

Publisher's Note

2018 — Release 2

Previous release was 2018-1

From Your Library:

Graham Underwood and Jonathan Penner Electronic Evidence in Canada

Electronic Evidence in Canada contains a broad examination of electronically-stored information (“ESI”) from its creation to its admission into evidence in civil and criminal proceedings. The book discusses the nature and characteristics of ESI and how these influence admissibility at trial. It then covers the retention and destruction of electronic records, the obligations to preserve and produce ESI for litigation, spoliation, and the admissibility of ESI at trial. The last part of the work considers specific modalities of admissibility of ESI, whether as real, documentary, or demonstrative evidence, and includes a discussion of the admissibility of metadata, ESI from the Internet, computer-generated re-creations, and other issues unique to ESI

In this release, the authors discuss recent case law and update the commentary to chapters 1 (The Nature of ESI), 5 (The Obligation to Disclose ESI), 6 (Managing the Production of ESI), 9 (Ensuring Preservation of ESI Held by Others), 11 (Admissibility of ESI Generally), 12 (Admissibility of ESI as Real Evidence), and 13 (Admissibility of ESI as Documentary Evidence).

Update Highlights:

- **The Obligation to Disclose ESI — In Civil Litigation — Limiting the Scope of Production — Factors to be Considered — Intrusive Nature of Production** — The Sedona Conference has published guidelines for the

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disclosure of social media which explain the relationship between privacy concerns and the requirement to produce ESI found in social media this way:

Privacy concerns are not a per se bar to discovery of relevant information, regardless of whether it is located in social media or elsewhere. Instead, privacy is more “germane to the question of whether repeated discovery is burdensome or oppressive and whether it has been sought for a proper purpose’ rather than to affording a ‘basis for shielding those communications from discovery.’” The proportionality limitation on the scope of discovery includes two factors that implicate privacy concerns, i.e., “the importance of the discovery in resolving the issues, and whether the burden . . . of the proposed discovery outweighs its likely benefit.”

(The Sedona Conference: Primer on Social Media, Second Edition, Public Comment Version (July 2018: Sedona Conference) at 13 (online: <<https://chrisdale.wordpress.com/2018/07/11/the-sedona-conference-primer-on-social-media-second-edition/>>) (date accessed: 24 Sept 2018))

- **Managing the Production of ESI — Protocols Prescribing the Manner of Production — Uniform electronic Document Rules** — The Uniform Law Conference of Canada has undertaken a project to recommend a uniform set of rules governing the production of ESI in civil and administrative proceedings. The project was initiated at the August 2016 annual meeting, a draft Rule was approved in August of 2017, and after consultation with stakeholders a revised draft Rule was published in August of 2018. The ULCC hopes that adoption of a version of the uniform Rule by all Canadian jurisdictions will address problems created by differing rules and standards, including unnecessary expense, inconvenience, delay, and inconsistency of practice. (Uniform Law Conference of Canada, Electronic Document Rules: Report of the Working Group (2018: ULCC), online: <http://www.euclid.ca/Pub/Electronic_Document_Rules_ULCC_2018.pdf> (date accessed: 7 October 2018))
- **Admissibility of ESI as Real Evidence — Specific Types of ESI as Real Evidence — Audiotapes** — The admissibility of audiotapes follows the same protocols that govern the admissibility of all evidence. Moreover, the same requirements of proof of authenticity and threshold reliability apply. However, care must be taken to discern the purpose for tendering the audiotape evidence and the use that can be made of that evidence if it is admitted. For example, an audiotape may be admitted to prove the truth of the statements recorded in it; to prove that the statements recorded in it were made; or for some other collateral purpose. *R. v. Trotchie*, 2018 SKQB 129, 2018 CarswellSask 228.