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Book Review: 'E-Discovery in Canada' by Todd J. Burke, Kelly Friedman, Andrew J. McCreary, James Morton, Susan Nickle, Vincenzo Rondinelli, Glenn Smith, James Swanson & Susan Wortzman

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BOOK REVIEW

**Todd J. Burke, Kelly Friedman, Andrew J. McCreary,
James Morton, Susan Nickle, Vincenzo Rondinelli, Glenn
Smith, James Swanson & Susan Wortzman**
E-Discovery in Canada
(Markham, Ont.: LexisNexis Canada Inc., 2008)

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It is not hyperbolic to say that the proliferation of electronically stored information (ESI) is probably the most prominent change-harbinger and potential havoc-wrecker in civil litigation today — second only, perhaps, to the spiralling costs of litigation itself. Indeed, the practical and legal difficulties associated with the storage, gathering, preservation, disclosure and evidentiary use of ESI have the potential to act as a Trojan Horse, causing what would previously have been ordinary cases to implode under their weight. Increasing recognition of this is evident; electronic discovery (e-discovery) cases have begun to emerge in the reports,¹ a successful co-operative effort by Bench and Bar to develop governing principles has emerged,² and one province has even generated a new stand-alone civil proce-

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¹ For very recent decisions, see *Chadwick v. Canada (Attorney General)*, 2008 BCCA 346 (B.C. C.A. [In Chambers]); *Adroit Resources Inc. v. Tres-Or Resources Ltd.*, 2008 BCSC 1211 (B.C. S.C. [In Chambers]); *Vector Transportation Services Inc. v. Traffic Tech Inc.*, [2008] O.J. No. 1020 (Ont. S.C.J.). See also *Canadian E-Discovery Case Law Digests (Common Law)*, online: Ontario Bar Association <http://www.oba.org/En/publicaffairs_en/E-Discovery/digest.aspx>.

² *The Sedona Canada Principles Addressing Electronic Discovery*, online: The Sedona Conference <<http://www.lexum.org/e-discovery/SedonaCanadaPrinciples01-08.pdf>>.

dure rule on “electronic disclosure.”³ Some resources on ESI have been available before, but the new book *E-Discovery in Canada*⁴ is the most comprehensive yet.

Despite being one of the most pressing issues confronting the law regarding civil litigation today, e-discovery has not attracted much in the way of academic commentary in Canada. Though this is at least in part a function of the paucity of serious academic writing on civil litigation generally, it is regrettable. E-discovery issues present significant challenges to some of the foundational concepts that underpin civil matters — for example, that fairness is best achieved through a regime of full disclosure of evidence, animated by a very broad assessment of “relevance” to the material issues in a given case. E-discovery also presents a unique opportunity to apply the emerging principle of “proportionality” in civil matters (i.e. that the availability of procedural mechanisms and remedies should be proportional to the value of the claims being pursued), which has been driving the various civil procedure reform initiatives that have been under way in Canada for some time.

Perhaps more pressing, however, is the need for civil litigation practitioners to have resources that will both provide some engagement with the larger issues and allow them to get “up to speed” in a practical sense on the many ways in which ESI will impact their practices. The authors⁵ of *E-Discovery in Canada* have, I suggest, picked up this baton and run with it admirably. These authors are a group of experienced litigators with interest and expertise in ESI issues. The group includes Susan Wortzman and Susan Nickle, the founders of Canada’s first specialized firm providing legal as well as technical advice about e-discovery. The book itself is a well-constructed primer on e-discovery issues, tailored towards a practical litigation context, but always mindful of how ESI both affects, and is affected by, the currently-shifting ground of Canadian civil procedure.

The format is one of multiple chapters, several co-written by Wortzman and Nickle, and each of the others written by a different author or set of authors. The groundwork is laid in chapters one, two and ten, while the remaining seven chapters attack specific issues. The logical beginning to this book is, in fact, at the end. Chapter 10, by James Swanson, is a brief, but reasonably comprehensive overview of information technology for the uninitiated, running through the basics of computer hardware and software, networks, the Internet and digitization — an ideal place for a lawyer to run to when first encountering talk of “metadata” and “steganography.”

The substantive part of the book begins with Chapter one’s overview of “The U.S. Experience.” This chapter is well written and the topic is well chosen given that American case law on e-discovery issues is substantial and has been of some

³ Nova Scotia, *Civil Procedure Rules*, r. 16 (Disclosure of Electronic Information, in force January 1, 2009), online: Nova Scotia Barristers’ Society <<http://nslaw.nsbs.org/nslaw/rule.do?id=16>>.

⁴ Todd J. Burke, et al., *E-Discovery in Canada* (Markham, Ont.: LexisNexis Canada Inc., 2008).

⁵ Todd J. Burke, Kelly Friedman, Andrew J. McCreary, James Morton, Susan Nickle, Vincenzo Rondinelli, Glenn Smith, James Swanson & Susan Wortzman.

assistance in developing Canadian law and practice. It contains a brief account of the development of the Sedona Principles and Guidelines on e-discovery, an evolving set of “best practices”, which Wortzman and Nickle identify as “embody[ing] an ongoing dialogue between the legal and technical professions.”⁶ The Sedona Principles and Guidelines have been influential in the development of U.S. e-discovery law, and spawned the *Sedona Canada Principles*, which are referred to as touchstones for best or desirable practices throughout the book. Indeed, given that several of the authors were members of the Sedona Canada Working Group (and Wortzman was the Chair), it is surprising that the book does not contain any overview of the genesis of the Sedona Canada Principles or a stand-alone consideration of their qualities and merit.⁷

Chapter two endeavours to provide what its title promises, “A Survey of E-Discovery Case Law in Canada.” It canvasses the major issues which arise in e-discovery cases, such as scope of production, spoliation, privilege, and cost allocation. While brevity is generally a salutary quality of this book (it is 164 pages, exclusive of appendices), this chapter in particular suffers from it somewhat. Although the authors (Burke and Smith) correctly note that the case law is not as well-developed in Canada as it is in the U.S., they ultimately could have made more reference to the cases that do exist, and thus developed a fuller discussion of trends, or at least divergent developments.

The following three chapters pick up on matters raised generally in Chapter two and pursue either technical or specialized aspects thereof: “The Preservation and Destruction of Electronically Stored Information in Ontario” (Chapter three); “Privilege” (Chapter four); and “The Costs of E-Discovery” (Chapter five). These chapters provide effective introductions to very specialized issues, but more importantly they successfully convey that the tension and challenge of ESI arises from trying to apply traditional legal and procedural concepts to a new technology base onto which they map poorly. They also provide practical insight that will be of use to litigators. Chapter three, for example, introduces the importance of ensuring that one’s client understands how broad the preservation and disclosure obligations are regarding ESI, and introduces the “preservation letter/order” for use in ensuring opposing counsel does the same. Chapter four’s treatment of privilege issues is perhaps too brief and could have used some more treatment of the basics and a more expansive exploration of privilege issues. However, it does effectively contextualize privilege arising from ESI, and has useful and illustrative discussions of both the Supreme Court of Canada’s decision in *Celanese*⁸ and the famous *Air Canada v. WestJet* case.⁹ Chapter five’s treatment of ESI cost issues is more fulsome, drawing heavily on Sedona and including the necessary treatment of the infamous *Zubu-*

⁶ *Supra* note 4 at 2.

⁷ *Supra* note 4 (*Sedona Canada Principles*, Appendix 1) at 165. A one-page overview of the Principles appears as Appendix 1, at 165.

⁸ *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189 (S.C.C.).

⁹ *Air Canada v. WestJet Airlines Inc.*, [2006] O.J. No. 1798 (Ont. S.C.J.).

lake decision.¹⁰ It also contrasts the Canadian costs regime with the American one and suggests directions for tailoring differences.

These chapters are followed by several that attempt to explore ESI issues in specific practice contexts. Of these, Andrew McCreary's Chapter six, "Accessing Employee Electronic Information: Employer Rights and Risks" is the most successful, sketching out the parameters of the major issue for employers in this context: employee privacy. The chapter provides a reasonable sampling of arbitral caselaw, though it would have been improved with more attention to decisions made by the federal and provincial privacy commissioners. Two chapters written by James Morton offer brief forays into other specific areas; chapter seven gives a short account of e-discovery in family law (limited to Ontario), while Chapter nine offers hints for solo practitioners and those at small firms. This part of the book is rounded by Chapter eight, an examination of e-disclosure in the criminal context. This chapter does not feel as much like an afterthought as those before and after it, and is probably enough in a book aimed at civil litigators. However it, too, could stand more thorough treatment.

There is criticism to be offered of *E-Discovery in Canada*. There is some duplication — for example, both US and Canadian caselaw on spoliation are dealt with in two separate places in the book. This is perhaps more acceptable in a text that will likely be read in pieces by busy lawyers. As noted above, given the importance of the *Sedona Canada Principles*, a more thorough overview and exploration would have helped to shape the book a little more. As well, while there is some limited attention to American work on ESI issues, comparative work, drawing on the law of other common law countries, would have complemented it nicely. The eight appendices providing examples of provincial practice, while certainly useful, feel a bit thrown together and most are presented in an extremely small font that makes reading difficult.

The inclusion of a chapter on criminal disclosure makes one think that a broader scope for the book generally would have been appealing. In particular, some chapters verge into evidence law from time to time, to the point where it almost seems that there is a missing twin side of the book on electronic evidence issues. This is an area that could use more attention in Canadian literature.¹¹ Similarly, beyond a brief foreword from Justice Colin Campbell of the Ontario Superior Court of Justice, the perspective on e-discovery from the judicial side of the bench is missing. It is clear that judges will have a great deal of involvement in ESI issues, particularly in resolving disputes between parties as to scope and cost of production. Several Canadian judges have significant acumen in this area,¹² and their views would definitely have been of interest to readers.

¹⁰ *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003).

¹¹ But see R. Currie & S. Coughlan, "Canada" in S. Mason, ed., *Electronic Evidence: Disclosure, Discovery & Admissibility* (London: LexisNexis Butterworths (UK), 2007) 148–174.

¹² Along with Justice Campbell, Justice Ted Scanlan of the Supreme Court of Nova Scotia was heavily involved with the Sedona Canada Working Group.

However, I am wary of criticizing the authors simply because they wrote the book they set out to write, and not the one the reviewer envisions. Ultimately, *E-Discovery in Canada* is an admirable and mostly successful attempt to set out a snapshot of where e-discovery currently is, and provide some sense of the direction in which it is heading. Given the current rate of development, as well as the various opportunities for expansion identified above, the next edition could easily be three times as long. Unlike more moribund subsequent editions of texts, the second edition of *E-Discovery in Canada* is one for which the profession should, and will be waiting.

