

# **E-Discovery and Document Retention in Alberta**

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## **I. INTRODUCTION**

- e-discovery and document retention are two sides of the same coin;
- the number of coins spent on e-discovery is a direct function of the time spent on document retention;
- as business lawyers, you are often the first contact with the client; important for you to understand what to do, and equally important to understand when and why to do it.

## **II. E-DISCOVERY: THE PROBLEM**

- the intersection of technology and discovery;
- Rules 186-87 of Alberta Rules of Court provide the obligation for parties to produce “records” in the “possession, custody or power” of the party that are “relevant and material” to the issues in the law suit; and a “record” includes “the physical representation or record of any information, data or other thing that is or is capable of being represented or reproduced”; R.1(8) defines “record” to include “...any film..., negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom...” i.e., the Alberta Rules of Court contemplate production of electronic records;
- for further reading, see Alberta Practice Direction re “Guidelines for the Use of Technology in any Civil Litigation Matter” at [http://150.101.153.34/pdcanada/index\\_files/slide001.htm](http://150.101.153.34/pdcanada/index_files/slide001.htm), which is currently in draft form;
- Ontario and B.C. have published guidelines as well;
- e-discovery has become a tool for plaintiff’s counsel because companies can be forced to produce thousands of electronic records at significant expense; and, if

unable or unwilling to comply, can be sanctioned financially or, ultimately, by having its defence struck;

- must also consider duties of counsel: *Zubulake* re duty to: become familiar with client's document retention policies, information systems, and storage and back-up procedures; see also *Dreco Energy Services Ltd. v. Wenzel* 2005 A.B.C.A. 185;
- NOTE: metadata, back-up tapes and other non-active data may not have to be produced, but it may still have to be preserved.

### **III. DOCUMENT RETENTION: THE (PARTIAL) SOLUTION**

- a formal document retention/destruction policy, which is followed, serves several important purposes:
  - (i) limits the scope of production;
  - (ii) provides explanation for limited production;
  - (iii) facilitates implementation of "litigation hold";
  - (iv) eases location of records;
  - (v) enhances consistency through change of personnel or corporate control.

### **IV. KEYS TO A SUCCESSFUL DOCUMENT RETENTION POLICY**

1. Involve key decision-makers from corporate, legal and IT:
  - buy-in is 90% of the battle;
2. Identify categories of documents:
  - e.g., human resources and administration; accounting and financial; contract; correspondence; construction drawings;
3. Remember to account for all electronic sources:
  - i.e., PDA's, blackberries, etc.

4. Determine your record-keepers:
  - 100 is too many; 0 is not enough;
  - group leader, department manager, administrator?
5. Confirm the format:
  - i.e., some documents ought to be preserved in hard copy (e.g., executed contracts, construction drawings, etc.).
6. Analyze legal obligations for retention:
  - i.e., various statutes govern retention periods for different types of records;
  - outside counsel can assist here.
7. Provide for regular destruction of unnecessary records:
  - you can't produce what you legitimately don't have.
8. Include protocol for litigation hold:
  - identify record-keepers; issue internal hold and update regularly; if appropriate, mirror hard drives.
9. Reduce policy to writing:
  - particularly important in explaining destruction.
10. Keep it simple:
  - the policy is only as good as people's adherence to it.

## V. **WHAT DO I DO AND WHEN DO I DO IT?**

1. When:
  - as soon as litigation is contemplated or threatened (Ontario Principle 5).

2. What:

- advise your client immediately to *identify* potentially relevant electronic documents;
- advise your client immediately to *preserve* potentially relevant data sources including backup tapes, meta-data, residual and replicate data;
- *notify* opposing counsel to preserve their client's electronic documents and meta-data if relevant;
- work with your client's IT department (and perhaps an outside service provider) to properly *capture* relevant data – starting with active data;
- as soon as possible *meet with opposing counsel* to map out key discovery issues;
- *screen* captured data (perhaps using *automated* tools such as de-duplication, key word searching and random sampling);
- *review* screened data using a phased approach to minimize cost;
- *notify* opposing parties of any potential unavailability of data as soon as possible;
- agree with opposing counsel on a *format and protocol* for exchange of data – preferably electronic, not paper.

VI. **CONCLUSION**

- e-discovery is new, and the practice (of both the clients and the Courts) is developing;
- your best tool is knowledge; awareness of the issues at a minimum;
- do not stick your head in the sand; numerous conferences and resources available;
- ensure your organization or that of your client is not paralyzed by a litigation hold;
- it is manageable; it just needs to be managed.