

**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.