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ELECTRONIC EVIDENCE IN CANADA

Graham Underwood and Jonathan Penner

Release No. 1, October 2021

Publisher's Special Release Note 2021

The pages in this work were reissued in October 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the October 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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Electronic Evidence in Canada contains a broad examination of electronically stored information ("ESI") from its creation to its admission into evidence in civil and criminal proceedings. The book discusses the nature and characteristics of ESI and how these influence admissibility at trial. It then covers the retention and destruction of electronic records, the obligations to preserve and produce ESI for litigation, spoliation, and the admissibility of ESI at trial. The last part of the work considers specific modalities of admissibility of ESI, whether as real, documentary, or demonstrative evidence, and includes a discussion of the admissibility of metadata, ESI from the Internet, computer-generated recreations, and other issues unique to ESI.

In this release, the authors discuss recent case law and update the commentary to chapters 5 (The Obligation to Disclose ESI), 6 (Managing the Production of ESI), 7 (Managing the Production of ESI in Criminal Proceedings), 8 (Spoliation), 9 (Ensuring Preservation of ESI Held by Others), 11 (Admissibility of ESI Generally), 12 (Admissibility of ESI as Real Evidence), 13 (Admissibility of ESI as Documentary Evidence), 14 (Admissibility of ESI as Demonstrative Evidence) and 15 (Working with ESI at Trial).

Update Highlights:

- ***Dixon v. Lindsay*, 2021 ONSC 1360**—Kiteley J. granted an order preventing a litigant from using for any purpose any of 1,850 emails she had surreptitiously downloaded from her ex-husband's email account, stating that "the conduct of the Applicant in accessing, reviewing and storing the privileged and confidential communications of the Respondent must be denounced in the clearest terms".
- ***Canada v. Gottfriedson*, 2020 FCA 179**—the Federal Court of Appeal was faced with a situation where the defendant federal government had produced tens of thousands of documents spanning a 100-year period in electronic form. Many of the documents were difficult for the plaintiffs to convert to OCR-readable format, because of their age. The plaintiffs therefore sought an order compelling the government to provide them with a copy of the database in which it had stored and catalogued the documents for its own use. The chambers judge granted the order sought, in the face of an assertion by the government of litigation privilege over the database. In setting aside the chambers judge's order, the Federal Court of Appeal stated:

  To the extent that technology can be used to make litigation more manageable and less expensive, it should be used. Nevertheless, there is no rule that technological limits alter the obligations of the parties, one to the other. Each party is entitled to a useful affidavit as to documents and to the production of copies that are as usable as the condition of the original documents permits. Once those obligations have been satisfied by the producing party, the state of the relevant technology is irrelevant. The current status of OCR technology does not justify departures from established principles governing litigation privilege.
- ***R. v. Cuffie*, 2020 ONSC 4488**—An example of what is sometimes referred to as a "Dunn" motion. the Crown had disclosed almost 320,000 pages of documents, along with 9,000 audio calls and thousands of videos and photographs. The court was satisfied that the "disclosure [was] not

reasonably accessible to the Applicant because it [was] not organized, and it [was] not reasonably capable of being searched." In the end, because disclosure was ongoing, the court ordered that all PDF documents disclosed in future would have to be machine-readable.

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