

**THE NEW BC ELECTRONIC EVIDENCE
PRACTICE DIRECTION**

A STARTER KIT FOR THE AVERAGE CASE

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THE NEW ELECTRONIC EVIDENCE PRACTICE DIRECTION

In the paper "Technology and the Small Case" that Mike Demers and I presented at last year's Pacific Legal Tech Conference, we noted that several Australian State Supreme Courts had adopted Practice Notes promoting the use of technology in civil actions. Our prediction then was that:

"The day may soon come, therefore, when using technology in conducting civil litigation in BC is no longer purely a matter of choice or happenstance. Like in Australia, our Courts may soon adopt a set of procedural rules to promote - or even compel - the appropriate use of technology to improve efficiency in the conduct of civil litigation, should any of the parties wish to do so and insist that the other parties do the same"

That day in fact arrived - sooner than many would have thought - on July 1, 2006 when the Supreme Court of British Columbia's new Electronic Evidence Practice Direction came into effect.

Like the Australian Practice Notes it is modeled on, BC's new Electronic Evidence Practice Direction establishes a flexible framework of suggested practices and procedures for employing technology in conducting civil litigation. It "strongly encourages" counsel to confer with each other and reach agreement, wherever possible, on how technology can be best used to promote efficiency in the conduct of particular cases. It creates a judicial mechanism for fine-tuning the technological tools to be used on specific cases, and contains the power to "order that the proceeding or certain steps in the proceeding be conducted using Technology", even against an unwilling party.

As daunting as it may look on the surface, however, the new Practice Direction really does little more than give a strong shove in the direction of more widespread use of technology in the conduct of civil litigation. Ultimately, its success or failure will hinge on how (and whether) practitioners actually apply it in running their cases.

BUT IS IT *REALLY* RELEVANT TO THE AVERAGE CASE?

The Electronic Evidence Practice Direction is clearly relevant, and will certainly soon come to play a major role, in large pieces of litigation with multiple parties, thousands of documents and millions of dollars involved. Litigators soldiering in the more earth-bound realm of mid-sized cases - for everyday clients with limited budgets - might well

wonder, however, whether the Practice Direction was really meant for their class of files at all. The added effort and perceived extra cost of applying the Practice Direction in "smaller" cases, unfortunately, will discourage many counsel from treading down the path that the Practice Direction aims to chart.

The best answer I can suggest to the question posed by this heading is: "Yes, but it's up to the Bar to make the effort and be creative in figuring out how". There are opportunities for using technology to improve efficiency on small cases as well as on large ones. The challenge, though, is to be selective about the set of technological tools to be used, so they fit the realities and economics of the case, and to be smart in using them.

WAYS OF USING TECHNOLOGY TO IMPROVE EFFICIENCY

This paper offers some practical suggestions and a few working tools for meeting that challenge. Before doing that, though, let's step back for a moment first to consider some of basic activities involved in the day-to-day handling of a basic litigation file where technology might be used to do those things more efficiently.

CORRESPONDENCE AND OTHER WRITTEN COMMUNICATIONS WITH OPPOSING COUNSEL

Starting with the most basic, we send and receive written communications to opposing counsel and others outside our office. Email and fax have largely come to replace the written letter sent by mail or courier, but habits vary widely from one lawyer to the next in how and when we use these and for what purposes. Without an established norm or custom to guide us, lawyers and their staff on both sides of a case continually need to decide whether this or that communication should be sent as a signed letter, as a fax, as an email or as a scanned version of a letter attached to an email.

While the Electronic Evidence Practice Direction is mainly concerned with promoting the use of technology in the document discovery process, it also expressly encourages using technology in even this most basic aspect of the handling of a file:

- 2.7. In that regard, Parties should consider the ways in which the use of Technology might lead to the more efficient conduct of the litigation and, in particular, to its application and use in:

...

- 2.7.2 communicating with another party

By conferring with our opponents, there is scope for improving efficiency in this area. Lawyers can agree in advance, for example, on how and when they will communicate through email or other electronic means and when (if ever) a more traditional letter printed on stationery, signed and physically delivered, is expected. That way, there is never any doubt over the "right" form to use when communicating, and communications flow back and forth easily.

ELECTRONIC EXCHANGE OF COURT DOCUMENTS

Another thing we regularly do is send court documents (pleadings, motion materials, discovery appointments, demands for discovery of documents and so forth) back and forth to each other. While often done by fax - and increasingly by email - habits also vary greatly from lawyer to lawyer in this respect. As things stand, there is no established custom to tell us when to send copies of court documents to our opponents in electronic form, and if done, what format to use (Word, PDF or other) and how the material should be sent (email, CD or download from a secure site).

The Electronic Practice Direction establishes some basic standards, and specifically encourages discussion and agreement between counsel, on these sorts of issues:

- Paragraph 4.1.1. specifies PDF as the "default" file format for counsel to use when exchanging electronic versions of court documents (other than Lists of Documents and indexes to Common Books of Documents)
- Paragraph 5.2 says "[w]hether or not a party is involved in the e-filing pilot project, parties are encouraged to agree to deliver and to accept delivery of Court Documents and other Documents and communications electronically"
- Paragraph 5.3 provides that a party must, on request, deliver a copy in electronic format of any court document which is required to be delivered in hard copy, in addition to the hard copy.

Beyond this, there is room for counsel to agree on other things as well - such as the media they will use (email, CD or other) when sending court documents electronically, when one medium will be used instead of another, and how they will handle "large" computer files - that can further improve efficiency when exchanging court documents electronically.

DOCUMENT DISCOVERY

Of all the areas involved in the handling of a litigation file, this is undoubtedly the one where technology has the most to offer in terms of improved efficiency. It is the area that the new Electronic Evidence Practice Direction primarily deals with, and in most detail. Unfortunately, though, is also the area where counsel on the average-sized case will be most inclined to be scared off.

The Electronic Evidence Practice Direction deals with two basic but very different functions involved in the document discovery process. First, it deals with the process of producing and exchanging lists of documents in electronic form. In that regard, the Practice Direction contains guidelines and default standards for the information fields to be included when preparing such lists. Second, it deals with the process of maintaining and exchanging electronically stored or created copies of documents that the Rules require to be disclosed (whether paper or electronic in their native format).

It is useful to keep this distinction in mind, since one doesn't necessarily have to go along with the other. In tailoring the tools of technology to a particular case, for example, counsel might well agree to exchange lists of their documents in Excel or other electronic format with pre-agreed information fields, but decide to exchange paper copies only of the documents they have listed. Or they might agree to exchange imaged copies of some documents, or types of documents, but paper copies of the rest.

STARTER KIT BASICS

With these general concepts in mind, here are a few tips and practical suggestions that counsel might want to apply in deciding on the set of technological tools to use on particular cases, and in getting his or her opponent on-side in doing so.

TALK TO YOUR OPPONENT

The first and cardinal rule in making better use of technology in actually running a file is to talk to your opponent about the tools that are available and how you can work together collaboratively in putting those tools to work over the life of the file.

To get this dialogue going, though, someone has to take the lead. If you are attending this conference and reading this paper, the chances are that it will likely fall on your shoulders to be the one to do this. In the adversarial climate of a civil lawsuit, your opponent - especially a less tech-savvy one - may resist the idea of collaborating to use

technology more efficiently for the benefit of both your clients. Paragraph 2.6 of the new Practice Direction makes it very clear, however, that the Court now expects counsel to put this mind-set aside and to work together in determining how to use technology to promote efficiency:

- 2.6. Parties have the primary responsibility to agree upon the matters that are the subject of this Practice Direction and are strongly encouraged by the Court to do so.

DO IT EARLY

The right time to start the dialogue with opposing counsel about using technology is *at the very beginning* of a case. Otherwise, inertia sets in and the subject may never receive the specific and focused attention it deserves.

Further, if counsel don't put their heads together and discuss technology at the start of a case, there is a very real risk each will independently commit to methods of listing and managing their documents that can not later be easily integrated with the method used by the other. By failing to discuss this subject early on, for example, counsel may start listing their documents using different information fields, or start the process of having their documents imaged in different file formats. When they later decide to get on the same page, much of the work already done may have to be redone or significantly revised.

START SMALL

Don't be paralyzed into avoiding the Practice Direction altogether by assuming wrongly that it must be adopted in all its detail, or else not at all. Even if counsel agree (say) to exchange court documents by email in PDF form and to exchange Lists of Documents in Excel format with pre-agreed fields - things that most lawyers with only basic knowledge of computers would find easy to do - this in itself would be an important step in the right direction, and may be all the “technology” that a particular file needs or can afford.

OUTSOURCE DOCUMENT LISTING AND IMAGING

For those who haven't already tried it, pick a case with 8 inches or more of documents and ship it to one of the independent service providers (Triage Data Solutions, Platinum Legal or Commonwealth Legal, for example) to have the documents listed and imaged. The process will be a learning experience in itself, and the cost will probably be a lot less than you think.

SOME PRECEDENTS

Attached to this paper are a few stabs at modest precedents to help counsel get started in applying the new Electronic Evidence Practice Direction:

- Appendix 1 A sample letter to opposing counsel opening discussion of technology issues
- Appendix 2 A simplified checklist of technology issues to consider and discuss with opposing counsel when conferring on technology issues
- Appendix 3 Template Excel spreadsheet for listing documents, with explanatory notes
- Appendix 4 A sample “plain language” Protocol Agreement to serve as a starting point for discussions with opposing counsel

CONCLUSION

The new Electronic Evidence Practice Direction provides a skeletal framework for incorporating technology in the prosecution and defence of civil actions that is both flexible and adaptable to the demands of particular cases. The meat that will go on those bones, however, will grow out of the new approaches, ideas and practical strategies that counsel come up with in actually applying the Practice Direction and in using technology to run their cases more efficiently.

APPENDIX 1

Sample Letter to Opposing Counsel Opening Discussion of Technology Issues

Jones & Jones
Barristers and Solicitors
1234 Main Street
Vancouver, BC V0L 1T0

Attention: Rob Jones

Dear Mr. Jones:

Re: *John Smith v Major Insurance Company*

As you know, parties and their counsel now have an obligation under the Electronic Evidence Practice Direction (the "Practice Direction") that came into effect on July 1, 2006 to consider ways that computer technology might be used to improve efficiency in the conduct of civil actions brought in the Supreme Court of BC.

The purpose of this letter is to open a discussion between us over ways that technology might be used to conduct this case more efficiently. We offer some initial thoughts below as to some matters we might agree on, but only as a starting point for further discussion. We are open to any suggestions or different ideas you may have as to how technology may be used to our clients' mutual benefit in this case.

General Communications

We might agree to send correspondence and other written communications to each other by email or other electronic means, rather than by letter with hard copy enclosures. We might also agree on standard file formats to be used when sending documents of different sorts to each other electronically (eg. PDF for standard correspondence, Word or WordPerfect for word processing documents, Excel for spreadsheet documents, etc.).

Filing of Court Documents

We plan to file court documents electronically under Rule 69 through Court Services Online (CSO) wherever possible. If you also plan to file court documents in this way, there may be ways for us to collaborate when filing of materials related to chambers applications and other matters so this can be done more efficiently.

Exchange of Court Documents

We might agree to deliver - and to accept delivery of - court documents (whether filed electronically or whether filed at the court registry or not) in electronic form, either in addition to or instead of paper copies. Since PDF is the required file format for documents filed electronically under Rule 69, we suggest that those documents be sent in PDF format if we do agree to exchange court documents electronically.

Document Discovery

Depending on the volume of documents involved in making discovery of documents in this case, we may wish to consider entering into - and filing with the Court - a formal Protocol Agreement as contemplated by the Practice Direction, with agreed standards for preparing and exchanging lists of our documents in electronic form and for exchanging electronic copies (images) rather than photocopies of documents.

Whether we enter into a formal Protocol or not, however, we may still wish to agree to exchange lists of our documents in spreadsheet or other electronic format with agreement as to the fields to be used in describing documents and how those fields will be populated. We may also wish to agree to have some or all our clients' documents imaged and to exchange copies of our documents in electronic format rather than paper copies.

We may also be able to agree on terms for splitting or sharing the costs of having documents imaged that could ultimately save both our clients money.

RealTime

We may wish to conduct examinations for discovery using RealTime to reduce the need to take notes and to have rough transcripts of the evidence immediately available.

Next Steps

Please contact us to discuss the next steps to be taken in trying to reach agreement on these and other technology-related issues. A short meeting or telephone conference between us and the members of our staff who will be involved in working out the details and implementing any agreements reached may be helpful as a first step. We are also willing to prepare an initial draft of a formal Protocol Agreement or less formal agreement governing the use of technology in the case for review and further discussion.

Yours truly,

BROWN & BROWN

Per:

Sam Brown

Appendix 2

Checklist of Technology Issues to Discuss with Opposing Counsel

I. GENERAL COMMUNICATIONS

1. Correspondence, wherever possible, to be sent by email? _____
2. If so, encrypted? Or with other security arrangements as follows: _____

2. Form for written communications
 - A. "Formal" correspondence normally to be sent as
 - (a) Letter sent as body of an email, under firm letterhead _____
 - (b) Scanned version of letter, sent as attachment _____
 - (c) If (b), in what format?
 - PDF _____
 - If PDF, with text embedded? _____
 - Word _____
 - WordPerfect _____
 - B. Email generally okay for "informal" communications (scheduling matters, general information requests, etc.)? _____
 - C. "Safe Zone" understanding for candid email discussions between counsel _____
3. Maximum file size for emails? If so, max. size = 2 MG / 5 MG / 10 MG? _____
4. "Large" documents or document packages (ie over 10 MG / 20 MG / 50 MG / 100 MG) normally to be sent
 - As CD-R or DVD-R _____
 - By download from website _____
 - URL for download (ours) _____
 - URL for download (theirs) _____

II. COURT DOCUMENTS

1. Electronic filing - Who will be filing electronically? Us? ___ Them? ___ _____
2. Agreement to accept *delivery* of court documents sent electronically (whether *filed* electronically or not)? _____
3. Paper copies also required? Yes ___ No ___ _____

4. Email addresses for court documents delivered electronically _____
- Ours: Counsel's normal address, or _____
 - Theirs: Counsel's normal address, or _____
5. Format for court documents sent electronically
- PDF (image only) _____
 - PDF (w/ text embedded) _____
 - Other _____
6. Acknowledge receipt by:
- Acknowledgment copy of cover letter, signed and returned? _____
 - Email read receipt? _____

III. DOCUMENT DISCOVERY

1. Should a formal Electronic Document Protocol be considered? If so, staff members to be involved in discussions and next steps to be taken _____
- _____
- _____
- _____
2. Agreement to exchange lists of documents in electronic form? _____
3. Format for document lists
- Tab delimited ASCII file _____
 - MS Excel Spreadsheet _____
 - MS Access _____
 - CT Summation format _____
 - Concordance _____
 - FTI Ringtail _____
 - Word processing table format (Word / WordPerfect) _____
 - Other _____
4. Fields to be used in document lists exchanged electronically
- Default fields as per Practice Direction _____
 - **Document ID** / Host document no / **Date** / Est Date / **Document type** / **Author/Author Organization** / **Recipient/Recipient Organization** / Title/description / Parties / Source / Non-Paper Record / Redacted / Basis of Redaction / Status (copy vs original) / No of Pages / _____
- [**Bold face** indicates Practice Direction default fields]
5. Copies of documents to be exchanged in electronic format? _____

6. If so, all documents? Or only certain documents, as follows: _____

7. File formats for documents to be exchanged in electronic form
- A. Images of paper records
- Resolution: 300 dpi? Other? _____ _____
 - TIFF (Single page) _____
 - TIFF (Multi-page) _____
 - PDF (image only) _____
 - PDF (text embedded, where "convenient") _____
 - Other _____

 - OCR versions? Of all documents? Or only of the following _____ _____
- B. Non-paper documents
- In native format _____
 - Exceptions? _____ _____
8. Colour images of colour paper records? Yes _____ No _____ _____
9. Oversized reduced to 8½ x 11? Yes _____ No _____ _____
10. Imaging arrangements and cost sharing
- Each party to arrange separately and bear own costs? _____
 - Parties will use same independent service provider? _____
(Name of service provider: _____)
 - If so, overall imaging costs will be: Split equally? / Portion paid according to number of documents imaged? / Other arrangement: _____
 - Cost splitting arrangements to be discussed further and decided later? _____
11. Document exchange via:
- CD-R _____
 - To be uploaded by parties to secure site. URL _____ _____

TEMPLATE EXCEL SPREADSHEET FOR LISTING DOCUMENTS
(WITH EXPLANATORY NOTES)

A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P
List No	Document ID	Date	Est Date	Document Type	Author / Author Organization	Recipient Organization	Title / Description	Source	Non-Paper Record	Redacted Basis of	Status	No of Pages	Privileged?		
1	SMI.000001	23-Mar-82		Statement	John Smith (Acme Pile Company)		Form 1 - Complaint	Isabelle Reid			Copy	12			
2	SMI.000013	15-Jul-88		Form	Amanda Jones		Photographs taken of workplace	Rob Brown			Copy	4			
3	SMI.000016_001	15-Jul-83	Yes	Photographs	Roger Harris		Photographs taken of workplace	Rob Brown			Original	8			
4	SMI.000023	1-Jun-84		Email	Amanda Jones	BC Human Rights Tribunal	Re: Workplace harassment	Bob Smith	Yes						

Number of the document in the disclosing party's List of Documents. Cell format = Number (Optional field)

Default Field: The date the document was created. Cell format = DateDDMMYY

Default Field: Unique identifying number assigned to all pages of all documents, following conventions set out in the Practice Direction. [Note: The document ID for multi-page documents is the number assigned to the first page. Cell format = General]

Default Field: Type of document chosen from the agreed set of document categories. Cell format = Text

Default Field: First and last name of author, followed by name of company or organization. Multiple entries separated by semi-colons. Cell format = Text

Default Field: First and last name of author, followed by name of company or organization. Multiple entries separated by semi-colons. Cell format = Text

Title that appears on a document. Use to supplement information about the document. For Non-Paper Record, can use to include file name and native file format. Cell format = Text

The person or organization from which the document was obtained. Cell format = Text

Indicate "Yes" when the document is an electronic document in its native state. Printed copies should be listed separately. Cell format = Text

Indicate "Yes" when part of the document being disclosed has been redacted (eg for privilege). Cell format = Text

Reason for redacting the excised part(s). Cell format = Text

Number of pages (of paper documents). Cell format = Number

"Copy" or "Original" (of paper documents). Cell format = Text

Indicate "Yes" if all or part of the document is subject to a claim of privilege. Cell format = Text

APPENDIX 4

Plain Language ‘Simple’ Protocol Agreement

NO. S061234
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JOHN SMITH

PLAINTIFF

AND:

MAJOR INSURANCE COMPANY

DEFENDANT

TECHNOLOGY PROTOCOL AGREEMENT

The parties agree to follow the protocols set out in this Agreement in relation to the use of computer technology in the conduct of this action

1. WRITTEN COMMUNICATIONS BETWEEN COUNSEL

- 1.1 Wherever possible, counsel will exchange correspondence and other written communications in this proceeding by email.
- 1.2 Correspondence of a “formal” nature (ie. communications dealing with matters of procedural or substantive importance in the litigation that would traditionally have been sent in the form of a signed letter) will be sent as:
 - 1.2.1 an email message bearing the letterhead or other identifying particulars of the sending lawyer or law firm;
OR
 - 1.2.2 A letter in the native word processing format in which it was created (ie. Word or WordPerfect), sent as an email attachment;
OR
 - 1.2.3 A scanned version of a letter, in PDF format (with[out] embedded text), sent as an email attachment.
- 1.3 Where correspondence and the document(s) accompanying it exceed 20 MB in size, the communication should normally be sent either (a) in CD-R format by courier, or (b) by making the items available for download from a secure web-site of the sending party.

- 1.4 Unless specifically asked by the recipient to do so, the sender will not send hard copies of correspondence or documents that are sent electronically.

2. COURT DOCUMENTS

- 2.1 For the purposes of this section, "court documents" mean documents of any of the forms provided for in the Supreme Court Rules.
- 2.2 The parties agree to accept delivery of court document in electronic form
- 2.3 Unless specifically asked by the recipient to do so, the sender will not send hard copies of court documents delivered electronically.
- 2.4 Court documents will be delivered in PDF format with embedded text, except for Affidavits which will be delivered in PDF (image only) format.
- 2.5 Counsel will acknowledge delivery of court documents sent electronically by:
 - 2.4.1 Returning a signed delivery acknowledgment copy of the covering letter sent with the document(s)
 - OR
 - 2.4.2 Returning a "read receipt" response to the email message attaching the document(s).

3. DISCOVERY OF DOCUMENTS

- 3.1 The parties agree to exchange lists of their discoverable documents in electronic form with / without a hard copy of the List(s) of Documents to follow by mail or by courier.
- 3.2 The parties will provide lists of their discoverable documents to the other party in the following format: [Tab delimited ASCII format / MS Excel Spreadsheet / MS Access / CT Sujmmation / Concordance / FTI Ringtail].
- 3.3 The parties will use the following information fields in the list(s) of documents sent to the other party:

Document ID / Host document No / Date / Est Date / Document type / Author/Author Organization / Recipient/Recipient Organization / Title/description / Parties / Source / Non-Paper Record / Redacted / Basis of Redaction / Status (copy vs original) / No of Pages.
- 3.4 The parties will use the following conventions in assigning Document ID numbers to their discoverable documents:

ABC.000123_001

ABC	Unique 3 letter prefix identifying the party making disclosure. The prefixes to be used in this case will be "SMI" for the plaintiff "MAJ" for the defendant
-----	--

000123 Unique 6-digit number (with zeros preceding the sequential number) assigned to each individual page for all documents disclosed by the parties

_001 Suffix used to identify pages inserted or added later into a party's document assembly (eg., if mistakenly omitted when originally assigning Document ID numbers)

3.5 The parties agree that the information fields to be used in the lists of documents to be exchanged between them will be populated in keeping with the standards set out in the Electronic Evidence Practice Direction, except as follows:

_____.

3.6 So far as possible, the parties will use the following standard categories when assigning document types to specific documents when listing their discoverable documents:

Accounting Record	Email	Photograph
Agenda	Extract	Plan
Agreement	Fax Cover Sheet	Policy
Annual Return	Fax Confirmation	Presentation
Article	File Cover / Divider	Receipt
Bank Statement	File Note	Report
Brochure	Financial Report	Schedule
Business Card	Form	Specification
Certificate	Graph	Spreadsheet
Chart	Guidelines	Table
Cheque	Handwritten Note	Tender
Company Records	Invoice	Video
Computer Disk / CD ROM	Letter	With Compliments Slip
Computer Printout	List	
Court Document	Memorandum	
Diary / Notebook	Minutes	
Drawing	Note	

3.7 The parties also agree to exchange imaged copies of their discoverable paper documents, rather than paper copies of those documents. The file format to be used for such imaged copies will [TIFF (single page), TIFF (multi-page), PDF, Other].

3.8 In addition to the images of paper documents to be provided by them, the parties also agree to provide OCR versions of the following types of discoverable documents existing in paper form

3.9 The parties also agree that they will exchange electronic copies, in their native format, of non-paper records which must be disclosed under Rule 26.

4. GENERAL

4.1 The parties agree that the Electronic Evidence Practice Direction will apply to this proceeding, and that this Agreement constitutes a Protocol within the meaning of the Practice Direction.

4.2 The recipient will be responsible to test for viruses. The sender should take all reasonable precautions to ensure that their data is virus free.

4.3 Each party will be responsible for the cost of producing the electronic data as outlined in these protocols, subject to any costs orders which may ultimately be made in the proceedings.

Dated: _____

Counsel for the Plaintiff

Counsel for the Defendant