



UNIFORM LAW CONFERENCE OF CANADA

ELECTRONIC DOCUMENT RULES

REPORT OF THE WORKING GROUP

**Presented by
Crystal O'Donnell,
Heuristica Discovery Counsel LLP**

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For more information, please contact
info@ulcc-chlc.ca

1. Introduction

[1] The goal of this project is to develop harmonized rules governing the production of electronic documents in civil and administrative proceedings. A description of the background of the project and progress is outlined in the Working Group’s August 14, 2018 report and will not be repeated for the purpose of this report.

[2] The purpose of this report is to discuss the amendments to the draft Rule in response to questions and feedback received at the ULCC meetings in Quebec City. This report will also outline the Working Group’s plan to move forward with this project.

2. Revisions

[3] The Working Group is appreciative of the feedback received during the presentation, most of which is incorporated in the revised draft. The revisions are described briefly by Rule below. Quebec provided helpful feedback regarding the terminology used. The updated draft Rule with Commentary is set out in Schedule A to this Report.

Rule 1

[4] The phrase “other technology” was removed, and language similar to what was used in Saskatchewan’s Electronic Information and Electronic Documents Act:

“electronic” means created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means;

Rule 2

[5] The “Proportionality Rule” was moved to the first of the substantive rules after the definitions to better reflect that it is an overarching Rule applicable to all of the Rules. The reference to “ESI” was removed, reference to third parties was added to 2.1 (e), and, 2.1 was revised to read:

The Court and the parties shall apply this Rule in a manner that is proportionate to:

- a. the nature and scope of the litigation;
- b. the importance and complexity of the issues and interests at stake and the amounts in controversy;
- c. the relevance of the available Electronic Documents;
- d. the importance of the Electronic Documents to the Court's adjudication in a given case; and,
- e. the costs, burden and delay that the discovery of the Electronic Documents may impose on the parties or third parties, to the importance and complexity of the issues, and the amount in controversy.

Rule 3

[6] The Application Rule was moved to after “Proportionality” and was revised to make it clearer that it applied to all proceedings that require the disclosure or production of electronic documents, including proceedings with both “paper” or other non-electronic evidence.

Rule 4

[7] Rule 4 was moved to follow the “Application” rule and the words “on consent” were added to address the concern raised that it should be clear the parties could consent. The commentary was modified to specify that the “steps” included both discovery and hearing stages.

Rule 5

[8] As suggested, we added the phrase “or could reasonably be anticipated” to provide for an objective standard. The phrase “in the case of Electronic Documents” was removed as redundant.

Rule 6

[9] Along with proportionality, discovery planning is a critical component of the proposed harmonized Rule. Proper planning is the most effective way of minimizing cost and disputes with Electronic Documents. It is important to keep in mind that simple, lower dollar value matters can have simple plans. Planning does not increase cost or complexity. Planning reduces costs, and if there are disputes regarding the scope of production, they should be dealt with early to avoid the extraordinary expenses of having to “re-do” any aspect of the discovery process.

[10] While the rule requires the parties to make best efforts, the proposed approach ensures the matter can proceed, removing the ability to intentionally stall the proceeding because the parties do not have a discovery plan.

[11] Minor revisions to this rule include adding “or produce” to subrule 6.8 and “relevant” to 6.3(c) and 6.4(c).

[12] To address the concern that parties will bring motions purely on the question as to whether “best efforts” were used to agree to a plan where documents are produced pursuant to subrule 6.3, subrule 6.6 was revised to read as follows:

6.6 A party may apply to the Court for an order compelling another party or other parties to comply with the Discovery Plan or to comply with Rule 6 on those terms the Court may order. Parties may not bring a motion on the question as to whether “best efforts” were used to develop a discovery plan when documents are produced by any party pursuant to sub-rule 6.3.

[13] In the event parties produce documents pursuant subrule 6.3 and 6.4, parties are still able to bring a motion to compel a plan for other aspects of the discovery or proceeding, or to challenge the approach a party took to produce documents without a plan. The failure to reasonably develop a plan can be considered by the court when dealing with costs. (See subrule 8.2 (c)).

Rule 7

[14] The phrase “subject to Rule 3” (the proportionality rule) was removed from subrule 7.1 to address the concern that specifically referring to proportionality on this one subrule could be interpreted to mean that it was intentionally not referred to in the other subrules. The intent is that proportionality be an overarching principle for the entire set of rules, not just Rule 7.

[15] Similar to Rule 6, rule 7 was also revised to add the word “produce” to subrule 7.3 and removed the word “relevant” from subrule 7.1(a) as it was redundant.

Rule 8

[16] No revisions were made to Rule 8, as no comments were provided during the presentation.

Resolutions

[17] The resolutions passed in August were:

THAT the report of the working group be accepted as modified by the direction of the Civil Section; and

THAT the recommendations in the report and the directions of the Civil Section be incorporated into the Uniform Rule and commentaries, and circulated to the jurisdictional representatives. Unless two or more objections are received by the Projectors Coordinator by November 30, 2018, the *Uniform Electronic Documents Rules* should be taken as adopted as a Uniform Rule and recommended to the jurisdictions for adoption.

Next Steps

[18] Once the proposed *Uniform Electronic Documents Rules* are adopted, our group will continue working to distribute the draft Rule to the various Rules Committees for discussion and implementation. This work will include correspondence and communiques to provide background information, policy goals and detailed rationale for the proposed procedural rule.

[19] In addition, our working group will work to raise awareness and support for the proposed Rule through professional education conferences, social media, speaking engagements and presentations.

[20] The Working Group understands that the jurisdictional representatives did not want to pass resolutions regarding the implementation phase. The Working Group is hopeful however that jurisdictional representatives will support the ongoing work of the Working Group through introductions to known Rules Committees.

1. Our Working Group plans going forward include: The Working Group will prepare a list of contacts for the various Rules Committees.
2. Members of the Working Group will be assigned as liaisons with the Rules Committees.
3. Correspondence and communiqués will be drafted to provide background information, policy goals and detailed rationale for the proposed procedural rule.
4. Meetings will be scheduled with the Rules Committees to present and discuss the policy and procedural goals with the various Rules Committees to encourage adoption.

Recommendations of the Project Team to ULCC

The Project Team’s recommendations to the Conference are as follows:

1. Approval of the draft Rule;