

Index

ADMISSIBILITY

See also TRIAL USE AND PRESENTATION OF ESI

Generally, § 11:1

Authenticity, § 11:7 to § 11:10

Authenticity and reliability, see AUTHENTICITY AND RELIABILITY

Balancing probative value against prejudicial effect, § 11:33 to § 11:35

Canada Evidence Act s. 31.2, § 11:19

Canada Evidence Act s. 31.3, § 11:20

Common law best evidence rule, § 11:36

Common law discretion, § 11:23 to § 11:26

Demonstrative evidence, see DEMONSTRATIVE EVIDENCE

Documentary evidence, see DOCUMENTARY EVIDENCE

ESI, § 11:4 to § 11:6

Exclusionary rule, evidence not subject to, § 11:22

Exclusionary rule, see EXCLUSIONARY RULE

Factors affecting, § 2:22

Legal relevance, § 11:3

Legal threshold, § 11:5

Logical relevance, § 11:3

Materiality, § 11:2

Real evidence, see REAL EVIDENCE

Relevance, § 11:2

Reliability, § 11:11 to § 11:16

Statutory best evidence rule, Canada Evidence Act, § 11:17 to § 11:21

Ultimate reliability left to trier of fact, § 11:21

Voir dire to determine, § 11:6

Weighing probative value and prejudicial effect, § 11:27 to § 11:32

ADMISSIONS

See PRE-TRIAL AUTHENTICATION OF ESI

AUDIOTAPES

See REAL EVIDENCE

AUTHENTICITY

Generally, § 11:7

Method of proof, § 11:8

Proof, § 11:8 to § 11:10

Proof is contextual, § 11:10

Standard of proof, § 11:9

AUTHENTICITY AND RELIABILITY

See also ADMISSIBILITY

Demonstrative evidence

generally, § 14:3 to § 14:11

authenticity, § 14:4

threshold reliability, § 14:4

Documentary evidence

generally, § 13:2 to § 13:7

authentication, § 13:4

threshold reliability, § 13:5

Real evidence

generally, § 12:6 to § 12:10

authenticity of ESI in possession, § 12:8

proof of authenticity, § 12:7

threshold reliability, § 12:10

BEST EVIDENCE RULE

See also ADMISSIBILITY

Common law, § 11:36

CANADA EVIDENCE ACT

Generally, § 11:17 to § 11:21

Proof of integrity, § 11:18

Ultimate reliability left to trier of fact, § 11:21

CIVIL PROCEEDINGS

Disclosure

generally, § 5:9 to § 5:26

devices as documents, § 5:19

factors considered when requiring disclosure, § 5:22

redact irrelevant information, § 5:19.50

sources of disclosure obligation, § 5:10

Production

generally, § 5:9 to § 5:26

devices as documents, § 5:19

CIVIL PROCEEDINGS—Cont'd

- Production—Cont'd
 - limiting scope of production
 - generally, § 5:20
 - cost/benefit analysis, § 5:23
 - intrusive nature of production, § 5:24
 - proportionality, § 5:21
 - redact irrelevant information, § 5:19.50
 - scope of production obligation, § 5:11

COMMON LAW

- Constitutional imperative, interaction with the Charter, § 11:25
- Evolution of the discretion, § 11:24
- Exclusion of evidence in civil matters, § 11:26
- Prejudicial effect outweighs probative value, § 11:23 to § 11:26

CRIMINAL PROCEEDINGS

- Disclosure
 - generally, § 5:4 to § 5:8
 - consequences of failure to disclose, § 5:8
 - privacy interests, § 5:7
 - scope of disclosure obligation, § 5:6
 - source of disclosure obligation, § 5:5
- Production, see PRODUCTION OF ESI (CRIMINAL PROCEEDINGS)

DEMONSTRATIVE EVIDENCE

- See also TRIAL USE AND PRESENTATION OF ESI
- Admissibility of ESI as
 - generally, § 14:3 to § 14:11
 - assessing utility
 - generally, § 14:5
 - cost, § 14:8
 - determining utility, § 14:9
 - necessity, § 14:7
 - reliability, § 14:6
 - authenticity and threshold reliability, § 14:4
 - balancing utility and potential prejudice, § 14:11
 - weighing potential prejudice, § 14:10
- Animations
 - generally, § 14:16
 - admissibility of, § 14:16
 - computer generated illustrations of facts, § 14:13

DEMONSTRATIVE EVIDENCE**—Cont'd**

- Animations—Cont'd
 - demonstrative ESI illustrating facts, § 14:16
 - distinct from simulations, § 14:15
- Conclusion, § 14:31
- Meaning of, § 14:2
- Re-enactments, § 14:26
- Simulations
 - generally, § 14:12 to § 14:16
 - admissibility of, § 14:19, § 14:25
 - computer-generated
 - generally, § 14:18
 - output is fair and valid representation, § 14:24
 - proper functioning of program with data supplied, § 14:23
 - validity of computer program, § 14:21
 - validity of data, § 14:22
 - determining reliability of, § 14:20
 - distinct from animation, § 14:15
 - illustrate opinions, § 14:17 to § 14:25
 - videotape re-enactments, § 14:19
- Use of demonstrative aids at trial
 - generally, § 14:26
 - during trial, § 14:29
 - in closing, § 14:30
 - in opening, § 14:28

DIGITAL PHOTOGRAPHS

See REAL EVIDENCE

DISCLOSURE OF ESI

- See also MANAGEMENT OF ESI ONCE PROCEEDING INITIATED; PRODUCTION OF ESI
- Civil proceedings
 - generally, § 5:9 to § 5:26
 - devices as documents, § 5:19
 - limiting scope of production
 - generally, § 5:20
 - cost/benefit analysis, § 5:23
 - intrusive nature of production, § 5:25
 - proportionality, § 5:21
 - redact irrelevant information, § 5:19.50
 - standard is not perfection, § 5:24
 - scope of production obligation
 - generally, § 5:11

INDEX

DISCLOSURE OF ESI—Cont'd

- Civil proceedings—Cont'd
 - scope of production obligation—Cont'd
 - Manitoba, § 5:17
 - Other Canadian Jurisdictions, § 5:18
 - redact irrelevant information, § 5:19.50
 - sources of disclosure obligation, § 5:10
- Criminal proceedings
 - generally, § 5:4 to § 5:8
 - requirement to disclose electronically, § 7:3
 - scope of disclosure obligation
 - generally, § 5:6
 - Alberta, § 5:12
 - British Columbia, § 5:15
 - Nova Scotia, § 5:13
 - Ontario, § 5:14
 - Saskatchewan, § 5:16
 - source of disclosure obligation, § 5:5
 - sufficiency of electronic disclosure, § 7:2
- Documents, § 5:2
- Failure to disclose, § 5:26
- Jurisdictional considerations, § 5:27
- What must be disclosed, § 5:2
- Where electronic “documents” are found, § 5:3

DOCUMENTARY EVIDENCE

- See also TRIAL USE AND PRESENTATION OF ESI
- Electronic documents, specific instances of
 - generally, § 13:8 to § 13:18
 - emails, § 13:9
 - engineering drawings, § 13:15
 - instant messages, § 13:9
 - internet ESI
 - generally, § 13:10
 - ESI from Facebook, § 13:12
 - ESI from internet as documentary evidence, § 13:11
 - ESI from internet as real evidence, § 13:13
 - ESI from social media, § 13:12
 - Possession of ESI from internet sources, § 13:14
 - PDFs, § 13:15

DOCUMENTARY EVIDENCE—Cont'd

- Electronic documents, specific instances of—Cont'd
 - spreadsheets
 - generally, § 13:16
 - used to summarize evidence, § 13:17
 - use in court, § 13:18
 - text messages, § 13:9
 - word processing documents, § 13:8
- Electronic documents generally
 - generally, § 13:2 to § 13:7
 - authentication of ESI, § 13:4
 - hearsay nature, § 13:6
 - purposes for tendering, § 13:7
 - threshold reliability, § 13:5
 - treatment of, § 13:3
- Electronic records
 - generally, § 13:19 to § 13:25
 - business records
 - generally, § 13:21
 - documentary electronic records as, § 13:22
 - proper functioning of computer used to store, § 13:24
 - real electronic records as, § 13:23
 - characteristics and classification of, § 13:20
 - print-outs of, § 13:25

ELECTRONICALLY-STORED INFORMATION (ESI)

- Analog ESI, § 2:5
- Characteristics of
 - generally, § 2:15
 - difficult to destroy, § 2:19
 - easy to duplicate, § 2:17
 - easy to modify, § 2:18
 - imperceptible in its native form, § 2:16
 - metadata, § 2:21
 - pervasive, § 2:20
- Digital ESI, § 2:4
- Factors affecting admissibility of, § 2:22
- Internet and social media sites, § 13:10
- Nature of, § 2:2
- Need to record information, § 1:2
- Organization of
 - generally, § 2:9 to § 2:14
 - analog or digital ESI recorded to tape, § 2:9
 - digital ESI stored in files, § 2:11

ELECTRONICALLY-STORED INFORMATION (ESI)—Cont'd

- Organization of—Cont'd
 - physical devices used to record ESI, § 2:13
 - recording digital files and records in storage devices, § 2:14
 - records, § 2:12
 - transient ESI in computers, § 2:10
- Other forms of evidence and, § 1:4
- Overview, § 2:1
- Permanently stored ESI, § 2:6
- Purpose of tendering ESI, § 1:2
- Rules of evidence and, § 1:3
- Semi-permanent ESI, § 2:7
- Transient ESI, § 2:8, § 12:36

ELECTRONIC DOCUMENTS

- Generally, see DOCUMENTARY EVIDENCE
- Ediscovery, § 6:10 to § 6:20, § 6:24 to § 6:27
- Identification and treatment of duplicate documents, § 6:20
- Identification and treatment of parent documents, § 6:20
- Proof of authorship, § 13:7.5
- Sanctions for improper dealings with privileged documents, § 6:35
- Specific instances of, see DOCUMENTARY EVIDENCE
- Where electronic “documents” are found, § 5:3

ELECTRONIC RECORDS

- See also PRE-LITIGATION MANAGEMENT OF ESI
- Generally, § 2:12, § 3:2
- Characteristics of
 - generally, § 3:3 to § 3:7
 - authenticity, § 3:4
 - integrity, § 3:6
 - reliability, § 3:5
 - usability, § 3:7
- Classification of
 - generally, § 3:14 to § 3:16
 - administrative and operational records, § 3:16
 - transitory and permanent records, § 3:15
- Disposition of
 - generally, § 3:17 to § 3:19

ELECTRONIC RECORDS—Cont'd

- Disposition of—Cont'd
 - destruction of, § 3:18
 - disposition of, § 3:19
- Documentary evidence, see DOCUMENTARY EVIDENCE
- Management of
 - generally, § 3:8 to § 3:13
 - compliance with legal and business requirements, § 3:11
 - comprehensiveness, § 3:12
 - integrity, § 3:10
 - reliability, § 3:9
 - systematic nature, § 3:13

EXAMINATIONS

- See PRE-TRIAL AUTHENTICATION OF ESI

EXCLUSIONARY RULE

- See also ADMISSIBILITY
- Evidence, § 11:22

LITIGATION HOLDS

- See PRESERVATION OF ESI

MANAGEMENT OF ESI ONCE PROCEEDING INITIATED

- Disclosure of ESI, see DISCLOSURE OF ESI
- Preservation of ESI held by others, see PRESERVATION OF ESI HELD BY OTHERS
- Pre-trial authentication of ESI, see PRE-TRIAL AUTHENTICATION OF ESI
- Production of ESI, see PRODUCTION OF ESI
- Production of ESI in criminal proceedings, see PRODUCTION OF ESI (CRIMINAL PROCEEDINGS)
- Spoilation, see SPOILIATION

MATERIALITY

- See also ADMISSIBILITY
- Generally, § 11:2

METADATA

- See REAL EVIDENCE

ONTARIO GUIDELINES

- Generally, § 6:4, APP B

INDEX

ORDERS

See PRESERVATION OF ESI HELD BY OTHERS

PRACTICE DIRECTIONS

Generally, § 6:5, § 15:14, APP C

PRE-LITIGATION MANAGEMENT OF ESI

Electronic records, see ELECTRONIC RECORDS

Preservation of ESI, see PRESERVATION OF ESI

PRESERVATION OF ESI

See also PRE-LITIGATION MANAGEMENT OF ESI

Litigation holds, § 4:3

Scope of obligation, § 4:2

PRESERVATION OF ESI HELD BY OTHERS

See also MANAGEMENT OF ESI ONCE PROCEEDING INITIATED

Anton Piller orders, § 9:2

Discovery against non-parties, § 9:6

Failure to preserve, § 4:4

Norwich Pharmacal orders, § 9:5

Preservation orders, § 9:3

Privilege issues, § 9:4

PRE-TRIAL AUTHENTICATION OF ESI

See also MANAGEMENT OF ESI ONCE PROCEEDING INITIATED

Authentication by agreement

generally, § 10:1 to § 10:3

effect of agreement at trial, § 10:3

nature of agreement, § 10:2

Pre-trial admissions

generally, § 10:4 to § 10:9

how to seek admissions, § 10:8

permissible scope, § 10:6

seeking admissions respecting authenticity, § 10:7

use of pre-trial admissions at trial, § 10:9

what admissions to seek, § 10:8

what needs to be admitted, § 10:5

Pre-trial examinations of parties

generally, § 10:10 to § 10:14

exploring opponent's case, § 10:11

PRE-TRIAL AUTHENTICATION OF ESI—Cont'd

Pre-trial examinations of parties—Cont'd
gaining admissions on oral examinations, § 10:12

identifying ESI on pre-trial examinations, § 10:13

use of ESI at trial, § 10:14

PRIVILEGE

See PRODUCTION OF ESI; PRESERVATION OF ESI HELD BY OTHERS

PROBATIVE VALUE

Generally, § 11:23 to § 11:35

Balancing probative value and Prejudicial Effect, § 11:34

Can prejudice be offset by direction to jury, § 11:35

Demonstrative evidence, § 11:30

Evaluating prejudicial effect, § 11:32

Issue, § 11:28

Meaning of “Prejudice,” § 11:31

Prejudicial effect, weighing, § 11:27

Reliability of evidence affects, § 11:29

PRODUCTION OF ESI

See also MANAGEMENT OF ESI ONCE PROCEEDING INITIATED; DISCLOSURE OF ESI

Confidentiality concerns, § 6:29

Costs

generally, § 6:36 to § 6:39

taxable items, § 6:39

Devices as documents, § 5:19

Limiting scope of production

generally, § 5:20

cost/benefit analysis, § 5:23

intrusive nature of production, § 5:24

proportionality, § 5:21

redact irrelevant information, § 5:19.50

Minimizing review

generally, § 6:24 to § 6:27

agreement on scope of production (“meet and confer”), § 6:25

limiting review of own documents, § 6:27

redact irrelevant information, § 5:19.50

rules of court, § 6:26

Obligation to provide assistance, § 6:23

PRODUCTION OF ESI—Cont'd

Obligation to provide proprietary software, § 6:23

Privilege

generally, § 6:30 to § 6:35

adequate description of privileged document, § 6:32

inadvertent waiver of, § 6:33

preserving, § 6:34

sanctions for improper dealings with privileged documents, § 6:35

whether ESI is privileged, § 6:31

Process

generally, § 6:10 to § 6:20

advising client, § 6:12

capturing relevant ESI, § 6:14

communicating with opposing counsel, § 6:13

effective coding and standards, § 6:17

ground rules, § 6:11

identification and treatment of duplicate documents, § 6:20

identification and treatment of parent documents, § 6:20

software choice, § 6:15

standards for coding, § 6:18

standards for imaging, § 6:19

transfer media, § 6:16

Producing ESI in native formats, § 6:22

Producing ESI in other prescribed formats, § 6:22

Protocols and orders prescribing manner of production

generally, § 6:2 to § 6:9

Nova Scotia, § 6:8

Ontario Guidelines, § 6:4, APP B

Ontario Model Precedents, § 6:7

Practice Directions, § 6:5, APP C

Saskatchewan and Manitoba, § 6:6

Sedona Principles, § 6:3, APP A, APP C

Uniform Electronic Document Rules, § 6:9

Requests for further production, § 6:28

Scope of production obligation, § 5:11, § 5:19.50

Special considerations when government is a party, § 6:21

PRODUCTION OF ESI (CRIMINAL PROCEEDINGS)

See also MANAGEMENT OF ESI ONCE PROCEEDING INITIATED

PRODUCTION OF ESI (CRIMINAL PROCEEDINGS)—Cont'd

Lack of perfection, § 7:5

Requirement to disclose electronically, § 7:3

Requirement to provide software, § 7:4

Special circumstances, § 7:6

Sufficiency of electronic disclosure, § 7:2

REAL EVIDENCE

See also TRIAL USE AND PRESENTATION OF ESI

Audiotapes

generally, § 12:20

admissibility of, § 12:21

authentication of audio recording, § 12:22

complete recording of transaction, § 12:23

probative value not overborne by prejudicial effect, § 12:26

quality of recording, § 12:25

recording not misleading or confusing, § 12:24

use of transcripts of audiotapes, § 12:27

Classification of ESI as

generally, § 12:3 to § 12:5

distinction between ESI that is real evidence and other forms of evidence, § 12:4

non-hearsay nature of ESI from automated processes, § 12:5

Digital photographs, § 12:19

ESI from internet, § 13:10

ESI in possession of individual, § 12:18

Establishing location, § 12:37

Internet ESI, § 12:17

Meaning of, § 12:2

Metadata

generally, § 12:13

embedded, § 12:16

substantive, § 12:15

system, § 12:14

Proof of authenticity and threshold reliability

generally, § 12:6 to § 12:10

authenticity of ESI in possession, § 12:8

proof of authenticity, § 12:7

INDEX

REAL EVIDENCE—Cont'd

- Proof of authenticity and threshold reliability—Cont'd
 - proof of authorship of electronic documents, § 13:7.5
- Tendered for other purposes, § 12:11
- Transient ESI, § 12:36
- Video recordings
 - generally, § 12:28
 - admissibility of, § 12:29
 - authentication of, § 12:30
 - Canada Evidence Act, § 12:35
 - discretion to exclude, § 12:34
 - display video evidence at trial, § 12:33
 - editing, § 12:32
 - quality of video and audio reproduction, § 12:31

RE-CREATIONS

- See DEMONSTRATIVE EVIDENCE

RELEVANCE

- See also ADMISSIBILITY
- Generally, § 11:2
- Legal relevance, § 11:3
- Logical relevance, § 11:3

RELIABILITY

- See AUTHENTICITY AND RELIABILITY
- Generally, § 11:11
- Common law, § 11:13
- Proof of threshold
 - common law, § 11:14
 - ESI from automated systems, § 11:15
 - ESI from human sources, § 11:16
- Purpose dictates nature of evidence required, § 11:12
- Threshold, § 11:13

SEDONA PRINCIPLES

- Generally, § 6:3, APP A

SIMULATIONS

- See DEMONSTRATIVE EVIDENCE

SPOILIATION

- See also MANAGEMENT OF ESI ONCE PROCEEDING INITIATED
- Avoiding problem of, § 8:6
- Consequences of finding of, § 8:3
- Elements of, § 8:2
- Emerging tort of, § 8:5

SPOILIATION—Cont'd

- Practice Considerations, § 8:4, § 8:4.50

TORONTO REGION COMMERCIAL LIST E-DELIVERY PROJECT

- Generally, APP G

TRANSIENT ESI

- Generally, § 2:8
- Organization of transient ESI in computers, § 2:10
- Real evidence, § 12:36

TRIAL USE AND PRESENTATION OF ESI

- Admissibility generally, see ADMISSIBILITY
- Afterword, § 15:27
- Communicating with the court
 - generally, § 15:2 to § 15:13
 - Alberta, § 15:4
 - British Columbia, § 15:5
 - Federal Courts, § 15:3
 - Manitoba, § 15:12
 - Newfoundland and Labrador, § 15:6
 - Nova Scotia, § 15:7
 - Nunavut, § 15:11
 - Ontario, § 15:8
 - Other Provinces and Territories, § 15:13
 - Prince Edward Island, § 15:9
 - Saskatchewan, § 15:10
 - Yukon, § 15:12.50
- Demonstrative evidence, see DEMONSTRATIVE EVIDENCE
- Documentary evidence, see DOCUMENTARY EVIDENCE
- Practice Direction, § 15:14, APP C
- Preparation for trial, § 15:15
- Real evidence, see REAL EVIDENCE
- Trial
 - generally, § 15:16 to § 15:24
 - digitized mapping, § 15:23
 - equipment, § 15:19
 - external communication, § 15:24
 - preliminary considerations, § 15:17
 - preparation, § 15:18
 - software and database, § 15:20
 - technician, § 15:21
 - transcripts, § 15:22
- Trial record, § 15:25
- Written argument, § 15:26

VIDEO EVIDENCE
See REAL EVIDENCE