

**E-DISCOVERY AND
DOCUMENT DISCLOSURE**

Prepared and Presented by:

ALAN G. McINTYRE

**MCKERCHER LLP
Barristers and Solicitors
500 – 2220 – 12th Avenue
Box 1037
Regina, Saskatchewan.
S4P 3B2**

With offices in Regina and Saskatoon.

**Regina: (306) 352-7661
Saskatoon: (306) 653-2000**

E-DISCOVERY AND DOCUMENT DISCLOSURE

I. INTRODUCTION

What documents are relevant for retention or disclosure is a little like what Justice Potter Stewart of the U.S. Supreme Court said when he defined pornography: “One knows it when one sees it” *Jacobellis v. Ohio* (1964) 376 U.S. 184.

The problem with such an approach is that manual examination would be required in every case and virtually all documents making storage access locatability and production, among other things, a very costly and time consuming process.

The purpose of this paper is to serve as a primer on e-discovery and document disclosure. This presentation is focused primarily from a litigation perspective.

II. WHAT IS A DOCUMENT?

The *Queen’s Bench Rules of Saskatchewan* provide the following in Rule 211:

211 In this Part, “document” includes information recorded or stored by means of any device and includes an audio recording, video recording, computer disc, film, photograph, chart, graph, map, plan, survey, book of account or machine readable information.

It is fair to say that this definition is not exhaustive. It simply illustrates information stored in any form is producible if relevant for the purposes of litigation.

III. WHAT IS ELECTRONIC DISCOVERY (E-DISCOVERY)?

Electronic discovery refers to the discovery of electronically stored information including e-mails, web pages, word processing files and virtually any information that is stored on a computer or other electronic device. That information as referenced in Rule 211 would include DVD's, CD's, magnetic tapes, random access memory, etcetera.

“Paper Discovery” is the old method typically used involving discovery or disclosure of writings on paper which can be read without the use of electronic devices.

In terms of what must be produced, our courts have adopted a “broad relevancy” test. This test is predicated on discovery as a wide-scope while relevance imposed some broad limits, issues of admissibility and weight have little, if anything, to do with that matter.

How e-discovery “modifies” this Rule will be developed more fully hereafter.

IV. HOW ARE ELECTRONIC DOCUMENTS DIFFERENT FROM PAPER DOCUMENTS?

According to the “Sedona Canada Principles” paper addressing electronic discovery (January 2008), there are six broad categories defining the difference between electronic and paper documents. Those include:

1. Volume and ease of duplication.

It is no surprise that electronic documents and information is created far more easily and quickly than paper documents. Today, the vast majority of businesses in Canada and as well as most household are now connected to the internet.

Take for example a small to medium sized business of 100 employees each of whom receives 25 e-mails a day. Those e-mails total 2,500 per day. Further, presume there are 225 working days per year. That small organization alone will therefore generate 562,000 e-mails a year, without reference to sharing or duplication.

2. Electronic documents are harder to dispose of.

Electronic documents are hard to dispose of even when documents are “deleted” they can continue to exist. Further, it means that documents are information that can accumulate in places hidden from documents custodians.

3. Metadata

Electronic documents contain metadata which is information created by the operating system about a file that allows that file to be stored or retrieved at a later date. Metadata is not typically readily accessible. However and more materially, metadata usually includes information on file designation, creation, editing, revisions, etcetera and can be all reviewed should a person know how to access the metadata on any particular electronic document.

While there may be times when metadata is relevant, for example, the creation date of a document for the purposes of patent, or theft of trade secrets, it can also cause problems. Anecdotally, counsel has been advised of a situation where a document was provided in its native form, for example a word document to opposing counsel. Opposing counsel was able to access the metadata, look at the revisions and ultimately determine who had written the document allowing them to have access to information they were not entitled to, in this case the expert author of a report for the purposes of litigation.

4. E-Documents are Often Automatically Updated.

This may occur through user input but may also occur automatically. Therefore, for example, if there are auto updates it is not probable that all will be preserved. Similarly, standard office applications like e-mail and spreadsheets may change dates and times. These problems are compounded by sharing data files among “virtual work groups”.

5. Electronic data may need a computer program which can become obsolete.

It seems that the speed at which technology improves especially with respect to computers is developing exponentially. With faster computers and more memory, new programs will be created rendering others obsolete. This means that it may result in electronically stored information which could become difficult to access.

6. Electronic documents are searchable but may be in many locations.

Typically, paper documents are consolidated in any filing cabinet but that is not the case with electronic documents. They may be held in any number of devices (desktop, hard drives, laptops, servers, blackberries, CD's, disks, etcetera). The electronic information may be identical or it may be earlier versions of a completed work.

Having the information in electronic form allows great search ability which may save time.

V. E-DATA

With the proliferation of electronic devices and increasingly greater memory at a reduced cost, it is inevitable that more and more information will be stored which therefore must be searched and produced if necessary.

Everyone knows what a gigabyte of information is even if in just reference to an i-pod holding music, videos, etcetera. From a business application, one gigabyte of text information equals 33 boxes of paper.

One DVD will hold about five gigabytes or 155 boxes of information.

One terabyte which is 1,000 gigabytes of necessity would hold 33,000 boxes of information, or in this case a semi trailer load.

VI. WHERE TO FIND GUIDANCE

Electronic document production based on how those documents are created is obviously very different than paper discovery. However, most of the rules engaged in both record keeping and document production for various reasons were designed to deal with paper. The difficulty is that the rules themselves do not provide meaningful guidance for litigants, courts, lawyers or others involved in the business and judicial process.

In the U.S., these problems were recognized in a case called *Williams v. Sprint/United Management Co.* (205) 230 F.R.D. 640 wherein the court found insufficient guidance in either the Federal Rules or case law and relied primarily on the Sedona conference principles and comments for guidance on the emerging standards of electronic document production.

Based on the Sedona Canada Principles, the Sedona Principles address electronic discovery.

The Sedona Canada principles are 12 in number. They are as follows:

1. Electronically stored information is discoverable.
2. In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account:
 - (a) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake;
 - (b) the relevance of the available electronically stored information;
 - (c) its importance to the court's adjudication in a given case; and
 - (d) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.
3. As soon as litigation is reasonably anticipated, parties must consider their obligation to take reasonable and good faith steps to preserve potentially relevant electronically stored information.
4. Counsel and parties should meet and confer as soon as practicable, and on an ongoing basis regarding the identification, preservation, collection review and production of electronically stored information.
5. The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.
6. A party should not be required, absent an agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information.

7. A party may satisfy its obligation to preserve, collect, review and produce electronically stored information in good faith by using electronic tools and processes such as data sampling, search or by using selection criteria to collect potentially relevant electronically stored information.
8. Parties should agree as early as possible in the litigation process on the format in which electronically stored information will be produced. Parties should also agree on the format, content and organization of information to be exchanged in any required list of documents as part of the discovery process.
9. During the discovery process parties should agree to or, if necessary, seek judicial direction on measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronic documents and data.
10. During the discovery process, parties should anticipate and respect the rules of the forum in which the litigation takes place, while appreciating the impact any decisions may have in related actions in other forums.
11. Sanctions should be considered by the Court where a party will be materially prejudiced by another party's failure to meet any obligation to preserve, collect, review or produce electronically stored information. The party in default may avoid sanctions if it demonstrates the failure was not intentional or reckless.
12. The reasonable costs of preserving, collecting and reviewing electronically stored information will generally be born by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.

It is fair to say that the Sedona Canada principles will become the guiding force across Canada for electronic document disclosure.

I propose to review, at least briefly, some of the case law in areas which might have application to any businesses. After reviewing digest excerpts, I propose to formulate a list of practical considerations and how these cases may relate to the day to day operation of many businesses.

VII. SCOPE OF PRODUCTION AND DISCOVERY

In *Dulong v. Consumers Packaging Inc.*, [2000] OSCJ, 161, the court held that a request from the plaintiff to the corporate defendant to search its entire computer system for e-mails relating to matters in issue in the litigation was properly refused as oppressive.

“Matters in issue” or “touching the matters in issue” is a common phrase used in virtually all civil rules relating to discovery.

In *Mathieson v. Scotia Capital Inc.*, 2008 CanLII 45409 (Ont. Sup.Crt) 2008-09-09 the plaintiff who was suing for wrongful dismissal sought production of 25,000 e-mails revealed in a search on the plaintiff’s name among the e-mails stores of eight corporate principals and their assistants covered during one year prior to his termination. Here, the court determined that there was no evidence that the documents sought were relevant or “missing” and based on the lack of evidence, the court said that there was no reason to believe that the documents sought had any relevance to the issues in the action.

In *Passerello v. Minaco* 2007 CanLII39891 (Ont.Sup.Crt) 2007-02-08, the court held that in a share purchase transaction dispute, the defendant had produced very few e-mails. The court concluded that there had been inadequate search of electronic sources of information. The court ordered a proper search to be done and also the defendants were to advise of the nature and extent of the scope of their search.

VIII. PRESERVATION OF EVIDENCE

In *Doust v. Schatz* 2002 SK.C.A. 129 our Court of Appeal stated that:

A party is under a duty to preserve what he knows or reasonably should know, is relevant in an action. The process of discovery of documents in a civil action is central to the conduct of a fair trial and the destruction of relevant documents undermines the prospect of a fair trial.

IX. SPOILIATION

Spoilation is the destruction of evidence, usually intentionally. It is related to the issue of preservation of evidence. It is probably going to be the single biggest growth area with respect to e-discovery. In *Dreco Energy Services Ltd. v. Wenzel* 2008 AB.Q.B. 489, the parties were fighting about what the plaintiff said was the deliberate destruction of evidence by the defendants and previously contained in their computers. The court made orders for forensic inspection of the computers. However the method of inspection became contentious and very expensive. The plaintiffs sought reimbursement of their costs for the forensic inspection but the defendants denied responsibility. In reviewing all the matters, the judge determined that it would be best reviewed and ruled upon by the trial judge. However, the plaintiff argued there was still a real possibility that the defendants may be held responsible for an expensive forensic inspection requested by the plaintiffs which they would then use against the defendants to prove their case.

In *Galenzoski v. Awad* 2000 SK.Q.B. 436, Madam Justice Hunter dismissed a claim in relation to spoliation because as she said there was no duty to preserve the records at the time they were destroyed which destruction occurred before the litigation commenced. It is worth noting that in Canada the test now implied is whether or not litigation is “reasonably foreseeable” which if it were, even if a claim had not been commenced, the spoliation issue could arise.

In *Jay v. D.H.L.*, PEISCTD 13, the Prince Edward Island Supreme Court Trial Division dismissed a Statement of Defence and recommended the plaintiff proceed with a motion for default judgment. The case involved the D.H.L. courier business. The plaintiff had sought disclosure of evidence of revenue by other contractors working for D.H.L. in the form of weigh bills and associated invoices. That request had been in place since 2003. The court ordered production of those items in 2006 but by October of 2006 the plaintiff sought to strike out the defence for non-compliance. More time was granted to the defendants. The evidence revealed that since the year 2000, weigh bills had been scanned electronically and thereafter destroyed after nine months. Such a policy continued even after the plaintiff had specifically requested such information in 2003. When it was discovered that the backup processes in place had not been strictly followed

and though some of the images could be recovered, the indices for transactions was irretrievable. That led to the defence of the plaintiff's claim being dismissed.

X. PROPORTION AND MARGINAL UTILITY

In relation to proportion and marginal utility, this issue was considered in *Innovative Health Group Inc. v. Calgary Health Region*, [2008] ABAC 219. In a case management conference, that judge had ordered production of the image hard drives in specie that is (in their present state). The Court of Appeal commented about electronic discovery and stated:

The wide spread use of computers for record keeping, communication and information storage has vastly expanded the breath of potential discovery and litigation. Although technology is helpful in the same sense that it makes fuller disclosure possible, it also creates an unfortunate paradox. The cost of sorting and producing all the relevant information in a party's possession may put litigation beyond the economic ability of a vast number of litigants. Thus, it is necessary to ask such questions as:

How much discovery is enough?

Do all cases justify the same type of disclosure?

Should there be some rule of proportionality that governs production based upon the issues in the law suit?

How is irrelevant and immaterial information protected from production in those situations where a court orders productions of hard drive for examination by an expert?

Who pays the cost?

In a 2008 Ontario Supreme Court case *Vector Transportation Services Inc. v. Traffic Tech Inc.* 2008 CanLII 11050, the plaintiff sued for wrongful solicitation of clients by a former employee now with the defendant. A million dollars was at stake. The defendant had not produced e-mails that the plaintiff said he could prove had been in his computer. The court reviewed principle 2 of the Sedona Canada principles (proportionate discovery) and decided that the plaintiff had produced evidence of the existence of

relevant electronic information on the laptop and concluded that there be an order for the production and inspection of that computer.

XI. DOCUMENT RETENTION POLICIES

In *Weber v. Erb and Erb Insurance Brokers Ltd.* a 2006 Ontario Supreme Court case (CanLII 9987), the court dealt with document retention and the lapse of time. This case involved a dispute between insurance brokers. There was a contractual relationship but most of the contracts were oral. However, there were documents relating to aspects of the oral contract. The claim in question was sued out in 1996. There have been requests for document production from the plaintiff but after ten years (2006) documents still had not been produced. Further, the normal retention period for business records had expired. Based on that, the court found that there was a strong probability that the February, 1996 records in question no longer existed. The plaintiff offered no evidence to the contrary. Based on that, the court dismissed the plaintiff's action.

In *Moezzam Saeed Alvi v. YM. Inc.*, the Ontario Supreme Court held (2003 CanLII 15159) that a properly run company should have a document retention policy requiring retention of files for a reasonable period of time extending beyond the limitation period for a civil cause of action and the limitation period for a reassessment under the *Income Tax Act*. Failure to do so risks a court making an adverse inference on the absence of evidence.

At the time that case was decided, most limitation periods for contract or tort were six years. Now typically there has been a reduction (with some exceptions) to two years, however, there is an ultimate limitation period of 15 years.

In *Ontario v. Johnson Controls Ltd.*, [2002] CanLII 14053, Ontario brought a claim against the defendant in respect to damages paid for personal injuries sustained from a fall on to ice at one of the plaintiff's buildings. That building was managed in part by Johnson under contract to the government. Briefly, in April of 1993 a pedestrian was injured by slipping on snow and ice at the government building in question. The contract between Johnson and the government expired in 1995. Johnson closed its office in Sudbury and moved its furniture and records back to Markham, Ontario. Between 1997 and 1999 a box of Sudbury files disappeared. It was only in 1998 that the government

advised Johnson of the action being brought against it. Johnson claimed that based on the delays it should not be liable. The court said that Johnson bears substantial responsibility for any loss of its documents. There was no evidence of any document retention or destruction policy. A policy with a short retention period might offer some justification to dispose of “smoking guns” and other prejudicial evidence. Any such policy that permits destruction within much less than ten years after an event, probably fails to take reasonable account of the standard six year limitation period under the *Limitations Act* for actions in tort or contract, plus some period to allow for a discoverability, which allows for discovery of the damage and those responsible prior to the commencement of the limitation period. Additionally, the court also held that the absence of a document retention policy also constitutes a failure to recognize the court’s ability to draw an adverse inference in certain circumstances for failure to produce a document and a failure to address the practical need to retain documents once notice of a proceeding has been received.

XII. DISCLOSURE PRIVILEGED AND PRIVATE COMMUNICATIONS

One of the big issues is that if computer hard drives, for example are accessed, there may be private information on there as well. In addition there may be privileged information that is communication between solicitor and client. Nevertheless, both the private communications and privileged material must be separated from other material which might be relevant and producible.

In the Decision *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 S.C.C. 36, the Supreme Court dealt with a situation where a plaintiff’s lawyer seized electronic documents from the defendants but in seizing those documents found items which were solicitor/client privileged. The plaintiff’s solicitors reviewed at least partly, those documents. The defendants sought to have the plaintiff’s lawyers removed. Ultimately, the Supreme Court found that the plaintiff’s lawyers should be removed.

Practically, what this means is that if privileged information was reviewed by your lawyers having been received from counsel opposite, there is a good chance that they could be disqualified from acting. It would mean that someone new would need to be retained and instructed likely at substantial expense.

One solution in such a circumstance is to have the documents reviewed by a third party inspector. That would allow at least some initial considerations about privilege to remain in tact and not result in the wholesale removal of counsel.

XIII. COST SHIFTING

I have already referred to the *Vector Transportation Services* file where the court allowed a forensic examination of the defendant's computer hard disk but the plaintiff's were required to pay for it.

XIV. METADATA HIDDEN INFORMATION – DELETED INFORMATION

In a B.C. Supreme Court case entitled *Veltheer v. Prachnau*, B.C.S.C. 511, Madam Justice Sinclair Prowse said:

Deleted material may still need to be produced if it is relevant. With respect to the documents that are filed and the electronic devices and/or the computers, the Plaintiff may find the material of the Defendant to be very helpful as it is explained as to what in fact is in the possession or under control of a person having such electronic devices or computers. That is, documents are still possessed and in control even though they may have been deleted or they thought they had been deleted from the hard drive.

What this case suggests is that in the right circumstances, a business could be ordered to take steps to attempt to recover information which has already been deleted but still available in some form or another on the hard drive. The expense and difficulty related with this is obvious.

XV. WHAT TO DO IF YOU RECEIVE A LETTER REQUIRING “LITIGATION HOLD” OF ALL ELECTRONIC DOCUMENTS

In an excellent paper called “Swimming in a Sea of Production” Mark Nelson and others detail considerations for managing large document production. Those authors detail a number of things which include:

1. Memorandum to each individual with potentially responsive documents explaining they should retain all such documents and prevent the deletion or destruction of any materials within their care or control. It is noted that a litigation hold suspends a company's normal document retention practice and policy.

In the US a duty arises to preserve evidence when litigation is reasonably foreseeable. In Canada the test appears similar being reasonably probable.

2. Step two would be to narrow document requests. That is done in the following ways:
 - (a) Narrow the individuals to be notified and subject to providing a response for documents in storage. The authors note that with a large number of individuals, it can be useful to establish "tears" of custodians using relevance as a guideline.

Subject Matter

- (b) The authors note that limiting the subject matter scope is fundamental, if at all possible. It is important to work closely with the client to understand the specific categories or documents that may be eliminated through narrowing the requests. They state that the goal should be to craft proposed modifications that eliminate the most burdensome aspects of the request while retaining sufficient scope to capture the relevant material sought by the other party.
3. Using the computer and a "set of bookends" – i.e. start and stop date, can narrow down the focus quite significantly.
4. Keyword searches - this allows fairly rapid collection and organization of relevant material. It does not however, forego the need for subsequent review by lawyers for a review of relevance and privilege and in their own right can be quite costly.

While it is beyond the scope of this paper, the “Swimming in a Sea of Production” article provides a very good summary about how to deal with police or similar administrative agencies if a search warrant were executed.

XIV. ELECTRONIC DISCOVERY REQUESTS

Two of the most active lawyers on the Canadian scene concerning this issue are Martin Felsky and Peg Duncan. They write for various publications including Lawyers’ Professional Indemnity Company. In their article “Making and Responding to Electronic Discovery Requests” (originally appearing in Law Pro Magazine “e-Discovery” 2005) these learned authors point to some of the changes necessitated by e-Discovery. In the guise of an electronic discovery request by plaintiff’s counsel to defendant’s counsel in a contract dispute, they detail some very relevant considerations:

1. Fundamentally, for electronic discovery to work counsel must meet and confirm (this following an American model) but is very important;
2. While most lawyers will ask for the standard e-discovery items (email, spreadsheets and word processing documents), a growing area and a major aspect of e-discovery is structured data, in other words accounting applications, customer databases, enterprise resource programs that may contain millions of records not easily converted to a “document”.

In order for e-discovery to be effective, the authors identify several critical issues which should be addressed (whether by court order or by agreement) including:

1. The preservation of relevant information;
2. The designation of key custodians and their readily identifiable electronic documents;
3. The identification of shared server folders to which the designated custodians have access;
4. The acceptable electronic files;

5. Record collecting procedures, including de-duplication, key words etcetera;
6. Identification of an agreement as to producible metadata and other electronic files;
7. The form of the production.

These steps will apply to virtually all e-discovery. The only issue is whether or not they will form part of a court order, become part of the Rules of Court or simply be the subject of a written agreement between counsel.

Bearing in mind that lawyers are responsible for litigation management, in order to be cost effective and comply with discovery requirements, they need to have their clients understand what they must do.

Martin Felsky in an article entitled “Principles of Litigation Management” (July 31, 2008 found at www.slaw.ca) details ten principles for lawyers. Clients being aware of what they are, and liaising with their counsel can only save time and money in the long run for both the client and the law firm there by saving money. Those ten principles are:

1. Satisfy the legal and business requirements of your clients. Under this point Mr. Felsky indicates that out sourcing of document review to e-discovery law firms, even off shore may be necessary to make the most effective use of client dollars;
2. Keep clients informed of the nature, costs and benefits of electronic evidence. Under this heading Mr. Felsky indicates that communication is primarily the key as between the lawyer and the client and especially what is happening to their case;
3. Communicate clearly your vision for the firms approach to managing litigation. Here, the author indicates that the firm must have a vision about how to deal with electronic documents which must be communicated clearly within the firm, to clients and to trusted business partners;
4. Use technology effectively to enhance the quality of advocacy. The fundamental principle here is using technology to be a better advocate at a reduced cost. If the technology does not accomplish that it is not doing its job;

5. Plan every case and allocate sufficient resources. Here the author indicates the critical elements are a sponsor, a manager, a budget, a timeframe, measurable objectives, regular communication, risk assessment, and sufficient resources;
6. Make sure every member of the litigation team understands his or her role. Here the author makes the point that clarification of roles and responsibilities ensures the highest level of competence in client service and also boosts morale;
7. Educate, train and support all members of the team. The author sees this point as a corollary to points 5 and 6. If education and training is not done, it appears almost inevitable that there is an increased risk of serious errors;
8. Cooperate with opposing counsel and production. The author here indicates that their judges are asking counsel to do it, guidelines are emerging. The sooner counsel has an effective meeting and confers what the process is to be will avoid wasting client money. Document production even within the context of our adversarial system must be conducted co-operatively or it fails. (As a side note this is consistent with the comment of Mr. Justice Talis in *Doust v. Schatz*);
9. Adopt and adapt industry standard production protocols for use within the office. Here the author notes that the Canadian Judicial Council on some superior courts have shown leadership in establishing protocols for the exchange of documents in electronic format. Firms should be establishing their own version and using it in every case. As a side note the Alberta Court of Queen's Bench in practice note 14 recognizes this issue;
10. Document and follow best practices for handling original client data. Mr. Felsky points out that frequently firms receive client data not knowing where it came from or how it was collected. He correctly points out that this is not only a serious issue in terms of the completeness of any Statement as to Documents or Affidavit of Documents that may under cut the admissibility of any such evidence.

XVII. PRACTICAL CONSIDERATIONS

Aside from the “dry as dust” case summaries, many business people may wonder what practical application this discussion has to their business. I submit there are a number of points that merit consideration:

1. Does your business have a document retention and destruction policy?
Some of the case law demonstrates this is fundamental in relation to whether an adverse inference should be drawn for a party not producing documents.
2. Is the staff aware of the document retention and destruction policy particularly those people involved in the information technology side of any business?
This relates to the “disconnect” between what courts and others might expect and what day to day users of the computers, PDA’s etcetera might expect. Rather than randomly deleting, carelessly storing, etcetera various documents, it is important that all involved understand their duties and obligations.
3. If members of the staff understand document retention/destruction policies for paper documents, has there been an opportunity to instruct them about how electronic documents are different especially as it relates to e-mails?
Fundamentally, the way we exchange information has drastically changed. It is so easy to create and disseminate information that it might be very difficult to determine where it all went or even if we have information we did not appreciate. This is a fundamental question your staff should ask itself before it automatically sends out e-mails to all and sundry.
4. Has the company liaised with its lawyers to determine what format counsel is using for the purposes of e-disclosure/discovery?
One of the Sedona principles involved mandates that there be an opportunity to meet and confer concerning the exchange of e-data. If you know what processes your lawyer might use, it can save the company a great deal of time in dealing with this issue when it becomes involved in a law suit, not if it becomes involved in a law suit.

5. A further question is to consider the method being used as a backup of digital data and whether files will be saved without corruption for the time necessary to let limitation periods expire.

This is not to suggest that companies must immediately change what they are doing with their data. However, bearing in mind how much data a company can produce, it is important that it be indexed and searchable.

XVIII CONCLUSION

E-discovery is a new area. Businesses that understand how to organize their information in such way that it is readily producible when needed and liaise with their lawyers to work together will mean that when the time comes, it will not be a monumental burden. While insurance policies do not presently address the issue, I expect that in the future exclusions will be written where firms that do not properly manage their electronic data will have to spend their own money for litigation E-Discovery which will not be a litigation expense covered by the policy of insurance.

All of which is respectfully submitted.

ALL OF WHICH is respectfully submitted this ____ day of _____, 2009.

Alan G. McIntyre

Prepared and Presented by:

ALAN G. McINTYRE

MCKERCHER LLP
Barristers and Solicitors
500 – 2220 – 12th Avenue, Box 1037
Regina, Saskatchewan S4P 3B2

RESOURCES

1. *Sedona Canada Principles*, found at www.thesedonaconference.org.
2. *Swimming in a Sea of Production*, prepared and presented to the Canadian Bar Association 2006 Annual Fall Conference on competition law.
3. *Electronic Requests*, found at www.lawpro.ca/magazinearchives.
4. *Alberta Queen's Bench Practice Note 14*, found at www.albertacourts.ab.ca.
5. *Principles of Litigation Management*, found at www.slaw.ca.
6. *E-Discovery Canada*, found at www.ediscoverycanada.com/blog.