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# THE SEDONA CANADA PRINCIPLES

## *Addressing Electronic Document Production*

A Project of The Sedona Conference®  
Working Group 7 (WG7)

FEBRUARY 2007 PUBLIC COMMENT DRAFT

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# *The Sedona Canada Principles Addressing Electronic Document Production*

[Public Comment Draft]

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## *Preface*

Welcome to the first publication of The Sedona Conference® Working Group 7, “Sedona Canada.” This public comment draft addresses the disclosure and discovery of electronically stored information in Canadian civil litigation. The Sedona Conference® is a nonprofit law and policy think tank based in Sedona, Arizona, dedicated to the advanced study, and reasoned and just development, of the law in the areas of complex litigation, antitrust law and intellectual property rights. It established the Working Group Series (the “WGS<sup>SM</sup>”) to bring together some of the finest lawyers, consultants, academics and jurists to address current issues that are either ripe for solution or in need of a “boost” to advance law and policy. (See Appendix B for further information about The Sedona Conference® in general and the WGS<sup>SM</sup> in particular). WGS<sup>SM</sup> output is first published in draft form and widely distributed for review, critique and comment. Following this public comment period, the draft is reviewed and revised, taking into consideration what has been learned during the peer review process. The Sedona Conference® hopes and anticipates that the output of its Working Groups will evolve into authoritative statements of law and policy, both as these are and ought to be.

Working Group 7, “Sedona Canada,” was formed out of the growing recognition that the discovery of electronically stored information can no longer be seen as a peculiarity of litigation in the United States or limited to complex commercial lawsuits in Ontario and British Columbia. It is quickly becoming a factor in all Canadian civil litigation, large and small. It requires universal understanding by the Canadian bar and a common approach rooted in proportionality and reasonableness, with respect for variations in local rules and practices. We hope that the principles and commentary that follow will be of immediate benefit to the bench and bar as they approach this cutting-edge intersection of law and information technology. It is our expectation that Sedona Canada will benefit greatly from the public comment process.

I want to thank the entire Working Group for all their hard work, and especially the combined Steering and Editorial Committees. I also want to note that Sedona Canada sought and received considerable assistance from members of The Sedona Conference® Working Group 1 in the United States, which began a similar process in October 2002 and published the first U.S. public comment draft of The Sedona Principles in March 2003. That publication and the editions that followed have been well received by U.S. courts, both as resources cited in judicial opinions and as significant contributions to the process leading to the amending the Federal Rules of Civil Procedure in December 2006. We hope that The Sedona Canada Principles will make similarly positive contributions to the development of Canadian law.

To make suggestions or if you have any questions, or for further information about The Sedona Conference®, its Conferences or Working Groups, please go to [www.thesedonaconference.org](http://www.thesedonaconference.org) or contact us at [tsc@sedona.net](mailto:tsc@sedona.net).

*Richard G. Braman,*  
Executive Director,  
The Sedona Conference®  
February 2007

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## Foreword

I am pleased to provide a foreword to *The Sedona Canada Principles*. There is a growing recognition throughout Canada that electronically stored information poses new problems and complications for litigants, their counsel and the judiciary.

When work was undertaken in Ontario on guidelines for e-discovery, those involved understood that to be truly effective, guidelines had to be at least national if not international in scope.

A number of individuals who helped develop the Ontario guidelines eagerly joined other practicing lawyers, judges, in-house counsel and Court law society representatives from across Canada, together with the organizers of The Sedona Conference® and a representative of the United States federal judiciary, to form The Sedona Conference Working Group 7, (“Sedona Canada”).

Drawing on the work previously undertaken by The Sedona Conference® with respect to guidelines and principles addressing e-discovery in the United States, and with the benefit of work in Ontario, the undertaking of the Sedona Canada Working Group over 2 ½ days at Mont Tremblant was amongst the most productive and most collegial with which I have been associated.

The result is a set of principles for e-discovery that we believe are compatible with the discovery rules in all the Canadian provinces and territories and consistent with the Federal Rules of Civil Procedure in the United States, allowing for substantive differences in discovery practice and procedure. There continues to be a misconception that e-discovery issues are mainly applicable to big law firm, large document cases. Electronically stored information is rapidly becoming a feature of even the most routine of civil cases.

The particular concerns of e-discovery are directly applicable to all discovery: the need to have a Discovery Plan to address issues of preservation of information, proportionality of potentially relevant documentation and an analysis of cost vs. benefit of the exercise. There needs to be dialogue between the parties to civil litigation to develop a plan in which their clients participate with knowledge of the costs involved.

*The Sedona Canada Principles* is a pioneering effort to state some fundamental concepts for e-discovery that are applicable to a wide range of cases in any jurisdiction. The *Principles* is meant to be commented upon, revised and improved. Those of us who have been a part of the development anticipate a continuing process of review.

Complementary to the principles themselves will be the work presently being undertaken by bar groups such as the Ontario Bar Association, the Advocates’ Society and others to develop the protocols, templates and precedents to complement and implement the Principles. It is hoped that these will be available to the profession in the near future.

Discovery reform, e-discovery or otherwise, will not be complete until there is a cultural change in the legal profession and its clients. The system simply cannot continue on the basis that every piece of information is relevant in every case, or that the “one size fits all” approach of Rules can accommodate the needs of the variety of cases that come before the Courts. Judicial resolution of discovery disputes is to be discouraged, as it simply adds cost and delay to the resolution of actions on their merits. Additional rules, while helpful, are not the entire answer to the cost of discovery.

*The Sedona Canada Principles* is the work of Sedona Canada, the members of which are to be congratulated for their effort. The principles are an important contribution to a continuing process of education of clients, the legal profession and the judiciary.

*Justice Colin Campbell*  
Superior Court of Justice  
Toronto, Ontario

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*The Sedona Canada Principles Addressing Electronic Document Production*  
*At A Glance*

1. Electronically stored information is discoverable.
2. In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically stored information; (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.
3. Counsel and parties should meet and confer as soon as practicable and on an ongoing basis, regarding the identification, preservation, collection, review and production of electronically stored information.
4. As soon as litigation is reasonably anticipated, parties must consider their obligation to take reasonable and good faith steps to preserve potentially relevant electronically stored information.
5. The parties should be prepared to disclose all relevant electronically stored information that is reasonably accessible in terms of cost and burden.
6. A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information.
7. A party may satisfy its obligation to identify electronically stored information in good faith by using electronic tools and processes such as data sampling, searching and/or the use of selection criteria to collect potentially relevant electronically stored information.
8. Parties should agree as early as possible in the litigation process on the format in which electronically stored information will be produced. Parties should also agree on the format, content and organization of information to be exchanged in any required list of documents as part of the discovery process.
9. During the discovery process parties should agree to, or if necessary, seek judicial direction on, measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronic documents and data.
10. During the discovery process, parties should anticipate and respect the rules of the forum in which the litigation takes place, while appreciating the impact any decisions may have in related actions in other forums.
11. Sanctions should be considered by the court where a party will be materially prejudiced by another party's failure to meet any obligation to preserve, collect, review or produce electronically stored information. The party in default may avoid sanctions if it demonstrates the failure was not intentional or reckless.
12. The reasonable costs of preserving, collecting and reviewing electronically stored information will be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.

# Introduction

## *Discovery in a World of Electronic Documents and Data*

Discovery, and document production in particular, is a familiar aspect of litigation practice. The explosive growth and diversification of electronic methods of creating documents, communicating, and managing data have transformed the meaning of the term “document.” Twenty years ago, PCs were a novelty and email did not exist. Today by some estimates more than 90 percent of all information is created in digital format.<sup>1</sup>

For courts and lawyers, whose practices are steeped in tradition and precedent, the pace of technological and business change presents a particular challenge. In recent years, courts and litigants have attempted to meet this challenge, sometimes by resorting to traditional approaches to discovery, sometimes by innovating. The Sedona Canada Principles and Commentaries seek to synthesize the current approach and offer new, practical standards for managing electronic discovery.

### **1. What Is Electronic Discovery?**

“Electronic discovery” refers to the discovery of electronically stored information, including email, web pages, word processing files, computer databases, and virtually any information that is stored on a computer or other electronic device. Technically, electronically stored information is “electronic” if it exists in a medium that can be read through the use of computers or other digital devices. Such media include cache memory, magnetic disks (such as computer hard drives or floppy disks), optical disks (such as DVDs or CDs), and magnetic tapes. Electronic discovery can be distinguished from “paper discovery,” which refers to the discovery of writings on paper that can be read without the aid of electronic devices.

For readers less familiar with technical terms relevant to electronic discovery, the complete *Sedona Conference Glossary For E-Discovery and Digital Information Management* is available on The Sedona Conference website: [www.thesedonaconference.org](http://www.thesedonaconference.org), under “Publications.”

### **2. What Rules Govern Electronic Document Production in Canada?**

In Canada, the rules for documentary production are codified by each province’s rules of civil procedure or rules of court. In terms of electronic documentary production, there are typically two complementary sets of rules: those requiring documentary production, and those defining “document” to include various forms of electronic records or data.

Each province and territory has an elaborate set of rules regulating the production, inspection, dissemination, review, listing and safekeeping of documents that are somehow relevant to the proceedings at hand.<sup>2</sup> While the approach varies

<sup>1</sup> Peter Lyman and Hal R. Varian, “How Much Information” (2003), online: UC Berkeley School of Information <<http://www.sims.berkeley.edu/how-much-info-2003>>.

<sup>2</sup> The general rules requiring documentary production are found at the following sections in the relevant province’s rules: Ontario, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 30.02; Alberta, *Alberta Rules of Court*, Alta. Reg. 390/1968, R. 193; British Columbia and Yukon, *Rules of Court*, B.C. Reg. 221/90, R. 26; Manitoba, *Court of Queen’s Bench Rules*, Man. Reg. 553/88, R. 30.02; New Brunswick, *Rules of Court*, N.B. Reg. 82-73, R. 31.02; Newfoundland and Labrador, *Rules of the Supreme Court*, S.N.L. 1986, c. 42, Sch. D R. 32.01, 32.04; Northwest Territories and Nunavut, *Rules of the Supreme Court*, N.W.T. Reg. 010-96, R. 219, 225 and 229; Nova Scotia, *Judicature Act*, R.S.N.S. 1989, c. 240, *Civil Procedure Rules*, R. 20.03, 20.04 and 20.05; Prince Edward Island, *Supreme Court Act*, R.S.P.E.I. 1988, c.S-10, *Rules of Civil Procedure*, R. 30.02; Saskatchewan, *Queen’s Bench Act*, R.S.S. 1978, c. Q-1, *Queen’s Bench Rules*, R. 214; and Quebec, *Code of Civil Procedure*, R.S.Q. c. C-25 s. 331.

from province to province, some provinces' rules are substantially similar<sup>3</sup>, and two territories<sup>4</sup> have simply adopted the rules of another jurisdiction.

Most provinces explicitly define "document" in their rules. In almost every case, the definition includes either "electronic" documents, or documents or records "in any format", which ostensibly includes electronic documents.<sup>5</sup>

### **3. How Are Electronic Documents Different from Paper Documents?**

If the same rules govern paper discovery and electronic discovery, why should electronic discovery be any different from paper discovery? Electronically stored information presents unique opportunities and problems for document production. These subtle, but sometimes profound, differences can be grouped into six broad categories.

#### **A. Volume and Duplicability**

Electronically stored information is created at much greater rates than paper documents and, as such, there are vastly more electronic documents than paper documents. As a result, the amount of information available for potential discovery has increased exponentially with the introduction of computers. Today, the great majority of households and businesses in Canada are connected to the internet. A research paper published by the Science, Innovation and Electronic Information Division of Statistics Canada in December, 2005 described the evolution of information and communications technologies (ICT) connectivity in Canada:

Although in 1996 only a very small number of households used the Internet from home (7.4%), by 2001 the penetration rate approached half of all households (48.7%) and by 2003 it reached 55%, while Internet use from any location reached 64% in 2003 (Statistics Canada 2004a).<sup>6</sup>

The percentage of Canadian private businesses using the internet stood at 82% in 2005, compared to 63.4% in 2000, with internet sales growing from \$5.7 billion in 2000 to \$28.3 billion in 2004, and jumping to \$39.2 billion in 2005.<sup>7</sup> Just over three-quarters (77%) of firms used email, up from 74% in 2003 and 66% in 2001.

The dramatic increase in email usage and electronic file generation poses special problems for large corporations. A single large corporation can generate and receive millions of emails and electronic files each day. According to a 2003 study, email generates about 400,000 terabytes<sup>8</sup> of new information each year worldwide.<sup>9</sup> Instant messaging generates

<sup>3</sup> For instance, the rules of Ontario, Manitoba, New Brunswick and P.E.I. are very similar in their approach.

<sup>4</sup> Nunavut uses the Northwest Territories' *Rules of the Supreme Court*, and Yukon uses British Columbia's *Rules of Court*.

<sup>5</sup> Definitions of "document" are found at the following sections in the respective province's rules: Ontario, Rule 30.01; Alberta, Rule 186; British Columbia, Rule 1; Manitoba, Rule 30.01; New Brunswick, Rule 31.01; Northwest Territories and Nunavut, Rule 218; Prince Edward Island, Rule 30.01; and Saskatchewan, Rule 211.

<sup>6</sup> Statistics Canada, *Literacy and Digital Technologies: Linkages and Outcome* (2005), online: Statistics Canada <<http://www.statcan.ca/english/research/56F0004MIE/56F0004MIE2005012.pdf>>.

<sup>7</sup> Statistics Canada, *Survey of Electronic Commerce and Technology* (2005), online: Statistics Canada <<http://www.statcan.ca/Daily/English/060420/td060420.htm>>.

<sup>8</sup> A terabyte would be roughly equivalent to 50 million pages of printed text.

<sup>9</sup> Peter Lyman and Hal R. Varian, "How Much Information" (2003), online: UC Berkeley School of Information <<http://www.sims.berkeley.edu/how-much-info-2003>>.

five billion messages a day (750GB), or 274 terabytes a year. Ninety-two percent of new information is stored on magnetic media, primarily hard disks, compared to 0.01% for paper.<sup>10</sup> Not surprisingly, the proliferation of the use of electronic data in corporations has resulted in vast accumulations of data. While a few thousand paper documents fill a file cabinet, a single computer tape or disk drive the size of a small book can hold the equivalent of millions of printed pages. Organizations often accumulate thousands of such disks and tapes as data is stored, transmitted, copied, replicated, backed up, and archived.

Partly responsible for this phenomenon is the fact that electronic documents are more easily duplicated than paper documents. Electronic information is subject to rapid and large scale user-created and automated replication. For example, email users frequently send the same email to many recipients. These recipients, in turn, often forward the message, and so on. At the same time, email software and the systems that are used to transmit the messages automatically create multiple copies as the messages are sent and re-sent. Similarly, other business applications are designed to periodically and automatically make copies of data. Examples of these include web pages that are automatically saved as cache files and file data that is routinely backed up to protect against inadvertent deletion or system failure.

## B. Persistence

Electronic documents are more difficult to dispose of than paper documents. A shredded paper document is essentially irretrievable. Likewise, a paper document that has been discarded and taken off the premises is generally considered to be beyond recovery. Disposal of electronically stored information is much less straightforward. It has been observed that , “when you delete a document on a hard drive, you are only erasing the pointers to the location of the file data on the hard drive. The actual data itself remains on the hard drive, completely untouched.”<sup>11</sup> In *Prism Hospital Software Inc. v. The Hospital Records Institute*,<sup>12</sup> the defendants produced a quantity of magnetic media, from which the plaintiff was able to locate a series of files that, though deleted, continued to exist. This persistence of electronically stored information compounds the rate at which it accumulates in places hidden from custodians who may have no idea that the information is still available on their computers. Due to the difficulty of effectively deleting electronically stored information, software is sold that purports to completely erase or “wipe” the data by repeatedly overwriting the data numerous times.

## C. Metadata

Electronic documents contain information known as “metadata,” information about a file that allows the operating system to store and retrieve the file at a later date. Much metadata is not normally accessible by the computer user.

Metadata includes information on file designation, create and edit dates, authorship, and edit history, as well as hundreds of other pieces of information used in system administration. For instance, email metadata elements include the dates that mail was sent, received, replied to or forwarded, blind carbon copy (“bcc”) information, and sender address book information. Similarly, office documents contain metadata tracking the dates of creation, modification and printing. Internet documents contain hidden data that allow for the transmission of information between an internet user’s computer and the server on which the internet document is located. So called “meta tags” allow search engines to locate websites responsive to specified search criteria. “Cookies” are embedded codes that can be placed on a computer (without user knowledge) that can, among other things, track usage and transmit information back to the originator of the cookie.<sup>13</sup>

<sup>10</sup> Peter Lyman and Hal R. Varian, “How Much Information” (2003), online: UC Berkeley School of Information <<http://www.sims.berkeley.edu/how-much-info-2003>>.

<sup>11</sup> Dan Pinnington, “Why electronic documents are different” *LawPRO Magazine* (September 2005), online: Practice Pro <<http://www.practicepro.ca/LawPROmag/Whyelectronicdocuments.pdf>>.

<sup>12</sup> (1994) 97 B.C.L.R. (2d) 201 (S.C.).

<sup>13</sup> Jason R. Baron, “Recordkeeping in the 21st Century” (1999) 33 *Information Management Journal* 8.

Metadata presents unique issues for the preservation and production of documents in litigation. On the one hand, it is easy to conceive of situations where metadata is necessary to authenticate a document, or establish facts material to a dispute, such as when a file was accessed in a suit involving theft of trade secrets. In most cases, however, the metadata will have no material evidentiary value; it does not matter when a document was printed or who typed the revisions. There is also a real danger that information recorded by the computer may be inaccurate. For example, when a new employee uses a word processing program to create a memorandum by using a memorandum template created by a former employee, the metadata for the new memorandum may incorrectly identify the former employee as the author. Email, on the other hand, may have very useful metadata that can be extracted and used to generate the to:, from:, date:, cc: fields for ultimate loading in the review or litigation support tool. Unlike the possibly erroneous information that might be transferred from a template, e-mail metadata is accurate, and capturing it automatically can save time and money.

Understanding what metadata<sup>14</sup> needs to be specifically preserved and produced represents one of the biggest challenges in electronic document production.

#### **D. Dynamic, Changeable Content**

Unlike paper documents, electronic documents have dynamic features that may change over time, often without the user even being aware of the changes taking place.

Databases are constantly being updated with new information, most often through direct user input, but also automatically through other systems. For example, a store with fourteen locations may have the accounting system at each location update a main system with daily sales information. Because the stores may be located in several time zones, the updated data will appear at various times throughout the day. Under this scenario, deciding which “version” of the database is the appropriate one to preserve for discovery may be problematic.

Internet-based business systems are dynamic, frequently changing as new information is updated, changed and/or removed throughout the day either by online users interacting with the system or by the system owner. Again, deciding which snapshot of the system is the proper one for discovery can be challenging.

Standard office applications like electronic mail, word processors or spreadsheets also have dynamic features. Opening an electronic mail message can change dates and times. Metadata elements change to reflect new dates and times each time a spreadsheet or word processed document is copied. Files that have other files linked with them, or embedded within them, may change whenever the related file changes<sup>15</sup>.

The move towards sharing application data files among many users (“virtual” work groups) further compounds discovery as the data within the file can change without any particular custodian being aware of the change.

In the course of discovery, managing the dynamic nature of electronically stored information will be an ongoing challenge. The Principles and Commentaries below are intended to provide guidance in dealing with those challenges.

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<sup>14</sup> The term “metadata” is often used to include changes and deletions to text in a word processing document, or formulae in a spreadsheet, because this information is hidden from view once a document is printed in paper format or converted to a paper-equivalent like a scanned copy. Strictly speaking, this kind of information is part of the substantive content of the document and should be preserved and, if appropriate, produced.

<sup>15</sup> An example of a linked file is a small spreadsheet that has been pasted into a word processed document. If the user changes the spreadsheet, the copy in the document changes as well.

## **E. Environment-Dependence and Obsolescence**

Electronic data, unlike paper data, may be incomprehensible when separated from its environment. For example, information in a database is organized into structured fields interpreted by an application; without the application the raw data in the database will appear as a long list of undefined characters. To make sense of the data, a viewer needs the context, including labels, columns, report formats, and other information. Existing or customized “reports” based on queries of the database can be generated without producing the entire database.

It is normal for an organization to upgrade its systems every few years, but technological change and obsolescence can create unique issues for recovering “legacy data” not present in the recovery of paper documents. Neither the personnel familiar with the obsolete systems nor the technological infrastructure necessary to restore the out-of-date systems may be available when this “legacy” data needs to be accessed. In a perfect world, electronically stored information that has continuing value for business purposes or litigation would be converted for use in successor systems, and all other data would be discarded. In reality, such migrations are rarely flawless.

## **F. Dispersion and Searchability**

While paper documents will often be consolidated in a handful of boxes or filing cabinets, employees’ electronically stored information could reside in numerous locations: desktop hard drives, laptop computers, network servers, floppy disks, CDs and backup tapes. Many of these electronic documents may be identical copies. Others may be earlier versions drafted by a single employee, or by other employees working on a shared network.

Consequently, it may be more difficult to determine the provenance of electronically stored information than paper documents. The ease of transmission, the routine modification and a multi-user editing process may obscure the origin of a document. Electronic files are often stored in shared network folders that may have departmental or functional designations rather than author information. In addition, there is growing use of collaborative software that allows for group editing of electronically stored information, rendering the determination of authorship far more difficult. Finally, while electronically stored information may be stored on a single drive, it may also be found on high-capacity, undifferentiated backup media, or on network servers not under the custodianship of the individual who may have created the document.

Counterbalancing the dispersed nature of electronically stored information is the fact that some forms and media can be searched quickly and fairly accurately by automated methods. For these types of electronically stored information, lawyers may be able to search through far more documents than they could hope to review manually.

## **4. Why Do Courts and Litigants Need Standards Tailored to Electronic Discovery?**

The differences between electronically stored information and paper documents make electronic document production a very different process than paper discovery. In practical terms, these differences mean that the Rules of Procedure, principally designed to govern the discovery of paper documents, do not always provide meaningful guidance for disputes involving the discovery of electronic documents.

For example, a preservation order to save “all records pertaining to the manufacture of X” could, if all documents were paper documents, be applied logically by a party. The party could, in a relatively simple manner, instruct its employees to collect and preserve those records. In the electronic age, such a command could present intractable problems. Since electronic information is both dynamic and ubiquitous, a party would have to either suspend operations or copy all electronically stored information, wherever located and in whatever form, for possible production. That process can be extraordinarily complex and expensive, depending upon the volumes involved. In the electronic context, it is very difficult to suspend destruction of only the information covered by the preservation order.

Early experiences in Canada with e-discovery have been marked by very expensive and time-consuming burdens in preserving and producing electronically stored information in litigation. We have heard anecdotal stories about cases where parties were required to spend millions of dollars to process and review large volumes of electronically stored information that had marginal relevance to the case. In other cases, the preservation of electronically stored information has been costly, necessitating the restoration of thousands of backup tapes containing only marginally relevant information. In other cases counsel simply ignore electronically stored information as a potential source of evidence.



These burdens would be minimized if standards were provided to parties and courts for addressing electronic document production. Without standards, parties are left to guess what their obligations are, with the threat of various sanctions for incorrect guesses. Indeed, a number of courts, particularly in the United States have noted the lack of principled guidance in the area<sup>16</sup>. The Introduction to the Guidelines for the Discovery of Electronic Documents in Ontario also noted that the “rules and the case law to date provide little clear guidance to parties and their counsel on *how* to fulfill that [e-discovery] requirement.”

In Canada, standards have been drafted in Ontario and British Columbia specific to each province with best practice recommendations. In Ontario, the Guidelines for the Discovery of Electronic Documents in Ontario (the “Ontario E-Discovery Guidelines”)<sup>17</sup> offered the first attempt at the best practices guidelines for courts and counsel in Ontario. The British Columbia guidelines took the form of a practice direction to the profession. Other provinces are considering similar Practice Directions. There is still a need for a national “best practices” set of standards in Canada to govern multi-jurisdictional litigation and to assist courts in other provinces where standards have not yet been developed. While Canadian courts have relied on the Ontario E-Discovery Guidelines and the U.S. Sedona Principles, it is clearly preferable to have a Canadian version of eDiscovery Principles.

## **5. How Can Courts and Litigants Use Precedent from the Context of Paper Discovery in the Context of Electronic Documents?**

The differences between electronic and paper document production give rise to an important question: what is the relevance of the great body of case law that has developed applying the provincial Rules of Civil Procedure and the Quebec Civil Code in the context of paper discovery? How can courts and counsel use the existing case law that has developed surrounding the Rules of practice to guide discovery in the unique context of electronic documents?

Case law considering paper discovery should be applied to electronic discovery giving careful regard to the similarities and differences between the two. Appreciating the differences between electronic and paper documents can allow courts and parties to break from past practice where appropriate, while still achieving the fundamental objective of securing the “just most expeditious and least expensive” resolution of litigation.

### **A. Sameness: Find Analogy from Paper Discovery**

Many principles from paper discovery are illuminating in the context of electronic document production.

*Illustration i.* Searches for relevant paper documents usually entail identifying the files of key individuals or files devoted to the individual, product, or conduct that is at issue in the litigation (such as the personnel file of a plaintiff who is suing for wrongful dismissal). There is no expectation that an organization search the filing cabinets of employees with no connection to the issues in the litigation. By analogy, there should be no expectation that an organization search the electronic files of individuals with no connection to the litigation.

*Illustration ii.* The preservation obligation for paper documents does not require a party to keep multiple identical copies of each potentially relevant paper document. Thus, it makes no sense to require a party to preserve electronic documents on optical disks or hard drives as well as the copies of those same documents that might exist on backup media.

Drawing analogies from paper discovery, however, can lead to costly pitfalls. These pitfalls arise when parties fail to recognize the distinct capabilities or limitations of electronically stored information.

<sup>16</sup> See *Williams v. Sprint/United Management Co.* (2005), 230 F.R.D. 640; 2005 U.S. Dist. LEXIS 21966: “[T]he Court finds insufficient guidance in either the federal rules or case law, and thus relies primarily on the Sedona Conference Principles and comments for guidance on the emerging standards of electronic document production...”

<sup>17</sup> Discovery Task Force, *The Supplemental Discovery Task Force Report* (October 2005), online: Ontario Bar Association <[http://www.oba.org/en/pdf\\_newsletter/DTFFinalReport.pdf](http://www.oba.org/en/pdf_newsletter/DTFFinalReport.pdf)>. The Supplemental Report includes Guidelines for the Discovery of Electronic Documents in Ontario, prepared by the e-discovery sub-committee.

*Illustration iii.* When reviewing paper documents before production, lawyers and paralegals commonly review each page of a potentially relevant paper file to see if the document mentions a person or event responsive to a document request. It has been common practice with respect to electronic documents to print out paper copies of all potentially responsive documents and then review them by hand. By doing so, however, the responding party foregoes the possibility of greatly reducing the time and cost of document review by using automated searches that allow counsel to use key words to electronically search through electronic files.

*Illustration iv.* In the world of paper discovery, a document preservation order requiring that a corporate party “freeze” all of its documents is burdensome, but normally would not force the party to shut down its business. Paper documents can be left in their files, or copied if they need to be marked up. Personnel can suspend their practice of throwing away old files. In the electronic context, complying with such an order and freezing all electronic information (including shared or interactive databases) could be catastrophic to a business. It may be difficult to “freeze” a company’s entire set of electronically stored information without effectively shutting down its entire computer system, because data are altered and overwritten constantly on all computer systems, often in ways that users cannot detect or control. For example, the mere act of accessing a document can alter it. On any given system, thousands of temporary files are created and overwritten daily, hourly, or more frequently. Disk space that is no longer in use but which may contain potentially relevant fragmented data may be overwritten.

## **B. Difference: Eschew Precedent from Paper Discovery Where Appropriate**

As noted above, automated searches may be faster and less expensive than a page-by page manual review of electronic documents, and parties may find it appropriate to deviate from paper discovery practices accordingly. Parties may want to consider the use of automated tools that assist with the relevancy and privilege review of large volumes of electronically stored information.

*Illustration v.* It may be easier to recover “destroyed” electronic documents than “destroyed” paper documents. Computer forensic techniques allow parties to recover or reconstruct deleted documents even, in some cases, documents that appear to have been permanently deleted. However, this does not mean that parties responding to document requests should be required to produce deleted data or data fragments. Generally, the expense and disruption caused by such techniques do not justify such a production. Here, an analogy to paper is useful. A producing party is not required to produce papers that it threw away a year ago. In *Rowe Entm’t, Inc. v. The William Morris Agency, Inc.*,<sup>18</sup> the court held, “just as a party would not be required to sort through its trash to resurrect discarded paper documents, so it should not be obligated to pay the cost of retrieving deleted emails.” However, if there is a serious question of document destruction, recovering destroyed documents may be justified. Even paper documents that have been shredded to confetti possibly can be reconstructed using new, sophisticated (but expensive) technology.<sup>19</sup>

*Illustration vi.* Because the cost of electronic document storage (i.e., optical disks or magnetic tape) is relatively low, some have suggested preserving copies of electronic documents even when there is no business reason or legal obligation to do so. This overlooks the fact that indiscriminate copying and retention of electronic files – even if cheaper than indiscriminate copying and retention of paper files – leads to the same or greater headaches in litigation: ballooning costs of review for responsiveness and privilege, large numbers of duplicate documents, and problems dealing with retrieving documents in obsolete formats that have been unnecessarily retained. To date, there is no expectation or requirement to retain documents when there is no business reason or legal obligation to do so simply because the documents are in electronic format.

<sup>18</sup> 205 F.R.D. 421 at 431 (S.D.N.Y. 2002).

<sup>19</sup> See Douglas Heingartner, “Back Together Again” *New York Times* (July 17, 2003), G1 (describing technology that may be used to reconstruct documents shredded by the East German secret police).



### **C . Translation: Applying Media-Neutral Rules in a Context-Specific Way**

The best approach to electronic discovery begins by recognizing how existing precedent and new technology interact. The rules governing discovery are broadly stated standards that require reasonableness in their application. As such, the rules governing discovery are media neutral, in that they apply to documents in all forms of media—electronic or stone tablets. Due to their generality, however, the proper application of the rules only takes shape when one understands the specific context in which the rules are applied. For electronic discovery, this requires that the litigants and the courts understand how electronic documents work, and the costs and benefits of different approaches to discovery.

The result is a process of translation. Precedent from the world of paper discovery provides a starting point. One can translate paper discovery to the world of electronic discovery by asking whether the factual differences between the paper context and the electronic context are relevant to the rule. If so, the precedent may not be a good model. If not, the paper-based precedent could be an adequate starting point for discovery in the electronic context.

For example, in *illustration i.* above, the controlling, media-neutral rule is that production is limited to relevant documents. The specific application in the paper context is that employees not connected to the issues in the litigation need not search their files because in all likelihood they will not have any relevant documents. In translating from paper discovery to electronic discovery, the question is, “Does the existence of documents in electronic form make the files of such employees more relevant?” Since the answer is no, the guideline in the paper context translates well to the electronic context.

On the other hand, in *illustration iii* above, the controlling, media-neutral rule is the obligation to produce documents responsive to a document request. The specific application in this illustration involves the most efficient way to identify responsive documents. In the paper context, paralegals and attorneys commonly conduct a page-by-page review of documents, looking for certain key words. In translating this best practice from paper discovery to electronic discovery, the question is, “Does the existence of documents in electronic form make another technique more efficient?” In this case the answer may be yes if the electronic documents are in a searchable format. Importantly, correctly answering this question (“translating”) requires an understanding of the electronic documents at issue.

## **6. Diversity of Canadian Discovery Rules**

The Canadian approach to discovery differs from that of our United States counterparts in one respect of particular significance to this discussion. In Canada, there is generally a duty to produce documents, imposed by the various provincial rules of civil procedure. This is not the case in Quebec, which has an entirely separate legal regime; nevertheless, electronically stored information is routinely produced without the specific obligation to do so.

While the precise standards differ from province to province, documentary discovery is an integral part of practice in most Canadian courts. As discussed, this includes production of electronic documents, broadly defined throughout the provinces to encompass all manner of items such as email, electronic files, computer databases, and so on. The list is open and appears to grow as parties increasingly turn to the courts to determine whether such items are captured within the various provincial definitions of “document” or “record”.

The rules governing documentary production also prescribe the manner in which these documents are to be produced. Generally, an affidavit or list of documents or records is required. Ontario’s scheme is typical of the approach taken across Canada. In Ontario, each party must produce an affidavit of documents, in which all documents relevant to the proceedings are listed in three Schedules. Schedule A lists all relevant, non-privileged documents in a party’s possession, control or power. Schedule B lists all relevant documents that are alleged to be privileged and are in the party’s possession. Schedule C lists documents that were once, but are no longer, in the party’s possession. It is noteworthy that the duty to produce generally requires parties to list documents no longer in their possession.

The concept of the “deemed undertaking” is found in common law and civil procedure rules and requires all parties and counsel to undertake not to use the evidence or information acquired from discovery procedures for any purposes other than those relating to the proceeding in which the evidence or information was obtained. Alberta and British Columbia follow such a practice in accordance with the common law; however, it has yet to be codified under their Rules. The deemed undertaking is included in Ontario’s *Rules of Civil Procedure*.<sup>20</sup>

In Quebec, the *Code of Civil Procedure*<sup>21</sup> does not specifically require the preservation or production of information beyond documents that the disclosing party intends to refer to as exhibits at the hearing. Parties can, however, be required to deliver specific documents when requested by the other side in the context of discovery. In this context, there is no specific obligation to preserve electronic information in advance of litigation that extends beyond the general obligation of parties to refrain from acting with the intent of causing prejudice to another person or behaving in an excessive or unreasonable manner, which would be contrary to the requirements of good faith as prescribed by the Code of Civil Procedure.

The Sedona Canada Working Group has examined the issues surrounding electronic document production closely, focusing on the similarities to and differences from paper document production, as well as the differences in discovery practices across Canada. The Principles that follow reflect our efforts to translate the rules of discovery into the law of electronic document production.

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<sup>20</sup> R.R.O. 1990, Reg. 194, R. 30.1.

<sup>21</sup> R.S.Q. c. C-25 s. 331.

## Principle 1

### Electronically stored information is discoverable.

#### Comment 1.a. Definition of Electronically Stored Information

While the Rules of Court in Canadian jurisdictions provide for varying definitions of what constitutes a “record” or “document” for the purposes of production in discovery, they all provide that electronically stored information must be produced as part of the discovery process. Practically speaking, typical forms of electronically stored information include the familiar office documents found on desktop and laptop computers, electronic mail and instant messages, financial databases, internet sites, among others.

Canada, its provinces and territories have set in place a legislative framework for electronic records and electronic commerce. In 1998, the Uniform Law Conference of Canada adopted the *Uniform Electronic Evidence Act*, amending the existing rules of evidence to facilitate the admissibility of electronic records in proceedings in the courts. Following on this, in 1999 the Uniform Law Conference of Canada adopted the Uniform Electronic Commerce Act, based on the United Nations *Model Law on Electronic Commerce* (1996), and recommended that such legislation be passed by governments across Canada.

The federal counterpart is Part 3 of the *Personal Information Protection and Electronic Documents Act*,<sup>22</sup> in which “electronic document” is defined as “data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device. It includes a display, printout or other output of that data.” The *Canada Evidence Act*<sup>23</sup> defines an electronic record or document as “data that is recorded or stored on any medium in or by a computer system or other similar device.”

Québec passed *An Act to establish a legal framework for information technology*,<sup>24</sup> which includes the following definition:

Document: Information inscribed on a medium constitutes a document. The information is delimited and structured, according to the medium used, by tangible or logical features and is intelligible in the form of words, sounds or images. The information may be rendered using any type of writing, including a system of symbols that may be transcribed into words, sounds or images or another system of symbols.

#### Relevancy

Rules of court make relevancy a prerequisite to production, regardless of the form. For example, Rule 186.1 of the Alberta *Rules of Court*<sup>25</sup> provides that records be both relevant and material. The Ontario *Rules of Civil Procedure*<sup>26</sup> and the British Columbia *Supreme Court Rules*<sup>27</sup> provide that every document relating to any matter in question in the action shall be disclosed.

Canadian courts have repeatedly held that electronically stored information is producible and compellable in discovery.<sup>28</sup> Actual media have been ordered to be produced in particular cases, such as in *Reichmann v. Toronto Life Publishing*

<sup>22</sup> S.C. 2000, c.5

<sup>23</sup> R.S.C. 1985, c. C-5, s. 34.1(1).

<sup>24</sup> R.S.Q. c. C-1.1.

<sup>25</sup> Alta. Reg. 390/1968.

<sup>26</sup> R.R.O. 1990, Reg. 194, R. 30.02(1).

<sup>27</sup> B.C. Reg. 221/90, R. 26(1).

<sup>28</sup> See *Cholakis v. Cholakis* (2000), 44 C.P.C. (4th) 162 (Man. Q.B.): “The plaintiff has satisfied me that the electronic information requested falls within the definition of a document under the Rules and contains relevant information that should be produced. If the defendants Leo Cholakis, Fairmont Real Estate Limited and Kensington Building Limited wish to provide the information in a format that does not reveal irrelevant information, then it is incumbent upon them to develop a mechanism by which that can be done. The interests of broad disclosure in a modern context require, in my view, the production of the information in the electronic format when it is available.”

*Co.*<sup>29</sup>, where a party was ordered to produce not only a printed copy of a manuscript contained on a disk and already produced, but the disk itself. The court found that the disk fell within the common law definition of a “document” and therefore had to be produced.

More recently, in *Northwest Mettech Corp. v. Metcon Service Ltd.*<sup>30</sup>, the court declined to order production by the defendants of an entire hard drive, and ordered production of only the relevant data housed on the drive. The court found that the drive was simply a storage medium or electronic filing cabinet containing electronic documents, and that the defendants were not required to list the entire contents or produce the entire electronic filing cabinet anymore than they would be with respect to a filing cabinet containing paper. The court did order the defendants to produce an affidavit verifying all of the files on the hard drive related to the matter in issue. In appropriate circumstances, with proper safeguards for privilege and confidentiality a court may be willing to grant access to a hard drive or other medium, and/or to allow inspection.<sup>31</sup> This suggests that access for forensic purposes such as recovering deleted information may be permitted.

### **Comment 1.b. E-Commerce Legislation and Amendments to the Evidence Acts**

Most provinces have passed legislation that provides guidance on how electronic means can be used for creating and managing records and complete electronic commerce transactions.<sup>32</sup> These statutes provide that information shall not be denied legal effect or enforceability solely by reason that it is in electronic form.

The statutes do not require individuals to use or accept information in electronic form, but the consent of a person to do so may be inferred from the person’s conduct. Requirements that information be in writing are generally satisfied if the information is accessible so as to be useable for subsequent reference.

Currently, legislation across Canada provides a means to facilitate the admissibility of electronically stored information in the courts, including the establishment of evidentiary presumptions related to integrity of electronic information and procedures for introducing such evidence and challenging its admissibility, accuracy and integrity. The legislation generally does not modify any common law or statutory rule related to the admissibility of records, except the rules relating to authentication and best evidence<sup>33</sup>.

<sup>29</sup> (1989), O.R. (2d) 65 (H.C.J.).

<sup>30</sup> 1996 CanLII 1056 (B.C.S.C.).

<sup>31</sup> see *Nicolardi v. Daley*, [2002] O.J. No. 595 (Ont. Sup. Ct.) (QL).

<sup>32</sup> The Yukon, Prince Edward Island, Ontario, Nova Scotia, Newfoundland, and Nova Scotia have respectively passed: *Electronic Commerce Act*, R.S.Y. 2002, c. 66; R.S.P.E.I. 1988, c. E-4.1; S.O. 2000, c. 17; S.N.S. 2000, c. 26; S.N.L. 2001, c.E-5.2; N.S. 2000, c. 26. Alberta, New Brunswick and British Columbia have similar legislation under the title of the *Electronic Transactions Act*, found respectively at: S.A. 2001, c. E-5.5; S.N.B. 2001, c. E-5.5; S.B.C. 2001, c. 10. Manitoba’s legislation is titled: *Electronic Commerce and Information Act*, C.C.S.M. 2000, c. E55. Saskatchewan’s legislation is entitled: *Electronic Information and Documents Act*, S.S. 2000, c. E-7.22.

<sup>33</sup> See, for example, *Evidence Act*, R.S.O. 1990, c. E.23, s.34.1; *An act to establish a legal framework for information technology*, R.S.Q. c. C-1.1, s.5, 6 and 7.

## Principle 2

**In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically stored information; (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.**

The widespread use of computers and the Internet has created vast amounts of electronically stored information, making the cost and burden of discovery exponentially greater than it was in the “paper” world. Even a case involving small dollar amounts and straightforward legal issues can give rise to significant volumes of electronically stored information. Litigants should take a practical and efficient approach to electronic discovery, and should ensure that the burden of discovery remains proportionate to the issues, interests and money at stake. Without a measured approach, overwhelming electronic discovery cost may prevent the fair resolution of litigation disputes.

Costs extend beyond recovering or making electronic documents available in a readable form, searching documents to separate the relevant material from the irrelevant material, reviewing the documents for privilege, and producing the documents to the other party. Non-monetary costs and other factors include possible invasion of the litigant's privacy, and the risks to legal confidences and privileges. Electronic discovery can overburden information technology personnel and consume organizational resources.

Courts frequently balance the costs of discovery with the objective of securing a just and speedy resolution of the dispute on the merits<sup>34</sup>. Courts have not ordered production of documents where the parties have demonstrated that the costs of producing documents or the adverse effect upon other interests such as privacy and confidentiality outweighs the likely probative value of the document<sup>35</sup>.

### Comment 2.a. The Proportionality Rule

Many provinces have taken specific initiatives to ensure that the discovery procedures employed are proportional. In British Columbia, for example, Rule 68 of the *Supreme Court Rules*<sup>36</sup> modifies ordinary litigation procedures for certain actions where the amount in controversy is less than \$100,000, providing that the court must consider what is reasonable in relation to the amount at issue in this action. Rule 68 limits the times at which interlocutory applications may be brought, and modifies the generally broad scope of discoverable documents. In particular, a party must list only those documents referred to in the party's pleading, the documents to which the party intends to refer at trial, and all documents in the party's control that could be used to prove or disprove a material fact at trial. The Court has the discretion to require more fulsome discovery, but will “consider the difficulty or cost of finding and producing the documents”. Another British Columbia initiative, Rule 66 of the *Rules of Court* (Fast Track Litigation), modifies the ordinary rules in certain cases, with a view to providing “a speedier and less expensive determination of certain actions the trial of which can be completed within 2 days”. Ontario's Simplified Procedure set forth in Rule 76 of the *Rules of Civil Procedure*, applicable to most civil actions involving less than \$50,000, also modifies the ordinary procedures to reflect the interests at stake in relatively low-value cases.

<sup>34</sup> The Rules of Practice or the equivalent in every jurisdiction in Canada (including the *Federal Court Rules of Practice*) contain a provision emphasizing the over-riding importance of maintaining proportionality within legal proceedings. Appendix “B” provides the citation for each jurisdiction's Rules of Practice.

<sup>35</sup> *Goldman, Sachs & Co. v. Sessions*, 2000 BCSC 67 (CanLII) (declining to order production where probative value outweighed by time and expense of production, and the party's confidentiality interest); *Ireland v. Low*, 2006 BCSC 393 (CanLII) (declining to order production of hard drive where probative value outweighed by privacy interests); *Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen* (2006), 53 B.C.L.R. (4th) 329 (S.C.), 2006 BCSC 554 (CanLII) (declining to order production of hard drive in the particular circumstances of the case); *Desgagne v. Yuen* (2006), 56 B.C.L.R. (4th) 157 (S.C.), 2006 BCSC 955 (CanLII) (declining to order production of a hard drive, metadata, and internet browser history due, in part, to the intrusive nature of the requested order compared to the limited probative value of the information likely to be obtained).

<sup>36</sup> B.C. Reg. 221/90.

Most recently, the Chief Justice of the Supreme Court of British Columbia promulgated a Practice Direction Regarding Electronic Evidence (effective July 1, 2006)<sup>37</sup>, setting forth default standards for the use of technology in the preparation and management of civil litigation, including the discovery of documents in electronic form (whether originating in electronic form or not). Section 6.1 of the Practice Direction suggests that the scope of discovery may be modified to reflect the circumstances of the particular case. For example, it requires the parties to confer regarding limitations on the scope of electronic discovery where the ordinary rules would be “unduly burdensome, oppressive or expensive having regard to the importance or likely importance” of the electronic documents<sup>38</sup>.

The rule of proportionality is a reaction to delays and costs impeding access to justice.

Section 4.2 *CCP* reads as follows:<sup>39</sup> “In any proceeding, the parties must ensure that the proceedings they choose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute; the same applies to proceedings authorized or ordered by the judge.”

Moreover, the proportionality rule must be interpreted in conjunction with section 4.1 *CCP* reads as follows:<sup>40</sup> “Subject to the rules of procedure and the time limits prescribed by this Code, the parties to a proceeding have control of their case and must refrain from acting with the intent of causing prejudice to another person or behaving in an excessive or unreasonable manner, contrary to the requirements of good faith.”

The rule of proportionality has been applied to order the communication of documents on CDs<sup>41</sup>, to the possibility of examining a witness after plea by videoconference<sup>42</sup> as well as to put an end to a disproportionate examination after plea where an excessive amount of documents have been requested and unreasonable number of questions have been asked<sup>43</sup>.

Although “the Court sees to the orderly progress of the proceedings and intervenes to ensure proper management of case” according to section 4.1 *CCP* par. 2, the application of the proportionality rule relies on the parties as stated by section 4.2 *CCP*<sup>44</sup>.

<sup>37</sup> *Electronic Evidence Project*, online: Courts of British Columbia <<http://www.courts.gov.bc.ca/sc/ElectronicEvidenceProject/ElectronicEvidenceProject.asp>>.

<sup>38</sup> Discovery Task Force, *Guidelines for the Discovery of Electronic Documents in Ontario*, (2005) online: Ontario Bar Association <[http://www.oba.org/en/pdf\\_newsletter/E-DiscoveryGuidelines.pdf](http://www.oba.org/en/pdf_newsletter/E-DiscoveryGuidelines.pdf)> Principle 2.

<sup>39</sup> *Code of Civil Procedure*, R.S.Q. c. C-25 s. 4.2.

<sup>40</sup> *9103-3647 Québec Inc. c. Rock Couët*, 2003 IIJCan 14311 (Q.C.S.).

<sup>41</sup> *Citadelle, Cie d'assurance générale c. Montréal (Ville)*, 2005 IIJCan 24709 (Q.C.S.).

<sup>42</sup> *Entreprises Robert Mazeroll Ltée c. Expertech - Bâtisseur de réseaux Inc.*, 2005 IIJCan 131 (Q.C.Q.).

<sup>43</sup> *Ryan Parsons c. Communismed Inc.* (14 avril 2005), J.E. 2005-1042 (C.Q.).

<sup>44</sup> Luc Chamberland, “La Règle de proportionnalité: à la recherche de l'équilibre entre les parties?” in *La réforme du Code de procédure civile, trois ans plus tard* (Cowansville, Qc.: Yvon Blais, 2006) 1.



## Principle 3

**Counsel and parties should meet and confer as soon as practicable and on an ongoing basis, regarding the identification, preservation, collection, review and production of electronically stored information.**

### Comment 3.a. Meet Early and Often

The purpose of the “meet and confer” is to identify and resolve e-discovery related issues in a timely fashion. The participants in the “meet and confer” come out with a more realistic understanding of what is ahead of them in the discovery process.

These Guidelines strongly encourage a collaborative approach for e-discovery, reflecting recent attitudes in Canada<sup>45</sup>. The origin of the meet and confer session is found in the U.S. Federal Rule 26 of Civil Procedure (f)<sup>46</sup>. The Ontario Task Force Guidelines adopted a variation of the meet and confer concept in Principle 8.

In Quebec, the modifications to the CCP introduced the notion of “meet & confer” by requiring the parties to agree on the conduct of the proceeding before the presentation of the introductory motion. A complete new chapter regarding case management was added to the CCP to ensure parties take control of their case in accordance with the new section 4.1 CCP<sup>47</sup>.

Meeting early is one of the keys to effective e-discovery for all sides, and the principle stresses the need to meet “as early as practicable”. Decisions made about e-discovery from the earliest moment that litigation is contemplated will have a serious impact on the conduct of the matter, not to mention the potential cost of discovery. Opening up debate on electronically stored information early in the process avoids subsequent disputes.

<sup>45</sup> *Wilson v. Servier Canada Inc.*, 2002 CanLII 3615 (Ont. Sup. Ct.) at paras. 8- 9:

“The plaintiff’s task in seeking meaningful production has been made particularly difficult by the defendants’ general approach to the litigation. On the simple premise, as expressed by the defendants’ lead counsel, that litigation is an adversarial process, the defendants have been generally uncooperative and have required the plaintiff to proceed by motion at virtually every stage of the proceeding to achieve any progress in moving the case forward.

I take exception to this. In contrast with other features of the civil litigation process in Ontario, the discovery of documents operates through a unilateral obligation on the part of each party to disclose all relevant documents that are not subject to privilege. The avowed approach of the defendants’ counsel is contrary to the very spirit of this important stage of the litigation process.”

See also *CIBC World Markets Inc. v. Genuity Capital Markets*, 2005 CanLII 3944 (Ont. Sup. Ct.) at para. 3. Farley J. required counsel to meet and confer:

“I would expect that the sooner all counsel sit down together to map out a litigation schedule, the better off all parties will be. I would request counsel to jointly advise me of a target date for that schedule to be provided to me. ... The court expects counsel/parties to work out problems/difficulties as quickly and reasonably as possible and in a practical way while not infringing on anyone’s true rights. ... While there was some sparring in court, all counsel dealt cooperatively and in a common sense manner with the points of concern.” See also *Sycor Technologies v. Kiaer* 2005 CanLII 46736 (Ont. Sup. Ct.). The court was dealing with a dispute about the form of production in a case where just the cost of printing e-mails was going to be \$50,000 or so. The court indicated that “procedural collaboration and a healthy dose of pragmatism and common sense” were required, and sent counsel back to work out an efficient method of production in accordance with the Ontario Guidelines.

<sup>46</sup> U.S., H.R.J. Res. 2, *Federal Rules of Civil Procedure*, 109<sup>th</sup> Cong., 2005 at 26(f).

<sup>47</sup> *Code of Civil Procedure*, R.S.Q. c. C-25 s. 151.1 - 151.23.

Principle 3 envisions not just a single meeting but an ongoing series of discussions. Those ongoing discussions assist counsel when they encounter unanticipated technical issues. In some situations, the volume of data to be collected and reviewed is underestimated, and search terms used to cull the collection may need to be reviewed and adjusted if results are not sufficiently precise or responsive. These developments should be communicated to all parties. Absent such communication, any agreement reached at the initial meet and confer can easily evaporate.

### **Comment 3.b. Who Should Attend**

Principle 3 suggests that counsel and parties should attend the meet and confer, since matters to be addressed are not limited to legal issues alone. Although the meet and confer must take place within the context of substantive and procedural law, important technical and strategic considerations arise that are almost certain to be beyond the range of counsel's expertise.

A meet and confer is like any business planning meeting – if the right people are at the table, if the agenda is set out in advance, if participants are prepared, if decisions are recorded and followed up, then the meeting will have a greater likelihood of success. Multi-party and class actions in particular need to have involvement from different points of view.

Depending on the nature of the discovery project and the scope of the litigation, preparation should include collecting information from knowledgeable people within the client organization. These people may include:

1. A business manager or managers familiar with the operational or project areas involved in the litigation and the key players in the organization
2. Someone familiar with the organization's document and records management protocols
3. An IT manager or managers familiar with the organization's network, e-mail, communication and backup systems

In many cases, each party at a meet and confer may benefit from the attendance of an e-discovery adviser with experience in the technical aspects of discovery.

### **Comment 3.c. Preparation for the Meet and Confer**

Counsel should come to the meet and confer prepared to discuss several key issues in a substantive way. Those issues include sources of potentially relevant electronically stored information, steps to be taken for preservation, and the methodology to be used to define and narrow the scope of the data to be reviewed and produced.

#### **Identification<sup>48</sup>**

To prepare for the meet and confer in a meaningful way, counsel should consult with IT staff, outside service providers, users and others to gain a thorough understanding of how electronically stored information is created, used and maintained by or for the client.<sup>49</sup>

<sup>48</sup> The Ontario Guidelines refer to the narrower concept of "location" rather than "identification" of possible sources of relevant data.

<sup>49</sup> See *Canada (Commissioner of Competition) v. Air Canada (T.D.)* (2000), [2001] 1 F.C. 219, 2000 CanLII 17157 (F.C.T.D.) at para. 27: «Counsel for the Commissioner noted that, at the time the Commissioner sought the section 11 order, he did not know what the record-keeping practices of Air Canada were. Counsel indicated that in so far as there were real difficulties in responding to the requests, as a result of the form in which they had been asked, this should be the subject of discussion between counsel, before the Court was asked to adjudicate further on it. That aspect of Air Canada's present motion was therefore set aside to allow for such discussion.»



## Preservation

At the meet and confer, parties discuss what electronically stored information falls within the scope of the litigation and the appropriate steps required to preserve what is potentially relevant. If unable to reach a consensus the parties should apply on an urgent basis for court direction to ensure that relevant information is not destroyed.

## Collection and Processing

The parties will also discuss the steps they will take to narrow the potentially relevant information to a smaller set that is reasonable and proportionate in the context of the lawsuit. Typical selection criteria used to narrow the scope of the electronically stored information include the names of key players, timelines, key data types, key systems (e.g. accounting), de-duplication and search terms.

Parties and counsel should agree in advance on (1) the concept of the use of selection criteria as a means to extract targeted, high-value data; (2) the type(s) and form(s) of selection criteria to be used; (3) a general form of process to be employed in the application of agreed-upon selection criteria; and/or (4) specific search terms that will be used. Absent such agreement, however, parties should be prepared to disclose the parameters of the searches that they have undertaken and to outline the scope of what they are producing and what potential sources or documents have not been searched.

## Review

Issues for discussion in connection with the review stage will include the scope of the review, whether it will be conducted manually or with the assistance of electronic tools, and the methods to be used to protect privilege.

## Production

Counsel should discuss the form in which productions will be exchanged – for example, whether productions will be in native format or TIFFs<sup>50</sup>. Counsel would benefit from a detailed discussion even where source documents are in paper form, or where, as is commonly the case, source documents exist in both hard copy and digital format.<sup>51</sup>

## Schedule

At the meet and confer, counsel should discuss the schedule and timing for the processing, review and production of electronically stored information; the need for additional meet and confers throughout the matter and a resolution process for any issues that may arise.

*Illustration i:* A manufacturer defending a product liability claim issues a litigation hold to the Operations Division, captures the hard drives and server e-mail of twelve production managers and uses a long list of search terms drafted by in-house counsel to cull the data. Outside counsel spend six months reviewing the data before it is produced, almost a year after the litigation was launched.

The receiving party now argues that (a) all data from the Marketing Department relating to the defective product should also have been preserved; (b) there are eight additional managers, four of whom have since left the company, whose e-mails should have been preserved and reviewed; (c) the list of search terms is demonstrably too narrow according to its e-discovery expert, and (d) backup media containing highly probative evidence should have been restored because active end-user e-mail stores are purged every 90 days in accordance with company records management policy.

The preservation, collection, processing, review and production are considered in greater detail in Principles 4 to 8.

<sup>50</sup> For a definition of terms, see *The Sedona Conference Glossary for E-Discovery and Digital Information Management*, <<http://www.thesedonaconference.org>>, under “Publications.”

<sup>51</sup> *Logan v. Harper* 2003 CanLII 15592 (Ont. Sup. Ct.) at para. 66: “Before indexing and scanning the documents, it would be useful for the parties to discuss how the documents are to be identified and organized and to agree upon the electronic format for the documents. If the parties can agree on a mutually acceptable system it may well save time, cost and confusion. It may be that Health Canada has an indexing and identification system that it would be appropriate to adopt.”

## Principle 4

**As soon as litigation is reasonably anticipated, parties must consider their obligation to take reasonable and good faith steps to preserve potentially relevant electronically stored information.**

### Comment 4.a. Scope of Preservation Obligation

The general obligation to preserve evidence extends to electronically stored information but must be balanced against the party's right to continue to manage its electronic information in an economically reasonable manner, including routinely overwriting electronic information in appropriate cases. It is unreasonable to expect organizations to take every conceivable step to preserve all electronically stored information that may be potentially relevant. If overwriting is part of the party's established and reasonable practice – rather than a deliberate or negligent destruction of evidence in anticipation of or in connection with an investigation or litigation – it should be permitted to continue after the commencement of litigation, as long as such practice does not result in the overwriting of electronically stored information relevant to the case that is not preserved elsewhere.

### Comment 4.b. Preparation for Electronic Discovery Reduces Cost and Risk

The costs of discovery of electronically stored information can be best controlled if steps are taken to prepare computer systems and users of these systems for the demands of litigation or investigation.

Such steps include defining orderly procedures and policies for preserving and producing potentially relevant electronically stored information, and establishing processes to identify, locate, retrieve, assess, preserve, review and produce data. A records retention policy should provide guidelines for the routine retention and destruction of electronically stored information as well as paper, and account for necessary modifications to those guidelines in the event of litigation.

With preparation, parties can present to the Court a more accurate picture of the cost and burden when refusing further discovery requests, or when applying for orders shifting costs to the receiving party in appropriate cases. Preparation also mitigates the risk of failing to preserve or produce evidence from computer systems (and thereby limiting the potential for sanctions or other adverse consequences). Finally, a focused and economically reasonable approach will assist in managing the costs of discovery generally.

### Comment 4.c. Response Regarding Litigation Preservation

Parties should take reasonable and good faith steps to preserve information relevant to the issues in an action.<sup>52</sup> In common law jurisdictions the preservation obligation arises when a proceeding has already been filed, but can also arise when it is reasonable to expect the evidence may be relevant to future litigation.<sup>53</sup> Owing to the dynamic nature of electronically stored information, delay may increase the danger of claims that relevant evidence was destroyed.<sup>54</sup>

<sup>52</sup> *Doust v. Schatz* (2002), 227 Sask. R. 1 (C.A.), [2002] SKCA 129 (CanLII) at para. 27: “The integrity of the administration of justice in both civil and criminal matters depends in a large part on the honesty of parties and witnesses. Spoliation of relevant documents is a serious matter. Our system of disclosure and production of documents in civil actions contemplates that relevant documents will be preserved and produced in accordance with the requirements of the law: see for example *Livesey (Jenkins) v. Jenkins* [1985] 1 All E.R. 106, 62 N.R. 23 (H.L.); *Ewing v. Ewing* (No. 1) (1987), 56 Sask. R. 260; *Ewing v. Ewing* (No. 2) (1987), 56 Sask. R. 263 (Sask. C.A.); *Vagi et al. v. Peters* [1990] 2 W.W.R. 170; *R. v. Foster and Walton-Ball* (1982), 17 Sask. R. 37 (Sask. C.A.), and *Rozen v. Rozen* 2002 BCCA 537, 30 R.F.L. (5th) 207, 173 B.C.A.C. 102, 283 W.A.C. 102 (B.C. C.A.). A party is under a duty to preserve what he knows, or reasonably should know, is relevant in an action. The process of discovery of documents in a civil action is central to the conduct of a fair trial and the destruction of relevant documents undermines the prospect of a fair trial.”

<sup>53</sup> As retention policies and preservation plans serve two different purposes, organizations may need to act promptly at the outset of possible litigation to suspend destruction in order to preserve evidence.

<sup>54</sup> On the issue of intentional spoliation of evidence as a separate tort see *North American Road Ltd. v. Hitachi Construction*, [2006] A.W.L.D. 1144 (Alta. Q.B.), 2005 ABQB 847 (CanLII) at paras. 16-17; *Spasic Estate v. Imperial Tobacco Ltd., et al.* (2000), 49 O.R. (3d) 699 (C.A.), 2000 CanLII 17170 (Ont. C.A.).

A proactive preservation plan will ensure a party can respond meaningfully to discovery requests or court orders. The scope of what is to be preserved and the steps considered reasonable may vary widely depending upon the nature of the claims and information at issue.<sup>55</sup> That said, parties dealing with preservation should consider the future discovery demands for relevant data to avoid having to repeat the steps in the future.

#### **Comment 4.d. Notice to Affected Persons in Common Law Jurisdictions**

Upon determining that litigation<sup>56</sup> has triggered a preservation obligation, the party should communicate to affected persons the need for and scope of preserving relevant information in both paper and electronic form. The style, content and distribution of the notice will vary widely depending upon the circumstances. The notice also may include non-parties who have in their power, possession and control information relating to matters in issue in the action.

*Illustration i:* A company receives a statement of claim alleging false or misleading information about its products on its website. It uses an outsourcer to manage its email and its website. As part of its contract for services, the company requires the outsourcer to take weekly backups of the website and to keep the backup tapes for 6 months, after which it would keep the last copy of the month. The company asks the outsourcer to suspend the rotation of the backup tapes until it can determine which tapes would contain the version of the website corresponding to the time period mentioned in the claim.

The notice should describe in detail the kinds of information that must be preserved so the affected custodians can segregate and preserve it. In addition, it may need to address preservation of information in multiple locations (e.g., electronic evidence may exist in more than one place at the same time, network, workstation, laptop, Blackberry/PDAs, cell phone, voicemail, etc), depending upon the circumstances. The notice should also mention the volatility of electronically stored information and that particular care must be taken not to alter, delete or destroy it.

*Illustration ii:* A former employee is suspected of having stolen client contact information and copies of design diagrams when he resigned to start a competing company. The systems can generate electronic reports that can be sent by email to a recipient. Instructions to the company's IT department should include the preservation of the logs of activities as well as any email from the former employee's account. The company's IT department should prevent the employee's workstation from being "wiped" and reassigned to another member of the company to preserve local information tracking the former employee's activities, or the use of a public email system to transfer the information.

The best evidence in this case, though, may be with the former employee. See Comment 4.g. on *Anton Piller* orders below.

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<sup>55</sup> In contrast to the extensive case law and commentary in the United States, the law regarding preservation of electronic documents in Canada is still developing. Not surprisingly, several Canadian courts have looked to the U.S. for guidance in defining the scope of the duty to preserve. The decision from the District Court for the Southern District of New York in *Zubulake v. UBS Warburg LLC* 220 F.R.D. 212 at 217 (S.D.N.Y. 2003) provides guidance regarding the scope of the duty to preserve electronic documents and the consequences of a failure to preserve documents that fall within that duty. At paragraph 7, the court commented as follows on the scope of the duty to preserve: "Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every email or electronic document, and every backup tape? The answer is clearly, "no". Such a rule would cripple large corporations, like UBS, that are almost always involved in litigation. As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation."

<sup>56</sup> Also applies to investigations either internal (e.g. fraud) or external (by a government agency).

The notice should seek preservation of all information affected by the preservation obligation; however, it typically should not require the suspension of all routine records management policies and procedures.

The notice does not need to reach all employees, only those reasonably likely to maintain documents potentially relevant to the litigation or investigation. The notice should also be sent to a person or persons responsible for maintaining and operating computer systems or files falling within the scope of the preservation obligation that have no identifiable custodian or owner.

Communications of the litigation hold should provide prominent notice and clear instructions to the recipients. It may be advisable to repeat the notice periodically and ensure that the notice is provided to new employees. When preservation obligations apply to documents and data spanning a significant or continuing time period, organizations should determine how to deal with systems, hardware or media containing unique relevant material that might be retired as part of a technology upgrade.

#### **Comment 4.e. Preservation in the Province of Quebec**

In the civil law jurisdiction of Quebec, the parties' obligations in the context of litigation differ from the common law jurisdictions. For instance, the obligation to disclose documents to the opposing party ("communication of documents") is limited to those documents that the disclosing party intends to refer to as exhibits at the hearing. The receiving party can also request specific documents in the context of discovery.

There is no specific obligation to preserve electronic information in advance of litigation that extends beyond the general obligation of parties to refrain from acting with the intent of causing prejudice to another person or behaving in an excessive or unreasonable manner, which would be contrary to the requirements of good faith as prescribed by the Code of Civil Procedure.

Before litigation has started, a party who has reason to fear that relevant evidence will become lost or more difficult to use can apply to the Court for an order to allow a person of their choice to examine the evidence in question if its condition may affect the outcome of the expected legal proceeding.

#### **Comment 4.f. Preservation Heroics Not Necessarily Required**

The basic principle which defines the scope of the obligation to preserve relevant information can be found in the common law<sup>57</sup>. A reasonable inquiry based on good faith to identify and preserve active and archival data should be sufficient.

A party should not be required to search for or preserve information that is deleted, fragmented or overwritten unless the party is aware of relevant information that can only be obtained from such sources or there is specific agreement or court order.<sup>58</sup>

#### **Comment 4.g. Preservation Orders**

In some cases it may be appropriate to seek the intervention of the Court to ensure that electronically stored information is preserved. For example, *Anton Piller* orders, which allow one party to copy or take custody of evidence in the possession of another party, have been widely used in most Canadian provinces when one party is concerned

<sup>57</sup> The Ontario e-discovery guidelines provide a useful resource: Discovery Task Force, "Guidelines for the Discovery of Electronic Documents" (2005), online: Ontario Bar Association <[http://www.oba.org/en/pdf\\_newsletter/E-DiscoveryGuidelines.pdf](http://www.oba.org/en/pdf_newsletter/E-DiscoveryGuidelines.pdf)> at principle 3 and 4.

<sup>58</sup> This is in keeping with *The Sedona Principles*, which also note that the obligation to preserve does not require that all electronic information be frozen and that a legal hold should be limited in scope to only the information to the records which may be relevant to the litigation.

that the opposing party will destroy relevant electronically stored information. *Anton Piller* orders are exceptional remedies and are awarded in very limited circumstances for instance “when it is essential that the plaintiff should have inspection so that justice can be done between the parties... (and)...there is a grave danger that vital evidence will be destroyed”. The Supreme Court of Canada recently provided guidelines for the granting and execution of *Anton Piller* orders in *Celanese Canada Inc. v. Murray Demolition Corp.*<sup>59</sup>

Although *Anton Piller* orders are typically granted without notice to the respondent, preservation orders may also result from contested or unapproved applications. For example, the plaintiff in *CIBC World Markets Inc. v. Genuity Capital Markets*<sup>60</sup> brought a motion for the preservation of electronic evidence stored in the defendants’ computer systems. 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, Blackberries, 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.

In *Portus Alternative Asset Management Inc. (Re)*<sup>61</sup>, the Ontario Securities Commission successfully applied for an order appointing a receiver of all assets, undertakings and properties of Portus Alternative Asset Management Inc. The Court granted the receiver unfettered access to all electronic records for the purpose of allowing the receiver to recover and copy all electronic information, and specifically ordered the debtors not to alter, erase or destroy any records without the receiver’s consent. The debtors were ordered to assist the receiver 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.

#### **Comment 4.h. All Data Does Not Need to be “Frozen”**

Even though it may be technically possible to capture vast amounts of data during preservation efforts, this usually can be done only with significant disruption to IT operations. Imposing an absolute requirement to preserve all electronically stored information could require shutting down computer systems and making copies of data on each fixed disk drive, as well as other media that are normally used by the system, which could paralyze the party’s ability to conduct ongoing business. A party’s preservation obligation should therefore not require freezing of all electronically stored information, but rather the appropriate subset of electronically stored information that is relevant to the issues in the action.<sup>62</sup>

*Illustration i.* A typical *Anton Piller* order dealing with a departing employee unlawfully competing may involve isolating electronically stored information relating to certain customers, contracts, orders, etc. With sufficient specificity, this information can be isolated from other non-related business.

#### **Comment 4.i. Disaster Recovery Backup Media**

Generally, parties should not be required to preserve short-term disaster recovery backup media created in the ordinary course of business. When backup media exist to restore electronic files that are lost due to system failures or through disasters such as fires, their contents are, by definition, duplicative of the contents of active computer systems at a specific point in time. Provided that the appropriate contents of the active system are preserved, preserving backup media on a going-forward basis will be redundant. Further, because backup media generally are not retained for substantial periods, but are instead periodically overwritten when new backups are made, preserving backup media would require the intervention of IT staff and the purchase and management of new backup media.

<sup>59</sup> (2006), 269 D.L.R. (4th) 193 (S.C.C.), 2006 SCC 36 (LexUM).

<sup>60</sup> 2005 CanLII 3944 (Ont. Sup. Ct.).

<sup>61</sup> (2005), 28 O.S.C.Bull. 2760.

<sup>62</sup> See *Doust v. Schatz* (2002), 227 Sask. R. 1 (C.A.), [2002] SKCA 129 (CanLII); and *Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen, Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen* (2006), 53 B.C.L.R. (4th) 329 (S.C.), 2006 BCSC 554 (CanLII).



In some organizations, the concepts of “backup” and “archive” are not clearly separated, and backup media are retained for a relatively long period of time. Backup media may also be retained for long periods of time out of concern for compliance with record retention laws. Organizations that use backup media for archival purposes should be aware that this practice is likely to cause substantially higher costs for evidence preservation and production in connection with litigation. See *Farris v. Staubach Ontario Inc.*<sup>63</sup> Organizations seeking to preserve data for business purposes or litigation should, if possible, consider employing means other than traditional disaster recovery backup media.

If a party maintains archival data on tape or other offline<sup>64</sup> media not accessible to end users of computer systems, steps should promptly be taken to preserve those archival media that are reasonably likely to contain relevant information not present as active data on the party’s systems. These steps may include notifying persons responsible for managing archival systems to retain tapes or other media as appropriate.<sup>65</sup>

*Illustration i.* Pursuant to an information technology management plan, once each day a producing party routinely copies all electronic information on its systems and retains, for a period of 5 days, the resulting backup tapes for the purpose of reconstruction in the event of an accidental erasure, disaster or system malfunction. A requesting party seeks an order requiring the producing party to preserve, and to cease reuse of, all existing backup tapes pending discovery in the case. Complying with the requested order would impose large expenses and burdens on the producing party, and no credible evidence is shown establishing the likelihood that, absent the requested order, the producing party will not produce all relevant information during discovery<sup>66</sup>. The producing party should be permitted to continue the routine recycling of backup tapes in light of the expense, burden and potential complexity of restoration and search of the backup tapes.

*Illustration ii.* An employee was dismissed for cause from a company. Three months after separation, the former employee sues for wrongful dismissal. During the search for information relevant to the matter, counsel learns that the IT department routinely deletes emails older than 30 days in users’ inboxes in an effort to control the volume of email on their mail servers. The tape from the last backup of the month is kept for a year before being returned to the backup tape recycling pool. As part of the preservation plan, the backup tapes that are three months and older are retrieved and safeguarded; counsel reasons that tapes used in the daily pool need not be preserved since the evidence they are seeking is at least 90 days old. The backup taken just after the employee left is restored and emails advancing the employer’s case and damaging the Plaintiff’s are found.

<sup>63</sup> 2006 CanLII 19456 (Ont. Sup. Ct.) at para. 19: “In his testimony before me Mr. Straw corrected one statement in the June 28, 2005 letter to the solicitors for the plaintiff. In that letter the solicitors for TSC reported that TSC did not have a separate archival copy of its electronic databases for the November-December 2003 time period. This is not strictly accurate. Sometime in 2004 and probably after June 28, 2004, Mr. Straw had a back up set of tapes made of all information on the TSC server. These tapes have been preserved. While they are not an archival copy of the TSC database for November – December 2003, some of the information on these tapes goes back to that time period. Mr. Straw did not know how many documents were on those preserved archival tapes. However he said they contain in excess of one terabyte of information.”

<sup>64</sup> Offline data sources refers to those sources of data that are no longer active in the sense that they cannot be readily accessed by a user on the active computer system. Examples of offline data sources include backup tapes, floppy diskettes, CD’s DVDs, portable hard drives, ROM-drive devices and the like.

<sup>65</sup> Martin Felsky & Peg Duncan, “Making and Responding to Electronic Discovery Requests” LawPRO Magazine (September 2005), online: LawPRO <<http://www.lawpro.ca/LawPRO/ElectronicDiscoveryRequests.pdf>>.

<sup>66</sup> See *Apotex Inc. v. Merck & Co. Inc.* (2004), 33 C.P.R. (4<sup>th</sup>) 387, 2004 FC 1038 (CanLII) at para. 14: “It is clear that the burden of showing that Merck’s production is inadequate lies on Apotex, who made that allegation. Apotex must show that documents exist, that they are in the possession or control of Merck and that the documents are relevant.”

Finally, if it is unclear whether there is a likelihood that unique, relevant data is contained on backup media, the parties and/or the Court may consider the use of sampling to better understand the data at issue. Sampling will help establish the degree to which potentially relevant information exists on the tapes in question and the likely cost of the retrieval of such information. As such, sampling may allow for the informed retention of some, but not all, of the backup media.

*Illustration iii.* In the course of a search for relevant emails belonging to a custodian who left its employ a number of years ago, a party discovers that IT has kept the last email backup tape of the week for the past ten years. The backup tapes carry labels with the date of the backup and the server name; however, IT does not have a record of which accounts were stored on which servers. The events happened over a six-month period and the party determines that if there were emails, they should most likely appear in the middle of the period. Therefore, they sampled the backup tapes that were labeled with the date in the middle of the range. If a backup of a particular server did not contain emails of the custodian, the backups for that particular server were excluded from further searches.

#### **Comment 4.j. Potential Preservation of Shared Data**

A party's networks or intranet may contain shared areas (such as public folders, discussion databases and shared network folders) that are not regarded as belonging to any specific employee. Such areas should be identified promptly and appropriate steps taken to preserve shared data that is potentially relevant.

## Principle 5

The parties should be prepared to disclose all relevant electronically stored information that is reasonably accessible in terms of cost and burden.

### Comment 5.a. Scope of Search for Reasonably Accessible Electronically Stored Information

The issues to be considered in recovery of electronically stored information include the costs and burdens to the parties and the reasonableness of the scope of the searches for relevant electronically stored information. In *Gould Estate v. Edmonds Landscape and Construction Services Ltd*<sup>67</sup> the court observed “ the concept of relevance cannot be considered in a vacuum. It involves an element of practicality and pragmatism. The issue requires the court to perform a cost benefit analysis.” In *Park v. Mullin*<sup>68</sup>, the court held that it : “... has used its discretion to deny an application for the production of documents in the following circumstances: (1) where thousands of documents of only possible relevance are in question: *Peter Kiewit Sons Co. v. B.C. Hydro*<sup>69</sup>; *B.C. Milk Marketing Board v. Aquilini*<sup>70</sup>; and (2) where the documents sought do not have significant probative value and the value of production is outweighed by competing interests, such as confidentiality, and time and expense required for the party to produce the documents: *Goldman, Sachs & Co. v. Sessions*<sup>71</sup>.”

In refusing a request for further production, the producing party must provide evidence that the cost, burden and disruption of retrieving and processing the electronically stored information from sources other than those accessed in the normal course of business are not justified because the source contains no relevant information, the relevant information is more readily available from other sources, or it contains only marginally relevant information.

*Illustration i:* Requesting party seeks all backup tapes from the producing party. However, only the backup tapes of servers used by the custodians and taken during the period when the alleged events took place would potentially contain relevant information. Therefore the remaining backup tapes need not be searched for relevant information.

*Illustration ii:* Requesting party seeks backup tapes from email servers. Producing party has already produced the relevant emails. Requesting party cannot identify any documents that have not been produced, or evidence of incomplete disclosure. Therefore, there is no reason to search the backup tapes.

*Illustration iii:* Requesting party must establish *prima facie* case that something relevant will be uncovered. The court has authority to limit discovery – see *Nova Scotia (Attorney General) v. Royal & Sun Alliance Insurance Co. of Canada*,<sup>72</sup> where the court observed: “there is a discretion to limit discovery where it would be just to do so, such as were the burdens that would be placed upon the party making answer clearly outweigh the interests of the party questioning.”

Owing to the volume and technical challenges associated with the discovery of electronically stored information, the parties should engage in a cost/benefit analysis, weighing the cost of identifying and retrieving the information from each potential source against the likelihood that the source will yield unique, necessary and responsive information. The cost benefit analysis should also consider the volume of the electronically stored information. The more costly and burdensome the effort to access electronically stored information from a particular source, the more certain the parties need to be that the source will yield responsive information.

<sup>67</sup> (1997), 166 N.S.R. (2d) 334 (S.C.), 1998 CanLII 5136 (N.S.S.C.).

<sup>68</sup> 2005 BCSC 1813 (CanLII).

<sup>69</sup> (1982), 36 B.C.L.R. 58 (S.C.).

<sup>70</sup> 1996 CanLII 1980 (B.C.S.C.).

<sup>71</sup> 2000 BCSC 67 (CanLII).

<sup>72</sup> (2003), 218 N.S.R. (2d) 288 (S.C.), 2003 NSSC 227 (CanLII).



On the cost side of the analysis, different sources of electronically stored information involve different costs for retrieval and review. In most cases, the search for relevant information should be limited to sources that are reasonably accessible. A “reasonably accessible” source is one from which relevant information can be identified using the applications that custodians would use in the ordinary course of business. Common examples of reasonably accessible electronically stored information are email messages, word-processing documents, and other files created and maintained in the ordinary course of business. Some sources of potentially responsive electronically stored information are not as readily accessible. For these sources, the producing party must resort to sophisticated retrieval tools and techniques not available in the ordinary course of business and at significant cost and burden. Common examples are damaged or deleted files, residual data, or information from obsolete sources for which the appropriate hardware and software are not readily available.

On the benefit side of the analysis, some sources of electronically stored information may contain few, if any, relevant documents, together with massive amounts of information that is not relevant or is only marginally relevant to the litigation. A common example of a high volume, low utility source of electronically stored information is disaster recovery backup media. Resort to a source that is determined “not reasonably accessible” must be justified by showing that the need for that particular electronically stored information outweighs the costs involved. Evidence that is otherwise logically relevant may be excluded on the grounds that recovery of that evidence involves an inordinate amount of time and or resources which are not commensurate with the evidentiary value.<sup>73</sup> Case law suggests that the burden of showing that another party’s productions are inadequate lies with the party alleging deficiencies<sup>74</sup>.

If a party is aware, or should reasonably be aware, that relevant electronic information can only be obtained from a source other than the active or archived electronic information, it should at least be considered for preservation and inclusion in the party’s list of documents.

Parties and courts should exercise judgment, based on reasonable good faith inquiry having regard to the location and cost of recovery or preservation. If potentially relevant documents exist in sources that are not in a “readily usable” format, cost-shifting may be appropriate.<sup>75</sup>

In some jurisdictions, particularly where case management is available, a party may apply for directions regarding its discovery obligations. The seeking of guidance in advance may avoid a contentious after-the-fact dispute where the onus may lie on the producing party to show why it did not produce the information.

### **Comment 5.b. Forensic Data Collection**

Forensic data collection, such as the making of bit-level images of hard drives, should not be required unless the nature of the matter warrants the cost and burden.<sup>76</sup> Making forensic image backups of computers is only the first step in a potentially expensive, complex, and difficult process of data analysis. It can divert litigation into side issues involving the interpretation of ambiguous forensic evidence.

### **Comment 5.c. Outsourcing Vendors and Non-Party Custodians of Data**

Many organizations outsource all or part of their information technology systems or share electronically stored information with third parties for processing, transmitting or for other business purposes. In contracting for such services, organizations should consider how they will comply with their obligations to preserve and collect electronically stored information for litigation. If such activities are not within the scope of contractual agreements, costs may escalate and necessary services may be unavailable when needed. Parties to actual or contemplated litigation may also need to consider whether preservation notices should be sent to non-parties, such as contractors and/or vendors.

<sup>73</sup> *R. v. Mohan* [1994] 2 S.C.R. 9 (LexUM), as quoted in *Gould Estate v. Edmonds Landscape & Construction Services Ltd.* (1997), 166 N.S.R. (2d) 334 (S.C.), 1998 CanLII 5136 (N.S.S.C.).

<sup>74</sup> *Rhodia UK Ltd. v. Jarvis Imports (2000) Ltd.* (2005), 45 C.P.R. (4th) 161, 2005 FC 1628 (CanLII).

<sup>75</sup> See *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 319-20 (S.D.N.Y. 2003); Principle 10, *infra*.

<sup>76</sup> See *Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen*, 53 B.C.L.R. (4th) 329 (S.C.), 2006 BCSC 554 (CanLII) at para. 1: This is an application to compel the defendant to produce a Supplemental List of Documents, listing his hard disk drives (“HDD”) and a mirror image copy of those hard disk drives as documents in its possession. The plaintiff wants the mirror-image HDD produced to its own computer expert for a computer forensic analysis.” And at para. 36: “Without some indication that the application of the interesting technology might result in relevant and previously undisclosed documents, the privacy interests of the third parties and the avoidance of unnecessary and onerous expense militate against allowing such a search merely because it can be done.”

## Principle 6

**A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information.**

### Comment 6.a. The Scope of the Search

Deleted or residual data that is not accessible except through forensic means should not be presumed to be a document that is discoverable in all circumstances. Such data may be discoverable, but the evaluation of the need for and relevance of such discovery should be analyzed on a case by case basis.

Ordinarily, searches for electronically stored information will be restricted to a search of active data and reasonably accessible offline sources. In the absence of demonstrated need for the collection of hidden files<sup>77</sup>, system logs, deleted files<sup>78</sup>, fragmented data and partially over-written files, the scope of electronic data collection should be limited to the relevant electronically stored information that would have been used in the ordinary course of business. In those cases where deleted or residual data may be relevant to a proceeding, the parties should communicate this information to one another early in the process so as to “avoid costly and unnecessary preservation of deleted or residual data, on one hand, or claims of spoliation, on the other”.<sup>79</sup>

Deleted and residual data, like papers discarded in the trash, may be subject to discovery.<sup>80</sup> However, only exceptional cases will turn on “deleted” or “discarded” information (whether paper or electronic).

Illustration i: A party seeking relevant emails demands a search of an active account, backup tapes and hard-drives for deleted materials. The party has not given any justification for the extraordinary search, or demonstrated a special need. The request should be denied. Parties are not typically required to search the trash bin outside an office building after commencement of litigation; neither should they be required to preserve and produce deleted electronic information in the normal case.

Illustration ii: After a key employee leaves X Company (“X Co.”) to work for a competitor, a suspiciously similar competitive product suddenly emerges from the new company. X Co. produces credible testimony that the former employee bragged about sending confidential design specifications to his new company computer, copying the data to a CD, and deleting the data so that the evidence would never be found. The Court properly orders that, given the circumstances of the case, the receiving party has demonstrated the need for the production of a mirror image of the computer’s hard drive. If the defendant is not willing to undertake the expense of hiring its own reputable data recovery expert to produce all available relevant data, inspection of the computer’s contents by an expert working on behalf of X. Co. may be justified, subject to appropriate orders to preserve privacy, to protect data, and to prevent production of unrelated or privileged material. If special need is demonstrated, accompanied by appropriate orders of protection, extraordinary efforts to restore electronic information could also be ordered.

<sup>77</sup> See *Reichman v. Toronto Life Publishing Company* (1988), 66 O.R. (2d) 65 (High Ct. J.), where the Court ordered the production of floppy discs allowing the receiving party to identify information from previous drafts of manuscript which would not be accessible in the manuscript’s final form.

<sup>78</sup> See *Nicolardi v. Daley*, [2002] O.J. No. 595 (Ont. Sup. Ct.) (QL), where a request was made to access deleted documents. This case suggests that in special circumstances deleted information may be ordered to be produced particularly where a party establishes that truly relevant documents not disclosed exist or once existed. See also *Prism Hospital Software Inc. v. Hospital Medical Records Institute* (1991), 62 B.C.L.R. (2d) 393 (S.C.). The recent decision of *Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen* (2006), 53 B.C.L.R. (4th) 329 (S.C.), 2006 BCSC 554 (CanLII) at para. 36 demonstrates that a search for deleted data will not be automatically entertained without “some indication that the application of the interesting technology might result in relevant and previously undisclosed documents, the privacy interests of the third parties and the evidence of unnecessary and onerous expense militate against allowing such a search merely because it can be done.”

<sup>79</sup> *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Production: 2005 Version* at 48, <<http://www.thesedonaconference.org>> under “Publications.”

<sup>80</sup> It is a well accepted proposition that deleted computer files are discoverable: See *Rowe Entertainment, Inc. v. The William Morris Agency Inc.*, 205 F.R.D. 421, 428 (S.D.N.Y. 2002). Even if production of deleted or residual data is unwarranted, parties should communicate early about the possible relevance of deleted data in order to avoid costly and unnecessary preservation of deleted or residual data, on the one hand, or claims of spoliation, on the other.

## Principle 7

**A party may satisfy its obligation to identify electronically stored information in good faith by using electronic tools and processes such as data sampling, searching and/or the use of selection criteria to collect potentially relevant electronically stored information.**

### Comment 7.a. Use of Targeted Selection to Focus Discovery

Large electronic data processing systems contain vast amounts of information, including much that is likely to be irrelevant. It may be impractical or prohibitively expensive in some cases to review all the information manually for relevance. In appropriate circumstances, parties to litigation should discuss and implement the use of targeted selection criteria, including terms to be used in searches of electronically stored information for production. The search should identify the largest amount of relevant data in a manner that also optimizes time and cost effectiveness. Targeted selection criteria can be developed, tested, and then used to extract high-value discovery data from large collections of data.

Where possible, parties and counsel should agree in advance on (1) the concept of the use of selection criteria as a means to extract targeted, high-value data; (2) the type(s) and form(s) of selection criteria to be used; (3) a general form of process to be employed in the application of agreed-upon selection criteria; and/or (4) specific search terms that will be used. Absent such agreement, however, parties should document for the court the search methodology used and the scope of production, including decisions to exclude certain sources of electronically stored information, in the event their opponent disputes the approach taken.

In some circumstances the parties may be unsure whether a particular source of electronic information contains potentially responsive data or whether the search terms selected can retrieve responsive information. The courts should allow sampling techniques to determine the existence of responsive data and to define the accuracy of searches, with the object of securing the “just, speedy and inexpensive determination of the proceeding”, in the language of B.C. Rule 1(5). For example, sampling might determine that a very low percentage of files on a particular data set contains evidence that is responsive. This high cost/low return ratio—or low marginal discovery utility ratio—may weigh against the need to search that source further or it may be a factor in a cost shifting analysis if one party insists that very expensive and time consuming searches be employed. See *Consortio Minerio Horizonte S.A. et al v. Klohn-Crippen Consultants Limited et al*<sup>81</sup> for an application of the concept of cost-shifting in an analogous situation.

### Comment 7.b. Processing Techniques to Reduce Volume

A number of techniques are available to simplify the process of searching for relevant electronically stored information. These techniques include:

#### Filtering

Filtering using targeted selection criteria refers to reducing the size of the electronic data population to be included in the collection by identifying and extracting data likely to be relevant. The need for such a process arises because electronically stored information is not stored or organized in the same manner as paper files. For example, email messages covering a wide range of topics, customers and issues will be stored in the custodian’s Inbox, sorted in the order they were received. Through filtering, those emails potentially relevant to the case at hand can be identified.

As an example, the following data search protocols should be considered:

- a) Date/time range limiting selection to information created, modified or sent/received during the time period covered by the matter at hand.

<sup>81</sup> (2005), 25 C.C.L.I. (4th) 219 (B.C.S.C.), 2005 BCSC 500 (CanLII).

- b) Author, recipient or other key personnel limiting selection to those individuals who are most likely to have created, edited, sent and/or received data containing potentially relevant information.
- c) Key data types most likely to contain potentially relevant information, such as word processing, presentation graphics, spreadsheets, electronic mail, CAD (computer-aided design), among others.
- d) Key email and file servers, used by a group of custodians, or key database servers that processed the type of information sought, such as financial planning records.
- e) Key search terms: a list of the words or phrases that are common to the claim and/or defence such as product names and components in a product liability case. (Note that many casual emails may not contain the words or phrase because the correspondents are familiar with the context and the exchange is part of a larger conversation.)

### De-Duplication

Sources of electronically stored information often include multiple copies of the same document or email. Consider, for example, an email with a word processing attachment sent to multiple recipients, or copies of the word processing document saved by recipients in their local hard drive. De-duplication or “de-duping” refers to a process of identifying duplicate e-mail or other computer files. De-duplication will save considerable amounts of time and money in almost every case.

In certain cases, it may be appropriate to eliminate exact duplicates to render the data set a more manageable size.

*Illustration i:* a company with hundreds of employees will have hundreds of copies of a relevant company policy that was emailed to all employees. It is not necessary to include hundreds of copies of the electronic company policy where to do so would greatly increase the size of the data set and the cost of the collections and the related review.

In rare cases, the existence of copies associated with a particular custodian or a particular period of time may be relevant.

*Illustration ii:* a company with hundreds of employees will have hundreds of copies of a relevant company policy that was emailed to all employees. A critical issue in the case is whether a particular person received the company policy. In this case, care must be taken that the company policy in the relevant custodian’s collection has not been eliminated through de-duplication.

De-duplication can be performed within each custodian’s data or “across” differing custodian’s data. For example, in a cross-custodian de-duplication, where copies of the same document may reside with different custodians, all exact<sup>82</sup> copies are identified as duplicates regardless of their custodian. However, in custodian de-duplication, only exact copies belonging to the same custodian are identified.

Near de-duplication techniques identify documents that are substantially similar and are an effective way to group similar documents for the purposes of review.

### Sampling of Computer Data

In the United States case of *McPeck v. Ashcroft*<sup>83</sup>, the Court required the Defendant, the U.S. Department of Justice, to restore one year of a custodian’s e-mail from disaster recovery backups tapes as a “test run” to decide whether enough relevant information was found to justify compelling restoration and processing of other backup tapes.

<sup>82</sup> De-duplication should be limited to those documents or data items that are exactly alike (typically through the use of a “hash” value) It should be noted that specific elements from a document or data item—such as author, creation date and time, size, full text and the like—can be used alone or in combination to develop targeted de-duplication algorithms. A “hash” is a mathematical algorithm that represents a unique value for a given set of data, similar to a digital fingerprint. Common hash algorithms include MD5 and SHA. See *The Sedona Conference® Glossary*, May 2005, <[www.thesedonaconference.org](http://www.thesedonaconference.org)>under “Publications.”

<sup>83</sup> 202 F.R.D. 31 at 34 (D.D.C. 2001).

## **Validation**

The search process should also include data validation<sup>84</sup> procedures to ensure the integrity and completeness of data collected and that the collection process is defensible.

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<sup>84</sup> Data validation is a systematic review process to confirm the results are of known quality and any errors or exception are addressed.

## Principle 8

Parties should agree as early as possible in the litigation process on the format in which electronically stored information will be produced. Parties should also agree on the format, content and organization of information to be exchanged in any required list of documents as part of the discovery process.

### Comment 8.a. Production of Electronic Documents and Data Should be in Electronic Format

Production of electronic documents and data should be made only<sup>85</sup> in electronic format<sup>86</sup>, unless the recipient is somehow disadvantaged and cannot effectively make use of a computer<sup>87</sup>, or the volume of documents to be produced is minimal and metadata is known (and agreed by all parties) to be irrelevant.

The practice of producing electronically stored information in static format such as paper should be discouraged in most circumstances for several reasons. For example, paper is not an authentic substitute for the contents and properties of an original electronic file. Paper cannot retain potentially critical metadata, which, if relevant, could be producible. Moreover, paper is not searchable, which means a paper production set is less meaningful than a set of documents produced in a searchable electronic format<sup>88</sup>. Reviewing large paper sets is more time consuming since parties do not have the benefit of automated litigation support tools<sup>89</sup>. Finally, each printed set required for hard copy production adds to the cost of reproduction, shipping and storage, whereas multiple electronic copies can be made at a nominal cost. This creates opportunities for cost sharing, particularly in multi-party actions, where savings can be significant.

<sup>85</sup> See *Logan v. Harper*, 2003 CanLII 15592 (Ont. Sup. Ct.) at para. 32: “There is no good reason to require the defendant to produce paper copies of the documents if the copies on the CDs are legible, complete and printable. I have inspected the documents on CD. There may be some illegible copies but that same problem can occur with photocopies. If any of the copies on the CD are not readable or are badly copied, a better copy on paper or on CD may be requested and shall be provided. ... Health Canada need not produce all of its documents both on paper and on CD.”

<sup>86</sup> Ontario Task Force, Principle 11, Commentary: “Production of voluminous documentation in a form that does not provide meaningful access should be avoided.” See also *Cholakis v. Cholakis* (2005), 198 Man.R. (2d) 128 (Man. Q.B.), 2005 MBQB 105 (CanLII) at para.30: “The interest of broad disclosure in a modern context require, in my view, the production of the information in the electronic format when it is available.”

<sup>87</sup> In a criminal case, in circumstances where the accused are in prison and have insufficient access to computers, the Crown was ordered to disclose in paper form. See *R. v. Cheung* (2000), 267 A.R. 179 (Alta.P.C.), 2000 ABPC 86 (CanLII) at para. 99: “...while electronic or soft copy disclosure may now in the 21st Century be considered a usual form also, in the circumstances of this case, it is not accessible to the accused.”

<sup>88</sup> See *Wilson v. Servier Canada Inc.*, 2002 CanLII 3615 (Ont. Sup. Ct.) at para. 10: “Following this contrary approach, the defendants took the position in the first instance that the CD-ROMs and electronic data base (used in conjunction with the Summation legal data processing system) defendants’ counsel had prepared at significant expense for themselves in respect of their own documents (so as to organise meaningfully the documents they disclosed in their affidavits) were not to be shared with the plaintiff. Later, in the course of a case conference, the defendants provided an index in word format but plaintiff’s counsel asserted that the voluminous documents were simply not searchable. The production of voluminous documentation in a form that does not provide meaningful access is not acceptable. *Solid Waste Reclamation Inc. v. Philip Enterprises Inc.* (1991), 2 O.R. (3d) 481 (Gen. Div.)”

<sup>89</sup> In *Sycor Technology Inc. v. Kiaer*, 2005 CanLII 46736 (Ont. Sup. Ct.) at para. 2, a case where the cost of printing and photocopying e-mail productions was estimated at \$50,000, the Master had this to say: “At the very least there should be consideration given to electronic production of documents that are required and perhaps the use of computer experts to identify what exists and what is truly relevant to the issues that are actually in dispute.”



### **Comment 8.b. Agreeing on a Format for Production**

The parties should strive to agree on a methodology of production that (a) preserves metadata and allows it to be produced when relevant; (b) communicates accurately the content; (c) protects the integrity of the information; (d) allows for the creation of a version that can be redacted (e) assigns a unique production identification number to each data item, and (f) can be readily imported into any industry-standard litigation review application.

### **Comment 8.c. Document Lists – Format and Organization**

Rules of procedure often require the preparation of a list that describes the produced documents, those documents being withheld on the basis of privilege, and those documents that may be relevant but are not within the care and control of the producing party. Traditionally, these lists are prepared from information gleaned from the face of the document, and typically include: Document Type, Author, Recipient, Date, Title or Subject, and a production identification number.

Parties should agree on the format and organization of the document list so that the information that is ultimately exchanged between the parties is consistent. For example, e-mail messages and their attachments should be kept together to achieve a meaningful production. Various issues such as how parties intend to organize and produce container files such as “zip” files should also be addressed. (See Principle 3, “Meet and Confer.”) The list should be exchanged in electronic format, which facilitates searching, sorting and reporting.<sup>90</sup> It is not necessary for parties to use the same litigation software in order to have an effective exchange of an electronic document list. In British Columbia, counsel should refer to the Practice Direction “Re: Guidelines for the Use of Technology in any Civil Litigation Matter,” Supreme Court of British Columbia, July 2006, for detailed specifications relating to the exchange of electronic documents and document lists.

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<sup>90</sup> See *Wilson v. Servier Canada Inc.*, 2002 CanLII 3615 (Ont. Sup. Ct.) at para 12: “In my view, it is implicit to an affidavit as to documents that a defendant gives meaningful access to its documents through its electronic database when that has been prepared by that defendant. 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 purposes. ... This approach is particularly appropriate when a party is faced with some 500,000 pages of documents by the opposite party.” See also *Logan v. Harper*, 2003 CanLII 15592 (Ont. Sup. Ct.) at para. 23: “Rule 30 is inadequate to deal with big document cases. To be sure it will be necessary for each party to catalogue its documents and to produce a list but in and of itself a descriptive list of the documents is an unhelpful ‘make work project’. What is required in such cases is a custom designed documentary identification and retrieval system agreed to by all counsel or imposed by the court.”

## Principle 9

**During the discovery process parties should agree to, or if necessary, seek judicial direction on, measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronic documents and data.**

Solicitor-client privilege is intended to facilitate and encourage full and frank communication between a lawyer and client in the seeking and giving of legal advice. A party potentially waives the solicitor/client privilege and/or litigation work product privilege if that party, or even third party, voluntarily discloses or consents to the disclosure of any significant part of the matter or communication, or fails to take reasonable precautions against inadvertent disclosure. Because of the volumes involved, the production of electronic materials can result in the inadvertent disclosure of privileged and/or confidential information.

### Comment 9.a. Inadvertent Disclosure

Canadian courts have generally accepted that inadvertent disclosure does not waive solicitor-client privilege.<sup>91</sup> Nevertheless, one court held that the privilege was lost after inadvertent disclosure of a privileged communication, deciding that it was possible to introduce the information into evidence if it was important to the outcome of the case and there was no reasonable alternative form of evidence that can serve that purpose.<sup>92</sup> See also *Celanese Canada Inc. v. Murray Demolition Corp.*,<sup>93</sup> in which the Supreme Court of Canada endorses the use of supervising solicitors.

### Protective Measures

With the extremely large numbers of electronic documents involved in litigation matters, conducting a “privilege and/or confidentiality review” of the relevant electronic documents can be very costly and time consuming. Parties must employ reasonable good faith efforts<sup>94</sup> to detect and prevent the production of privileged or potentially privileged materials. Good faith efforts will vary from case to case, but could range from a manual page-by-page review for a small data set, to an electronic search for “privileged terms” where the data set is larger.

Parties should consider entering into an agreement to protect against inadvertent disclosure, while recognizing the limitations in the local forum as well as in other jurisdictions of such an agreement vis à vis Courts and third parties. Court approval of the agreement should be obtained. The agreement or order would typically provide that the inadvertent disclosure of a privileged document does not constitute a waiver of privilege. The privileged communication or document should be returned, or an affidavit sworn that the documents have been deleted or otherwise destroyed. The agreement should provide that any notes or copies will be destroyed or deleted and any dispute will be submitted to the court. It is preferable that any such agreement or order be obtained before any production.

### Comment 9.b. Sanctions

Courts have imposed a spectrum of sanctions when counsel have obtained privileged communications from an opposing party. These sanctions can include striking pleadings, the removal of counsel from the file and costs. The removal of counsel has been ordered where the evidence demonstrated that despite the fact counsel or the party knew or should have known that it had acquired opposing party’s solicitor-client communications, counsel took no steps to seek directions from the court or to stop the review and notify the privilege holders.<sup>95</sup>

<sup>91</sup> See *Elliot v. Toronto (City)* (2001), 54 O.R. (3d) 472 (Sup. Ct.) at para. 10; John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at 766-7; *Dublin v. Montessori Jewish Day School of Toronto*, 2006 CanLII 7510 (Ont. Sup. Ct.); *Sommerville Belkin Industries Ltd. v. Brocklesh Transport and Others* (1985), 65 B.C.L.R. 260 (S.C.); *National Bank Financial Ltd. v. Daniel Potter et al.* (2005), 233 N.S.R. (2d) 123 (S.C.), 2005 NSSC 113 (CanLII); *National Bank Financial Ltd. v. Daniel Potter* (2004), 224 N.S.R. (2d) 231 (S.C.), 2004 NSSC 100 (CanLII); *Autosurvey Inc. v. Prevost*, 2005 CanLII 36255 (Ont. Sup. Ct.).

<sup>92</sup> See *Metcalfe v. Metcalfe* (2001), 198 D.L.R. (4th) 318 at para. 28 (Man. C.A.).

<sup>93</sup> (2006), 269 D.L.R. (4th) 193 (S.C.C.), 2006 SCC 36 (LexUM).

<sup>94</sup> See *Air Canada v. Westjet Airlines Ltd.* (2006), 267 D.L.R. (4th) 483 (Ont. Sup. Ct.), 2006 CanLII 14966 (Ont. Sup. Ct.) where the court rejected the request for an order protecting against the waiver of privilege where a “quick peek” type of production was being proposed.

<sup>95</sup> See *National Bank Financial Ltd. v. Daniel Potter* (2005), 233 N.S.R. (2d) 123 (S.C.), 2005 NSSC 113 (CanLII) and *Auto Survey Inc. v. Prevost*, 2005 CanLII 36255 (Ont. Sup. Ct.) and *Celanese Canada Inc. v. Murray Demolition Corp.* (2006), 269 D.L.R. (4th) 193 (S.C.C.), 2006 SCC 36 (LexUM).



### **Comment 9.c. Use of Court Appointed Experts to Preserve Privilege**

In certain circumstances, a court may appoint a neutral person (i.e. a special master or judge or court-appointed expert, monitor or inspector) to help mediate or manage electronic discovery issues.<sup>96</sup> A benefit of using a court appointed neutral person is the probable elimination of privilege waiver concerns with respect to the review of information by that person. In addition, the neutral person may speed the resolution of disputes by fashioning fair and reasonable discovery plans based upon specialized knowledge of electronic discovery and/or technical issues with access to specific facts in the case.<sup>97</sup>

In a recent decision<sup>98</sup>, the Supreme Court of Canada endorsed the practice that review of documents, a privilege obtained under an Anton Piller order, be undertaken by a lawyer who would prepare a report detailing conclusions reached.

### **Comment 9.d. Protection of Privilege Regarding a modified “Claw-back” Production**

Given the expense and time required for pre-production reviews for privilege and confidentiality, there is increasing interest<sup>99</sup> in various methodologies that can reduce the cost and expense, such as production subject to a modified “claw-back” agreement.<sup>100</sup> A modified “claw-back” agreement would allow the parties to forego an initial manual privilege review in favour of an agreement to return inadvertently produced privileged documents.<sup>101</sup> In order for the claw-back agreement to be enforceable, the court would likely require prior agreement between the parties that the search methodology would remove from the production set those documents that are potentially privileged. If the search methodology is reasonably thorough, the removal may allow the production of privileged documents to be deemed “inadvertent” by the courts, and therefore be returned without the loss of privilege. Parties should exercise caution when relying on claw-back agreements because such agreements may not eliminate counsel’s obligation to use reasonable good faith efforts to exclude privileged documents prior to initial disclosure. Moreover a claw-back agreement negotiated in one jurisdiction may not be enforceable in another.

There is a growing body of evidence from the Information Science field that the use of technologically based search tools may be more efficient and more accurate than manual searches. Courts should be urged to consider this body of evidence in assessing whether reasonable steps were taken. The searching can be done using keywords or search terms (such as “privileged”, the names of internal and external counsel, terms such as lawsuit, etc.).

<sup>96</sup> *Catalyst Fund General Partner 1 Inc. v. Hollinger Inc.*, 2005 CanLII 30317 (Ont. Sup. Ct.).

<sup>97</sup> *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Production* (July 2005), online: <<http://www.thesedonaconference.org/>>, under “Publications,” Comment 10c.

<sup>98</sup> *Celanese Canada Inc. v. Murray Demolition Corp.* (2006), 269 D.L.R. (4th) 193 (S.C.C.), 2006 SCC 36 (LexUM).

<sup>99</sup> *Air Canada v. Westjet Airlines Ltd.* (2006), 267 D.L.R. (4th) 483 (Sup. Ct.), 2006 CanLII 14966 (Ont. Sup. Ct.).

<sup>100</sup> See *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D. N.Y. 2003) (“*Zubulake III*”).

<sup>101</sup> *The Sedona Principles of Electronic Document Production*, Id., Comment 10d, July 2005.

### Comment 9.e. Document Lists – Lawyer Work Product

Parties should not be required to produce a lawyer's work product, merely because counsel has made use of litigation database management software. Producing selected contents of a litigation database should not be confused with producing the software used to create and manage the database.

There are fact based decisions that may assist counsel in understanding the Canadian approach to a number of issues. In *Wilson v. Servier Canada*<sup>102</sup>, the court granted the plaintiff's motion for an order directing the defendant to release the objective coding of the documents in their litigation support database in order to satisfy meaningful disclosure, given the volume of documents. In *Logan v. Harper*<sup>103</sup>, the defendants had produced the documents along with a searchable index in electronic form. The index did not permit full-text searching of the documents, although the version of the application used by counsel for the defendants did offer that feature. The master considered litigation support and document management software not normally subject to disclosure, and accepted as reasonable that plaintiff's counsel purchase a licence for the software independently in order to have the full-text search feature. In *Jorgensen v. San Jose Mines et al*<sup>104</sup>, the defendants sought delivery of the electronic database used by the plaintiffs to compile the list of documents. The court held that the use of a software program to facilitate the production of the list is a choice that it made and it is part of that firm's work product, but ordered the defendant to tender \$4,000 to the plaintiff's firm in order to have a copy of the database in electronic form. The \$4,000 covered a share of the cost of preparing the database.

### Comment 9.f. Protection of Confidentiality

Confidentiality concerns can arise when there is sensitive or proprietary business information that maybe disclosed through an electronic discovery. The confidentiality concerns are greatest where an opposing party seeks access to the other party's computer systems for the purpose of conducting searches or analysis. This should not be permitted where the computer contains information that is privileged, subject to public interest immunity, confidential or commercially sensitive information, or other information that is clearly not relevant to the litigation. The parties should explore an alternative method of gaining access to the information without breaching confidentiality. One such alternate method would involve the appointment of a neutral person or monitor to review the confidential material.

### Comment 9.g. Privacy Issues

Canada and its provinces, to varying extents, have comprehensive privacy legislation<sup>105</sup> governing the collection, use and control of personal information<sup>106</sup> in both the public and private sectors that may impact on the discovery process. The courts have not been sympathetic to objections to production of records or answering questions based on privacy legislation.

Confidentiality orders, common law or civil procedure rules may limit the extent to which commercially sensitive or personal information must be disclosed, offering solutions to the protection of private or commercially sensitive information.

<sup>102</sup> 2002 CanLII 3615 (Ont. Sup. Ct.).

<sup>103</sup> 2003 CanLII 15592 (Ont. Sup. Ct.).

<sup>104</sup> 2004 BCSC 1653 (CanLII).

<sup>105</sup> Legislation regulating the public sector includes the *Privacy Act*, R.S.C. 1985, c. P-21, *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25; *Freedom of Information and Protection of Privacy Act*, S.S.S. 1990-91, c. F-22.01; *Freedom of Information and Protection of Privacy Act*, C.C.S.M. c. F-175; *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F-31; *An Act respecting access to documents held by public bodies and the protection of personal information*, L.R.Q. c. A-2.1; *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5; *Protection of Personal Information Act*, S.N.B. 1998, c. P-19.1; *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988; *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1. Legislation governing the private sector includes the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5; *Personal Information Protection Act*, S.B.C. 2003, c. 63; *Personal Information Protection Act*, S.A. 2003, c. P-6.5; *An Act respecting the protection of personal information in the private sector*, L.R.Q. c. P-39.1.

<sup>106</sup> Generally, information about an identified or identifiable individual.

## **Principle 10**

**During the discovery process, parties should anticipate and respect the rules of the forum in which the litigation takes place, while appreciating the impact any decisions may have in related actions in other forums.**

In any proceeding, counsel must comply with the applicable local forum specific discovery rules. At the same time, where there is related litigation in other forums or jurisdictions, counsel should appreciate that the rules of discovery in those other forums may conflict with the local discovery rules. The rules of discovery vary amongst the common law provinces. The discovery rules in Quebec are very different from the common law counterparts.

When there are related matters, counsel should make good faith efforts to ensure that there are no breaches in the rules of any jurisdiction, and take care to fully explain to foreign clients the local forum discovery process so that the latter can make informed decisions on how to proceed. The meet and confer process offers an ideal opportunity to identify and resolve any possible forum related rules conflicts at the earliest possible stage of a matter. At the meet and confer, counsel should also consider how efforts can be coordinated to reduce the duplication of work so the preservation, collection, review and production of electronically stored information from all related matters can occur in the most cost-effective manner.

## Principle 11

**Sanctions should be considered by the court where a party will be materially prejudiced by another party's failure to meet any obligation to preserve, collect, review or produce electronically stored information. The party in default may avoid sanctions if it demonstrates the failure was not intentional or reckless.**

### Comment 11.a. The need for Sanctions

When parties fail to meet their discovery obligations, the fair administration of justice may be undermined. Absent appropriate sanctions for intentional or reckless destruction or non-production of evidence, the advantages that a party may receive from such conduct (i.e. having actions brought against them dismissed for lack of evidence or avoiding potential money judgments) may outweigh the risk of exposure to any severe penalty.

Not all non-production is intentional or the result of bad faith or recklessness. Given the continuing changes in information technology and the burdens and complications that will inevitably arise when dealing with growing volumes of electronically stored information, litigants may inadvertently fail to fully preserve and/or disclose all relevant material. The role of the court is to weigh the scope and impact of non-disclosure and to impose appropriate sanctions proportional to the culpability of the non-producing party, the prejudice to the opposing litigant and the impact that the loss of evidence may have on the court's ability to fairly dispose of the issues in dispute.

### Comment 11.b. Canadian Experience to Date with Sanctions

Canadian jurisprudence regarding the appropriate response to a party's failure to comply with its document discovery obligations is limited. Canadian courts have shown a willingness to order production of documents, including electronic documents, with sanctions following for a party's non-compliance with such orders.

Generally, deficiencies in disclosure have been reflected in costs awards (whether for the other party's out-of-pocket expenses, or wasted costs)<sup>107</sup>, or the drawing of adverse inferences<sup>108</sup>. Other direct remedies include punitive monetary awards, critical jury instructions, motion or case dismissal, exclusion of testimony or exhibit, or findings of liability. In the common law provinces in Canada, the law that governs the destruction of evidence or spoliation is developing. There is a question as to whether spoliation exists as an independent tort. The Court of Appeal for Ontario suggested in *Spasic (Estate) v. Imperial Tobacco Ltd*<sup>109</sup> there may be an independent tort. The Supreme Court of Canada denied leave to appeal. Alternatively, the British Columbia Court of Appeal in *Endean v. Canadian Red Cross Society*<sup>110</sup> found that spoliation is not an independent tort.

There are indications that Canadian courts are becoming more willing to use extraordinary remedies to discipline parties in the performance of their discovery obligations. In *Brandon Heating and Plumbing (1972) Ltd. et al v. Max Systems Inc.*<sup>111</sup> the plaintiff provided undertakings to preserve certain hardware, discs and other documents as they were key to the defendant's defence. The hardware and software were replaced as part of the normal replacement cycle making the evidence unavailable. The court concluded the destruction was a willful act and the resulting prejudice was sufficient to lead to the dismissal of the plaintiff's case.

Significant judicial attention has been directed towards making proactive orders intended to ensure that documents are preserved in the first place, whether in the form of *Anton Piller* orders or through more conventional document preservation orders<sup>112</sup>.

### Comment 11.c. American Experience with Sanctions

A substantial body of jurisprudence has developed in the United States regarding the circumstances in which a party may be sanctioned for failing to comply with its electronic discovery obligations. Generally, in order to provide a foundation for the imposition of sanctions, United States courts have required evidence that a party has, in the face of a clear preservation obligation, intentionally or recklessly failed to preserve and produce relevant electronic documents,

<sup>107</sup> *Farro v. Nutone Electrical Ltd.* (1990), 72 O.R. (2d) 637 (C.A.); *Endean v. Canadian Red Cross Society* (1998), 157 D.L.R. (4th) 465 (B.C.C.A.), 1998 CanLII 6489 (B.C.C.A.).

<sup>108</sup> *Logan v. Harper*, 2003 CanLII 15592 (Ont. Sup. Ct.).

<sup>109</sup> (2000), 49 O.R. (3d) 699 (C.A.), 2000 CanLII 17170 (Ont. C.A.).

<sup>110</sup> (1998), 157 D.L.R. (4th) 465 (B.C.C.A.), 1998 CanLII 6489 (B.C.C.A.).

<sup>111</sup> (2006), 202 Man.R. (2d) 278 (Q.B.), 2006 MBQB 90 (CanLII).

<sup>112</sup> *CIBC World Markets Inc. v. Genuity Capital Markets*, 2005 CanLII 3944 (Ont. Sup. Ct.); *Canadian Derivatives Clearing Corp. v. EFA Software Services Ltd.* (2001), 294 A.R. 182 (Q.B.), 2001 ABQB 425 (CanLII); *Portus Alternative Asset Management Inc. (Re)* (2005), 28 O.S.C.Bull. 2760.

to the material prejudice of the other party. See, for example, *Zubulake v. UBS Warburg LLC*.<sup>113</sup>

The sanctions that have been imposed by United States courts have been varied. In appropriate cases, courts have instructed juries to draw inferences adverse to the defaulting party<sup>114</sup>, imposed monetary sanctions or made extraordinary costs awards<sup>115</sup>, made findings of liability,<sup>116</sup> and have even entered default judgment<sup>117</sup>.

#### **Comment 11.d. Sanctions for non-disclosure**

Despite the early stage of Canadian jurisprudence on the subject, it is clear that courts have a wide discretion to impose suitable sanctions proportionate to the nature of the non-disclosure. Sanctions will be imposed taking into account all relevant factors including but not limited to the extent of the prejudice suffered or potentially suffered by the opposing party; the potential impact the non-production on the costs and timeliness of the litigation; the scope of non-production; the timeliness of production; evidence of deliberate non-disclosure or intentional or reckless disregard of the destruction of relevant or potentially relevant electronically stored information.

Sanctions may include but are not limited to contempt proceedings; costs; prohibition from using evidence at trial; loss of right to examine witness or witnesses at discovery or at trial; or the dismissal of a claim or a defence.

Courts may make such other orders as are necessary to appropriately sanction parties for non-disclosure or intentional or reckless disregard for the destruction of electronically stored information.

The factors to be considered in determining the appropriate sanction for failure to comply with the obligation to disclose documents (or for other similar failures) were considered in *Zelenski v. Jamz*<sup>118</sup> cited in *Brandon Heating*<sup>119</sup>. The Court held it was appropriate to take into account such factors as: 1) the quantity and quality of the abusive acts; 2) whether the abusive acts flow from neglect or intent; 3) prejudice generally, and specifically the impact of the abuse on the opposing party's ability to prosecute or defend the action; 4) the merits of the abusive party's claim or defence; 5) the availability of sanctions short of dismissal that will address past prejudice to the opposing party; and 6) the likelihood that a sanction short of dismissal will end the abusive behaviour.

#### **Comment 11.e. Reasonable records management policies**

Compliance with a reasonable records management policy, or justifiable inadvertent destruction or non-production of relevant documents should not, in the ordinary course, constitute sanctionable conduct.

There are a number of factors to be considered in determining if destruction was intentional or reckless. Adherence to a document management policy in the face of reasonably contemplated or actual litigation is not appropriate<sup>120</sup>. Destruction in this circumstance should not escape sanctions although in Quebec it should be noted there are significant differences with respect to a party's preservation obligations<sup>121</sup>.

In *Ontario v. Johnson Controls Ltd.*<sup>122</sup> the court was critical of a party, Johnson Controls, against whom an action for indemnity was taken after settlement of the original personal injury claim. Johnson sent certain documents, some of which would have been relevant, to storage in 1995. Somewhere between 1997 and 1999 a box containing relevant documents disappeared, but there was no evidence the documents had been dealt with according to a document retention policy. Johnson received no notice of the original claim until 1999. The court held:

- [50] Johnson bears substantial responsibility for any loss of its documents. There is no evidence of any document retention or destruction policy. A policy with a short retention period might offer some justification to dispose of "smoking guns" and other prejudicial evidence. Any such policy that permits destruction within much less than ten years after an event probably fails to take reasonable account of the standard six year limitation period under the *Limitations Act* for actions in tort or contract, plus some period to allow for a discoverability period, which allows for discovery of the damage and those responsible prior to the commencement of the limitation period. A short retention period would also ignore the extended period under s. 8 of the Act.

<sup>113</sup> 212 F.R.D. 212 (S.D.N.Y. 2003).

<sup>114</sup> *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739 (8th Cir. 2004); *Wiginton v. CB Richard Ellis, Inc.* 2003 WL 22439865 (N.D. III. 2003).

<sup>115</sup> *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005).

<sup>116</sup> *Metro. Opera Ass'n. v. Local 100, Hotel Employees & Rest. Employees Int'l Union*, 212 F.R.D. 178 (S.D.N.Y. 2003).

<sup>117</sup> *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472 (S.D. Fla. 1984).

<sup>118</sup> *Zelenski v. Jamz et al.*; *Zelenski v. Houston* (2004), 189 Man.R. (2d) 151 (Q.B.), 2004 MBQB 256 (CanLII).

<sup>119</sup> *Brandon Heating and Plumbing (1972) Ltd. et al v. Max Systems Inc.* (2006), 202 Man.R. (2d) 278 (Q.B.) at paras. 23-24.

<sup>120</sup> *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001).

<sup>121</sup> See above Comment 4.e under Principle 4.

<sup>122</sup> 2002 CanLII 14053 (Ont. Sup. Ct.).

- [51] The absence of a document retention policy also constitutes a failure to recognize the court's ability to draw an adverse inference in certain circumstances for failure to produce a document and a failure to address the practical need to retain documents once notice of a proceeding has been received.

The *Johnson* case involved facts where there was a known hazard and it was reasonable to anticipate that litigation might arise. It is on this basis that the long hold period was justified. In other circumstances, where there is no reasonable basis to anticipate litigation, a shorter hold period would be justified.

Recent Canadian decisions in addition to *Brandon Heating* have considered the impact of the destruction of relevant electronically stored information. *Fareed v. Wood*<sup>123</sup> is an estate case against the deceased's solicitor, who also acted as attorney under a general power of attorney. There were insufficient funds in the estate to pay out the bequests. The defendant failed to provide anything but a superficial explanation of his conduct and failed to disclose records that might flesh out his explanation. The court drew an adverse inference from the failure to disclose these records.

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<sup>123</sup> 2005 CanLII 22134 (Ont. Sup. Ct.).



## Principle 12

**The reasonable costs of preserving, collecting and reviewing electronically stored information will be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.**

In most Canadian provinces and territories, the costs of discovery are traditionally borne by the producing party.<sup>124</sup> The issue of cost allocation of electronically stored information has not been resolved in Canada<sup>125</sup>. However, when documents are produced, the opposing party is responsible for the immediate costs of the production of documents to them, such as copying, binding and delivery costs. Any other cost-shifting generally occurs at the end of the litigation, at which time the unsuccessful party may be required to contribute, in whole or in part, towards the costs (fees and disbursements) of the successful party<sup>126</sup>.

While litigants are properly expected to bear the costs, on at least an interim basis, of producing electronically stored information in the ordinary course of business, different considerations are engaged when extraordinary effort or resources will be required to first restore data to an accessible format before it can be produced. For example, restoring deleted data, disaster recovery tapes, residual data, or legacy systems may involve extraordinary efforts or resources. In such cases, requiring the producing party to fund the significant costs associated with restoring such data may be unfair, and may hinder the party's ability to litigate the dispute on the merits. Accordingly, it is generally appropriate that the party requesting such extraordinary efforts should bear, at least on an interim basis, all or part of the costs of doing so.

The Advisory Committee on the Rules of Civil Procedure in the United States set out seven factors after considering various cases. Appropriate considerations may include:

- (1) the specificity of the discovery request;
- (2) the quantity of information available from other and more easily accessed sources;
- (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources;
- (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;
- (5) predictions as to the importance and usefulness of the further information;
- (6) the importance of the issues at stake in the litigation; and
- (7) the parties' resources.

It could also be argued, in Canada, that the costs of producing accessible electronically stored information should be shifted in certain circumstances.

E-discovery may involve significant internal client costs as well as counsel fees and disbursements for out-sourced services. These fees can arise at both the stage of locating and reviewing electronic documents and at the production stage. As such, there may be a need for the costs rules to be clarified so that internal discovery costs are regarded as a recoverable disbursement in appropriate cases.

<sup>124</sup> Similarly, in the United States, the costs of discovery are usually borne by the producing party. However, Rule 26(b) empowers courts to shift costs where the demand is unduly burdensome because of the nature of the effort involved to comply. If a court requires retrieval of information that is not reasonably available, it should also adjudicate the need for cost shifting. See *Rowe Entm't, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002) at paras. 430-31: "[A] party that happens to retain vestigial data for no current business purposes, but only in case of an emergency or simply because it has neglected to discard it, should not be put to the expense of producing it."

<sup>125</sup> *Bank of Montreal v. 3D Properties (Bank of Montreal v. 3D Properties Inc. et al)*. (No. 1) (1993), 111 Sask.R. 53 (Q.B.): "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."

<sup>126</sup> For example, s. 3.1 of the Supreme Court of British Columbia's *Practice Direction Regarding Electronic Evidence*, in force July 1, 2006, provides that the reasonable costs of complying with the Practice Direction, "including the expenses of retaining or utilizing necessary external or in-house technical consultants" may be claimed as costs under the *Rules of Court*.

As the e-discovery costs borne initially by producing parties may be significant, such parties may wish to adopt strategies so as to control the costs of e-discovery. For example, a producing party may wish to limit, either through negotiation, appropriate admissions, or motions, the scope of their e-discovery obligations. They may also wish to consider whether the costs should be partially or completely shifted to the receiving party. As well, in common law jurisdictions, a producing party may wish to serve on the receiving party an Offer to Settle, or to seek security for costs, to enhance its chances of recovery if it is ultimately successful in the proceeding.

Given the potential for interim costs awards in an e-discovery context, the parties seeking production of electronic documents should also carefully consider the cost implications of these claims as early as possible.

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# Appendix A

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The first Working Group was convened in October 2002, and was dedicated to the development of guidelines for electronic document retention and production. The impact of its first (draft) publication—*The Sedona Principles; Best Practices Recommendations and Principles Addressing Electronic Document Production* (March 2003 version)—was immediate and substantial. *The Principles* was cited in the Judicial Conference of the United State Advisory Committee on Civil Rules Discovery Subcommittee Report on Electronic Discovery less than a month after the publication of the “public comment” draft, and was cited in a seminal e-discovery decision of the Federal District Court in New York less than a month after that. As noted in the June 2003 issue of Pike & Fischer’s *Digital Discovery and E-Evidence*, “*The Principles*...influence is already becoming evident.”

The WGS<sup>SM</sup> Membership Program was established to provide a vehicle to allow any interested jurist, attorney, academic or consultant to participate in Working Group activities. Membership provides access to advance drafts of Working Group output with the opportunity for early input, and to a Bulletin Board where reference materials are posted and current news and other matters of interest can be discussed. Members may also indicate their willingness to volunteer for special Project Team assignment, and a Member’s Roster is included in Working Group publications.

We currently have active Working Groups in the areas of 1) electronic document retention and production; 2) protective orders, confidentiality, and public access; 3) the role of economics in antitrust; 4) the intersection of the patent and antitrust laws; 5) *Markman* hearings and claim construction; 6) international e-information disclosure and management issues; and 7) e-discovery in Canadian civil litigation. See the “Working Group Series” area of our website [www.thesedonaconference.com](http://www.thesedonaconference.com) for further details on our Working Group Series and the Membership Program.

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