting production of 30 categories of documents.
- Late discovery of backup tapes resulted in large, late production of over 660,000 documents.
- OFHEO could not produce privilege logs by the court ordered deadline and was, accordingly, held in contempt.
- Court ordered OFHEO to provide the actual documents withheld on the basis of deliberative process privilege and not logged by the deadline as a sanction.

Impact of US Privilege Cases on Canada

- Although “clawback” agreements are not common in Canada, if they are not used, any inadvertent disclosure may result in actual disclosure

Production - US Case Law – I

Aguilar v. Immigration & Customs Enforcement Division of U.S. Department of Homeland Security, 2008 WL 5062700 (S.D.N.Y. Nov. 21, 2008)

- Civil rights class action alleging a patten of unlawful warrantless searches
- Plaintiffs did not initially specify form of production but later sought metadata. Defendant resisted except on showing of specific need

Production – US Case Law – I *(cont'd)*

Aguilar v. Immigration & Customs Enforcement Division of U.S. Department of Homeland Security, 2008 WL 5062700 (S.D.N.Y. Nov. 21, 2008)

Issue:

Must Defendant produce metadata?

Decision:

Defendant ordered to produce metadata; some cost shifting applied depending upon document type.

Production - US Case Law – I *(cont'd)*

Aguilar v. Immigration & Customs Enforcement Division of U.S. Department of Homeland Security, 2008 WL 5062700
(S.D.N.Y. Nov. 21, 2008)

Court identified 3 types of metadata:

- Substantive: tracked changes and comments; not routinely produced absent good cause.
- System: author, date and time of creation, last modification, etc.; most is irrelevant except for searching / sorting or if authenticity or creation dates are challenged.
- Embedded: Spreadsheet formulas, hidden columns, links, references, etc.; generally discoverable and should be produced as a matter of course.

Production – US Case Law - II

Qualcomm Inc. v. Broadcom Corp., 2008 WL 66932 (S.D. Cal.).

- Patent Infringement Case
- During discovery Qualcomm's legal team discovered and then withheld 21 relevant e-mails
- Ultimately, 46,000 e-mails comprising 300,000 pages of printed evidence were withheld
- At trial, the court sanctioned Qualcomm \$9.2M for "litigation misconduct" and sanctioned attorneys on the Qualcomm legal team personally
- The sanctions with respect to the attorneys were later reduced, both in scope and amount.

Impact of US Production Cases on Canada

- Consider Mutuality
- Format of Production
 - o Native v. Imaged
 - o Exchange of Metadata
 - o OCR or Text
 - o Load Files

Lessons to be Learned from Trends in E-Discovery Case Law



Brett Harrison
McMillan LLP
Brookfield Place, 181 Bay Street
Suite 4400
416 865 7932

Brett.Harrison@mcmillan.ca

MBDOCS_4697574.3