

Part 5 - Disclosure and Discovery

Rule 14 - Disclosure and Discovery in General

Educational Notes

How This Rule Works

Rule 14.08 maintains Nova Scotia's tradition of broad disclosure with a presumption that full disclosure is necessary for justice. Rule 14.08(2) sets out the content of the duty to make full disclosure: it means taking all reasonable steps to become knowledgeable about relevant documents and electronic information that are in a party's control, and to preserve the information for disclosure.

Within 20 days after the close of pleadings, or 2 days after a notice of contest in an application, corporate parties must appoint a designated manager for discovery. This should be an individual with a real connection to the proceeding who can inform him or herself and become the corporation's primary discovery witness (R.14.14).

Parties may make a demand for production under R.14.09 requiring disclosure or refusal with reasons within 15 days. Rule 14.11 allows for a demand for production at a trial or hearing, provided the demand is made before the finish date in an action or hearing date in an application.

Rule 14.10 allows for a demand for production or inspection of an original document or electronic information with a 15 day deadline to arrange a time and place for the inspection on reasonable terms. Rule 14.12(3) allows a judge to fix terms to protect privileged information and limit the prospect of mischief. The power to demand production under R.14.10 is now time limited: a party may not make a demand under R.14.10 until all parties have complied with R.15 and R.16 and disclosed their documents and electronic information. Under the previous R.20.04 the demand could be made at any time and the arrangements had to be made within 4 days.

Under the previous R.20.03 a party had 10 days after receiving a list of documents to object to the authenticity of a document, after which it was deemed admitted. Rule 54.05 now gives a party 25 days to object.

A judge may order production under R.14.12 or order a party to process data to produce relevant electronic information under R.14.13. Disclosure from non-parties is not addressed separately, as it was in the previous R.20.06, but it is still available, and requires a judge's order under R.14.12.

Limits on Dealing With Disclosure

Implied Undertakings - Rule 14.03 recognizes the implied undertaking rule.

Privilege - Rule 14.05 protects privileged documents and allows a judge to determine privilege claims using the procedure set out in R.85.06.

Rule 14.06(2) creates a duty to exercise care to avoid delivering privileged information. The definition of "sort" in R.14.02(1) continues the requirement to redact privileged information from a document or electronic information and disclose the remainder.

Rule 14.01(1) confirms that inadvertent disclosure, by itself, does not extinguish privilege. Inadvertent disclosure will only extinguish privilege if there was negligence in the disclosure process resulting from:

- a. an ineffective or unreasonable records management system;
- b. inadequate security measures for protecting confidential information; or
- c. carelessness in disclosure, such as disclosing masses of documents or electronic information without taking reasonable steps to review them or making a reasonable search of the electronic information to identify privileged information.

Rule 14.06 creates a procedure for dealing with privileged documents disclosed in error. Upon realizing that another party's disclosure includes apparently privileged information, a party must immediately notify the disclosing party and refrain from dealing with the information for five days after the date of notice. Impermissible dealing with apparently privileged information is described in R.14.06(6) and (7) and includes reviewing the information and providing it to one's client.

On notification that another party has received apparently privileged information, the disclosing party has five days to require that the information be returned or destroyed. Failure to respond waives the privilege. An inadvertent failure to respond can be remedied by motion under R.2.03 to excuse compliance or 14.06(8) seeking an order that the information remains privileged.

This process is similar to the process for misdirected documents that is set out in Chapter 13 of the *Legal Ethics Handbook*:

Misdirected Information - Use of Opponent's Documents

13.2A A lawyer who has access to or comes into possession of a document which the lawyer has reasonable grounds to believe belongs to or is intended for an opposing party and was not intended for the lawyer to see, has a duty to:

- a. return the document, unread and uncopied, to the party to whom it belongs, or
if the lawyer reads part or all of the document before realizing that it was not intended for him or her, cease reading the document and promptly return it, uncopied, to the party to whom it belongs, advising that party:
 - i. of the extent to which the lawyer is aware of the contents, and
 - ii. what use the lawyer intends to make of the content of the document.

Relief from the Burden of Disclosure

Counsel whose clients face an enormous disclosure burden under the Rules can find recourse in R.14.07, R.14.08 and R.14.09. Rule 14.07 continues the general rule that the party making disclosure is responsible to pay for it, but allows for cost shifting to achieve proportionality in cases where the cost does not result from an ineffective or unreasonable records management system.

Rule 14.08(3) allows a party to rebut the presumption for full disclosure by establishing that modification is necessary to make the cost, burden and delay proportionate to both the likely probative value of the evidence and the importance of the issues to the parties. It also requires the party seeking relief to come to court with the clean hands that come from fully disclosing the party's knowledge of what evidence might be found.

Rule 14.08(6) allows a judge to lower the threshold in an application.

Rule 14.09(2)(c) provides for a motion to limit disproportionate production demands.

Definitions

Some definitions in this Rule bear special mention.

“computer” includes Blackberries and smartphones, even the memory in a fax machine. Counsel will need to be sure to canvass all potential sources of relevant documents and electronic information.

“document” in R.14 includes print-outs of electronic information and non-digital recordings and photos, but not the electronic information itself, which is covered under R.16. Under R.14, a printed digital photograph or e-mail is a document while same thing on a computer as a jpeg or e-mail is electronic information.

“electronic information” includes e-mail, word processing files, sound files, database files, and all associated metadata. Metadata is data about data. Often, it is not printed and may be hidden or difficult to access. Examples of metadata include blind copy recipients of an e-mail or the date a document was last modified. Metadata is discussed in more detail under Rule 16 – Disclosure of Electronic Information.

Highlights of Changes

Test is relevance throughout a proceeding - One of the primary changes to the law of discovery in Nova Scotia is that the court rejected the old “semblance of relevance” test in favour of simple relevance, as that term is understood at trial. The Honourable Coulter A. Osborne, Q.C recommended that Ontario replace the semblance of relevance test with simple relevance, noting that the original concern of trial by ambush has been replaced with the concern of trial by avalanche. He anticipated that the change would not change practice for litigators who already use the discovery process reasonably. See, The Honourable Coulter A. Osborne, Q.C., Civil Justice Reform Project Report (November 2007), Part 8: Discovery, page 2. A summary of his findings and recommendations is available online at www.attorneygeneral.jus.gov.on.ca (click on publications).

Questions in interrogatories and on discovery now mutually exclusive - Under R.14.04 a party can demand a witness answer a question by interrogatory or on oral discovery, but not both. The Rule is limited to questions asked of the same witness. The use of the word “question” (and in particular “a” question) rather than a broader term like “subject” suggests that the Rule is intended more as a codification of the asked and answered objection than a Rule that would bar counsel from exploring an entire subject area if it was broached by interrogatory.

Practice Tips

Trial by Avalanche - Previous commentary dealt with relief from excessive disclosure requests. Counsel in the opposite situation who experience trial by avalanche can have recourse to Rule 88 – Abuse of Process. The definition of “sort” in R.14 may also provide relief. Rule 15.02 requires a party to sort documents prior to disclosing them. “Sort” is defined as physically separating relevant, non-privileged documents, separating or redacting irrelevant or privileged information, then preserving the document for

disclosure.

Personal Injury Practice - It is not clear whether the discloser pays rule in R.14.07 will affect the current practice of insurers paying for plaintiffs' medical records.

Litigation Readiness – Corporate and litigation counsel advising clients on litigation readiness will need to ensure their clients maintain reasonable records management systems and create litigation response teams. They will need to identify possible designated managers for discovery as soon as the prospect of litigation arises.

Privilege - To avoid inadvertently waiving a client's privilege, counsel will have to create and maintain effective document management systems and take care in sorting and disclosing documents. Counsel will also have to respond quickly to any notice that apparently privileged information was disclosed in error.

It is not clear whether R.14.06 prevents parties from entering into non-waiver or claw back agreements protecting privilege, such as the one rejected by the court in *Air Canada v. WestJet Airlines Ltd.* [2006] O.J. No. 1798 (Ont.S.C.J.). The court in that case suggested that non-waiver agreements can be appropriate if the parties consent and the court is satisfied that they are necessary.

Rule 14 does not deal with situations where a privileged document is inadvertently provided to an expert who then considers it in arriving at an opinion and preparing a report. It is likely that the current case law will continue to apply on this point.

14.01 - Meaning of “relevant” in Part 5

1. In this Part, “relevant” and “relevancy” have the same meaning as at the trial of an
2. action or on the hearing of an application and, for greater clarity, both of the following
3. apply on a determination of relevancy under this Part:
4. a judge who determines the relevancy of a document, electronic information, or
5. other thing sought to be disclosed or produced must make the determination by
6. assessing whether a judge presiding at the trial or hearing of the proceeding would
7. find the document, electronic information, or other thing relevant or irrelevant;
8. a judge who determines the relevancy of information called for by a question asked
9. in accordance with this Part 5 must make the determination by assessing whether
10. a judge presiding at the trial or hearing of the proceeding would find the information
11. relevant or irrelevant.
12. A determination of relevancy or irrelevancy under this Part is not binding at the trial of
13. an action, or on the hearing of an application.

14.02 - Interpretation in Part 5

(1) In Part 5,

“actually possess” means to have physical control of a thing or the ability to take physical control of the thing by one's self, through one's employee, or, in the case of a corporation, through an officer, without the assistance or permission of another person;

"computer" means a device that can store, read, and present electronic information, whether or not it can also process data, such as a personal computer, personal digital

assistant, or fax machine with memory;

“designated manager” means a person designated by a corporate party under Rule 14.14;

“document” means a document that is not electronic information, including a print version of electronic information and a non-digital sound recording, video recording, photograph, film, plan, chart, graph, or record;

“electronic information” means a digital record that is perceived with the assistance of a computer as a text, spreadsheet, image, sound, or other intelligible thing and it includes metadata associated with the record and a record produced by a computer processing data, and all of the following are examples of electronic information:

- (i) an e-mail, including an attachment and the metadata in the header fields showing such information as the message’s history and information about a blind copy,
- (ii) a word processing file, including the metadata such as metadata showing creation date, modification date, access date, printing information, and the pre-edit data from earlier drafts,
- (iii) a sound file including the metadata, such as the date of recording,
- (iv) new information to be produced by a database capable of processing its data so as to produce the information; “exactly copy” means to make an electronic copy of electronic information in such a way that the copy is a mirror image of the original in a computer, storage medium, or other source; “sort” means to do all of the following:
 - (i) physically separate relevant, non-privileged documents from other documents and distinguish relevant, non-privileged electronic information from other electronic information,
 - (ii) separate or redact irrelevant or privileged information from a document or electronic information containing some information that is relevant and not privileged,
 - (iii) place the document or electronic information where it will be preserved for disclosure; “storage medium” means a thing on which electronic information is stored other than a computer, such as a digital versatile disc, a backup tape, and a hard drive removed from a computer.

(2) A Rule in Part 5 that refers to a copy of, or copying, electronic information calls for a copy that is in a readily exchangeable format, unless the Rule refers to an exact copy, a judge directs what format is to be used, or the parties agree on a format.

14.03 - Collateral use

(1) Nothing in Part 5 diminishes the application of the implied undertaking not to use information disclosed or discovered in a proceeding for a purpose outside the proceeding, without the permission of a judge.

(2) The implied undertaking extends to each of the following, unless a judge orders otherwise:

- (a) documentation used in administering a test, such as test documents supplied to and completed by a psychologist;
- (b) all notes and other records of an expert;
- (c) anything disclosed or produced for a settlement conference.

14.04 - Relationship between discovery and interrogatories

A party may only demand an answer to a question under Rule 19 - Interrogatories not already answered by the same witness under Rule 18 - Discovery, and a party may only ask a question at discovery not already answered by the same witness in answer to a demand under Rule 19 - Interrogatories.

14.05 - Privilege

(1) Nothing in Part 5 requires a person to waive privilege or disclose privileged information.

(2) A provision in a Rule in Part 5 for disclosure of a relevant document, electronic information, or other thing means disclosure of a relevant document, electronic information, or other thing that is not privileged.

(3) A provision in a Rule in Part 5 that requires an answer to a question calling for relevant evidence, or information that reasonably could lead to relevant evidence, means relevant evidence that is not privileged, or information, not itself privileged, that could lead to relevant evidence that is not privileged.

(4) A judge may determine a claim for privilege, except the information and confidences referred to in sections 37 to 39 of the *Canada Evidence Act* are determined under that Act.

(5) A judge who is required to determine a claim for privilege may direct a person to deliver the thing claimed to be privileged to the judge in order that it may be dealt with under Rule 85.06, of Rule 85 - Access to Court Records.

14.06 - Disclosure of privileged information by mistake

(1) Delivery by mistake of privileged information when making disclosure under Part 5 does not extinguish the privilege, unless the mistake results from one of the following:

- (a) a system of records management that is ineffective, or otherwise unreasonable;
- (b) inadequate security measures for protecting confidential information;
- (c) carelessness in disclosure, such as disclosing masses of documents or electronic information without taking reasonable steps to review the documents or making a reasonable search of the electronic information in an attempt to identify privileged information.

(2) A party who makes disclosure under Part 5 must exercise care to avoid delivering privileged information.

(3) A party to whom disclosure is made and who discovers that the disclosure includes apparently privileged information must immediately notify the disclosing party and not do any of the things mentioned in Rule 14.06(7) until five days after the day the receiving party notifies the disclosing party.

(4) A party who learns, by receiving a notice under Rule 14.06(3) or otherwise, that the party delivered privileged information by mistake must, no more than five days after the day the party learns of the disclosure, notify the receiving party of the claim that privileged information was disclosed by mistake, or the privilege is waived.

(5) A party who claims privileged information was delivered by mistake may require the receiving party to do any of the following:

- (a) return the document, if the information is in a physical document;
- (b) delete the privileged information, if it was delivered in electronic form;
- (c) return the storage medium, if the privileged information was delivered on a storage medium.

(6) Counsel who receives information claimed to be privileged and to have been delivered by mistake must not provide the information to anyone, including counsel's client, unless a judge determines the information is not privileged.

(7) A party who receives information claimed to be privileged and to have been delivered by mistake must not do any of the following, unless a judge determines the information is not privileged:

- (a) review the information;
- (b) keep a reproduction or record of the information;
- (c) communicate the information to another person;
- (d) ask a question based on the information in interrogatories, in discovery, on a hearing, or at a trial;
- (e) repeat the information.

(8) A judge may make an order to protect a privilege in anything disclosed by mistake under Part 5.

14.07 - Expense of disclosure

(1) The party who makes disclosure must pay for the disclosure, unless the parties agree or a judge orders otherwise.

(2) A judge may order another party to provide an indemnity to the disclosing party for an expense of disclosure, if all of the following apply:

- (a) considering the disclosing party's means, the indemnity is clearly necessary to achieve proportionality within the meaning of Rule 14.08(3);
- (b) the expense is not the result of a system of records management that is ineffective, or otherwise unreasonable;

(3) The order may require the disclosing party to do any of the following, if it is covered by the indemnity:

- (a) acquire more information about the disclosing party's records management system, the location of the party's documents and electronic information, or how they are accessed, and report to the indemnifying party or the court;
- (b) perform a search for relevant documents or electronic information, report on the results to the indemnifying party or the court, and produce a copy of any relevant document or electronic information the party finds;
- (c) acquire and produce a copy of a relevant document or electronic information;
- (d) take other steps that may assist the indemnifying party to receive disclosure.

(4) The provisions of an indemnity must be taken into account in the assessment of cost under Rule 14.08(3).

14.08 - Presumption for full disclosure

(1) Making full disclosure of relevant documents, electronic information, and other things is presumed to be necessary for justice in a proceeding.

(2) Making full disclosure of documents or electronic information includes taking all reasonable steps to become knowledgeable of what relevant documents or electronic information exist and are in the control of the party, and to preserve the documents and electronic information.

(3) A party who proposes that a judge modify an obligation to make disclosure must rebut the presumption for disclosure by establishing that the modification is necessary to make cost, burden, and delay proportionate to both of the following:

- (a) the likely probative value of evidence that may be found or acquired if the obligation is not limited;
- (b) the importance of the issues in the proceeding to the parties.

(4) The party who seeks to rebut the presumption must fully disclose the party's knowledge of what evidence is likely to be found or acquired if the disclosure obligation is not limited.

(5) The presumption for disclosure applies, unless it is rebutted, on a motion under Rule 14.12, Rule 15.07 of Rule 15 - Disclosure of Documents, Rules 16.03 or 16.14 of Rule 16 - Disclosure of Electronic Information, Rule 17.05 of Rule 17 - Disclosure of Other Things, or Rule 18.18 of Rule 18 - Discovery.

(6) In an application, a judge who determines whether the presumption has been rebutted must consider the nature of the application, whether it is chosen as a flexible alternative to an action, and its potential for a speedier determination of the issues in dispute, when assessing cost, burden, and delay.

14.09 - Demand for production of undisclosed copy

(1) After the time for making disclosure under Rule 15 - Disclosure of Documents, or Rule 16 - Disclosure of Electronic Information, a party who is satisfied another party has not disclosed a relevant document or electronic information required to be disclosed may demand that the other party deliver a copy of the document or electronic information.

(2) A party to whom a demand for a copy of a document or electronic information is delivered must respond to the demand in one of the following ways no more than fifteen days after the day the demand is delivered:

(a) accept the demand, and deliver a copy of the document or electronic information;

(b) refuse the demand on the ground that the document or electronic information is privileged, irrelevant, or not in the control of the party;

(c) make a motion to limit the party's obligation to produce the document or electronic information, and seek to rebut the presumption in favour of disclosure by establishing that compliance with the demand is disproportionate under Rule 14.08.

(3) A judge may order a party who fails to respond to a demand for production to indemnify the other party for the expenses of obtaining an order for production.

14.10 - Demand for production of, or access to, original

(1) After the parties have complied with Rule 15 - Disclosure of Documents, and Rule 16 - Disclosure of Electronic Information, a party may deliver to another party a demand for production for inspection of the original of a relevant document in the control of the other party, or for access to relevant electronic information in the control of the other party.

(2) The party who accepts a demand for production for inspection of an original document must do both of the following, unless a judge orders otherwise:

(a) not more than fifteen days after the day the demand is delivered, arrange a time, date, and place for the production;

(b) produce the document for inspection and permit the document to be copied at the arranged time, date, and place.

(3) The party who accepts a demand for access to electronic information must do each of the following, unless a judge orders otherwise:

(a) not more than fifteen days after the day the demand is delivered, offer reasonable terms under which the other party will have access to a computer or storage medium in the control of the disclosing party or to another source of electronic information the party accesses to the exclusion of another party;

(b) within the same time, arrange a convenient time and way for the other party to have access;

(c) provide access accordingly.

(4) The party who refuses a demand for access to electronic information must give reasons for the refusal, and the other party may make a motion for an order under Rule 14.12.

14.11 - Demand for production at trial or hearing

(1) A party may, before the finish date in an action or the day of the hearing of an application, deliver to another party a demand that the party produce any of the following at the trial or hearing:

- (a) the original of a relevant document, or an exact copy of relevant electronic information;
- (b) a copy of a relevant document, or a copy of relevant electronic information accurately copied in a readily exchangeable format;
- (c) a computer or storage medium containing relevant electronic information;
- (d) another means for accessing a source of relevant electronic information the party accesses to the exclusion of the demanding party.

(2) The party to whom the demand for production is delivered and who has control of the document, information, computer, medium, or source must produce it or provide access to it at the trial or hearing, unless a judge orders otherwise.

14.12 - Order for production

(1) A judge may order a person to deliver a copy of a relevant document or relevant electronic information to a party or at the trial or hearing of a proceeding.

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(2) A judge may order a person to produce the original of a relevant document, or provide access to an original source of relevant electronic information, to a party or at the trial or hearing.

(3) A judge who orders a person to provide access to an original source of relevant electronic information may include in the order terms under which the access is to be exercised, including terms on any of the following:

- (a) a requirement that a person assist the party in obtaining temporary access to the source;
- (b) permission for a person to take temporary control of a computer, part of a computer, or a storage medium;
- (c) appointment of an independent person to exercise the access;
- (d) appointment of a lawyer to advise the independent person and supervise the access;
- (e) payment of the independent person and the person's lawyer;
- (f) protection of privileged information that may be found when the access is exercised;
- (g) protection of the privacy of irrelevant information that may be found when the access is exercised;
- (h) identification and disclosure of relevant information, or information that could lead to relevant information;
- (i) reporting to the other party on relevant electronic information found during the access.

(4) A judge who is satisfied that the requirement is disproportionate under Rule 14.08 may limit a requirement to produce a copy of a document, to produce exactly copied electronic information, or to provide access to electronic information.

14.13 - Order to process data

A judge may order a party to cause data on a computer or in a storage medium actually possessed by the party, or in a database accessed by the party to the exclusion of another party, to be processed so as to produce relevant electronic information.

14.14 - Designated manager for discovery

(1) A corporate party to a defended action must designate a manager for discovery of the corporation and notify the other parties of the name of the designated manager no more than twenty days after the day pleadings close.

(2) A corporate party must designate a manager in a contested application no more than two days after either of the following:

(a) the day a notice of contest is delivered to the corporate party who is an applicant;

(b) the day the notice of contest is filed by the corporate party who is a respondent.

(3) A judge may designate a manager if the corporate party fails to do so.

(4) A judge may substitute a manager if a corporate party makes an unreasonable designation, such as designating a person who has no real connection with the party's claim, defence, or ground although such a person is available and able to act as manager.

(5) A designated manager must, before being discovered, become informed about relevant information available to the party.

14.15 - Public archives and other public repository

Despite the provisions of Part 5, a party who controls a public archive, museum, or other place where the public has access to documents or electronic information is not obligated to search there for relevant documents or electronic information that are available to all parties.

Rule 15 - Disclosure of Documents

Educational Notes

This Rule replaces the previous R.20. Rule 15 requires counsel to carefully explain disclosure obligations under R.14-16 to clients and sign a certificate of advice that they have done so. The obligation is a significant one and counsel will need to give careful consideration on how to meet it. (Rule 17 obligations are not included, but it would be prudent to address R.17 obligations in appropriate circumstances even though the certificate does not require it.)

Rule 15 now requires that the parties exchange affidavits disclosing documents that have been sworn or affirmed by the party (not counsel) within 45 days of the close of pleadings in an action. There are two separate forms of affidavit, one for individuals (Form 15.03A), and one for corporate parties (Form 15.03B). A form for the certificate of counsel is attached to Form 15.03A. The affidavit now contains four schedules:

Schedule A listing all relevant non-privileged documents actually possessed by the party; **Schedule B** setting out the date that counsel was retained, claiming privilege over communications with counsel, and providing information about all other privilege claims; **Schedule C** lists documents within a party's control that have not yet been acquired and provides an undertaking to acquire them or reasons for not doing so; **Schedule D** lists documents once, but no longer, in a party's control.

Note that while the schedules form part of the affidavit disclosing documents, the documents themselves do not.

Rule 15.05 provides guidance on organizing the affidavit disclosing documents and provides for scanning and delivering electronic copies only where all parties have the means to use them.

As with the previous R.20, the duty to disclose is an ongoing one. Rule 15.04(b) creates a duty to disclose further relevant documents found or acquired, which raises the question of how to treat further documents found or acquired by counsel. Generally these would fall under work product privilege.

Rule 15.06 provides a simplified process for documentary disclosure in an application. No deadline is provided, presumably because it will be set during the motion for directions.

15.01 - Scope of Rule 15

- (1) This Rule provides for making disclosure of documents, not electronic information.
- (2) A party must disclose documents in the control of the party, in accordance with this Rule.

15.02 - Duty to make disclosure of documents

- (1) A party to a defended action or a contested application must do each of the following:
 - (a) make diligent efforts to become informed about relevant documents the party has, or once had, control of;
 - (b) search for relevant documents the party actually possesses, sort the documents, and either disclose them or claim a document is privileged;
 - (c) acquire and disclose relevant documents the party controls but does not actually possess.

- (2) The party must also disclose information about all of the following:
- (a) a relevant document the party once controlled but no longer controls, such as a lost document or a document given away;
 - (b) a claim that a document in the control of the party is subject to a privilege in favour of the party or another person, to the extent it is possible to inform another party without infringing the privilege;
 - (c) a relevant document newly created, discovered, or acquired;
 - (d) a relevant document that has ceased to be privileged.

15.03 - Disclosure in an action

- (1) A party to a defended action must deliver to each other party an affidavit that fulfills the party's duty to make disclosure of documents no more than forty-five days after the day pleadings close.
- (2) The affidavit must contain the standard heading, be entitled "Affidavit Disclosing Documents (Individual)" or "Affidavit Disclosing Documents (Corporate)", and be sworn or affirmed by an individual party, the litigation guardian of an individual party, or an officer or employee of a corporate party.
- (3) The person making the affidavit must swear to or affirm all of the following:
- (a) an attached certificate of advice or understanding about disclosure duties under this Rule 15, and Rule 16 - Disclosure of Electronic Information, is true;
 - (b) the person has thoroughly searched for, or supervised a thorough search for, relevant documents that are actually possessed by the party;
 - (c) the person has become informed about relevant documents in control of, but not actually possessed by, the party and has acquired the documents, or disclosed otherwise in the affidavit;
 - (d) an attached Schedule A lists all relevant, non-privileged documents that are actually possessed by the party;
 - (e) the person has arranged for delivery of copies of the listed documents in a printed booklet, or in a readily exchangeable electronic format, that is organized in a way that corresponds to Schedule A;
 - (f) an attached Schedule B provides the date of retention of counsel, claims privilege over communications with counsel unless the party waives the privilege, and provides information on all claims that a document, other than a communication
 - (g) an attached Schedule C describes each relevant document in the party's control that has not yet been acquired by the party and provides the party's undertaking to acquire the document or the reasons for not doing so;
 - (h) an attached Schedule D accurately describes any document once, but no longer, in the control of the party;
 - (i) to the best of the person's knowledge, the party has never had control of a relevant document except as disclosed in the affidavit;
 - (j) disclosure of electronic information is the subject of another affidavit, an agreement, or directions of a judge.
- (4) The certificate attached to the affidavit must be of one of the following kinds:
- (a) if the person is represented by counsel, a certificate signed by counsel stating that counsel has advised the person providing the affidavit of the duties under Rule 14 - Disclosure and Discovery in General, this Rule 15, and Rule 16 - Disclosure of Electronic Information to search for, make diligent efforts to become informed about, acquire, sort, and disclose relevant documents and electronic information, and of the kinds of documents and electronic information that may be relevant in the proceeding;
 - (b) if the party is acting on their own, a certificate of the party that they have taken

any assistance they require to understand the duties under Rule 14 - Disclosure and Discovery in General, this Rule 15, and Rule 16 - Disclosure of Electronic Information to search for, make diligent efforts to become informed about, acquire, sort, and disclose written documents and electronic information, and the party understands the duties.

(5) Each schedule attached to the affidavit must describe a document so it is easily identifiable from the description, and if copies of documents are to be delivered in an electronic format rather than a printed booklet, Schedule A must conform with Rule 16.09(3)(d).

(6) The affidavit disclosing documents may be in Form 15.03A for an individual party, or Form 15.03B for a corporate party.

Forms

Affidavit Disclosing Documents (Corporation)(15.03B), Affidavit Disclosing Documents (Individual)(15.03A).

15.04 - Supplemental affidavit disclosing documents

A party who delivers an affidavit disclosing documents must, immediately on becoming aware of any of the following, deliver to each other party a supplementary affidavit disclosing documents:

- (a) a relevant document in the actual possession of the party is not covered by the affidavit disclosing documents;
- (b) a further relevant document is found or acquired;
- (c) a relevant document claimed to be privileged is no longer claimed to be privileged.

15.05 - Book or electronic copy of documents

(1) A party who delivers an affidavit disclosing documents, or a supplementary affidavit, must, at the same time, deliver to each other party a book of copies of all documents listed in Schedule A of the affidavit, or referred to in the supplementary affidavit.

(2) The documents must be provided in a sequence, and with identifying numbers or letters, so that they are easily matched with the list in the Schedule.

(3) A document that cannot be bound conveniently into a book, may be placed in a sleeve or delivered separately with a cross-reference in the booklet.

(4) Instead of a book, a party to a proceeding in which all parties have means for reading electronic information may scan the documents and deliver copies in a readily exchangeable electronic format.

(5) A party who delivers documents in an electronic format must comply with Rule 16.12, of Rule 16 - Disclosure of Electronic Information, as if the scanned documents were electronic information, and the party must provide in the party's affidavit of documents a Schedule "A" that conforms with Rule 16.09(3)(d).

15.06 - Disclosure in an application

(1) A party to a contested application must deliver to each other party copies of all documents required to be disclosed under this Rule 15 and a list by which the documents can be identified and put in order.

(2) The copies must be delivered in a booklet, or in a readily exchangeable electronic format.

(3) A judge may give directions for delivery of a list identifying, or an affidavit disclosing, documents in an application.

15.07 - Directions for disclosure

(1) A judge may give directions for disclosure of documents, and the directions prevail over this Rule 15.

(2) A judge may not give directions limiting disclosure or production of a relevant document, unless the presumption in Rule 14.08, of Rule 14 - Disclosure and Discovery in General, is rebutted.

Rule 16 - Disclosure of Electronic Information

Educational Notes

Rule 16 creates a comprehensive process for preserving, sorting, and disclosing electronic information in litigation and will effect enormous changes in the litigation process. It is the first such Rule in Canada, although British Columbia, Ontario and Alberta all have practice directions or notes governing electronic disclosure, and the United States amended their *Federal Rules of Civil Procedure* to address electronic discovery in 2006.

Before getting into the mechanics of R.16 it is useful to understand the Rule's conceptual foundation in the Sedona Principles.

Sedona Principles

Many (perhaps all) electronic disclosure Rules are based on principles first articulated by the Sedona Conference, an American think-tank founded to address cutting edge issues in complex litigation, among other legal subjects. The first Sedona Working Group was established in 2001 to consider electronic document retention and production in the litigation process. Canada established its own Sedona e-discovery Working Group in 2006. The group released *The Sedona Canada Principles* in January 2008. Nova Scotia's R.16 is based on Sedona Principles.

The twelve key Sedona Principles addressing electronic discovery are reprinted below. The full 43 page document explaining them in detail is available free at www.thesedonaconference.org and through the University of Montreal's e-discovery portal at www.lexum.umontreal.ca/e-discovery.

The Sedona Canada Principles

Addressing Electronic Discovery

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, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically stored information; (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.

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 meet and confer as soon as practicable, and on an ongoing basis, regarding the identification, preservation, collection, 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.

Principle 7: A party may satisfy its obligation to preserve, collect, review and produce electronically stored information in good faith by using electronic tools and processes such as data sampling, searching or by using selection criteria to collect potentially relevant electronically stored information.

Principle 8: Parties should agree as early as possible in the litigation process on the format in which electronically stored information will be produced. Parties should also agree on the format, content and organization of information to be exchanged in any required list of documents as part of the discovery process.

Principle 9: During the discovery process parties should agree to or, if necessary, seek judicial direction on measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronic documents and data.

Principle 10: During the discovery process, parties should anticipate and respect the rules of the forum in which the litigation takes place, while appreciating the impact any decisions may have in related actions in other forums.

Principle 11: Sanctions should be considered by the court where a party will be materially prejudiced by another party's failure to meet any obligation to preserve, collect, review or produce electronically stored information. The party in default may avoid sanctions if it demonstrates the failure was not intentional or reckless.

Principle 12: The reasonable costs of preserving, collecting and reviewing electronically stored information will 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.

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Six Key Points about Electronic Information

Navigating e-discovery requires a certain comfort level with technology that was never previously necessary to a litigation practice. Here are six key points that every lawyer needs to know about electronic information:

1. Electronic information is everywhere

The first key point to understand is that relevant electronic information can be found in a dizzying array of sources, from the obvious, such as computers, CDs, or handheld flash drives, to less obvious sources such as Blackberries and other personal digital assistants, memory in printers and fax machines, recorded voice mail messages, and home computers, all of which must now be canvassed for relevant electronic information.

2. Electronic information is nearly impossible to delete

A second key point is that the vast majority of electronic information is never truly deleted. Most people are aware that files can be retrieved from a computer's recycle bin, but even files that have been deleted remain on the system and can be recovered until they are overwritten by a new file, which may never occur. Even after it is overwritten, information may still be recoverable; it is just more difficult. Deleted information may also be available through archived backup tapes.

3. Every electronic file contains hidden information called metadata

A third key point to understand is that computers store far more information about documents, files or e-mail than is ever printed. This largely hidden information is called metadata, meaning data about data. Metadata includes information such as who created a document and on what computer, when the document was last modified, earlier versions of documents that include deleted text, a history of websites visited, blind copy recipients of e-mail messages, information about when an e-mail was opened, or forwarded. Metadata can assist in determining authenticity, such as where a witness denies sending an e-mail. In many cases, none of this information is relevant, but it can also make or break a case, providing crucial proof of a fact in issue.

Understanding when metadata is relevant is one of the biggest challenges in electronic discovery.

4. While difficult to delete, some electronic information is easily destroyed

A fourth key point is that despite the near impossibility of deleting electronic information, the information itself can be fragile. Merely accessing or moving data can destroy it. Turning on a computer can alter hundreds of files stored on it. Opening a word processing document to see if it is relevant destroys metadata about when it was last accessed. The solution is to have an information technology specialist create a mirror image of the information stored on the computer in a timely way.

5. Old electronic information may be difficult or impossible to access

A fifth point relates to archived data and obsolete computer systems. Information created or stored years ago may be difficult or impossible to access, due to degradation of backup tapes, or loss of a crucial computer or software necessary to access the information.

6. The amount of available electronic information vastly exceeds information available on paper

The sixth and final point about electronic information relates to volume. Electronic documents are easily created and vastly outnumber paper documents. Many people now send far more e-mail and text messages than letters or faxes, and much of this information may never reach print. A single computer with a 400 gigabyte hard drive can hold 40 million pages of information. The sheer volume of electronic information in a case can produce many duplicate files.

These six points are only the tip of a very large electronic iceberg. The practice tips section for R.16 contains some suggestions for further reading on e-discovery issues.

How this Rule Works

Virtually every action and application will now require two affidavits from each party: one disclosing documents under R.15, and a second disclosing electronic information under R.16.

Tailoring Electronic Disclosure to each Case

A central theme running through R.16 is the ability to tailor the preservation and disclosure of electronic information to the requirements of a particular case. Rules 16.01 and 16.04 allow the parties to agree on preservation and disclosure obligations more extensive, or less extensive, than those that R.16 provides. Rule 16.05 allows this agreement to trump R.15 and R.16. Rule 16.01(2)(c) allows a judge to give directions where the parties cannot reach agreement and the default rules cannot be complied with. Under R.16.14(1) those directions also trump R.16.

Preserving Electronic Information

Rule 16.02 addresses the obligation to preserve relevant electronic information when required to do so by law. Rule 16.02 sets out the characteristics of information that must be preserved and R.16.02(4) specifies that a party must “exactly copy” the relevant information by creating a mirror image that preserves all of the associated metadata. (The term “exactly copy” is defined in R.14.02(1)). While the cost of creating an exact copy is not great, the work is technical and clients may need to engage information technology specialists to comply with R.16.02(4).

Rule 16.02(5) to (7) create an exception for rapidly changing databases or files (such as inventory), but allow for a motion to freeze this information if necessary.

Motions for all types of preservation orders are made under R.16.02(8).

Disclosing Electronic Information

Rule 16.03 sets out the disclosure obligations of parties in actions and applications:

- they must make diligent efforts to inform themselves about relevant electronic information currently or previously in their control;
- they must search for relevant information, sort it, and either disclose it or claim privilege.

“Sort” is defined in R.14.02(1);

- they must acquire and disclose relevant information accessible only through a custodian;
- they must disclose details about any computer or storage medium no longer in their possession if it could contain relevant information;
- they must disclose information about any deletion or destruction of relevant information;
- they must disclose all claims of privilege.

As with documents, the obligation to disclose electronic information is ongoing under R.16.03(4) and R.16.10.

Default Disclosure Rules

A party who cannot comply with R.16 must immediately notify each other party and provide a reason (R.16.06(2)), and all parties must then negotiate in good faith with a view to reaching an agreement. If no agreement is forthcoming in a reasonable time, the defaulting party must make a motion for directions under R.16.14.

Default Rules for Actions

Rules 16.07-16.11 and R.16.13 set out default disclosure rules for actions in which the parties cannot agree on electronic disclosure. Rule 16.07 sets the same deadline for delivering both affidavits: 45 days after the close of pleadings.

Rule 16.08(1) defines a “sufficient search” for electronic information in an action: first identifying sources of electronic information in a party’s possession, and then sources they do not actually possess, performing all reasonable searches, including keyword searches, to find the relevant electronic information, identifying people who are likely to have relevant electronic information, and then taking reasonable steps to acquire it. In accordance with Sedona Principles, parties are generally not required to search free space for file fragments, attempt to restore deleted files, or search backup tapes containing only duplicate information.

Rule 16.09 sets out the required content for the affidavit disclosing electronic information, which, like the affidavit disclosing documents, is now sworn or affirmed by the party. The affidavit has four schedules that correspond to schedules A-D in the affidavit disclosing documents. The affidavit must include the same certificate required with an affidavit disclosing documents. The affidavit must be accompanied by a copy of the electronic information referred to in schedule A (R.16.11).

Default Rules for Applications

Rules 16.12-16.13 set out simplified default disclosure rules for applications where the parties cannot agree on electronic disclosure. The Rule does not require the exchange of affidavits. Instead, each party must deliver a copy of the relevant electronic information preserved under R.16.02 with a description that conforms to schedule A of the affidavit. Rule 16.12(3) then obligates the party to answer questions in writing or on discovery about any claim for privilege, measures taken to preserve or acquire relevant information, details of searches made or potential sources of new information. As with actions, in applications, the disclosure obligation is ongoing (R.16.12(5)).

No deadline for disclosure is specified in R.16, as it would likely be set in each case during the motion for directions.

Spoliation

Spoliation is the destruction, mutilation, alteration or concealment of evidence. Rule 16.13 provides that deliberate or reckless deletion, expunging, or destruction of relevant electronic information is an abuse of process dealt with under R.88. Inclusion of reckless deletion indicates that malicious intent is not always required – negligence may be sufficient.

Rule 16.15(2) elaborates that a person who loses relevant electronic information as a result of good faith routine operation of a computer does not commit an abuse of process.

Failure to comply with an order directing preservation of electronic information is dealt with under Rule 89 – Contempt. Rule 16.13 applies to both actions and applications.

Highlights of Changes

The previous Rules addressed electronic disclosure only indirectly, through the definition of “document” in the previous R.1.05(i). “Document” was defined to include “any information generated, recorded or stored by means of any device, including, but not limited to, computers and digital media.”

Practice Tips

Many lawyers will face a steep learning curve to understand enough about technology to navigate R.16 strategically and be able to explain R.16’s obligations to their clients. Firms will need to develop close associations with IT professionals who can advise on the technical side of the e-discovery process.

The Rules allow counsel to tailor their clients’ e-discovery obligations in a manner proportionate to issues and amount at stake in the litigation, but knowing when to agree and when to refuse compromise on the default Rules will require a deep understanding the technology involved and the role that electronic information plays in the case. Insisting on the default Rules in every case will cost clients money unnecessarily; compromising on disclosure obligations inappropriately can mean that a smoking gun goes undiscovered.

Two immediate steps counsel should take when the duty to preserve arises are first, to ensure the client is aware of this duty and determine its scope so that the client can preserve relevant electronic information and limit vulnerability to a claim of spoliation. The second step is to send a preservation letter to the opposing counsel or party setting out your client’s expectations for the opposing party’s preservation of relevant electronic information.

Corporate clients will need advice on implementing or updating their electronic document management protocols to ensure that they will be able to comply with R.16. Not all deletion of electronic information constitutes spoliation. Case law is clear that corporations remain free to implement routine document destruction protocols, but such protocols should provide for immediate suspension when litigation, government investigation or audit is reasonably anticipated. (See Sedona Guideline #5). Clients should be made aware that dusting off and resuming a seldom used document destruction protocol in the face of anticipated litigation is unwise and likely to result in a claim of spoliation.

Further Reading

Every lawyer dealing with e-discovery issues should review Sedona Canada's full 43-page report: The Sedona Conference Working Group 7 (WG7) Sedona Canada, The Sedona Canada Principles: Addressing Electronic Discovery (The Sedona Conference, January 2008) online: www.thesedonaconference.org or www.lexum.umontreal.ca/ediscovery.

Lexum maintains an online e-discovery portal at www.lexum.umontreal.ca/ediscovery/ that includes regularly updated digests of Canadian e-discovery cases. PracticePRO offers an extensive e-discovery reading list at www.practicepro.ca/practice/SuppRes2eDiscov.asp.

The Ontario Bar Association maintains an e-discovery portal with downloadable model e-discovery precedents including a meet and confer agreement, preservation agreement, advice memos designed for individual and corporate clients, preservation letters suitable for opposing counsel and a self-represented litigant, and a preservation order. The portal can be found at: http://oba.org/en/publicaffairs_en/e-discovery/e_discovery_en.aspx.

Canadian e-discovery expert Martin Felsky's e-discovery blog tracks the latest developments in the field. It is located at www.ediscoverycanada.com. Todd J. Burke et.al., *E-Discovery in Canada* (Markham: LexisNexis, 2008) is a useful collection of essays addressing the American experience, Canadian case law, and key e-discovery issues including spoliation, privilege, and cost, along with a lawyer's IT primer. The appendices include reprints of the Ontario e-discovery Guidelines, the BC Practice Direction on electronic evidence, and the Alberta Queen's Bench Civil Practice Note 14: Guidelines for the use of Technology in any Civil Litigation Matter.

16.01 - Scope of Rule 16

- (1) This Rule prescribes duties for preservation of relevant electronic information, which may be expanded or limited by agreement or order.
- (2) This Rule also prescribes duties of disclosure of relevant electronic information and provides for fulfilling those duties in one of the following ways:
 - (a) first, an agreement made by the parties;
 - (b) second, to the extent that an agreement is not made, disclosure according to default Rules;
 - (c) third, if no agreement can be made and the default rules cannot be complied with, directions of a judge under Rule 16.14.
- (3) A party must preserve and disclose electronic information in the control of the party, in accordance with this Rule.

16.02 - Duty to preserve electronic information

- (1) This Rule 16.02 provides for preservation of relevant electronic information after a proceeding is started, and it supplements the obligations established by law to preserve evidence before or after a proceeding is started.
- (2) A party who becomes aware that a proceeding is to be defended or contested, must take measures to preserve relevant electronic information that is of one of the following kinds:
 - (a) it is readily identifiable in a computer, or on a storage medium, the party actually possesses;
 - (b) it is accessible by the party to the exclusion of another party, such as information

in a database the party accesses by password on a computer the party does not actually possess.

(3) Electronic information that is within any of the following descriptions is readily identifiable:

- (a) it was created, or regularly accessed, by a party during events related to a claim, defence, or ground, and if the information is still accessible;
- (b) the party finds it while doing anything in connection with the proceeding, such as preparing the party's own case or defence;
- (c) it is stored under a relevant name;
- (d) it is capable of being found by performing thorough keyword searches.

(4) The party must exactly copy the relevant electronic information required to be preserved, unless the parties agree or a judge orders otherwise (see the definition of "exactly copy" in Rule 14.02, of Rule 14 - Disclosure and Discovery in General).

(5) Rules 16.02(1) to (4) do not require a party to freeze a database or file that changes significantly and rapidly in ordinary use, such as a file for inventory control.

(6) A party may demand that a party who controls a database preserve relevant information in the database, and the party who receives the demand must immediately do one of the following:

- (a) preserve the information from being overwritten or otherwise altered;
- (b) explain in writing why the party cannot comply with the demand.

(7) A party may make a motion for an order requiring another party to preserve information in a database or a file that changes significantly and rapidly in ordinary use.

(8) A judge may make an order for preservation of relevant electronic information, in accordance with Rule 42 - Preservation Order.

16.03 - Duty to disclose electronic information

(1) A party to a defended action or a contested application must do each of the following:

- (a) make diligent efforts to become informed about relevant electronic information the party controls, or once controlled;
- (b) search for relevant electronic information the party can access to the exclusion of another party, sort the information, and either disclose it or claim it is privileged;
- (c) acquire and disclose relevant electronic information the party controls but can access only through a custodian who is not an employee or an officer of the party.

(2) A party must also disclose all of the following about relevant electronic information:

- (a) a description of a computer or storage medium that the party once actually possessed but no longer actually possesses and that may contain relevant electronic information;
- (b) information about any deletion or destruction of relevant electronic information of which the party is aware;
- (c) a claim that electronic information is subject to a privilege in favour of the party or another person, to the extent it is possible to inform another party without infringing the privilege.

(3) A party must disclose relevant electronic information that has ceased to be privileged or is newly created, discovered, or acquired.

16.04 - Agreement about preservation

The parties may, by agreement, and a judge may, by directions under Rule 16.14, expand or limit a party's duty to preserve electronic information.

16.05 - Agreement for disclosure

(1) Parties may make an agreement for disclosure of relevant electronic information, and a term of the agreement prevails over an inconsistent provision of Rule 15 - Disclosure of Documents, or this Rule 16.

(2) A judge may make an order to enforce a term in an agreement for disclosure of electronic information.

(3) Breach of a term in an agreement for disclosure of electronic information is the same as breach of a Rule for the purpose of Rule 88 - Abuse of Process.

16.06 - Rules for disclosure in default of agreement

(1) A party to either of the following proceedings must make disclosure of relevant electronic information in accordance with the following default Rules, to the extent there is no agreement on a subject pertaining to the default Rules:

(a) a defended action, in accordance with Rules 16.07 to 16.11 and Rule 16.13;

(b) a contested application, in accordance with Rules 16.12 and 16.13.

(2) A party who does not have an agreement covering a subject provided for in the default Rules and determines they cannot fulfill a default duty, or cannot comply with an applicable default Rule, must immediately notify each other party of the inability and reason for it.

(3) All parties must negotiate in good faith for an agreement under Rule 16.05 as soon as possible after being notified of an inability to fulfill a default duty or comply with a default Rule.

(4) If agreement is not reached in a reasonable time, the party who cannot fulfill a default duty, or comply with an applicable default Rule, must apply for directions under Rule 16.14.

16.07 - Time for disclosure in an action (default provision)

A party to a defended action must disclose relevant electronic information no more than forty five days after the day pleadings close.

16.08 - Sufficient search (default provision)

(1) A party who does all of the following performs a sufficient search for relevant electronic information:

(a) identifies computers and storage media the party actually possesses that are likely to contain relevant electronic information;

(b) identifies other sources that are likely to contain relevant electronic information, such as a source the party accesses to the exclusion of another party on computers the party does not actually possess;

(c) performs all reasonable searches, including thorough keyword searches, to find relevant electronic information in the computers, storage media, or other sources;

(d) identifies persons who hold, or are likely to hold, relevant electronic information the party controls;

(e) takes reasonable steps to acquire information from a person identified as holding information the party controls.

(2) A party performs a sufficient search without searching free space for file fragments, attempting to restore and search deleted files, or searching a backup file or tape containing only duplicate information.

16.09 - Disclosure in an action (default provision)

(1) A party to a defended action must deliver to each other party an affidavit disclosing relevant electronic information that fulfills the party's duties to make disclosure in the time allowed by Rule 16.07.

(2) The affidavit must contain the standard heading, be entitled "Affidavit Disclosing Electronic Information (Individual)" or "Affidavit Disclosing Electronic Information (Corporation)", and be sworn or affirmed by an individual party, the litigation guardian of an individual party, or an officer or employee of a corporate party.

(3) The person making the affidavit must swear to, or affirm, all of the following:

(a) the information in an attached certificate of advice or understanding about disclosure duties under this Rule 16 and Rule 15 - Disclosure of Documents, is true;

(b) the person has searched, or has supervised a search, for relevant electronic information in computers and storage media the party actually possesses and in sources exclusively accessed by the party;

(c) the person has made diligent efforts to become informed about relevant electronic information that is in the control of, but not held by, the party and the person has acquired the information except as disclosed in the affidavits;

(d) an attached Schedule A is provided in print and in a readily exchangeable electronic format, describing each discrete item of electronic information according to identification number or letters, date of creation, type of communication or other information, author or author and organization, and recipient;

(e) the person has arranged for the electronic information referred to in Schedule A to be prepared in a readily exchangeable electronic format, organized in a way that corresponds with Schedule A, and delivered to each other party;

(f) an attached Schedule B provides the date of retention of counsel and claims privilege over communications with counsel, unless the party waives the privilege, and provides information on all claims that a communication, other than a communication with counsel, is privileged in favour of the party or another person;

(g) an attached Schedule C provides information about relevant electronic information in the party's control but which the party has not yet found or acquired, and an undertaking to act diligently to find or acquire the information;

(h) an attached Schedule D describes relevant electronic information once, but no longer, in the control of the party and provides details about how the party ceased to have control of it;

(i) to the best of the person's knowledge, the party has never had control of relevant electronic information except as disclosed in the affidavit;

(j) disclosure of documents is the subject of another affidavit.

Rule 16 - Disclosure of Electronic Information

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(4) The certificate of advice or understanding attached to the affidavit must be the same as the certificate attached to an affidavit of documents.

(5) The affidavit may be in Form 16.09A for an individual party, or Form 16.09B for a corporate party.

Forms

Affidavit Disclosing Electronic Information (Corporation)(16.09B), Affidavit Disclosing Electronic Information (Individual)(16.09A).

16.10 - Supplemental affidavit of electronic information in an action (default provision)

A party who delivers an affidavit disclosing electronic information must, immediately on becoming aware of any of the following, deliver to each other party a supplementary affidavit disclosing further electronic information:

(a) some relevant electronic information in the control of the party is not covered by the

affidavit disclosing electronic information;

(b) further relevant electronic information is found or acquired;

(c) relevant electronic information claimed to be privileged is no longer claimed to be privileged.

16.11 - Copy of electronic information in an action (default provision)

A party who delivers an affidavit, or supplemental affidavit, disclosing electronic information must, at the same time, deliver to each other party a copy of the electronic information referred to in Schedule A of the affidavit, or in the supplementary affidavit.

16.12 - Making disclosure in an application (default provision)

(1) A party to an application who becomes aware that the application is contested must, as soon as possible, deliver to each other party copies of electronic information required to be disclosed by Rule 16.02.

(2) A party to an application who is requested by another party to provide a description of relevant electronic information must, as soon as possible, deliver a description to the requesting party that conforms with the requirements for Schedule A of an affidavit disclosing electronic information.

(3) The disclosing party must answer questions asked by another party that will inform the other party about any of the following subjects:

(a) a claim for privilege, to the extent information can be given without infringing the privilege;

(b) measures the disclosing party has taken to preserve, or acquire, relevant electronic information in the control of the party;

(c) details of the searches made by the disclosing party;

(d) details about a source of electronic information that may be used to produce new, relevant information;

Rule 16 - Disclosure of Electronic Information

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(e) any information that could reasonably lead to the location and preservation of relevant electronic information that has not been acquired.

(4) The inquiring party may require that the questions and answers be put in writing, recorded, or asked and answered at a discovery.

(5) A party to an application must copy relevant electronic information immediately on becoming aware that the information has ceased to be privileged, is newly created, discovered, or acquired, or was not disclosed when it should have been disclosed, and deliver a copy to each other party.

16.13 - Deletion or destruction of electronic information

(1) Deliberate or reckless deletion of relevant electronic information, expunging deleted information, or destruction of anything containing relevant electronic information after a proceeding is started may be dealt with under Rule 88 - Abuse of Process.

(2) Failure to comply with an order directing preservation of electronic information may be dealt with under Rule 89 - Contempt.

16.14 - Directions for disclosure

(1) A judge may give directions for disclosure of relevant electronic information, and the directions prevail over other provisions in this Rule 16.

(2) The default Rules are not a guide for directions.

(3) A judge may limit preservation or disclosure in an action only to the extent the presumption in Rule 14.08, of Rule 14 - Disclosure and Discovery in General, is rebutted.

16.15 - When loss of electronic information may be abuse

(1) A party who deliberately or recklessly does any of the following may be dealt with under Rule 88 - Abuse of Process:

(a) deletes relevant electronic information;

(b) expunges deleted, relevant, electronic information;

(c) destroys a thing that contains relevant electronic information.

(2) A party who acts in good faith and who loses relevant electronic information as a result of the routine operation of a computer or database does not commit an abuse

of process.