

## COMPUTERS, BLACKBERRYS AND E-DISCOVERY

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A current topic of widespread interest in litigation circles in British Columbia — indeed around the globe — is e-discovery, the term given to the process of disclosure of electronically stored documents such as letters, memos, calculations, telephone notes or photographs. They can be contained on a computer's hard drive, a hand-held device such as a BlackBerry, a DVD, or any other means of digital storage. Until recently, not much attention was paid to the need for producing such documents but the increasing use of electronic communications and storage means that this subject has started to received more attention.

The courts are developing rules governing the need and requirement to produce such documents in litigation and procedural guidelines for producing and managing such documents during litigation. Litigants should understand the requirements for e-discovery so they may properly manage documents that they develop and receive during the day-to-day conduct of their business.

The British Columbia Supreme Court Rules define the term “document” as follows:

Document has an extended meaning and includes a photograph, film, recording of sound, *any record of a permanent or semi-permanent character and any information recorded or stored by means of any device. (author's emphasis)*

This definition is broad enough to encompass electronically stored data. Any doubts about this were put to rest by a Practice Direction issued by the B.C. Supreme Court on July 1, 2006 entitled “Re: Electronic Evidence,” the purpose of which is to provide “guidance to parties in the use of Technology for the preparation and management of civil litigation in the Court and a Court approved framework for managing both Hard Copy and Electronic Documents in a Technology environment.”

The Direction contains three broad and comprehensive definitions.

- “Technology” is: . . . any equipment or interconnected system or subsystem of equipment, that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of Data or information. The term information technology includes computers, ancillary equipment, software, firmware and similar procedures, services (including support services), and related resources.

- “Data” is: . . . Electronic information that has been translated into a form that is more convenient to move or process (in the format of a Database for example).
- “Document,” which is broadly defined, includes: . . . any disc, tape, sound track, or other device in which sounds or other Data (not being visual Images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom;

any film including microfilm, 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; and

anything whatsoever on which is marked any words, figures, letters, or symbols that are capable of carrying a definite meaning to persons conversant with them.

These definitions show that the Practice Direction intends any document stored in an electronic format to be producible in legal proceedings.

Although there has been no direct judicial consideration of the Practice Direction, some recent court decisions indicate that the obligation to produce electronic documents is broad and far-reaching. In a 2003 case, *Walter Construction et al. v. Catalyst et al.*, the B.C. Supreme Court ordered production of electronic documents in their electronic form even though the litigants already had hard copies of the documents; this ruling established that any electronic document is producible which contains information that may directly or indirectly advance a party’s case or discredit an opponent’s case. (This is not unlike the rule for production of hard copy documents.)

In 2006, the same Court decided, in *Ireland v. Low*, that the definition of “document” under the Supreme Court Rules, quoted above, includes electronic data stored on a computer’s hard drive or other magnetic storage device, and is therefore *prima facie* admissible and producible in litigation; such documents might include those recoverable from a computer’s deleted or recycle bin. However, in another 2006 case, *Desgagne v. Yuen et al.*, the Court decided that privacy, economic and probative concerns, as well as any other relevant consideration, should be taken into account when determining if such documents should be produced. (In appropriate circumstances, documents stored on a hard drive, personal hand-held device or even a video game unit may be producible.)

In *Roske v. Grady*, also decided in 2006, the defendants attempted to have the Court order the plaintiff to produce her computer’s actual hard drive; to the extent that information stored on a computer’s hard drive is relevant, it is discoverable and producible. In some circumstances, a party to litigation may have to produce the hard drive itself to allow the information contained on it to be extracted.

E-discovery in British Columbia is now a permanent feature of litigation. Until more definitive guidelines are developed to define a party’s rights and obligations to discover and produce

electronically stored documents, the process will be onerous — both in the time and expense required to exercise or meet the right and obligation. Substantial benefits and efficiencies have resulted from the use of computers, BlackBerrys and other electronic storage devices but discovery during the litigation process of the information produced by and stored in such devices can impose a heavy burden on litigants. It is critical for litigants and their insurers to fully understand their e-discovery obligations and to manage the conduct of their businesses accordingly.