

The Sedona Canada Principles Addressing Electronic Discovery, Third Edition

(May 2021 Public Comment Version)

When the first edition of the *Sedona Canada Principles* was published in 2008, it was immediately recognized by federal courts as an authoritative source of guidance in the area of electronic discovery for Canadian practitioners and was explicitly referenced in the Ontario Rules of Civil Procedure and practice directives that went into effect in January 2010. The *Second Edition of the Principles* was published in November 2015. Since that time, there have been significant technological and societal changes that have changed how we manage eDiscovery. This Third Edition addresses the interplay between eDiscovery and developing privacy regimes in Canada, and the role of information governance to facilitate eDiscovery. The update also incorporates the ever-growing body of case law and also touches on the following topics:

- Privacy concerns in investigations and during preservation
- Tiered/phased discovery planning
- The role of information governance and records management
- Updated case law
- Ephemeral data issues
- The pros and cons of keyword searches
- Cross-border privacy issues

Principle 1: Electronically stored information is discoverable.

Principle 2: In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account: (i) the nature and scope of the litigation; (ii) the importance and complexity of the issues and interests at stake and the amounts in controversy; (iii) the relevance of the available ESI; (iv) the importance of the ESI to the court's adjudication in a given case; and (v) the costs, burden, and delay that the discovery of the ESI may impose on the parties.

Principle 3: As soon as litigation is reasonably anticipated, parties must consider their obligation to take reasonable and good-faith steps to preserve potentially relevant electronically stored information.

Principle 4: Counsel and parties should cooperate in developing a joint discovery plan to address all aspects of discovery and should continue to cooperate throughout



the discovery process, including the identification, preservation, collection, processing, review, and production of electronically stored information.

- Principle 5:** The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.
- Principle 6:** A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information that has been deleted in the ordinary course of business or within the framework of a reasonable information governance structure.
- Principle 7:** A party may use electronic tools and processes to satisfy its discovery obligations.
- Principle 8:** The parties should agree as early as possible in the litigation process on the scope, format, and organization of information to be exchanged.
- Principle 9:** During the discovery process, the parties should agree to or seek judicial direction as necessary on measures to protect privileges, privacy, trade secrets, and other confidential information relating to the production of electronically stored information.
- Principle 10:** During the discovery process, the parties should anticipate and respect the rules of the forum or jurisdiction in which the litigation takes place, while appreciating the impact any decisions may have in related proceedings in other forums or jurisdictions.
- Principle 11:** Sanctions may be appropriate where a party will be materially prejudiced by another party's failure to meet its discovery obligations with respect to electronically stored information.
- Principle 12:** The reasonable costs of all phases of discovery of electronically stored information should generally be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.

The full text of *The Sedona Canada Principles Addressing Electronic Discovery, Third Edition, Public Comment Version*, is available free for individual download from The Sedona Conference website at

https://thesedonaconference.org/publication/The_Sedona_Canada_Principles.

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