

A SURVEY OF E-DISCOVERY CASE LAW IN CANADA

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TABLE OF CONTENTS

Electronic Discovery in Canada	1
1. Introduction	1
2. Defining and Locating Electronic Documents	1
a) Definition of Document.....	<u>12</u>
b) Potential Sources of Documents.....	<u>23</u>
(i) <i>Scope of Production</i>	<u>23</u>
(ii) <i>Deleted Information</i>	<u>69</u>
(iii) <i>Hidden Data</i>	<u>71</u>
3. Spoliation and Preservation of Electronic Evidence.....	914
a) The Canadian Approach to Spoliation and Preservation.....	<u>914</u>
b) Spoliation and Preservation of Evidence in the United States	<u>1220</u>
4. Production of Electronic Evidence	1424
a) Form of Production.....	<u>1424</u>
b) Accessing Electronic Litigation Support Data	<u>1626</u>
5. Privilege and the Production of Electronic Documents.....	1729
6. The Cost of Electronic Discovery.....	2237
a) Cost Allocation in Canadian Cases	<u>2237</u>
b) Cost Allocation in the United States.....	<u>2440</u>
c) Cost-Benefit Analysis – A New Approach by Canadian Courts?.....	<u>2542</u>
7. Conclusion.....	2644
APPENDIX.....	2745
ALPHABETICAL INDEX OF CASES CITED.....	2745
SUBJECT INDEX OF CASES CITED.....	2947
Defining and Locating Electronic Documents.....	2947
(a) Definition of Document.....	<u>2947</u>
(b) Potential Sources of Documents	<u>2947</u>
(i) <i>Scope of Production</i>	<u>2947</u>
(ii) <i>Deleted Information</i>	<u>2947</u>
(iii) <i>Hidden Data</i>	<u>2947</u>
Spoliation and Preservation of Electronic Evidence.....	3048
(a) The Canadian Approach to Spoliation and Preservation.....	<u>3048</u>
(b) Spoliation and Preservation of Evidence in the United States	<u>3048</u>
Production of Electronic Evidence	3048
(a) Form of Production.....	<u>3048</u>
(b) Accessing Electronic Litigation Support Data	<u>3048</u>
Privilege and the Production of Electronic Documents.....	3149
The Cost of Electronic Discovery	3149
(a) Cost Allocation in Canadian Cases	<u>3149</u>
(b) Cost Allocation in the United States	<u>3149</u>
(c) Cost-Benefit Analysis – A New Approach by Canadian Courts?.....	<u>3149</u>

Electronic Discovery in Canada¹

1. Introduction

The advent of electronic documentation has caused the legal profession to re-examine issues related to the discovery process. The identification, location, preservation and production of electronic documentation should be a standard part of any case. Unfortunately, Canadian jurisprudence in this area is not as developed as it is in the United States. However, recent case law and guidelines developed by the profession do provide some guidance for Canadian lawyers. This paper addresses some of the emerging issues in the context of Canadian decisions in this area.

2. Defining and Locating Electronic Documents

Courts have consistently emphasized that documentary discovery is a liberal endeavour. British Columbia and Ontario allow wide latitude as to what documents are discoverable; Rule 30.02(1) of the Ontario *Rules of Civil Procedure*² and Rule 26(1) of the British Columbia *Supreme Court Rules*³ provide that every document relating to any matter in question in the action shall be disclosed. Rule 186.1 of the Alberta *Rules of Court*⁴ takes a narrower approach to document disclosure, requiring that documents be both relevant and material.

a) Definition of Document

It is no longer a matter of debate as to whether or not electronic data are discoverable for evidentiary purposes. In January 2005, Rule 30.01(1) of Ontario's *Rules of Civil Procedure* was amended to expand the definition of document. British Columbia's *Supreme Court Rules* and the Alberta *Rules of Court* provide for the inclusion of electronic documents within their definitions of document and record, respectively. Rule 1(8) of the British Columbia *Supreme Court Rules* provides:

“document” has an extended meaning and includes a photograph, film, recording of sound, any record of a permanent or semi-permanent character any information recorded or stored by means of any device.⁵

The broadened definitions are consistent with the definitions in the Evidence Acts of British Columbia,⁶ Alberta,⁷ and Ontario,⁸ as well as the *Canada Evidence*

¹ Thanks to David Wotherspoon and Anna Silver, who added the Western component to this paper for the June 22, 2006, *Insight* presentation.

² *Rules of Civil Procedure*, R.S.O. 1990, Reg. 194 [*Rules of Civil Procedure*].

³ *Supreme Court Rules*, R.S.B.C. 1990, Reg. 221 [*Supreme Court Rules*].

⁴ *Alberta Rules of Court*, AB Reg. 390/68 [*Alberta Rules of Court*].

⁵ *Supreme Court Rules*, *supra* note 3 at Rule 1(8).

⁶ *Evidence Act*, R.S.B.C. 1996, s. 42.

⁷ *Evidence Act*, R.S.A. 2001, c. E-55 s.33.

*Act.*⁹ The *Canada Evidence Act* defines an electronic document or record as “data that is recorded or stored on any medium in or by a computer system or other similar device, that can be read or perceived by a person or a computer system or other similar device.” Under these definitions, a broad range of electronic data and information is producible, posing new challenges for lawyers unaccustomed to such production in the discovery process.

b) Potential Sources of Documents

It is generally accepted that the definition of document includes electronic documents with which most of us are familiar; such as email, webpages and word processing files.¹⁰ However, with advances in technology, potential sources of electronic documents are ever expanding. For example, personal digital assistants, BlackBerry Devices, electronic calendars, pagers and cell phones have created new repositories of document storage and have expanded the scope of review when identifying producible information. This requires counsel to address the possible location of relevant electronic data at the outset of each case. Focusing on these issues at an early stage will not only define what the client will have to produce, but will also focus attention on the information that should be sought from the other side.

(i) Scope of Production

In *Northwest Mettech Corp. v. Metcon Service Ltd.*,¹¹ the plaintiff commenced an action alleging that the defendant, a former employee, had appropriated its confidential information. The plaintiff requested production of the hard drive of the defendant’s home computer. The defendant took the position that he had disclosed all relevant documents, including all relevant documents in electronic form that were on the computer hard drive. In denying this request, the court held that the plaintiff was entitled to the production of only the relevant electronic data residing on the hard drive, not the hard drive itself. In reaching this conclusion, Master Joyce stated:

As I understand it, a computer hard drive is simply a medium on which data is stored on a semi-permanent basis in the form of electronic impulses. It may be thought of as an electronic filing cabinet which contains electronic files, each of which in turn contains electronic documents. The defendants are obligated to list all relevant documents of whatever form (including electronic documents resident on the computer hard drive). In my view they are not required to list the entire contents of nor are they required to produce their entire electronic filing cabinet any more than a party is required to list or to produce the complete contents of its steel filing cabinet which houses documents which are in paper format.

⁸ *Evidence Act*, R.S.O. 1990, c. E.23 s. 34.1(1).

⁹ *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 31.8.

¹⁰ Bradley J. Freedman, “Discovery of Electronic Records Under Canadian Law – A Practical Guide” (2004) 18 I. P.J. 59 at 64.

¹¹ *Northwest Mettech Corp. v. Metcon Services Ltd.*, [1996] B.C.J. No. 1915 (B.C.S.C.) (QL).

In my view the plaintiff has not shown any proper basis to require production of the actual hard drive. The plaintiff is entitled to know with certainty, however, that all relevant electronic data which is resident on the hard drive has been disclosed. Accordingly, I order that the defendant provide an affidavit verifying all of the files still resident on the computer hard drive which relate to the matter in issue.¹²

In *Northwest Mettech*, the court sought to balance the concept of relevance against a broad construction of how a “document” may be defined. It also upheld the traditional notion that only relevant information need be produced, even in the electronic context.

However, there is case law which suggests that parties may be required to produce hard drives and other electronic equipment. In *Value Analytix Ltd. v. Doman Industries Ltd.*,¹³ the British Columbia Supreme Court noted that courts have the authority to order the production of electronic documents, including the devices on which the electronic information is stored.

A party may be ordered to produce electronic devices where there is evidence that the party has not been entirely forthright in its production of information. In *Nicolardi v. Daley*,¹⁴ a solicitor’s negligence action, the plaintiff sought access to the computer hardware of his former solicitor to determine whether relevant electronic documents were omitted from production. When the motion was first heard, the defendant advised that all relevant documents had been deleted and were therefore irretrievable. The plaintiff did not produce any evidence demonstrating that the deleted documents could be retrieved by a computer expert. As a result, the court dismissed the motion. At a second hearing, the plaintiff presented evidence that a technician might be able to recover the deleted documents. However, before the court could render a decision, the defendant informed the court that the computer in question had been discarded and was no longer available. As a result, the court was precluded from deciding whether the defendant’s hard drive should have been inspected in an effort to recover the deleted documents. Nevertheless, the court stated:

Where a party on proper evidence convinces the court that documents that have not been produced are likely stored on a computer’s hard drive or other electronic storage medium, but the party in possession of the computer asserts that it has printed and produced all that it has, then the only solution that would allow inspection of a document, would be

¹² *Ibid.* at ¶ 10.

¹³ *Value Analytix Ltd. v. Doman Industries Ltd.*, [2006] B.C.J. No. 1241 (B.C.S.C.) (QL) [*Value Analytix Ltd.*].

¹⁴ *Nicolardi v. Daley*, [2002] O.J. No. 595 (S.C.J.) (QL).

inspection of the storage medium itself, in this case the firm's hard drive, with proper safeguards.¹⁵

Nicolardi suggests that a court may be willing to grant access, in some circumstances, to a hard drive to allow deleted information to be recovered. However, this will require evidence that demonstrates a real likelihood that documents not disclosed exist or have existed. It is not sufficient for a party to simply state it believes more documents exist. The courts will be disinclined to allow one party to engage in a fishing expedition and will likely require specific evidence of non-disclosure.

This point is illustrated in *Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen*¹⁶ where the plaintiff sought production of a mirror image of the defendant's entire hard drive. In its decision, the Supreme Court of British Columbia stressed the importance of relevance, and held that the production of a mirror image of a hard drive would not be ordered in the absence of evidence that relevant documents had been withheld. *Baldwin* was followed in *Value Analytix Ltd.*¹⁷ in which the British Columbia Supreme Court refused to order the defendants' to produce their hard drives and personal computers.

Parties and their counsel are more likely to establish entitlement to an opposing party's electronic data when they identify all relevant data sources and submit focused discovery requests. This is made clear by the Ontario Superior Court of Justice decision in *Dulong v. Consumer Packaging Inc.*¹⁸ In this case, the plaintiff requested that the defendant "see if there are emails in existence which relate to the matters in issue in this litigation."¹⁹ The defendant objected to the scope of the plaintiff's request. On a motion to compel answers, the court held that the question was properly refused, as it was "too much like fishing and would, having regard to the extent of the defendant's business, be such a massive undertaking as to be oppressive."²⁰

The earlier case of *Proctor & Gamble v. Kimberly-Clark of Canada Ltd.*²¹ also demonstrates the importance of defining with precision the information that parties and their counsel wish to disclose. In this patent infringement case, the plaintiff requested disclosure of copies of computer tapes listed in the defendant's affidavit of documents. The defendant argued that the plaintiff was entitled to the information contained within the tapes and that a copy of the hard data, instead of the tapes, would be sufficient to fulfill its discovery obligations. The court disagreed and held that the

¹⁵ *Ibid.* at ¶ 29.

¹⁶ *Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen*, [2006] B.C.J. No. 753 (B.C.S.C.) (QL).

¹⁷ *Value Analytix Ltd.*, *supra* note 13.

¹⁸ *Dulong v. Consumers Packaging Inc.*, [2000] O.J. No. 161 (S.C.J.) (QL).

¹⁹ *Ibid.* at ¶ 18.

²⁰ *Ibid.* at ¶ 21.

²¹ *Proctor & Gamble Company v. Kimberly-Clark of Canada Ltd.*, [1989] F.C.J. No. 341 (F.C.T.D.) (QL).

plaintiff was entitled to a copy of the tapes as well as the information that was necessary to read the tapes because the tapes, as opposed to the printouts, were listed in the affidavits.²²

In the recent case, *Sourian v. Sporting Exchange Ltd.*,²³ the court examined issues arising from a focused production request for database information. Here, the plaintiff requested production of a database report itemizing, *inter alia*, the IP addresses of the defendant's online clientele. Master MacLeod agreed that a database falls within the definition of "document" in Rule 30.01(1)(a), but noted that in response to such a request, the document produced is not the database (being more akin to a filing cabinet than to a single document), but rather a subset of the requested data, organized in readable form. Unlike typical documents requested, this database report would have to be generated anew. As such, the Master remarked:

A party must produce relevant documents but it is not normally required to create documents. Accordingly, such an order is discretionary and the court should have regard for how onerous the request may be when balanced against its supposed relevance and probative value.²⁴

Here, the level of detail and time period requested were not sufficiently relevant to make such an order, reminding us that despite the novelty presented by electronic formats, the existing rules for production still offer proper guidance.

The skyrocketing popularity of downloading music from the Internet has led to many instances of high-profile litigation in both the United States and Canada. In these cases, it is generally record companies (the copyright holders) who attempt to sue individuals who download music files; the companies allege that, in so doing, these individuals are infringing their copyright. However, in most cases, the plaintiff record companies are unable to identify these persons, despite being able to identify the IP addresses associated with these activities. In *BMG Canada Inc. v. Doe*,²⁵ over a dozen record companies, together representing the "Canadian music industry," appealed a decision dismissing their motion for an order compelling several Internet service providers ("ISPs") to produce the names of the customers using some 29 IP addresses that had been associated with allegedly unlawful downloading activity. The respondent ISPs had refused to disclose this information in the absence of a court order, citing privacy concerns on behalf of their clients.

Copyright being a matter of federal jurisdiction, the applicable rules for production differ from those applicable to other cases discussed in this paper.

²² *Ibid.* ¶ 3.

²³ *Sourian v. Sporting Exchange Ltd.*, [2005] O.J. No. 753 (S.C.J.) (QL).

²⁴ *Ibid.* at ¶ 12.

²⁵ *BMG Canada Inc. v. Doe*, [2005] F.C.J. No. 858 (F.C.A.) (QL).

Nevertheless, the terms are similar. In dismissing the appeal, the Court remarked that:

The information sought by the plaintiffs may be buried in logs and tapes but is not presently in a readable format. Since the documents in a readable format do not currently exist and would have to be created, Rule 233 has no application. The Rule contemplates the production of documents which are “in the possession of a person”. It cannot be said that documents which do not exist are in the possession of a person.²⁶

This is consistent with the logic in *Sourian*, above. Of course, in *BMG Canada Inc.* the request for production had also to be balanced against the legitimate privacy expectations of third parties to the motion, that is, the individual downloaders themselves.

(ii) Deleted Information

The *Nicolardi* decision raised the issue of the discoverability of deleted computer files. Parties and their counsel must realize that the simple deletion of data does not erase it from the computer hard drive. The deleted data remains on the hard drive until it is overwritten at some future date, thereby leaving the possibility of accessing that data for evidentiary purposes.²⁷ Such was the case in *Prism Hospital Software Inc. v. Hospital Medical Records Institute*²⁸ where the central issue was whether the defendant had copied software written for them by the plaintiff. During the litigation, the defendant produced floppy disks and magnetic tape backups. The plaintiff sought to lead evidence from a computer technician who was able to restore the tape backups and locate a series of files, which the defendant had deleted. The court held that the files and programs stored on the backup tapes were ordinary documents that had been deleted. The court dismissed the defendant’s submission that the introduction of the evidence surrounding the uncovering of the deleted files amounted to expert evidence. The court explained that the skill and knowledge necessary to restore deleted documents is no longer rare and once restored, the documents could be read in the normal manner.²⁹ The *Prism Hospital Software* decision reflects the court’s acceptance of restored data as being a reliable and sometimes a required source of relevant evidence.

However, the court will not impose a universal requirement to restore deleted data unless satisfied that its relevance and probative value outweigh other competing

²⁶ *Ibid.* at ¶ 19.

²⁷ Dan Pinnington, “Why Electronic Documents are Different” *LawPro Magazine* 4:2 (September 2005) 3 at 4.

²⁸ *Prism Hospital Software Inc. v. Hospital Medical Records Institute*, [1991] B.C.J. No. 3732 (B.C.S.C.) (QL).

²⁹ *Ibid.* at ¶ 10.

considerations. For instance, in *Ireland v. Low*,³⁰ the British Columbia Supreme Court refused to grant the defendant an order permitting a computer expert to forensically examine the plaintiff's hard drive and make copies of all files, including deleted files. While the court found that the electronic documents on the plaintiff's computer may be relevant, their probative value was outweighed by competing considerations; namely, the privacy interests of the plaintiff's family who also used the computer, the fact that the most probative evidence in the case was available from other sources, and the cost involved with having a specialist retrieve and list deleted files. Instead, the court ordered the plaintiff to check for files which had been deleted, but which were readily retrievable by him using the computer's operating system since no special expertise is required for this type of search and it would involve minimal intrusions into the privacy of others.

(iii) Hidden Data

Likewise, hidden data associated or related to electronic documents will also be discoverable in some cases. In *Reichmann v. Toronto Life Publishing Company*,³¹ a defamation action, the defendant author proposed publishing a book about the plaintiffs. The defendant produced a hard copy of the manuscript, which had been heavily edited to delete identifying information about confidential sources. The plaintiffs agreed that confidential sources need not be revealed but sought information about the research methodology, what had been said during the interviews, and other relevant evidence in support of their claim that much of the author's information was false. On an interlocutory motion, the plaintiffs were successful in convincing the court that, in addition to providing the hard copy manuscript, the defendant was also required to disclose the electronic disks on which the author's manuscript was stored. The court held that the computer disk fell within the wider definition of a document and ordered disclosure. The court also commented, "it appears to be the position of the plaintiffs that information would be made available to them by the possession of the disk which is not obtainable from the product of the disk with which they have been provided."³² The plaintiffs were able to identify information only accessible from earlier versions of the manuscript, such as extensive research sources and rough notes that were subsequently removed from the final version. *Reichmann* illustrates that underlying data (often referred to as metadata) that is not accessible or apparent from a hard copy may properly be the subject of a motion for further production.

The decision in *Desgagnes v. Yuen*³³ recently elaborated on the availability of metadata in the discovery process. In this case, a motion was brought for production of an array of electronic evidence, including the plaintiff's palm pilot and video game unit, as well as digital photos of a personal vacation and her home computer for analysis of, *inter alia*, metadata. The court dismissed these requests, finding that the

³⁰ *Ireland v. Low*, [2006] B.C.J. No. 1592 (B.C.S.C.) (QL).

³¹ *Reichmann v. Toronto Life Publishing*, [1988] O.J. No. 1727 (H.C.J.) (QL).

³² *Ibid.* at ¶ 3.

³³ *Desgagnes v. Yuen*, [2006] B.C.J. No. 1418 (B.C.S.C.) (QL) [*Desgagnes*].

evidence was not relevant to the proceedings, but in so doing offered the following insight into the notion of metadata as electronic evidence:

The information being sought does not fit the ordinary or intuitive concept of a document, electronic or otherwise. What is being sought by the defendants is a report of recorded data (i.e., the metadata) that is generated by computer software. That data is not something created by the user, but it is based on what the user does with her software. It is not something that has content in the same sense as a document file generated by the user, for example, a word processing document or spreadsheet. Nor is it something which is printed out or emailed in the ordinary course. The assistance of an expert is required to generate the metadata report. In spite of this, it appears clear that the metadata is “information recorded or stored by means of [a] device” and is therefore a document under Rule 1(8).³⁴

This analysis recalls the discussion in *Sourian*, where the creation of a database report was at issue. In that case, the court held that an order for production in such a case was discretionary and that it must have regard for the potentially onerous nature of the request vis-à-vis its probative value. The court in *Desgagnes* likewise undertook a weighing of the moving party’s request, remarking at length and throughout the judgment on the potentially invasive effect of ordering production against the relevance or likely probative value. The court found that it would be highly intrusive and not relevant enough to warrant production of the requested documents.

Clearly, litigating parties and their counsel must develop some understanding of the different types of electronic documents and their characteristics in order to locate documents and assess relevance. This is emphasized in Ontario’s *Guidelines for the Discovery of Electronic Documents*,³⁵ and the Supreme Court of British Columbia’s *Electronic Evidence Project Draft Practice Direction*,³⁶ both of which were recently introduced in order to familiarize the profession with electronic discovery. The *Guidelines* ~~and the Draft Practice Direction~~ suggest that the process of locating and assembling electronic documents for litigation purposes is often more difficult than traditional paper-based discovery, and they recommend the involvement of Information Technology staff or consultants to assist counsel and the parties in identifying the sources of electronic documents.³⁷ For example, a chosen method of

³⁴ *Ibid.* at ¶ 29.

³⁵ The Supplemental Discovery Task Force Report, dated October, 2005 was prepared by the Discovery Task Force. The Supplemental Report includes *Guidelines for the Discovery of Electronic Documents in Ontario*, prepared by the electronic discovery sub-committee. [“*Guidelines*”].

³⁶ ~~The Supreme Court of British Columbia, *Electronic Evidence Practice Directions*, dated July 1, 2006. The Courts of British Columbia *Electronic Evidence Project Practice Direction*, Draft #3, dated April 11 2006 was prepared by Justice Brenner. The final Practice Direction is anticipated to be published on July 1, 2006.~~ [“*Practice Direction*”].

³⁷ *Guidelines*, *supra* note 35 at 4. ~~and Practice Direction, *supra* note 36 at 1.1.~~

copying electronic data may result in metadata being lost; this highlights the importance of receiving expert advice at an early stage.

3. Spoliation and Preservation of Electronic Evidence

Recently, it has been suggested that electronic discovery has given rise to a different concern namely, “whether the opposing party has failed to preserve or destroyed relevant electronic evidence.”³⁸ Spoliation refers to the destruction, mutilation, alteration, or concealment of evidence.³⁹ Electronic evidence is particularly susceptible to spoliation. Emails can be deleted, computer files are easily edited and tapes are often re-used. In each example, a litigant or potential litigant can suffer uncertainties, cost consequences and prejudice due to the spoliation of evidence.

a) *The Canadian Approach to Spoliation and Preservation*

As a result of conflicting case law in this area, a debate continues as to whether an independent tort of spoliation exists.⁴⁰ In *Rintoul v. St. Joseph’s Health Centre*,⁴¹ the Ontario Divisional Court found that destruction or spoliation of evidence does not create an independent tort. Similarly, in *Endean v. Canadian Red Cross Society*, the British Columbia Court of Appeal held that “an action for damages — being punitive or otherwise — is not an appropriate response to the destruction of evidence.”⁴² However, in *Spasic Estate v. Imperial Tobacco Limited*⁴³ the Ontario Court of Appeal permitted a claim for damages based on the tort of spoliation to proceed to trial. The Court of Appeal reasoned that the existence of procedural sanctions or the spoliation inference should not preclude the recognition of an independent tort. The Court of Appeal held that it was for a trial judge to determine whether the tort of spoliation is recognized by Canadian jurisprudence.⁴⁴

Canadian courts have recognized the potential harm that spoliation of evidence can cause. Despite the ruling in *Spasic Estate*, courts have applied by way of remedy an evidentiary inference or rule whereby evidence has been rendered non-usable at trials.⁴⁵ This rule creates the rebuttable presumption that if the spoiled evidence had been available at trial, it would have been harmful to the spoliator’s case. The origins of the evidentiary rule can be traced back to the maxim *omnia praesumuntur contra*

³⁸ Susan Wortzman, “Spoliation, Litigation Holds and Preservation Orders - The New Electronic Discovery Guidelines” in *Electronic Discovery and The New ED Guidelines – A Roadmap for Dealing with Electronic Information: Proceedings of a Conference Held November 28, 2005* (Ontario Bar Association, 2005) at 3.

³⁹ British Columbia Law Institute, “Report on Spoliation of Evidence” (2004) at 1 [Report on Spoliation].

⁴⁰ *Logan v. Harper*, [2003] O.J. No. 4098 (S.C.J.) at ¶ 42 (QL) [*Logan*].

⁴¹ *Rintoul v. St. Joseph’s Health Centre*, [1998] O.J. No. 4074 (S.C.J.) (QL).

⁴² *Endean v. Canadian Red Cross Society*, [1998] B.C.J. No. 724 at ¶ 20 (C.A.) (QL).

⁴³ *Spasic Estate v. Imperial Tobacco Ltd.*, [2000] O.J. No. 2690 (C.A.) (QL).

⁴⁴ *Ibid.* at ¶ 22.

⁴⁵ *Logan*, *supra* note 40 at ¶ 42.

spoliatorem, which means, “all things are presumed against the wrongdoer.”⁴⁶ This evidentiary rule is reflected in Rule 30.08(1) of Ontario’s *Rules of Civil Procedure*, which provides that if a party fails to produce a document that is favourable to its own case, that party may not be able to use the document at trial, and if the document is unfavourable, the court has the discretion to make an order it deems just. Rules 191 and 209(1) in Alberta, and Rules 26(10) and 26(12) in British Columbia also provide the court with discretion to make orders regarding document production.

In addition, the courts have developed procedural sanctions that address the spoliation of evidence. Common sanctions include default judgment in favour of the prejudiced party, the striking of pleadings, evidence preclusion, preservation orders and Anton Piller orders.⁴⁷

The decision in *Brandon Heating & Plumbing (1972) Ltd. et al v. Max Systems Inc.*⁴⁸ serves as an example of how courts will sanction plaintiffs who intentionally spoil electronic evidence. In this case, the plaintiff’s action arose out of its purchase of what was alleged to be faulty accounting software. In order to defend the action, the defendant required access to the original operating systems and processors on which the plaintiff had installed the software. The plaintiff gave an undertaking at examination for discovery to preserve the computer hardware and disks in question and to make them available for the defendant to inspect. Three years later, and after a number of inquiries by the defendant, the plaintiff advised that the hardware had been replaced. The court found that the failure to preserve the hardware and disks amounted to spoliation of evidence and dismissed the plaintiff’s action as a result.

Recently, in *Celanese Canada Inc. v. Murray Demolition Corp.*,⁴⁹ the Supreme Court of Canada stressed the importance of Anton Piller orders in an era of heavy dependence on computer technology, where documents are easily deleted, moved or destroyed. The decision of *Canadian Derivatives Clearing Corp v. EFA Software Services*⁵⁰ demonstrates how Anton Piller orders can be used to preserve electronic evidence. The plaintiff alleged that the defendant had provided to a competitor confidential information it used for the development of software. The plaintiff made an *ex parte* application for an Anton Piller order, which the court granted, permitting a bailiff to seize and copy the defendant’s paper documents and copy all of the defendant’s electronic data from its computer hard drive in “mirror image” form to ensure its preservation. The defendant applied to set aside the order. However, during the court’s review of the order it learned that the defendant had unintentionally altered the relevant evidence on its computers and did not have backup tapes in place. The court concluded that it was appropriate to preserve the copied data with the

⁴⁶ Report on Spoliation, *supra* note 39 at 10.

⁴⁷ *Ibid.* at 10-17.

⁴⁸ *Brandon Heating & Plumbing (1972) Ltd. v. Max Systems Inc.*, [2006] M.J. No. 149 (Q.B.) (QL).

⁴⁹ *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] S.C.J. No. 35 (QL) [*Celanese*].

⁵⁰ *Canadian Derivatives Clearing Corp. v. EFA Software Services Ltd.*, [2001] A.J. No. 653 (Q.B.) (QL).

bailiff, as it was likely the only existing evidence that would reflect the state of affairs at the beginning of the action. The court ordered the return of the defendant's paper documents, as there was no indication that the defendant would destroy them.

Similarly, the plaintiff in *CIBC World Markets Inc. v. Genuity Capital Markets*⁵¹ brought a motion for the preservation of electronic evidence stored in the defendants' computer systems. At issue in the main action was the defendants' alleged misappropriation of confidential information and solicitation of the plaintiff's employees, which was done primarily by way of email. In this case, the defendants voluntarily undertook to preserve the electronic evidence, and retained a forensic consultant to execute the preservation. The court allowed the forensic consultant access so that it could image and store the contents of computers, BlackBerry Devices, and other similar electronic devices the defendants had in their possession, power, ownership, use and control, directly and indirectly. The court granted the forensic consultant access to such devices located at any office or home (but not restricted to such locations), regardless of whether the devices were owned or used by others. The court also ordered the defendants to certify that they had not utilized the services of some other person or some other electronic device to send or receive messages and that they had not deleted records.

The order of the court in *Genuity* illustrates several aspects of document preservation. First, it indicates that parties have a broad duty to preserve documents of every kind and nature and that counsel must conduct an extensive search to identify what information sources exist early in the litigation. Second, the decision demonstrates the utility of third-party forensic copying of electronic information and the importance of retaining experts to carry out those tasks. Finally, the order highlights the fact that electronic discovery requires a more collaborative approach to litigation. The court required counsel to meet and confer in order to resolve difficulties as they arose and to specifically map out a litigation schedule. Ontario's *Guidelines* and section 6 of the *Draft Practice Direction*⁵² recommend that counsel meet and confer, as soon as practicable and on an ongoing basis, throughout the electronic discovery process.⁵³

In *Portus Alternative Asset Management Inc. (Re)*,⁵⁴ the Ontario Securities Commission successfully applied for an order appointing a receiver of all assets, undertakings and properties of Portus Alternative Asset Management Inc. Justice Campbell of the Superior Court of Justice granted the receiver unfettered access to all electronic records for the purpose of allowing the receiver to recover and copy all electronic information. Justice Campbell specifically ordered the debtors not to alter, erase or destroy any records without the receiver's consent. He tailored his access order to overcome any security obstacles by ordering the debtors to assist the receiver

⁵¹ *CIBC v. Genuity Capital Markets*, [2005] O.J. No. 614 (S.C.J.) (QL) [*Genuity*].

⁵² *Practice Direction*, *supra* note 36 at s. 6.

⁵³ *Guidelines*, *supra* note 35 at 12.

⁵⁴ *Re Portus Alternative Asset Management Inc.* (2005), 28 OSCB 2670 (O.S.C.).

in gaining immediate access to the records, to instruct the receiver on the use of the computer systems and to provide the receiver with any and all access codes, account names, and account numbers. In addition, all Internet service providers were required to deliver to the receiver all documents, including server files, archived files, recorded messages, and email correspondence.⁵⁵ Justice Campbell's order was directed at preserving and granting meaningful access to all electronic evidence in this action.

*Sycor Technology Inc. v. Kiaer*⁵⁶ was the first reported case where a court directed counsel to the new Ontario *Guidelines*. Here, like the two aforementioned cases, the court emphasized the need for “procedural collaboration and a healthy dose of pragmatism and common sense.”⁵⁷ Counsel for both parties were again instructed to meet and confer, in light of the overwhelming volume of documents requested in discovery. In this case, the cost of printing and photocopying the requested documents would have exceeded \$50,000; the Master therefore suggested that consideration be given to both the electronic production of documents and the use of computer experts to help identify which documents existed and were truly relevant.

b) Spoliation and Preservation of Evidence in the United States

The American courts have provided the most guidance on litigating parties' duty to preserve electronic documents. In particular, the Southern District Court of New York has made five influential interim rulings on electronic discovery issues. In *Zubulake v. UBS Warburg LLC*,⁵⁸ the plaintiff Laura Zubulake successfully brought a gender discrimination claim against her former employer, UBS Warburg. When UBS' counsel became aware of the pending suit, they advised UBS not to destroy or delete any material potentially relevant to the plaintiff's claim. Despite counsel's instruction, the court found that UBS intentionally deleted a number of potentially relevant email messages. A number of the email messages were recovered from backup tapes and produced to the plaintiff. However, at least one relevant message was never recovered. As a result of UBS' actions, the plaintiff requested that the court impose an adverse-inference sanction against UBS for destroying evidence.

In its fifth decision, the District Court found that UBS had a duty to preserve the email evidence, as UBS should have known that the email messages might be relevant to future litigation. The court also found that UBS did not comply with its own retention policy, which would have preserved the missing evidence. Before the jurors began deliberating, the court instructed them to assume that the discarded emails would have been harmful to UBS' case.

In its reasons, the District Court set forth a test for determining whether sanctions are appropriate for the spoliation of evidence. First, the party seeking the

⁵⁵ *Ibid.* at ¶ 6-7.

⁵⁶ *Sycor Technology Inc. v. Kiaer*, [2005] O.J. No. 5395 (S.C.J.) (QL) [*Sycor*].

⁵⁷ *Ibid.* at ¶ 2.

⁵⁸ *Zubulake v. UBS Warburg LLC*, [2004] U.S. Dist. LEXIS [13584-13574](#) (N.Y.D. Ct.) (Lexis).

sanction must first show that the party in control of the evidence had an obligation to preserve it at the time it was destroyed. According to the court, the obligation to preserve evidence arises when the party had notice that the evidence was relevant to litigation or when a party should have known that the evidence might be relevant to future litigation. Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and replace it with a “litigation hold” to ensure the preservation of documents.⁵⁹ Second, the party must show that the evidence was destroyed with a “culpable mind.” The court explained that a culpable state of mind includes actions taken negligently, intentionally or wilfully. Finally, a party must show that the evidence was relevant to the party’s claim such that a trier of fact could find that it would have supported that claim or defence. However, the court stated that if the party acted intentionally or wilfully with respect to the destruction of evidence, this requirement would irrefutably be inferred from the act of destruction alone. In contrast, where the evidence was destroyed negligently, the party seeking the sanctions must prove that the evidence was relevant to the claim or defence.

The court in *Zubulake* also emphasized that counsel has a duty to oversee compliance with the litigation hold and must monitor the party’s efforts to retain and produce the relevant documents. The court explained that counsel must become familiar with the client’s data retention policies and retention architecture. Counsel must also ensure compliance with the preservation obligation by communicating with the key players in the litigation, issuing reminders regarding the duty to preserve and actually taking possession of the relevant electronic information. The court did note that although counsel must take an active role, ultimately, the client must bear the responsibility for a failure to preserve.⁶⁰

Nearly every jurisdiction in the United States employs a version of the *Zubulake* test to determine if sanctions for spoliation are appropriate.⁶¹ A recent example is the Florida Circuit Court’s decision in *Coleman (Parent) Holdings Inc. v. Morgan Stanley Co. Inc.*⁶² The plaintiff Coleman sought damages from Morgan Stanley for fraud and conspiracy in connection with a sale of stock. Coleman sought access to Morgan Stanley’s internal files, including emails. Coleman brought a motion for an adverse jury instruction due to the destruction by Morgan Stanley of potentially relevant documents. The court found Morgan Stanley in breach of its preservation obligations, as it had continued to overwrite emails after 12 months, despite a Securities and Exchange Commission regulation to retain emails in readily accessible form for two years. The court also found that Morgan Stanley did not conduct proper searches for backup tapes that potentially contained emails and that it had failed to comply with orders. The court concluded that many of Morgan

⁵⁹ *Ibid.* at ¶ ~~44~~31.

⁶⁰ *Ibid.* at ¶ ~~44~~356.

⁶¹ Brian J. Leddin and Dean Gonsowki, “Spoliation of Electronic Data, The Wages of Sin a Virtual World” (2005) 3 New Jersey L. J. at 1.

⁶² *Coleman (Parent) Holdings Inc. v. Morgan Stanley*, 2005 WL 679071 (Fla. Cir. Ct March 1, 2005).

Stanley's failings were done knowingly, deliberately and in bad faith.⁶³ As a result, the court issued an adverse-inference order based on Morgan Stanley's discovery abuses.

Zubulake and other American decisions have influenced Canadian electronic discovery as demonstrated in Ontario's *Guidelines for the Discovery of Electronic Documents* and British Columbia's *Draft Practice Direction*. The *Guidelines* and *Draft Practice Direction* speak to many issues already canvassed in American courts. They highlight the parties' preservation obligations by recommending that parties take reasonable and good-faith steps to preserve relevant documents as soon as litigation arises. This may include implementing document retention policies, issuing instructions to staff and/or creating litigation copies of relevant data sources. The *Guidelines* and *Draft Practice Direction* recommend that parties place each other on notice as early in the process as is possible with respect to preserving electronic documents. They both outline the role counsel is to play in the preservation of electronic documents.⁶⁴

4. Production of Electronic Evidence

a) *Form of Production*

The production of electronic documents inherently raises the question as to how parties should produce electronic documents. Canadian courts have typically held that the discovery of documents requires disclosure of documents in electronic form when paper form is not sufficient.

In *Cholakis v. Cholakis*,⁶⁵ the Manitoba Court of Queen's Bench held that the "interests of broad disclosure in a modern context require... the production of the information in the electronic format when available."⁶⁶ In this case, the defendants appealed an order requiring them to provide to the plaintiff unedited journal entries, accounting journals and a computer disk containing accounting data. The defendants specifically opposed the production of the accounting data on computer disk on the grounds that the accounting data had been provided in paper form. The plaintiff maintained that he required the computer disk in order to perform certain accounting functions that could be performed quickly and inexpensively with the data in electronic format. Without the computer disk, the plaintiff would be required to input data from 12 boxes of documents. The court concluded that the computer disk was electronic information falling within the definition of a document and contained relevant information that should be produced. As a result, it ordered the defendants to provide the plaintiff with the electronic accounting data, the accounting software program required to access the data, and all other necessary and technical

⁶³ *Ibid.* at ¶ 32.

⁶⁴ *Guidelines*, *supra* note 35 at 11-13 and *Practice Direction*, *supra* note 36 at [6.4.26.1.3](#) and [6.4.3.3](#).

⁶⁵ *Cholakis v. Cholakis*, [2000] M.J. No. 6 (Q.B.) (QL).

⁶⁶ *Ibid.* at ¶ 30.

information. As evidenced in this decision, the production of electronic data in and of itself may not suffice. The court in *Cholakis* determined that the parties were entitled to meaningful access and ordered the production of the necessary accounting software.

Sycor Technology Inc., discussed above, canvassed the possibility of electronic production where hard-copy production of requested documents would be cost prohibitive. In that case, it was not suggested that the hard-copy documents would be somehow insufficient; rather, the preference for electronic over hard-copy production was a matter of pragmatism and reasonableness in the face of an overwhelming quantity of documents.

The case of *ITV Technologies Inc. v. WIC Television Ltd.*⁶⁷ raised another interesting aspect of the production of electronic evidence. This was a trademark infringement case, where allegedly infringing uses of the mark were found on various incarnations of the plaintiff's website over time. An issue arose as to the admissibility of Internet information at trial, a suggestion that was contested by the defendants on the ground that Internet documents constituted hearsay. While the court agreed with the defendants on the hearsay point, it allowed the use of Internet information at trial. As Tremblay-Lamer J. mused:

In my view, when considering the contents of a web site the original is found on the Internet and provides better evidence than a print copy. The court was able to see the documents as they existed on the Internet, and could witness such features as hyperlinking and interactive streaming that could not have been realistically reproduced on paper. [...] Overall, I am of the view that the use of the Internet at trial was beneficial and on several occasions, provided evidence which could not have otherwise been before the Court. For example, the Internet was used by counsel for WIC to confirm that the print copy of the meta-tags (key information on a web site) was in conformity with the information found on ITV Technologies' web site. This would not have been possible without access to the Internet.⁶⁸

The judge also remarked approvingly on the use of the WayBack Machine,⁶⁹ a website that archives the Internet as it appears over time. This was of considerable utility to an understanding of the case at bar, as the appearance on the plaintiff's website of the allegedly infringing mark at particular points in time was a point of contention.

⁶⁷ *ITV Technologies Inc. v. WIC Television Ltd.*, [2003] F.C.J. No. 1335 (F.C.T.D.) (QL).

⁶⁸ *Ibid.* at ¶ 13, 15.

⁶⁹ Online: WayBack Machine <www.archive.org>.

b) Accessing Electronic Litigation Support Data

An interesting issue arises with respect to the production of an opposing party's litigation support software.⁷⁰ It is now routine, in complex cases, for parties to input and organize relevant documents and information in litigation support databases. Once the discovery process commences, an opposing party may seek access to the litigation support database. The courts have leaned towards requiring the production of litigation databases in order to facilitate meaningful access to documentation but do not require the production of material that is privileged or otherwise protected.

In the recent decision of *Wilson v. Servier*,⁷¹ the plaintiff brought a class action on behalf of persons who allegedly contracted a serious illness by ingesting the defendant's diet drugs. The defendant pharmaceutical company was also involved in products-liability litigation in the United States. During the discovery process, more than 100,000 documents were identified in the defendant's affidavit of documents. Defendant's counsel prepared an electronic database of these documents and denied the plaintiff access to the database. The court ordered the defendant to provide its electronic database to the plaintiff in order to provide meaningful access to its documentation. It explained:

The database functions as an index to provide meaningful access to the documents. In this Court's view, the production of documents implies meaningful access to those documents through an electronic database, at least when the database has already been prepared by the defendant for its own use. [...] This approach is particularly appropriate when a party is faced with some 500,000 pages of documents by the opposite party.⁷²

This principle of meaningful access is articulated in both the British Columbia *Draft Practice Direction* and Ontario's *Guidelines*. The *Guidelines* urge counsel to avoid the production of voluminous documentation in forms that do not provide access to both parties.⁷³ This means that where one party has documents in a searchable electronic database, the searchable format should be produced.

In *Wilson*, the court also dismissed the defendant's submission that it was unable to isolate and remove certain "subjective fields" which contained counsel's privileged information from its database. In response, the court proposed the appointment of an independent legal technology expert to review the defendant's database. The parties were ultimately able to differentiate the "subjective field" from the remaining objective fields of the database and a court-appointed technology

⁷⁰ This also raises potential problems over the production of confidential proprietary information and/or privileged work product with respect to the software itself.

⁷¹ *Wilson v. Servier*, [2002] O.J. No. 3723 (S.C.J.) (QL).

⁷² *Ibid.* at ¶ 12.

⁷³ *Guidelines*, *supra* note 35 at 15.

expert was not required. As noted in the *Guidelines*, most litigation support software is now designed to enable counsel to produce only the relevant, non-privileged fields of a database.⁷⁴

In *Logan v. Harper*,⁷⁵ the court also considered the appropriateness of compelling disclosure and access to a party's electronic document management software. The defendant had scanned its productions into a searchable electronic format. The plaintiff requested production of both the defendant's electronic database and the software necessary to search the database. The court held that an action involving extensive documentation requires a specific plan for organized access to the documents. The court explained that "parties should ideally utilize a jointly accepted plan of organization, authentication, identification and retrieval"⁷⁶ for the purposes of production:

Where, as here, the party producing the documents wishes to produce the documents in electronic format rather than paper format, it might well be appropriate to compel disclosure of, and access to, electronic document management software.⁷⁷

Ultimately in *Logan*, the court ordered the defendant to provide the plaintiff with its electronic database and particulars of how to obtain a licence for the necessary software. The court's interests in these cases is to promote access to justice by ensuring that all parties can access relevant data in an efficient, effective and collaborative way.

5. Privilege and the Production of Electronic Documents

Electronic discovery presents some practical challenges for protecting privileged information, including an increased likelihood of inadvertent disclosure given the sheer volume of some electronic productions.⁷⁸ The recent case of *National Bank Financial Ltd. v. Potter*⁷⁹ demonstrates the inherent risks associated with electronic information containing privileged information. National Bank commenced proceedings against a publicly traded company, several principals including the former CEO, and a law firm, alleging that the defendants engaged in a scheme to manipulate the price of company shares. During the course of the litigation, the bank's counsel obtained a computer server that belonged to the company prior to its bankruptcy. The server contained emails exchanged between the company's principals and their lawyer. An application was made to strike the bank's claim, stay

⁷⁴ *Ibid.*

⁷⁵ *Logan v. Harper*, [2003] O.J.No. 4098 (S.C.J.) (QL).

⁷⁶ *Ibid.* at ¶ 27.

⁷⁷ *Ibid.* at ¶ 31.

⁷⁸ Michael Traynor and Lori Ploeger, "Hot Topics in Electronic Discovery" (2003) 4 Computer Law Reporter at 300.

⁷⁹ *National Bank Financial Ltd. v. Potter*, [2005] N.S.J. No. 186 (N.S.S.C) (QL).

proceedings and remove its counsel from the record on the grounds that the bank's counsel had wrongfully accessed and reviewed solicitor-client communications.

In his reasons, Justice Scanlon of the Nova Scotia Supreme Court emphasized the importance of solicitor-client privilege. He explained that as soon as the bank's counsel knew or reasonably suspected that they had acquired the opposing party's solicitor-client communications, they should have stopped any review, notified the potential privilege holders and if necessary sought direction from the court as to whether privilege applied. Justice Scanlon dismissed the bank's argument that privilege was lost due to a lack of expectation of privacy for emails contained on a server. By way of example, Justice Scanlon compared the computer server to a law firm's filing cabinet:

When it comes to privileged communications, a server is akin to a filing cabinet. Whether that cabinet is at work, home, or in a lawyer's office it is the nature of the document which affords the special protection, not where the filing cabinet is located.⁸⁰

Ultimately, Justice Scanlon removed the bank's solicitors from the record.

The decision in *Autosurvey Inc. v. Prevost*⁸¹ indicates that the consequences may be more serious where privileged information is wrongfully accessed. The plaintiff commenced an action against the defendants, alleging that they misappropriated its intellectual property. During the course of litigation, the plaintiff accessed the defendant's computer server and made a complete copy of its contents. The plaintiff then informed its solicitor of its actions. The solicitor instructed the plaintiff to secure, preserve and note the contents of the evidence. When the defendant became aware of the plaintiff's actions, he asserted that the plaintiff had improperly obtained access to privileged and confidential communications between the defendants and their solicitors. As a result, the defendant sought an order staying the action.

In response, the court ordered the plaintiff to provide the court with all information copied from the server and to delete all remaining copies. The court accepted that the plaintiff wrongfully accessed confidential and privileged communications that would not have been producible on discovery. In determining the appropriate remedy, the court focused on the actions of the plaintiff and its solicitors. It noted that the plaintiff's solicitors chose to remain wilfully blind and failed to disclose the actions of their client to the defendants, despite having several opportunities to do so. As a result, the court found that the plaintiff's solicitors were

⁸⁰ *Ibid.* at ¶ 96.

⁸¹ *Autosurvey Inc. v. Prevost*, [2005] O.J. No. 4291 (S.C.J.) (QL).

complicit in the inappropriate conduct of its client. Ultimately, the court concluded that the defendants were entitled to a stay of the action. It explained:

As serious as it might be to remove Autosurvey's counsel as solicitors of record in this action as an expression of the Courts distaste and rejection of their conduct and their client's conduct, in my opinion it provides the Defendants with no real or meaningful remedy in the unusual circumstances of this case. If such a limited sanction were to be imposed, Autosurvey itself would still remain seized throughout the course of the litigation between these parties with knowledge of the Defendants privileged communications. As such, the only remedy, which can properly recompense the Defendants in any meaningful way for Autosurvey's conduct, is to bring the proceedings to an end.⁸²

From these decisions, it is obvious that counsel should develop a production and discovery strategy in order to protect privileged documents. The *Guidelines* recommend that parties should discuss how to protect privilege at the outset of litigation.⁸³ Counsel making requests for extensive electronic production should be as specific as possible in order to obtain useful and relevant information and should identify to one another where privileged information may be stored. Prior to producing documentation, counsel should also carry out a review to identify privileged or irrelevant information. In situations where counsel suspect that they might have obtained access to an opposing party's privileged communications, they must take steps to notify the privilege holder or, in some circumstances, seek direction from the court. Finally, clients should be encouraged to establish and enforce acceptable document retention and destruction policies.⁸⁴

Air Canada v. WestJet Airlines Ltd.,⁸⁵ a case involving what the plaintiffs describe as “the largest case of corporate espionage ever seen in Canada,” provides another cautionary tale with respect to the use of electronic means for sifting through virtual reams of database files. Documentary production between the parties initially resulted in WestJet having produced some 40 000 documents, whereas Air Canada produced only 1100. As a result of this discrepancy, Air Canada was ordered by the court to produce a larger range of documents. This resulted in their producing another 10 000, as well as their raising the spectre of another 75 000 documents to be delivered pending the outcome of the motion at hand. At issue on the motion was the method by which the plaintiffs had collected the last batch of documents, as well as their proposed method of reviewing them for privilege, relevance and confidentiality.

⁸² *Ibid.* at ¶ 115.

⁸³ *Guidelines*, *supra* note 35 at 16.

⁸⁴ Jane Bailey, “Email’s Impact on Lawyers and Litigation: Recent Developments in Ontario” (2002) 3 I.E.C.L.C. at 11.

⁸⁵ *Air Canada v. WestJet Airlines Ltd.*, [2006] O.J. No. 1798 (S.C.J.) (QL) [*Air Canada*].

Air Canada had identified a set of search terms to be applied to its database in an effort to identify relevant documents. WestJet suggested several additional terms to be used in the search. Counsel for the parties were unable to come to a consensus on the matter of these search terms, a failure that may have led to some unnecessary litigation.

Air Canada used some, but not all, of WestJet's suggested terms in searching its database for relevant documents. These documents were then subjected to an electronic filter that purported to identify privileged documents. Air Canada proposed to produce this entire filtered set of documents without any further review for relevance, confidentiality or privilege. Air Canada did, however, express its intention to opposing counsel to undertake a sample review of less than 5% of the responsive documents, in order to ensure the efficacy of their electronic search. This failure of Air Canada to conduct a manual review of all responsive documents was at the core of the dispute raised on the motion. WestJet objected to this proposal, arguing that it was the obligation of a party under the *Rules of Civil Procedure* to undertake a manual review of all documents produced, and further, that manual review was the only effective way of determining the relevance and confidentiality of documents to be produced, as an electronic filter would not be attuned to the context in which any given search term was located. Both parties referred to the Ontario *Guidelines* in support of arguments made before the court. Principle #10 of the *Guidelines* states:

A party may satisfy its obligation to produce relevant electronic documents in good faith by using electronic tools and processes, such as data sampling, searching or the use of selection criteria, to identify the documents that are most likely to contain relevant data or information.⁸⁶

This would appear to support Air Canada's position that electronic filtering with a 5% manual review (which had in fact become a 40% review by the time the matter was heard) would satisfy its obligations while maintaining a realistic approach to the production of such a large number of documents. However, the Commentary following Principle #10 remarks that "[t]he objective should be to identify a subset or subsets of the available electronic documents **for detailed review**, that are most likely to be relevant"⁸⁷ [emphasis added]. It was the opinion of both WestJet and the court that this Commentary contemplated some form of further review after completion of the electronically filtered search. While not closing itself off to the possibility that future cases might allow for such a "detailed review" to be undertaken electronically, the court was of the firm belief that, here, it was impossible to do so other than manually.

⁸⁶ *Guidelines*, *supra* note 35 at 14.

⁸⁷ *Ibid.* at 15.

The court mused that solicitor-client privilege was not to be “sacrificed to the interests of expediency or economics,”⁸⁸ and likewise remarked that it was “unmoved”⁸⁹ by Air Canada’s complaint that a manual review would be unnecessarily costly and time-consuming. Indeed, the cost associated with such efforts is staggering. One hopes that, as courts and counsel become increasingly familiar with the technological issues, they will allow themselves to consider more realistically the ancillary issue of the ever-climbing expenses arising from orders such as these. As per the *Guidelines*’ recommendations that counsel “meet and confer”, tech-savvy, cooperative counsel on each side could have saved these parties both time and money.

In *Celanese*,⁹⁰ the Supreme Court of Canada provided some guidance on the issue of protecting solicitor-client privilege when dealing with large quantities of electronic documents. Briefly, this case involved a large volume of documents that had been seized from a defendant pursuant to an Anton Piller order. Contrary to the Anton Piller order, a complete list of the documents seized was not made prior to their removal from the defendant’s premises. In the course of the search for relevant information, approximately 1400 electronic documents, which had not been screened for potential solicitor-client privilege claims, were downloaded onto a portable hard drive and copied onto CD-ROMs. Unknown to the defendant, the contents of the CD-ROMs were eventually uploaded onto the computers of the plaintiff’s solicitors. After learning that these electronic documents had been uploaded, the defendant brought a motion to disqualify the plaintiff’s solicitors.

In reaching their decision, the court explained that the proper execution of an Anton Piller order requires the searching solicitors to be able to show which documents they have seen, which documents they have seized, and what steps have been taken to prevent and address any disclosure of privileged information. In this case, the plaintiff’s solicitors should have made a complete list of the electronic documents on the hard drive and CD-ROMs.

The court also addressed the issue of disqualification of counsel who have come into contact with privileged information. It held that where a remedy short of removing the searching solicitors will rectify the predicament, this less drastic remedy should be considered. In determining the appropriate remedy, courts will consider a number of factors, including: (i) how the documents came into the possession of the plaintiff or plaintiff’s counsel; (ii) what the plaintiff and plaintiff’s counsel did upon realizing that the documents could be subject to solicitor-client privilege; (iii) the extent to which the privileged documents have been reviewed; (iv) the contents of the solicitor-client information and the degree to which it is prejudicial; (v) the stage of the litigation; and, (vi) the potential effectiveness of firewall or other precautionary steps to avoid a breach of solicitor-client privilege. After considering each of these

⁸⁸ *Air Canada*, *supra* note 85 at ¶ 15.

⁸⁹ *Ibid* at ¶ 16.

⁹⁰ *Celanese*, *supra* note 49.

factors, the court ruled ordered that the plaintiff's solicitors be disqualified from acting as counsel in the case.

6. The Cost of Electronic Discovery

a) *Cost Allocation in Canadian Cases*

The issue of cost allocation in electronic discovery cases has not been clearly resolved in Canada. The costs associated with the retention, retrieval, reproduction and review of electronic records can be burdensome. It appears that neither the *Rules of Civil Procedure* nor the *Supreme Court Rules* fully contemplate these cost realities. Rule 1(5) of the British Columbia *Supreme Court Rules* provides that the object of the Rules is the "just, speedy and inexpensive determination of every proceeding on its merits."⁹¹ The Ontario *Rules of Civil Procedure* contain a similar provision. In addition, the Ontario⁹² and Alberta Rules⁹³ provide that copies of documents requested for inspection are to be made at the requesting party's expense.

The difficult issue of which party should bear the burden and expense of electronic discovery was addressed by the Saskatchewan Court of Queen's Bench in *Bank of Montreal v. 3D Properties*.⁹⁴ There, the defendant applied to the court for an order requiring the plaintiff bank to produce various documents, including computer records, disks and tapes in or upon which records were kept that related to the action and from which the documents included in the plaintiff's statement of claim originated. The court held that the word "document" included information stored by electronic means and required production subject to the following conditions:

1. The plaintiff will be entitled to first edit out all information contained in or on said "document" that is clearly protected against disclosure as being privileged and confidential;
2. The plaintiff will not be required to alter the format of the data contained in said "document": computer records, discs, and/or tapes. The plaintiff is only obligated to produce copies of same (as edited) to the applicant in its present existing form;
3. All reasonable costs incurred by the plaintiff, including inter alia, searching for, locating, editing, and producing said "documents": computer records, discs, and/or tapes for the applicant shall be at the applicant's cost and expense. An estimate shall first be provided to it by the plaintiff. The amount thereof, for so many of said documents which it

⁹¹ *Supreme Court Rules*, supra note 3 at 1(5).

⁹² *Rules of Civil Procedure*, supra note 2 at rule 30.04(7).

⁹³ *Alberta Rules of Court*, supra note 4 at rule 5.11 (3).

⁹⁴ *Bank of Montreal v. 3D Properties*, [1993] S.J. 279 (Q.B.) (QL).

determines it requires as specified by said applicant in writing, shall then be immediately deposited into Court before the plaintiff shall be obligated to produce them for and to the said applicant. The final cost, when determined, shall be paid out of said monies "in Court" or by said monies "in Court" being forthwith supplemented to cover any cost in excess of the said deposit. If any issue arises over what is considered for this purpose to be "Reasonable Costs" same will be settled by me on application, and unless on a date and time consented to, on notice.⁹⁵

An entirely different result with respect to the allocation of costs associated with electronic discovery was reached by the Manitoba Court of Queen's Bench in *Cholakis*. The court held that the defendants were responsible for the costs of reviewing and editing the electronic records to remove any irrelevant information that the defendants did not want to disclose to the plaintiff. It also noted that the costs incurred by the defendants might be considered a disbursement in an order for costs at a later stage in the proceeding.

The aforementioned cases clearly reveal conflicting philosophies with respect to determining which party should assume the costs associated with electronic discovery. The following observation has been made with respect to cost allocation:

The mere fact that electronic discovery is at issue should not change the rule that the producing party presumptively pays for the production. Cost shifting should be considered only when electronic discovery imposes an undue burden or expense on the producing party. The question usually turns on whether the electronic information is kept in an accessible or inaccessible format, which in turn depends on the type of media used to store the information.⁹⁶

This approach to cost allocation is also proposed by Ontario's *Guidelines*, which indicate that the interim costs of electronic discovery should be borne by the party producing the documents pending the final disposition of an action. Any cost shifting should occur at the end of the litigation when the unsuccessful party may be required to contribute to the costs of the successful party. The British Columbia *Draft Practice Direction* also considers transferring costs of searching for and discovering electronic documents.⁹⁷ Generally, the *Practice Direction* provides that the costs associated with applying the *Practice Direction* should be included in keeping with Rule 57 of the *Supreme Court Rules*. The Ontario *Guidelines* suggest that it may be

⁹⁵ *Ibid.* at ¶ 28.

⁹⁶ Karen Groulx, "The Issue of Costs" *LawPro Magazine* 4:2 (September 2005) 9 at 9.

⁹⁷ *Practice Direction*, [supra note 36 at 6.4.3.2-6.1.4.2](#)

appropriate for parties to allocate costs differently in special circumstances by way of agreement or court order.⁹⁸

b) Cost Allocation in the United States

In the United States, the traditional approach has been to require the party producing electronic documents to assume the costs of production. More recently, in *Rowe Entertainment, Inc. v. The William Morris Agency*⁹⁹ the court developed eight factors to be considered in determining who should bear the costs of electronic document production. The factors are: (1) the specificity of the discovery request; (2) the likelihood of a successful search; (3) the availability of the requested information from other sources; (4) whether the information was retained electronically for ongoing business purposes; (5) which party was likely to benefit from the requested production; (6) the magnitude of the costs of production; (7) which party is in the best position to control discovery costs; and (8) the party's resources.¹⁰⁰

Not all courts agree that the *Rowe* factors are the correct ones to apply when determining whether to shift the burden and the cost of production of electronic data to the requesting party. In *Zubulake*,¹⁰¹ the court modified the *Rowe* factors because it found that they tended to favour the responding party by too readily shifting the cost of production to the requesting party. Instead, the court articulated the following seven-factor test: (1) is the request specifically tailored to discover relevant information; (2) availability of the information from other sources; (3) total cost of the information from other sources; (4) total cost of production versus amount in dispute; (5) relative ability of each party to control cost and its incentive to do so; (6) importance of the issue; (7) relative benefit to the party obtaining the information.¹⁰²

In *Zubulake*, the plaintiff claimed that vital evidence in support of her claim could be found in inter-office emails stored on backup tapes and other archived media. The plaintiff sought an order compelling the defendant to search for, restore and produce the requested documents at its expense. The defendant sought to shift the costs of production to the plaintiff on the grounds that such costs were an undue burden. The court ordered production first and made the cost assessment later on the basis of the quality of evidence that surfaced. After reviewing the type of information retrieved and the costs incurred, the court applied the multi-factor test and shifted 25% of the costs to the plaintiff requestor.

Given the potential expense associated with the discovery of electronic documents, Canadian courts are likely to be concerned about the cost-benefit balance and have an interest in ensuring that discoveries do not become unfairly burdensome

⁹⁸ *Guidelines, supra* note 35 at 16-17.

⁹⁹ [2002] U.S. Dist. Lexis 488 (S.D.N.Y.) (Lexis) [*Rowe*].

¹⁰⁰ *Ibid.* at ¶ 8.

¹⁰¹ *Supra*, note 58.

¹⁰² *Ibid.* at ¶ 9.

or expensive. As mentioned, the Ontario *Guidelines* suggest that, pending the final disposition of the proceeding, the interim costs of electronic discovery should be borne by the party producing the documents. Rule 57 of the British Columbia *Supreme Court Rules* provides that costs should follow the event. Any cost shifting should occur at the end of the litigation when the unsuccessful party may be required to contribute towards the costs of the successful party. Notably, the litigation process in the United States does not involve cost shifting at the end of the litigation. Therefore, the American case law on the allocation of costs for electronic discovery may be of limited use.¹⁰³

c) *Cost-Benefit Analysis – A New Approach by Canadian Courts?*

Courts are becoming increasingly knowledgeable about the benefits and burdens of electronic discovery. A very recent Ontario case may have signalled yet another shift in the jurisprudential approach to ordering extensive production of electronic documents. In *Farris v. Staubach*,¹⁰⁴ the plaintiff brought a motion to compel the production of email messages that she claimed existed but had not been produced by the defendants on discovery. The plaintiff was unable to provide evidence in support of their existence, much less attest to their potential relevance to the action. The defendant asserted that, in order to meet the plaintiff's request, it would have to perform 87,000 separate database searches over one terabyte of information. The court weighed in with its opinion as follows:

No one could tell me how much this would cost or how long it would take. To my mind the most expensive part of the whole exercise would be reviewing the search results to see what documents were relevant, what documents were not relevant and what documents were privileged. [...] How long that review would take and how many billable hours would be involved one can only guess. I am confident that the resulting expense would shock all but the most jaded of litigants. That expense in turn raises fundamental access to justice issues. Absent compelling reasons the *Rules of Civil Procedure* should [not] be interpreted so as to impose procedural burdens on litigants so onerous that it makes no economic sense to take a case to trial no matter how meritorious that case may be. [...]

That is the cost side of a cost-benefit analysis of this motion. The benefits of the requested searches and documents relevance review seem to me to be minimal. [...]

The further searches which the plaintiff seeks will be very onerous and expensive, to say nothing of the cost of reviewing the search results for relevance and privilege. For her part the plaintiff feels that the requested

¹⁰³ *Guidelines*, *supra* note 35 at 17.

¹⁰⁴ *Farris v. Staubach*, [2006] O.J. No. 2335 (S.C.J.) (QL).

searches will disclose more relevant documents but does not proffer direct evidence of the existence of any relevant document which the TSC has but has yet to produce. [...]

Weighing all of these factors, but particularly the certainty of heavy cost to TSC against the uncertainty of material benefit to the plaintiff, I decline to order that TSC carry out the requested searches.¹⁰⁵

These remarks are unequivocal in their disapproval of what appears to be a trend towards escalating costs associated with production in the electronic age. A cost-benefit analysis is not explicitly warranted by the *Rules of Civil Procedure*; however, the Master here tied the argument back to access to justice, a fundamental tenet of the law, in order to rein in what appeared to be grossly unreasonable demands. As was the case in *Desgagnes*,¹⁰⁶ the court insinuated that parties are making these increasingly unrealistic production requests simply because the technology appears to allow them to do so at the click of a button. Here, the Master was wise to note that, despite technological simplicity in conducting searches, the bulk of the cost is, as it ever was, the cost of manual review by lawyers for relevance, confidentiality and privilege. As indicated by the decision in *Air Canada*, the requirement of old-fashioned manual review remains with us in the electronic age.

7. Conclusion

Recent case law in the area of electronic discovery shows that Canadian lawyers and courts are becoming more attuned to these issues. Our courts have adopted an approach that incorporates the traditional principles of relevance but also considers the necessity of access and the reasonableness of providing that access. Lawyers involved in electronic discovery issues will be required to develop their own protocols to ensure that electronic documents have been appropriately located, preserved and produced. This mandates an early assessment of the evidentiary requirements of your own case and that of your opponents. Failure to do so may result in the loss of important evidence and breaches of obligations of preservation. Clearly, electronic discovery is here to stay.

¹⁰⁵ *Ibid.* at ¶ 22-24, 26.

¹⁰⁶ *Supra* note 33. Throughout its reasons, the *Desgagnes* court addressed what might be considered another kind of cost-benefit analysis, weighing “the intrusive nature of the order in comparison to the probative value of the information”, and determining that the “marginal probative value” of the requested data was offset by “competing concerns for the plaintiff’s privacy and confidentiality.”

APPENDIX**ALPHABETICAL INDEX OF CASES CITED**

- Air Canada v. WestJet Airlines Ltd.*, [2006] O.J. No. 1798 (S.C.J.) (QL).
- Autosurvey Inc. v. Prevost*, [2005] O.J. No. 4291 (S.C.J.) (QL).
- Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen*, [2006] B.C.J. No. 753 (B.C.S.C.) (QL).
- Bank of Montreal v. 3D Properties*, [1993] S.J. No. 279 (Q.B.) (QL).
- BMG Canada Inc. v. Doe*, [2005] F.C.J. No. 858 (F.C.A.) (QL).
- Brandon Heating & Plumbing (1972) Ltd. v. Max Systems Inc.*, [2006] M.J. No. 149 (Q.B.) (QL).
- Canadian Derivatives Clearing Corp. v. EFA Software Services Ltd.*, [2001] A.J. No. 653 (Q.B.) (QL).
- Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] S.C.J. No. 35 (QL).
- Cholakis v. Cholakis*, [2000] M.J. No. 6 (Q.B.) (QL).
- CIBC v. Genuity Capital Markets*, [2005] O.J. No. 614 (S.C.J.) (QL).
- Coleman (Parent) Holdings Inc. v. Morgan Stanley*, 2005 WL 679071 (Fla. Cir. Ct March 1, 2005).
- Desgagnes v. Yuen*, [2006] B.C.J. No. 1418 (B.C.S.C.) (QL).
- Dulong v. Consumers Packaging Inc.*, [2000] O.J. No. 161 (S.C.J.) (QL).
- Endean v. Canadian Red Cross Society*, [1998] B.C.J. No. 724 (C.A.) (QL).
- Farris v. Staubach*, [2006] O.J. No. 2335 (S.C.J.) (QL).
- ITV Technologies Inc. v. WIC Television Ltd.*, [2003] F.C.J. No. 1335 (F.C.T.D.) (QL).
- Ireland v. Low*, [2006] B.C.J. No. 1592 (B.C.S.C.) (QL).
- Logan v. Harper*, [2003] O.J. No. 4098 (S.C.J.) (QL).
- National Bank Financial v. Potter*, [2005] N.S.J. No. 186 (N.S.S.C.) (QL).
- Nicolardi v. Daley*, [2002] O.J. No. 595 (S.C.J.) (QL).

Northwest Mettech Corp. v. Metcon Services Ltd., [1996] B.C.J. No. 1915 (B.C.S.C.) (QL).

Portus Alternative Asset Management Inc. (Re) (2005), 28 OSCB 2670 (O.S.C.).

Prism Hospital Software Inc. v. Hospital Medical Records Institute, [1991] B.C.J. No. 3732 (B.C.S.C.) (QL).

Procter & Gamble Co. v. Kimberly-Clark of Canada Ltd., [1989] F.C.J. No. 341 (F.C.T.D.) (QL).

Reichmann v. Toronto Life Publishing, [1988] O.J. No. 1727 (H.C.J.) (QL).

Rintoul v. St. Joseph's Health Centre, [1998] O.J. No. 4074 (S.C.J.) (QL).

Rowe Entertainment Inc. v. William Morris Agency, [2002] U.S. Dist. Lexis 488 (S.D.N.Y.) (Lexis).

Sourian v. Sporting Exchange Ltd., [2005] O.J. No. 753 (S.C.J.) (QL).

Spasic Estate v. Imperial Tobacco Ltd., [2000] O.J. No. 2690 (C.A.) (QL).

Sycor Technologies Inc. v. Kiaer, [2005] O.J. No. 5395 (S.C.J.) (QL).

Value Analytix Ltd. v. Doman Industries Ltd., [2006] B.C.J. No. 1241 (B.C.S.C.) (QL)

Wilson v. Servier, [2002] O.J. No. 3723 (S.C.J.) (QL).

Zubulake v. USB Warburg LLC, [2004] US Dist LEXIS 13584 (N.Y.D. Ct.) (Lexis).

SUBJECT INDEX OF CASES CITED

Defining and Locating Electronic Documents

(a) Definition of Document

(b) Potential Sources of Documents

(i) Scope of Production

Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen, [2006] B.C.J. No. 753 (B.C.S.C.) (QL).

BMG Canada Inc. v. Doe, [2005] F.C.J. No. 858 (F.C.A.) (QL).

Dulong v. Consumers Packaging Inc., [2000] O.J. No. 161 (S.C.J.) (QL).

Nicolardi v. Daley, [2002] O.J. No. 595 (S.C.J.) (QL).

Northwest Mettech Corp. v. Metcon Services Ltd., [1996] B.C.J. No. 1915 (B.C.S.C.) (QL).

Procter & Gamble Co. v. Kimberly-Clark of Canada Ltd., [1989] F.C.J. No. 341 (F.C.T.D.) (QL).

Sourian v. Sporting Exchange Ltd., [2005] O.J. No. 753 (S.C.J.) (QL).

Value Analytix Ltd. v. Doman Industries Ltd., [2006] B.C.J. No. 1241 (B.C.S.C.) (QL)

(ii) Deleted Information

Ireland v. Low, [2006] B.C.J. No. 1592 (B.C.S.C.) (QL).

Prism Hospital Software Inc. v. Hospital Medical Records Institute, [1991] B.C.J. No. 3732 (B.C.S.C.) (QL).

(iii) Hidden Data

Desgagnes v. Yuen, [2006] B.C.J. No. 1418 (B.C.S.C.) (QL).

Reichmann v. Toronto Life Publishing, [1988] O.J. No. 1727 (H.C.J.) (QL).

Sourian v. Sporting Exchange Ltd., [2005] O.J. No. 753 (S.C.J.) (QL).

Spoliation and Preservation of Electronic Evidence

(a) The Canadian Approach to Spoliation and Preservation

Brandon Heating & Plumbing (1972) Ltd. v. Max Systems Inc., [2006] M.J. No. 149 (Q.B.) (QL).

Canadian Derivatives Clearing Corp. v. EFA Software Services Ltd., [2001] A.J. No. 653 (Q.B.) (QL).

Celanese Canada Inc. v. Murray Demolition Corp., [2006] S.C.J. No. 35 (QL).

CIBC v. Genuity Capital Markets, [2005] O.J. No. 614 (S.C.J.) (QL).

Endean v. Canadian Red Cross Society, [1998] B.C.J. No. 724 (C.A.) (QL).

Logan v. Harper, [2003] O.J. No. 4098 (S.C.J.) (QL).

Portus Alternative Asset Management Inc. (Re) (2005), 28 OSCB 2670 (O.S.C.).

Rintoul v. St. Joseph's Health Centre, [1998] O.J. No. 4074 (S.C.J.) (QL).

Spasic Estate v. Imperial Tobacco Ltd., [2000] O.J. No. 2690 (C.A.) (QL).

Sycor Technologies Inc. v. Kiaer, [2005] O.J. No. 5395 (S.C.J.) (QL).

(b) Spoliation and Preservation of Evidence in the United States

Coleman (Parent) Holdings Inc. v. Morgan Stanley, 2005 WL 679071 (Fla. Cir. Ct March 1, 2005).

Zubulake v. USB Warburg LLC, [2004] US Dist LEXIS 13584 (N.Y.D. Ct.) (Lexis).

Production of Electronic Evidence

(a) Form of Production

Cholakis v. Cholakis, [2000] M.J. No. 6 (Q.B.) (QL).

ITV Technologies Inc. v. WIC Television Ltd., [2003] F.C.J. No. 1335 (F.C.T.D.) (QL).

Sycor Technologies Inc. v. Kiaer, [2005] O.J. No. 5395 (S.C.J.) (QL).

(b) Accessing Electronic Litigation Support Data

Logan v. Harper, [2003] O.J. No. 4098 (S.C.J.) (QL).

Wilson v. Servier, [2002] O.J. No. 3723 (S.C.J.) (QL).

Privilege and the Production of Electronic Documents

Air Canada v. WestJet Airlines Ltd., [2006] O.J. No. 1798 (S.C.J.) (QL).

Autosurvey Inc. v. Prevost, [2005] O.J. No. 4291 (S.C.J.) (QL).

Celanese Canada Inc. v. Murray Demolition Corp., [2006] S.C.J. No. 35 (QL).

National Bank Financial v. Potter, [2005] N.S.J. No. 186 (N.S.S.C.) (QL).

The Cost of Electronic Discovery

(a) Cost Allocation in Canadian Cases

Bank of Montreal v. 3D Properties, [1993] S.J. No. 279 (Q.B.) (QL).

Cholakis v. Cholakis, [2000] M.J. No. 6 (Q.B.) (QL).

(b) Cost Allocation in the United States

Rowe Entertainment Inc. v. William Morris Agency, [2002] U.S. Dist. Lexis 488 (S.D.N.Y.) (Lexis).

Zubulake v. USB Warburg LLC, [2004] US Dist LEXIS 13584 (N.Y.D. Ct.) (Lexis).

(c) Cost-Benefit Analysis – A New Approach by Canadian Courts?

Air Canada v. WestJet Airlines Ltd., [2006] O.J. No. 1798 (S.C.J.) (QL).

Desgagnes v. Yuen, [2006] B.C.J. No. 1418 (B.C.S.C.) (QL).

Farris v. Staubach, [2006] O.J. No. 2335 (S.C.J.) (QL).