



Electronic Discovery and Business Information in Canada

CALL CONFERENCE MAY
2006, EDMONTON

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Summary of Key Points 1-3

- Electronic Discovery applies in civil, criminal and regulatory matters
- Organizations that fail to retain relevant documents face serious sanctions
- However, because the volume of electronic data is staggering, the cost of retaining documents unnecessarily can be huge



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Summary of Key Points 4-5

- The solution is to apply effective Records Management policies and procedures to electronic documents and e-mail
- Emerging standards such as the Task Force Guidelines will help reduce cost of litigation



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Case Studies



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Case Study 1

- The incredible case of the CRA letter



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Case Study 2

- The case of the 300 tapes that could not be restored



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Case Study 3

- The case of the disappearing Insurance claims e-mail



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Case Study 4

- The case of the mistaken \$850,000 Order



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Case Study 5

- The case of the smoking Instant Message



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WELCOME TO THE NEW WORLD OF DISCOVERY AND RECORDS MANAGEMENT



No More Paper

- 99% of new documents are electronic
- 70%+ never printed



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Document Discovery

- Civil Litigation
- Criminal and Quasi-criminal matters
- Administrative Tribunals, Arbitrations
- Agencies: CRA, OSC, IDA, SEC etc.



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“Document” Defined By Rules

- Rule 30.01 - Document defined:
 - “includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and data and information in electronic form.” (emphasis added)



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“Electronic” defined

- Rule 1.03 - “Electronic” defined:
 - “includes created, recorded, transmitted or stored in digital form or in other tangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means...”



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Judicial Interpretation

- Electronic files and databases
 - *Cholakis v. Cholakis et al.*, 2005 MBQB 105 (CanLII)
- ISP, Blackberries and Home Computers
 - *CIBC World Markets v. Genuity Capital Markets* 2005 CanLII 3944 (On. S.C.)
- Both paper and Electronic Documents
 - *Walter Construction v. Catalyst*, 2003 BCSC 1582



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Developing Standards

- U.S. Experience
- Ontario Task Force Guidelines 2005
- B.C. Practice Direction 2006
- Canadian Judicial Council
- Sedona Canada WG-7



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What is Electronic Discovery?

“The preservation, retrieval, exchange and production of documents from electronic sources in electronic form.”



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Preservation

- Parties must take active steps to preserve original data and metadata



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Sanctions for Failure to Preserve Data

- Default judgment
- Adverse inference: *Zubulake* \$29m, *Morgan Stanley*; *Logan v. Harper*
- Exclusion of evidence
- Damages in Tort (*Spasic*), Legal fees
- Fine: *UBS* \$2.1m
- Corporate Suicide: Arthur Andersen



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Document Retention Policies

Moezzam Saeed Alvi v. YM Inc. (sales), 2003 CanLII 15159 (ON S.C.) "..... a properly run company should have a documents retention policy requiring retention of files for a reasonable period extending beyond the limitation period for civil cause of action in contract or tort and the limitation period for a reassessment under the Income Tax Act. Failure to do so risks a court making an adverse inference on the absence of evidence."

- See Case Law Digest at www.oba.org/en/main/ediscovery_en/digest.aspx



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Metadata

Dr Agenda Mar 14_inf.doc Properties

General Summary Statistics Contents Custom

Created: Tuesday, March 29, 2005 3:49:00 PM
Modified: Tuesday, March 29, 2005 5:06:31 PM
Accessed: Sunday, September 18, 2005 2:12:41 AM
Printed: Monday, March 14, 2005 9:32:00 AM

Last saved by: 6
Revision number: 6
Total editing time: 25 Minutes

Statistic name	Value
Pages	4
Paragraphs	90
Lines	195
Words	426
Characters	3830
Characters (with spaces)	4617

OK Cancel

Tel: (204) 942-6251
THURSDAY, MAY 5, 2005
7:30 – 9:00 a.m. Broadway Restaurant
9:00 – 11:45 a.m. Crystal Foyer – 7th floor
9:00 – 10:00 a.m. Crystal Ballroom
Small Group Exercise at the tables in the plenary room:

Fax: (204) 942-7036
Broadway Restaurant
Crystal Foyer – 7th floor
Crystal Ballroom

will be able to identify problems in relying upon stereotypes, unproved assumptions and demeanour in determining credibility and reliability.



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Printed e-mails or e-docs lack critical “metadata”

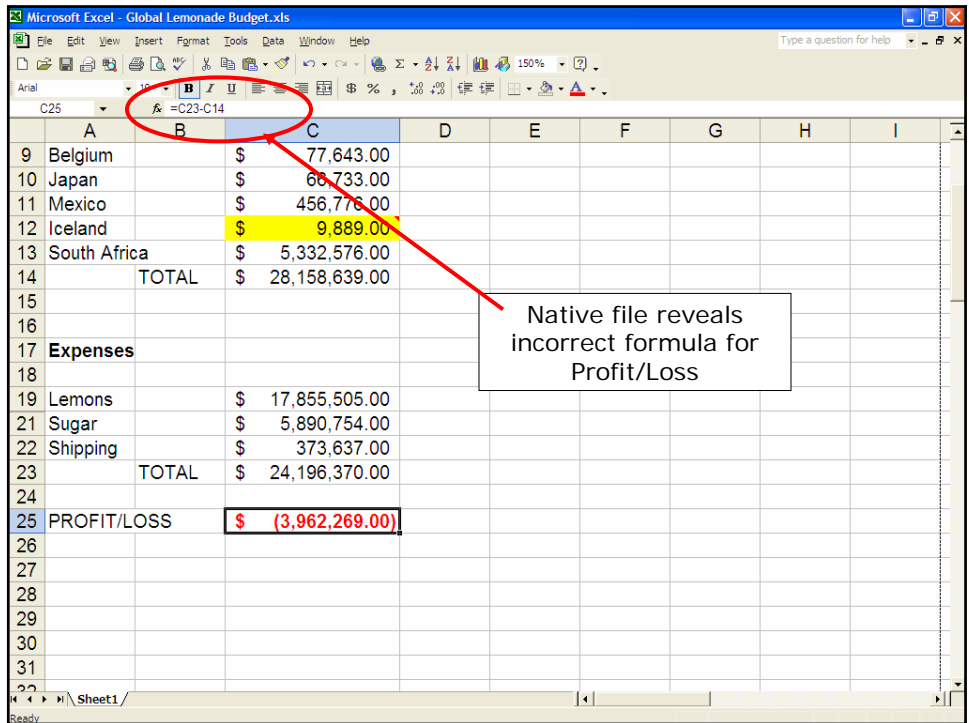
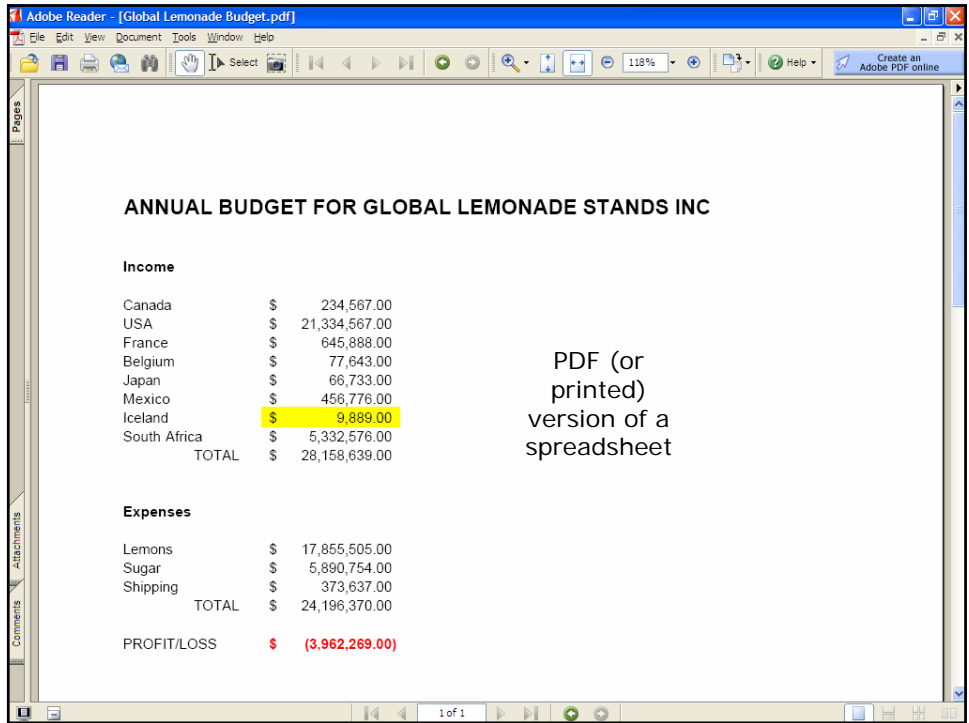
- Coded information about each file
- Embedded text
- Deleted or fragmented files
- Data about authenticity and provenance of e-mail
- End-user “Paper trail”



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Type a question for help		
Account	Anniversary	Assistant Name
Assistant Telephone Number	Attachment Count	AttachmentFilename
Attachments	Author	AuthorOfFrom
BCC	BatesNumberRange	BeginBatesNumber
Billing Information	Birthday	Body
Business Address	Business Address City	Business Address Country
Business Address Fax Number	Business Address Post Office Box	Business Address Postal Code
Business Address State	Business Address Street	Business Home Page
Business Telephone Number	Business Telephone Number 2	CC
Callback Telephone Number	Card Data	Categories
Category	Children	Comments
Companies	Company	Company And Full Name
Company Last First No Space	Company Last First Space Only	Company Main Telephone Name
Company Main Telephone Number	CompoundDocId	Computer Network Name
Conference Server Password	Contact Names	Contacts
Conversation Topic	Creation Time	Creation Time—DateOnly
Creation Time--TimeOnly	Customer Id	Date Completed
Date Completed--DateOnly	Date Completed--TimeOnly	Date Sent
Date Sent--DateOnly	Date Sent--TimeOnly	DedupMd5
Delegator	Department	DocId
DocSource	Document Date	Document Date—DateOnly
Document Date--TimeOnly	Document Date2	Document Date2—DateOnly
Document Date2--TimeOnly	Document Type	DocumentConversionNotes
DocumentRange	DocumentRangeBegin	DocumentRangeEnd
Due Date	Due Date--DateOnly	Due Date--TimeOnly
DupFlag	Duration	Email1 Address
Email1 Address Type	Email1 Display Name	Email2 Address
Email2 Address Type	Email2 Display Name	Email3 Address
Email3 Address Type	Email3 Display Name	EmailFolderFullPath
End	End--DateOnly	End--TimeOnly
EndingBatesNumber	ExternalDocId	FTP Site
File As	FileAttribute	FileCreateDate
FileCreateDate--DateOnly	FileCreateDate--TimeOnly	FileExtension



The Problem of Volume



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Example 1

- 200Gb of “relevant” file data for 36 custodians generated 6 million pages or 750,000 records
- Review 60 documents/hr = 12,500 hours
- Six months to review with a team of 10



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Example 2

- One backup set contains 30 full tapes
- Each tape contains 800Gb compressed data
- Total per weekly set is 24Tb (with duplicates)
- Typical video store contains 8 terabytes of video
- U.S. Library of Congress (24 million books), contains about 20 Tb of text. (<http://en.wikipedia.org/wiki/Terabyte>)



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Printed Contents of 4 CDS



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135,000 pages

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Printed Contents of 1 hard drive



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Why so much volume?

- Multiple sources and copies
- Lack of document organization
- Inexpensive storage
- Backup and archive policy
- Databases
- Paper constrains volume by cost



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Potential Sources

- Any shared server
- Home computer, relatives
- Portables, loaners
- ISP, ASP
- Blackberries, PDA
- Thumb drives, CDs, DVDs, diskettes
- Cell phones, fax machines
- Web history and cache
- Voice mail, IM



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Dilemma

- Lawyers paranoid about destroying *anything*: *BUT*
- Though cost of destroying relevant documents can be huge
- Cost of keeping irrelevant documents can also be huge



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Cost Implications

- Lawyer review costs \$3 per document
- 2Tb is 15 million documents or \$45 million
- 40,000 boxes, 100m pages



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The Solution

Effective Records Management



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What is a Record?

- Information created, received and maintained as evidence by an organization or a person in the transaction of business, or in the pursuance of legal obligations, regardless of media.
- ISO 15489



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Records

- Depends on content not format
- Could be a voice mail, Instant Message
- Email is managed by every end user



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Practical Steps (General)

- Establish reasonable records management policies and procedures
- Develop record retention/destruction policy and practices
- Be prepared to suspend ordinary destruction practices to comply with litigation hold, audit or investigation
- Follow Task Force Guidelines when faced with Litigation



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Practical Steps (Specific)

- Ensure RM policy includes electronic documents and e-mail
- Train all employees to identify and manage records
- Destroy all non-records quickly
- Review and destroy old backup tapes
- Segregate privileged communications



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Task Force on the Discovery Process in Ontario

- Formed 2001: Ontario Attorney General, Chief Justice
- Chair: Hon. Colin Campbell
- Report December 2004
- Recommended Best Practices manual for discovery



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Task Force Team

- The Hon. Colin L. Campbell (Chair)
- Debra Paulseth, Court Services Division (Associate Chair)
- The Hon. Catherine Aitken
- Ann Merritt, Court Services Division
- Kristopher H. Knutsen, Q.C.
- Susan Wortzman
- Susan Charendoff (Project Director)
- Mohan Sharma (Research Director)



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E-Discovery Subcommittee

- Sara Blake (Ontario AG)
- Peg Duncan (Department of Justice)
- Martin Felsky
- Michael B. Fraleigh (Advocates' Society)
- Derek Freeman (Ontario Bar Association)
- Karen Groulx
- Christopher Leafloor (Department of Justice)
- Daniel Pinnington (LawPro)
- Mohan Sharma (AG Staff)
- Glenn A. Smith
- Philip M. Tunley



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Supplemental Report

- October 2005
- Consists of two parts:
 - “General Guidelines”
 - “Guidelines for the Discovery of Electronic Documents”
- Purpose: Educate judiciary and legal profession
- Practical suggestions for effective discovery
- Objective: Reduce cost and undue delay



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General Guidelines

- First step in discovery is **PLANNING**
- Agreeing with opposing counsel on discovery matters is **GOOD ADVOCACY**
- Make clients aware of cost and scope of document discovery



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E-Discovery Guidelines Part (i) Discovery

1. Electronic documents are discoverable
2. Obligations are subject to balancing
3. In most cases, primary source is active data
4. Deleted or hidden data usually not producible



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E-Discovery Guidelines Part (ii) Preservation

5. *Immediately* take reasonable steps to preserve relevant e-documents
6. Notify all parties re their preservation obligations *early*
7. Discuss need to preserve or produce meta-data *immediately*



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E-Discovery Guidelines Part (iii) Pre-Discovery Discussions

8. Meet and confer regarding location, preservation, review and production
9. Define scope of e-discovery *with specifics*
10. Acceptable to use electronic tools for document screening



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E-Discovery Guidelines Part (iv) Production

11. Agree early as to format of production – paper or even scanned version may not be enough



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E-Discovery Guidelines Part (v) Privilege

12. Agree on measures to protect privilege(s)



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E-Discovery Guidelines Part (vi) Costs

13. Interim costs of production borne by producing party
 - Receiving party incurs cost of making a copy
 - Parties should be aware of cost implications



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