

THE SEDONA CONFERENCE® WORKING GROUP SERIES



THE SEDONA CANADA PRINCIPLES

Addressing Electronic Discovery

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

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***The Sedona Canada Principles
Addressing Electronic Discovery
Working Group 7 “Sedona Canada”***

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Preface

In May of 2006, a small but diverse group of lawyers, judges, and technologists met at Mont Tremblant, Quebec to begin a unique and extraordinary process of dialogue to grapple with the phenomenon of “electronic discovery.” The Sedona Conference® Working Group 7, “Sedona Canada,” 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. Over the next year, Working Group 7 worked to draft a set of universally acceptable principles addressing the disclosure and discovery of electronically stored information in Canadian civil litigation. The draft Public Comment Draft of *The Sedona Canada Principles* was released in February 2007. It immediately captured the attention of the legal profession, particularly the judiciary, looking for ways to avoid the cost, delay, and acrimony associated electronic discovery in the United States and elsewhere. Working Group 7 met again in September 2007 in Kananaskis, Alberta, to consider the many constructive comments received on the draft, and to finalize this first edition of *The Sedona Canada Principles*.

We want to thank the entire Working Group for all their hard work, and especially the combined Steering and Editorial Committees. We 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.

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 “WGSSM”) 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 WGSSM in particular). WGSSM 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.

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 or contact us at tsc@sedona.net.

Richard G. Braman
Executive Director,
The Sedona Conference®
January 2008

Foreword

We are 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. New issues emerge almost daily and challenge the appropriateness of Rules that tend to be static in nature.

What is the Purpose of the Sedona Canada Principles?

When work was undertaken in Ontario on guidelines for e-discovery, rather than rule amendment, 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 law society representatives from across Canada. They, together with the organizers of The Sedona Conference® and observers from the U.S. federal judiciary, came together to form The Sedona Canada Working Group 7 (“Sedona Canada”).

Drawing on the work previously undertaken by The Sedona Conference® with respect to U.S. guidelines, and with the benefit of work in Ontario, the undertaking of Sedona Canada over several days at Mont Tremblant and more recently at Kananaskis was amongst the most productive and most collegial with which we have been associated.

We believe the resulting Sedona Canada Principles Addressing Electronic Discovery are compatible with the discovery rules in all the Canadian provinces and territories. The Principles are also consistent with the Federal Rules in the United States but allow for substantive differences in discovery practice. Since publication of the initial draft, various jurisdictions have made reference to the Principles in projects involving possible changes to the rules or practice notes to accommodate e-discovery. Substantive Rule revision in the provinces of B.C. and Nova Scotia over the next year or so is expected to adopt the Principles. The Tax Court of Canada is reviewing the Sedona Canada Principles and will consider whether amendments to the Rules and a Practice Note are required. In Ontario, a recent report on civil justice reform has recommended adoption of a Practice Direction that would encourage reliance on the Principles.¹ It is hoped that other provinces will follow.

To Which Cases are the Principles Applicable?

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 as well as cases in family and criminal litigation. The cost of dealing with e-discovery issues in some cases exceeds the amount in issue.

¹ Honourable Coulter A. Osborne, Q.C., “Civil Justice Reform Project: Summary of Findings and Recommendations” (November 2007), online: Ontario Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf> Recommendation 32.

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. Dialogue between lawyers and the parties to civil litigation is essential in order to develop a plan that clients understand and so they may also appreciate the costs.

The Future

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 and hopefully will be referenced in judicial decisions and Court rules. The Principles are 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 implement the guidelines. 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 members of Sedona Canada 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

Justice J. E. Scanlan
Supreme Court of Nova Scotia
Truro, Nova Scotia

The Sedona Canada Principles Addressing Electronic Discovery

—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. 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.
4. 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.
5. The parties should be prepared to produce 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 preserve, collect, review and produce electronically stored information in good faith by using electronic tools and processes such as data sampling, searching or by using 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 generally 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.

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Introduction

Discovery in a World of Electronic Documents and Data

Discovery, and document production in particular, is a familiar aspect of litigation practice. Today, by some estimates, more than 90 percent of all information is created in electronic format. The explosive growth and diversification of electronic methods of creating documents, communicating, and managing data have transformed the meaning of the term “document.”

For courts and lawyers, whose practices are steeped in tradition and precedent, the pace of technological and business change presents a particular challenge. The Sedona Principles and Commentaries seek to synthesize the current approach and offer new, practical standards for managing electronic discovery.

1. What Is Electronic Discovery (“e-discovery”)?

“Electronic discovery” refers to the discovery of electronically stored information, including e-mail, web pages, word processing files, computer databases, and virtually any information that is stored on a computer or other electronic device. Technically, 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 random access 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, under “Publications.”

2. What Rules Govern Electronic Document (“e-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 is typically a rule requiring production of documents related to matters in issue in the action, along with a definition of “document” for the purposes of production to include various forms of electronic records or data.

Each province and territory has a well developed set of rules regulating the production, inspection, dissemination, review, listing and safekeeping of documents that are somehow relevant to the proceedings at hand.² While the approach varies from province to province, some provinces’ rules are substantially similar³, and two territories have adopted the rules of another Canadian jurisdiction.⁴

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.⁵

² 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 and 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, *The Queen’s Bench Act*, R.S.S. 1978, c. Q-1, *The Queen’s Bench Rules*, R. 214; Quebec, *Code of Civil Procedure*, R.S.Q. c. C-25; Tax Court of Canada, *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a, R.78 and 80; and Federal Court of Canada, *Federal Courts Rules* (SOR/98-106), R. 222 and 223.

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

⁴ Nunavut uses the Northwest Territories’ *Rules of the Supreme Court*, and Yukon uses British Columbia’s *Rules of Court*.

⁵ Definitions of “document” are found at the following sections in the respective province’s rules: Ontario, R. 30.01; Alberta, R. 186; British Columbia, R. 1; Manitoba, R. 30.01; New Brunswick, R. 31.01; Northwest Territories and Nunavut, R. 218; Prince Edward Island, R. 30.01; Saskatchewan, R. 211; and Quebec, *An Act to establish a legal framework for information technology*, R.S.Q. c. C-1.1, s. 3.

3. How Are Electronic Documents Different from Paper Documents?

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) Large Volume and Ease of Duplication

Electronically stored information is created at much greater rates than paper documents and, therefore, there are vastly more electronic documents than paper documents. Today, the great majority of households and businesses in Canada are connected to the internet.

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. Just over three-quarters (77%) of firms used e-mail, up from 74% in 2003 and 66% in 2001.⁶

The dramatic increase in e-mail usage and electronic file generation poses special problems for large corporations. A single large corporation can generate and receive millions of e-mails and electronic files each day. Ninety-two percent of new information is stored on magnetic media, primarily hard disks, compared to 0.01% for paper.⁷ 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.

Electronic documents are more easily duplicated than paper documents. For example, e-mail users frequently send the same e-mail to many recipients. These recipients, in turn, often forward the message, and so on. At the same time, e-mail 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 applications include web pages that are automatically saved and file data that is routinely backed up to protect against inadvertent deletion or system failure.

B) Persistence – e-documents Are Hard To Dispose Of

Electronic documents are more difficult to dispose of than paper documents. Despite the attempt to delete electronic documents, information may remain on an electronic storage device until it is overwritten by new data. Meanwhile it may still be available for discovery. In *Prism Hospital Software Inc. v. The Hospital Records Institute*⁸, 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 fully deleting electronically stored information, software is sold that purports to completely erase or “wipe” the data by repeatedly overwriting the data numerous times.

⁶ Statistics Canada, “Survey of Electronic Commerce and Technology” (2005), online: Statistics Canada <<http://www.statcan.ca/Daily/English/060420/td060420.htm>

⁷ 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/>>.

⁸ *Prism Hospital Software Inc. v. The Hospital Records Institute* (1991), 62 B.C.L.R. (2d) 393 (S.C.).

C) e-documents Are Attached To Tracking Information (Metadata)

Electronic documents contain information known as “metadata”⁹ which is information created by the operating system or application about a file that allows the operating system or application to store and retrieve the file at a later date. Much metadata is not accessible by the computer user without special tools.

Metadata includes information on file designation, creation and edit dates, authorship, and edit history, as well as hundreds of other pieces of information used in system administration. For instance, e-mail metadata elements include the dates that mail was sent, received, replied to or forwarded, blind carbon copy (“bcc”) information, and sender address book information. 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.

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; for instance, it does not usually 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. E-mail, on the other hand, may have some very useful metadata that can be extracted and used to generate the to:, from:, date: and cc: fields for use in the review or litigation support tool. Unlike the possibly erroneous information that might be transferred from a template, some e-mail metadata is generally accurate, and capturing it automatically can save time and money.¹⁰

Deciding what metadata¹¹ needs to be specifically preserved and produced represents one of the biggest challenges in electronic document production.

D) e-documents Are Often Updated Automatically (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.

⁹ Metadata can be used to: generate objective coding (file system and e-mail headers); properly interpret the meaning of other data (spreadsheet formulae); or act as hidden data like track changes that may well be probative.

¹⁰ Some caveats are in order. First, it is possible that e-mail metadata can be misinterpreted. For example, the time an e-mail was sent should be scrutinized if the sender and receiver are in different time zones, because the time zone is not recorded in the metadata. An e-mail sent at 11:00 a.m. Vancouver time, which corresponds to 2:00 p.m. Toronto time, might be misinterpreted as having been received at 2:00 p.m. Vancouver time. Further, the date and time an e-mail is sent or received is based on the date and time setting of the sending or receiving computer; therefore, if the computer settings are inaccurate, the related metadata will be inaccurate. Finally, some e-mail metadata can be reset by the user.

¹¹ 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.

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.¹²

The move towards sharing application data files among many users (“virtual” work groups) further compounds discovery problems 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.

E) Electronic Data Often Need A Computer Program, Which May Become Obsolete

Electronic data, unlike paper data, may be incomprehensible when separated from the working 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) e-documents Are Searchable, And May Be Dispersed In Many Locations

While paper documents will often be consolidated in a handful of boxes or filing cabinets, employees’ electronically stored information could reside in numerous locations, such as desktop hard drives, laptop computers, network servers, handheld digital devices, 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.

The ease of transmission, 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.

¹² 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.

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 in each jurisdiction, which were primarily 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 required the restoration of hundreds 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.¹³ The Introduction to the Guidelines for the Discovery of Electronic Documents in Ontario (the “Ontario E-Discovery Guidelines”)¹⁴ 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. The Ontario E-Discovery Guidelines 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 from the B.C. Supreme Court 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 some Canadian courts have relied on the Ontario E-Discovery Guidelines and the Sedona Principles, which were drafted specifically with the United States legal context in mind, it is clearly preferable to have a Canadian set of national best practices guidelines in the form of a Canadian version of the Sedona Principles.

5. Is the “Paper” Discovery Case Law Applicable to Electronic Discovery?

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?

¹³ 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...”

¹⁴ Discovery Task Force, “The Supplemental Discovery Task Force Report” (October 2005), online: Ontario Bar Association <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.

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.

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

Example 1: Relevance

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.

Example 2: Duplicates

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.

Example 3: Use of Search Tools

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 relevant to the issues in the pleadings. It has been common practice with respect to electronic documents to print out paper copies of all potentially relevant documents and then review them by hand. By doing so, however, the party conducting discovery 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.

Example 4: Workable Preservation Orders

In the world of paper discovery, a document preservation order requiring that a corporate party “freeze” all of its documents is a manageable burden. 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.

A) Precedents Derived From Paper Discovery Are Often Inapplicable To Electronic Documents

As noted in Example 3 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.

Example 5: Reasonable limits on data recovery

It may be easier and cheaper 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 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.*,¹⁵ 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 e-mails.” However, if there is a credible allegation that evidence has been destroyed, 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.¹⁶

Example 6: Don’t let the data tail wag the business dog

Because the cost of electronic document storage 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 relevance and privilege, large numbers of duplicate documents, and problems dealing with retrieving documents in obsolete formats that have been unnecessarily retained.

B) Some Rules Developed For Paper Discovery Can Be Adapted To Electronic Discovery

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 files 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. 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.

In Example 1 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 they will not likely 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 Example 3 above, the controlling, media-neutral rule is the obligation to produce all potentially relevant documents. The specific application in this illustration involves the most efficient way to identify potentially relevant documents. In the paper context, paralegals and attorneys commonly conduct a page-by-page review of documents, looking for certain key words and concepts. 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 the rule) requires an understanding of the electronic documents at issue and the capabilities and limitations of available production and review tools.

¹⁵ 205 F.R.D. 421 at 431 (S.D.N.Y. 2002).

¹⁶ See Douglas Heingartner, “Back Together Again” *New York Times* (July 17, 2003), G1 (describing technology that maybe used to reconstruct documents shredded by the East German secret police).

6. Why Can't Canadians Just Use the E-Discovery Guidelines Developed for the United States?

The Canadian approach to discovery differs from that in the United States in important ways. In Canada, apart from Quebec, there is generally a positive duty on each party to litigation to produce potentially relevant documents, imposed by the various provincial rules of civil procedure. In the United States, the production obligation stems from the obligation to respond to specific production requests; therefore, if a document is not requested, it need not be produced, even if it is relevant. In Canada, the parties might have different views of relevance, and the difference of opinion can remain unknown or unacknowledged until the parties actually exchange lists of productions or the productions themselves. It might then become apparent that information one side (and perhaps the court) views as relevant was not preserved. Quebec has an entirely separate legal regime, in which there is no general duty to produce potentially relevant documents. Nevertheless, electronically stored information is routinely produced in Quebec without the specific obligation to do so, and so electronic discovery guidelines are useful even for Quebec litigation.

The rules governing documentary production prescribe the manner in which these documents are to be produced. In most provinces, an affidavit or list of documents or records is required. Ontario's scheme is typical of the approach taken in most provinces. 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.

Another important difference is the concept of the "implied undertaking" which attaches to information obtained through discovery in a civil action. The implied undertaking rule provides that evidence obtained in a civil discovery will not be used for any purpose beyond the action in which it was obtained, without the consent of the party from whom it was obtained or leave of the court. Several provinces including Alberta and British Columbia follow this common law rule. Ontario has additionally enacted a specific rule, referred to as the deemed undertaking. It is codified in Ontario's *Rules of Civil Procedure*¹⁷ and has a similar purpose.

In Quebec, the *Code of Civil Procedure*¹⁸ ("CCP") 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 CCP.¹⁹

7. Conclusion

The Sedona Canada Working Group has examined these 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. We welcome ongoing discussion and review in this important, evolving area of legal practice.

¹⁷ R.R.O. 1990, Reg. 194, R. 30.1.

¹⁸ R.S.Q. c. C-25 R.331.1.

¹⁹ *Code of Civil Procedure*, R.S.Q. c. C-25 R.4.1.

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, these all provide that electronically stored information must be produced as part of the discovery process. 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),²⁰ 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*,²¹ 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*²² 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.”

Quebec passed *An Act to establish a legal framework for information technology*,²³ 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*²⁴ provides that records be both relevant and material. The Ontario *Rules of Civil Procedure*²⁵ and the British Columbia *Supreme Court Rules*²⁶ 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.²⁷

²⁰ United Nations Commission on International Trade Law, *Model Law on Electronic Commerce*, GA Res. 51/162, UNCITRAL (1997), online: UNCITRAL <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html>.

²¹ S.C. 2000, c.5.

²² R.S.C. 1985, c. C-5, s. 31.8.

²³ R.S.Q. c. C-1.1.

²⁴ Alta. Reg. 390/1968.

²⁵ R.R.O. 1990, Reg. 194, R. 30.02(1).

²⁶ B.C. Reg. 221/90, R. 26(1).

²⁷ 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.”

Actual media have been ordered to be produced in particular cases, such as in *Reichmann v. Toronto Life Publishing Co.*,²⁸ 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.

In *Northwest Mettech Corp. v. Metcon Service Ltd.*,²⁹ 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.³⁰ 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 electronic commerce transactions.³¹ 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.³²

²⁸ (1988), 66 O.R. (2d) 65 (H.C.J.).

²⁹ 1996 CanLII 1056 (B.C.S.C.).

³⁰ See *Nicolardi v. Daley*, [2002] O.J. No. 595 (ON.S.C.) (QL).

³¹ The Yukon, Prince Edward Island, Ontario, 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.L. 2001, c.E-5.2; S.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. E-55. Saskatchewan’s legislation is entitled: *Electronic Information and Documents Act*, S.S. 2000, c. E-7.22. Quebec’s legislation is: *An Act to establish a legal framework for information technology*, R.S.Q. c. C-1.1.

³² 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 rule of proportionality is a reaction to delays and costs impeding access to justice.

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 costs may prevent the fair resolution of litigation disputes. Parties should generally plan for the e-discovery process from the outset with a view to analyzing the potential costs of e-discovery, the means of controlling such costs and what process might best achieve proportionality.

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 individual privacy as well as 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, speedy and inexpensive resolution of the dispute on the merits.³³ 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.³⁴

Comment 2.a. The Proportionality Rule

Many provinces have taken specific initiatives to ensure that the discovery procedures employed are proportionate. In British Columbia, for example, Rule 68 of the *Supreme Court Rules*³⁵ modifies ordinary litigation procedures for certain actions to require the court to consider what is reasonable where the amount at issue is less than \$100,000. 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

³² 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.

³⁴ *Goldman, Sachs & Co. v. Sessions*, 2000 BCSC 67 (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 (declining to order production of hard drive where probative value outweighed by privacy interests); *Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen*, 2006 BCSC 554, 53 B.C.L.R. (4th) 329 (declining to order production of hard drive in the particular circumstances of the case); *Desgagne v. Yuen* 2006 BCSC 955, 56 B.C.L.R. (4th) 157 (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).

³⁵ B.C. Reg. 221/90.

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.

Most recently, the Chief Justice of the Supreme Court of British Columbia promulgated a Practice Direction Regarding Electronic Evidence (effective July 1, 2006),³⁶ 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.³⁷

In Nova Scotia, the requesting party must establish a *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*,³⁸ 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.”

In Quebec, Section 4.2 of the *Code of Civil Procedure (CCP)* reads as follows: “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.”³⁹

Courts have indicated that the proportionality rule must be interpreted in conjunction with section 4.1 *CCP*.⁴⁰ Section 4.1 reads as follows: “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 the exchange of documents on CDs,⁴¹ to the examination of a witness by videoconference⁴² as well as to the control of an examination where an excessive volume of documents had been requested and unreasonable number of questions had been asked.⁴³

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*.⁴⁴

³⁶ Courts of British Columbia, “Electronic Evidence Project” (2006), online: Courts of British Columbia <<http://www.courts.gov.bc.ca/sc/ElectronicEvidenceProject/ElectronicEvidenceProject.asp>>.

³⁷ 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> Principle 2.

³⁸ 2003 NSSC 227, 218 N.S.R. (2d) 288.

³⁹ R.S.Q. c. C-25, s. 4.2.

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

⁴¹ *Citadelle, Cie d’assurance générale c. Montréal (Ville)*, 2005 IIJCan 24709 (Q.C.S.).

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

⁴³ *Ryan Parsons c. Communismed Inc.* (2005), J.E. 2005-1042 (C.Q.), 2005 CarswellQue 2058 (WL).

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

Principle 3

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 3.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.

Comment 3.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.

Preparation will enable the parties to present a more accurate picture of the cost and burden to the court 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 limits the potential for sanctions).

Comment 3.c. Response Regarding Litigation Preservation

Parties should take reasonable and good faith steps to meet their obligations to preserve information relevant to the issues in an action.⁴⁵ In common law jurisdictions, the preservation obligation arises when a proceeding is filed, but can also arise when it is reasonable to expect that evidence may be relevant to future litigation.⁴⁶ Owing to the dynamic nature of electronically stored information, delay may increase the danger of claims that relevant evidence was destroyed.⁴⁷ 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.⁴⁸ 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.

⁴⁵ *Doust v. Schatz*, 2002 SKCA 129 at para. 27, 227 Sask. R. 1: "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. 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."

⁴⁶ 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.

⁴⁷ On the issue of intentional spoliation of evidence as a separate tort see *North American Road Ltd. v. Hitachi Construction*, 2005 ABQB 847 at paras. 16-17, [2006] A.W.L.D. 1144; *Spasic Estate v. Imperial Tobacco Ltd., et al.* (2000), 49 O.R. (3d) 699 (C.A.), 2000 CanLII 17170.

⁴⁸ 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

Comment 3.d. Notice to Affected Persons in Common Law Jurisdictions

Upon determining that litigation⁴⁹ 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 possession, control or power information relating to matters in issue in the action.

Illustration i: A company receives a statement of claim alleging that it has posted false or misleading information about its products on its website. It uses an outsourcer to manage its e-mail 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 e-mail to a recipient. Instructions to the company's IT department should include the preservation of the logs of activities as well as any e-mail 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 e-mail system to transfer the information.

The best evidence for the case in this illustration, though, may be with the former employee. See the section on Anton Piller orders in Comment 3.g on Preservation.

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 legal 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.

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 e-mail 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."

⁴⁹ Criminal and regulatory investigations also trigger a duty to preserve.

Comment 3.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 *CCP*.⁵⁰

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 3.f. Extreme Preservation Measures Not Necessarily Required

The basic principle which defines the scope of the obligation to preserve relevant information can be found in the common law.⁵¹ 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 a specific agreement or court order.⁵²

Comment 3.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 that the opposing party will destroy relevant electronically stored information. Anton Piller orders are exceptional remedies, are granted without notice, 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.*⁵³

To avoid an Anton Piller order, both parties may want to enter into a preservation order on consent. For example, the plaintiff in *CIBC World Markets Inc. v. Genuity Capital Markets*⁵⁴ 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.

⁵⁰ *Code of Civil Procedure*, R.S.Q. c. C-25 R.4.1.

⁵¹ 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> at Principle 3 and 4.

⁵² This is in keeping with "The Sedona Principles, Second Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production", 50 (The Sedona Conference® Working Group Series, 2007), online: The Sedona Conference <<http://www.thesedonaconference.org>> under "Publications.", 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 which may be relevant to the litigation.

⁵³ 2006 SCC 36, 269 D.L.R. (4th) 193.

⁵⁴ 2005 CanLII 3944 (ON.S.C.).

In *Portus Alternative Asset Management Inc.(Re)*,⁵⁵ 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 e-mail correspondence.

Comment 3.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. If a party's established and reasonable practice results in a loss or deletion of some electronically stored information – 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.

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.⁵⁶

Comment 3.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.

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.⁵⁷ Organizations seeking to preserve data for business purposes or litigation should, if possible, consider employing means other than traditional disaster recovery backup media.

⁵⁵ (2005), 28 O.S.C.Bull. 2670.

⁵⁶ See *Doust v. Schatz*, 2002 SKCA 129, 227 Sask. R. 1; and *Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen*, 2006 BCSC 554, 53 B.C.L.R. (4th) 329.

⁵⁷ See *Farris v. Staubach Ontario Inc.*, 2006 CanLII 19456 (ON.S.C.), 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.”

If a party maintains archival data on tape or other offline⁵⁸ 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.⁵⁹

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.⁶⁰ 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 later, the former employee sues for wrongful dismissal. During the search for information relevant to the matter, counsel learns that the IT department routinely deletes e-mails older than 30 days in users' inboxes in an effort to control the volume of e-mail 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 e-mails advancing the employer's case and damaging the Plaintiff's are found.

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 e-mails belonging to a custodian who left its employ a number of years ago, a party discovers that IT has kept the last e-mail 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 e-mails, 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 e-mails of the custodian, the backups for that particular server were excluded from further searches.

⁵⁸ 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, CDs, DVDs, portable hard drives, ROM-drive devices and the like.

⁵⁹ Martin Felsky & Peg Duncan, "Making and Responding to Electronic Discovery Requests," *LawPRO Magazine* (September 2005), online: <<http://www.lawpro.ca/LawPRO/ElectronicDiscoveryRequests.pdf>>.

⁶⁰ See *Apotex Inc. v. Merck & Co. Inc.*, 2004 FC 1038 at para.14, 33 C.P.R. (4th) 387: "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."

Comment 3.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.

Illustration iv. Responding to a “litigation hold” notice from in-house counsel, Custodian X identifies the following sources of data relevant to an engineering dispute that she has in her possession or control: e-mail, word processing, and spreadsheet files on her workstation hard disk and on the Engineering Department’s shared network drive, as well as a collection of CD ROMs with relevant data and drawings. Following up on her response, counsel determines that Custodian X also consults Engineering Department knowledge management databases, contributes to company Wikis and discussion groups, and is involved in online collaborative projects relevant to the dispute. Although Custodian X does not consider herself to be in possession or control of these additional sources, counsel works with the IT department to include these in the preservation process.

Principle 4

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 4.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” emerge with a more realistic understanding of what is ahead of them in the discovery process.

These Principles strongly encourage a collaborative approach to e-discovery, reflecting recent attitudes in Canada.⁶¹ The origin of the meet and confer session is found in the Rule 26(f) of the United States Federal Rules of Civil Procedure. 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 and 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 that parties take control of their case in accordance with the new section 4.1 *CCP*.⁶²

Meeting early is one of the keys to effective e-discovery for all sides. 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.

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.

⁶¹ *Wilson v. Servier Canada Inc.*, 2002 CanLII 3615 (ON.S.C.) 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 (ON.S.C.) 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 (ON.S.C.). 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.

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

⁶² R.S.Q.c. C-25, s. 151:1 - 151.23.

Principle 4 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 relevant. These developments should be communicated to all parties. Absent such communication, any agreement reached at the initial meet and confer can easily evaporate.

Comment 4.b. Who Should Attend

Principle 4 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 considerations may 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 a business manager or managers familiar with the operational or project areas involved in the litigation and the key players in the organization, someone familiar with the organization's document and records management protocols, and the 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 advisor with experience in the technical aspects of discovery.

Comment 4.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*⁶³

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, and to identify the likely sources of potentially relevant electronically stored information.⁶⁴

⁶³ The Ontario Guidelines refer to the narrower concept of "location" rather than "identification" of possible sources of relevant data.

⁶⁴ See *Canada (Commissioner of Competition) v. Air Canada (T.D.)*, [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 insofar 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 should 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.

While the making of bit-level images of hard drives is useful in selective cases for the preservation phase, the further processing of the total contents of the drive should not be required unless the nature of the matter warrants the cost and burden.⁶⁵ 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.

Collection and Processing

The parties shall 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. Every effort should be made to discuss and agree on these issues.

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 sources or documents have not been searched.

Automated Review Process

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 privileged and confidential information, and trade secrets. For more information, The Sedona Conference® has recently published a commentary on Search and Retrieval Methods and Technologies.⁶⁶

Production

Counsel should discuss the form in which productions will be exchanged – for example, whether certain document types will be in native format or static images. 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.⁶⁷

⁶⁵ See *Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen*, 2006 BCSC 554 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.”

⁶⁶ Jason R. Baron, ed., “The Sedona Conference® Best Practices Commentary on the Use of Search and Retrieval Methods in E-Discovery” (2007), 8 The Sedona Conference Journal 189, online: The Sedona Conference <<http://www.thesedonaconference.org>> under “Publications.”

⁶⁷ *Logan v. Harper*, 2003 CanLII 15592 (ON.S.C.) 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.”

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 sessions throughout the matter and a resolution process for any issues that may arise.

The preservation, collection, processing, review and production steps are considered in greater detail in Principles 3 and 5 to 8.

Principle 5

The parties should be prepared to produce 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 primary sources of electronically stored information in discovery should be those that are reasonably accessible. While it is tempting to define “reasonably accessible” in relation to the ease of access of online data, or the format in which the data is stored, the calculus is much more complex.

Certain forms of electronically stored information—such as old backup tapes, data for which applications no longer exist, and databases—are often considered “not reasonably accessible” simply because they are more difficult to deal with than other data forms. Since a successful declaration of “not reasonably accessible” effectively removes that particular set of electronically stored information from further consideration in the discovery process, there could be a tendency to interpret any difficulty in identifying, locating, retrieving or processing any particular form of electronically stored information as a sign of its not being “reasonably accessible”.

It is important, therefore, to recognize that the determination of accessibility does not depend strictly upon convenience, but rather on the concept of marginal utility. Accordingly, the test for the discovery of electronically stored information now becomes: Will the quantity, uniqueness and/or quality of data from any particular type or source of electronically stored information justify the cost of the acquisition of that data?

Courts have already taken the concept of marginal utility into consideration when giving reasons for denying further productions. In *Gould Estate v. Edmonds Landscape and Construction Services Ltd*⁶⁸ 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*,⁶⁸ 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 [...]; 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 [...]”

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. Defensible arguments for a source of electronically stored information not being reasonably accessible include: (1) there is no relevant data on it; (2) there is relevant data on it, but the same relevant data is available in another, more accessible, location; or (3) based on sampling, there is likely to be some relevant data on it, but the cost to obtain it is not worth the value the relevant data would provide.

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 e-mail servers. Producing party has already produced the relevant e-mails. Requesting party cannot identify any documents that have not been produced, or provide evidence of incomplete disclosure. Therefore, there is no reason to search the backup tapes.

⁶⁸ 2005 BCSC 1813 (citing *Peter Kiewit Sons Co. v. B.C. Hydro* [1982] B.C.J. No. 1599, Vancouver Registry No. C794669 (March 26, 1982); *B.C. Milk Marketing Board v. Aquilini*, 1996 CanLII 1980 (B.C.S.C.); *Goldman, Sachs & Co. v. Sessions*, 2000 BCSC 67).

Illustration iii: In a product liability case going back to the late 1980s, the plaintiff asks for raw test data that was analyzed to determine the safety of the product. The aggregated data was published with the recommendation, but the plaintiff's case is based on errors made in the analysis. The raw data was copied onto 5 ¼ inch diskettes that were attached to the file in Records Management. The file names are cryptic, and the programs to read the files are not on the diskettes. Based on the time and cost required to reconstruct the program to display and search the data for one dataset, the defendant determines the overall cost to retrieve the raw data from all the diskettes. Depending on how helpful the recovered data is to determining the outcome of the case, the court can decide whether to order reconstruction of the rest of the data on the diskettes.

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 relevant 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 relevant information.

Illustration iv: In an employment case, the plaintiff claims to have received abusive e-mail from his supervisor as part of an ongoing pattern of harassment. The alleged e-mail would have been sent 18 months ago. There are no backup tapes from the period. The plaintiff did not keep any copies. The company has imaged the workstation and conducted a thorough search of all e-mail folders, including the Deleted Items folder, but no evidence has been found. The plaintiff asks the court to order a forensic examination of the desktop computer to recover deleted information. In the absence of any evidence from the plaintiff of existence of the abusive e-mail, the court accepts defendant's argument that the probability of finding traces of an e-mail that was deleted 18 months ago from a workstation that is in daily active use is negligible because the space on the disk would have been overwritten in the normal course of business.

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 are not relevant or are only marginally relevant to the litigation. Resort to a source that is determined to be "not reasonably accessible" must be justified by showing that the need for that particular electronically stored information outweighs the costs involved. Information that is otherwise logically relevant may be excluded on the grounds that recovery of that information involves an inordinate amount of time and or resources which are not commensurate with the potential evidentiary value.⁷⁰ Case law suggests that the burden of showing that another party's productions are inadequate lies with the party alleging deficiencies.⁷¹

Illustration v: The unsuccessful bidder in a multi-million dollar construction contract for municipal government alleges unfairness and impropriety. The final report of the evaluation committee was in printed format on the file, but the plaintiff alleges that the criteria used to compare the bids were changed during the evaluation. The plaintiff asks for the electronic version of the selection criteria that, by policy, must be determined before the RFP is released. The plaintiff explains that this document is material and necessary to its prosecution of the case. It has been three years since the competitive tender, and because of staff turnover, the original electronic version has been lost. However, a backup copy of the server used by the former contracts officer is available and can be recovered. Because it would be the only source of a piece of critical information in the suit, the court orders the recovery of the server and the search for the document.

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.

⁷⁰ *R. v. Mohan*, [1994] 2 S.C.R. 9, as quoted in *Gould Estate v. Edmonds Landscape & Construction Services Ltd.*, 1998 CanLII 5136 (N.S.S.C.), 166 N.S.R. (2d) 334.

⁷¹ *Rhodia UK Ltd. v. Jarvis Imports (2000) Ltd.*, 2005 FC 1628, 45 C.P.R. (4th) 161.

Parties and courts should exercise judgment, based on reasonable good faith inquiry having regard to the cost of recovery or preservation. If potentially marginally relevant documents are demanded from sources for which the information is difficult, time-consuming and expensive to retrieve, cost-shifting may be appropriate.

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. 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.

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 electronically stored information that is available from reasonably accessible sources. In the absence of demonstrated need for the collection of hidden files,⁷² system logs, deleted files,⁷³ fragmented data and partially over-written files, the scope of 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.”⁷⁴

Deleted and residual data, like papers discarded in the trash, may be subject to discovery.⁷⁵ However, only exceptional cases will turn on “deleted” or “discarded” information (whether paper or electronic).

Illustration i: A party seeking relevant e-mails 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.

⁷² See *Reichman v. Toronto Life Publishing Company* (1988), 66 O.R. (2d) 65 (H.C.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.

⁷³ See *Nicolardi v. Daley*, [2002] O.J. No. 595 (O.N.S.C.) (Q.L.), 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.). In *Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen*, 2006 BCSC 554 at para. 36, 53 B.C.L.R. (4th) 329, a search for deleted data was prohibited because, “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.”

⁷⁴ The Sedona Principles, “Second Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production,” 50 (The Sedona Conference® Working Group Series, 2007), online: The Sedona Conference <<http://www.thesedonaconference.org>> under “Publications.”

⁷⁵ 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 preserve, collect, review and produce electronically stored information in good faith by using electronic tools and processes such as data sampling, searching or by using 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, much of which 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.

Although the benefits of using electronic tools and processes for data sampling, searching and review are obvious, especially when large volumes of electronic information are involved, these tools must be chosen with a view to their reliability, configured to ensure they operate properly, and used effectively by trained and experienced users. Ultimately, the reliability of the entire production process is dependent on the intelligent application of the appropriate tools. Any party who relies on technology (such as search engines) to assist with the determination of relevance or privilege should submit that technology to a validation or audit process to ensure its efficacy.

Illustration i: Lawyers are searching for any electronic files containing reference to a certain drug (“Aspermin”). The drug is often referred to by name but is also referred to by product number. If the client files are indexed for full-text searching but the person configuring the search engine does so by using default settings, it may be that numbers are not indexed (depending on the software) and, therefore, will not be searchable. When lawyers search for the phrase “Aspermin or 155422-09” and retrieve 5,000 hits, they assume they are retrieving all the relevant documents. In fact, they may be missing most of the key documents without ever realizing it. The best practice here would be to ensure that, as a part of the discovery plan, and before any indexing or searching is done, lawyers review the choice of software, its capabilities, limitations and configurations with an expert to ensure that the results obtained are the expected ones.

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; (4) the search technology;⁷⁶ and/or (5) 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.

Comment 7.b. 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, e-mail messages covering a wide range of topics, customers and issues may be stored in the custodian’s Inbox, sorted in the order they were received. Through filtering, those e-mails potentially relevant to the case at hand can be identified.

⁷⁶ Different text indexing software will treat words differently, resulting in different results. For example, some indexing software will not index numbers or what is considered to be “noise words” (the, a, I, and). Other indexing engines will treat words with symbols, such as A&B as to separate words (A and B). Finally, the use of Boolean terms, (and/or) in the search criteria can affect the values returned.

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.
- 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 e-mail 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 e-mails may not contain the words or phrase because the correspondents are familiar with the context and the exchange is part of a larger conversation.)

Eliminating Duplicates (“De-Duplication”)

Sources of electronically stored information often include multiple copies of the same document or e-mail. Consider, for example, an e-mail 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 ii: a company with hundreds of employees will have hundreds of copies of a relevant company policy that was e-mailed 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 iii: a company with hundreds of employees will have hundreds of copies of a relevant company policy that was e-mailed 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 exact⁷⁷ 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.

⁷⁷ De-duplication should be limited to those documents or data items that are exactly alike (typically confirmed by comparing the documents’ “hash” values). 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. From The Sedona Conference® Glossary, December 2007 online: The Sedona Conference <<http://thesedonaconference.org>> under “Publications.”

Sampling of Computer Data

In some circumstances the parties may be unsure whether a particular source of electronic information contains potentially relevant data or whether the search terms selected can retrieve relevant information. The courts should allow sampling techniques to determine the existence of relevant 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 relevant. This high cost/low return ratio—or low marginal 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 Minero Horizonte S.A. et al v. Klobn-Crippen Consultants Limited et al.*⁷⁸ for an application of the concept of cost-shifting in an analogous situation.

In the United States case of *McPeck v. Ashcroft*,⁷⁹ the Court required the Defendant, the U.S. Department of Justice, to restore one year of a custodian’s e-mail from disaster recovery backup tapes as a “test run” to decide whether enough relevant information was found to justify compelling restoration and processing of other backup tapes.

Comment 7.c. Review

Even after the volume of a party’s electronically stored information has been reduced by the use of various electronic tools and processes, there will often be an overwhelming volume of electronically stored information that counsel must review for relevance, privilege and confidentiality prior to production. Research in the information science field has demonstrated that automated review is statistically more reliable than human review of large data collections for the purpose of identifying relevant electronically stored information.⁸⁰ Electronic tools and processes such as the ability to run searches on the meanings of words (concept searching) and key terms, the ability to group and/or identify and tag collections of duplicates or “near duplicates” in bulk can significantly increase accuracy, efficiency and reduce the cost of the review process. It can also assist in preventing inadvertent production of privileged or confidential information. As valuable as these tools are, ultimately counsel must ensure that legal judgment and a carefully documented methodology are adopted.⁸¹

In assessing the use of electronic tools, counsel should consider the following:

- a) In many settings involving electronically stored information, time and burden of a manual search process for the purpose of finding producible data may not be feasible or justified. In such cases, the use of automated search methods should be viewed as reasonable, valuable and even necessary.
- b) Success in using any automated search method or technology will be enhanced by a well-thought out process with substantial human input at the outset of the process.
- c) The choice of a specific search and retrieval method will be dependent on the specific context in which it is to be employed.
- d) Parties should make a good faith attempt to collaborate on the use of particular search and information retrieval methods, tools and protocols, including keywords, concepts and other types of search parameters.
- e) Parties should expect that their choice of search tools and methodology will need to be justified, either formally or informally, in the lead up to trial.
- f) Parties and the court should be alert to new and evolving search and information retrieval methods.

⁷⁸ BCSC 500, 25 C.C.L.I. (4th) 219.

⁷⁹ 202 F.R.D. 31 (D.D.C. 2001) at 24.

⁸⁰ J. Baron, D. Oard, and D. Lewis, “TREC 2006 Legal Track Overview,” online: <http://trec.nist.gov/pubs/trec15/t15_proceedings.html> (document 3).

⁸¹ *Air Canada v. West Jet* 2006 CanLII 14966 (ON S.C.).

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 only⁸² in electronic format,⁸³ unless the recipient is somehow disadvantaged and cannot effectively make use of a computer,⁸⁴ 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.⁸⁵ Reviewing large paper sets is more time consuming since parties do not have the benefit of automated litigation support tools.⁸⁶ 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.

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.

⁸² See *Logan v. Harper*, 2003 CanLII 15592 (ON.S.C.) 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.”

⁸³ 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> Principle 11, Commentary: “Production of voluminous documentation in a form that does not provide meaningful access should be avoided.” See also *Cholakis v. Cholakis*, 2000 CanLII 20735 at para.30, 44 C.P.C. (4th) 162 (MB.Q.B.), “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.”

⁸⁴ 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 ABPC 86 (CanLII) at para. 99, 267 A.R. 179: “...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.”

⁸⁵ See *Wilson v. Servier Canada Inc.*, 2002 CanLII 3615 (ON.S.C.) 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.).”

⁸⁶ In *Sycor Technology Inc. v. Kiaer*, 2005 CanLII 46736 (ON.S.C.) at para. 2: Where the cost of printing and photocopying e-mail productions was estimated at \$50,000, “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.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. In light of the volume of electronically stored information available for discovery in modern litigation, courts and rules committees may have to reassess the utility of affidavits verifying full disclosure of traditional lists of documents.

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.⁸⁷ (See Principle 3, “Meet and Confer.”) The list should be exchanged in electronic format, which facilitates searching, sorting and reporting.⁸⁸ 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 B.C., 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.

⁸⁷ It is possible to have both privileged and non-privileged or relevant and non-relevant documents within the same container files. The parties should agree on how to organize and produce the container files in these situations.

⁸⁸ See *Wilson v. Servier Canada Inc.*, 2002 CanLII 3615 (ON.S.C.) 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 (ON.S.C.) 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 a 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.⁸⁹ 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 could serve that purpose.⁹⁰ See also *Celanese Canada Inc. v. Murray Demolition Corp.*,⁹¹ 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 efforts⁹² 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. In many cases, a combination of the two is appropriate.

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.⁹³

⁸⁹ See *Elliot v. Toronto (City)* (2001), 54 O.R. (3d) 472 (S.C.) at para. 10; John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 766-7; *Dublin v. Montessori Jewish Day School of Toronto*, 2006 CanLII 7510 (ON.S.C.); *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 NSSC 113, 233 N.S.R. (2d) 123; *National Bank Financial Ltd. v. Daniel Potter*, 2004 NSSC 100, 224 N.S.R. (2d) 231; *Autosurvey Inc. v. Prevost*, 2005 CanLII 36255 (ON.S.C.).

⁹⁰ See *Metcalfe v. Metcalfe*, 2001 MBCA 35 at para. 28, 198 D.L.R. (4th) 318.

⁹¹ 2006 SCC 36, 269 D.L.R. (4th) 193.

⁹² 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.

⁹³ See *National Bank Financial Ltd. v. Daniel Potter*, 2005 NSSC 113, 233 N.S.R. (2d) 123; *Auto Survey Inc. v. Prevost*, 2005 CanLII 36255 (ON.S.C.); and *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, 269 D.L.R. (4th) 193.

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.⁹⁴ 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.⁹⁵

In a recent decision,⁹⁶ the Supreme Court of Canada endorsed the practice that review of documents seized under an Anton Piller order be undertaken by a lawyer who would prepare a report detailing conclusions reached.

Comment 9.d. Protection of Privilege with a Modified “Claw-back” Agreement

Given the expense and time required for pre-production reviews for privilege and confidentiality, there is increasing interest⁹⁷ in various methodologies that can reduce the cost and expense, such as production subject to a modified “claw-back” agreement.⁹⁸ 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.⁹⁹ While ethical rules govern the conduct of counsel in situations in which privileged communications are inadvertently received, counsel may cautiously consider entering into claw-back agreements. 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. A claw-back agreement may not be enforceable against a party who is not a signatory to the agreement.¹⁰⁰

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.¹⁰¹ 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, “lawsuit”, etc.).

⁹⁴ *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, 2005 CanLII 30317 (ON.S.C.).

⁹⁵ The Sedona Principles, Second Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 53 (The Sedona Conference® Working Group Series, 2007), available at <http://www.thesedonaconference.org> under “Publications.”

⁹⁶ *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, 269 D.L.R. (4th) 193.

⁹⁷ *Air Canada v. Westjet Airlines Ltd.*, 2006 CanLII 14966 (ON.S.C.), 267 D.L.R. (4th) 483.

⁹⁸ See *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D. N.Y. 2003) (“*Zubulake III*”).

⁹⁹ The Sedona Principles, Second Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 54 (The Sedona Conference® Working Group Series, 2007), available at <http://www.thesedonaconference.org> under “Publications.”

¹⁰⁰ *Hopson v. Mayor of Baltimore*, 232 F.R.D. 228 (D. Md. 2005).

¹⁰¹ J. Baron, D. Oard, and D. Lewis, “TREC 2006 Legal Track Overview,” online: <http://trec.nist.gov/pubs/trec15/t15_proceedings.html> (document 3).

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*,¹⁰² 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*,¹⁰³ 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.*,¹⁰⁴ 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 Confidential Information

Confidentiality concerns can arise when there is sensitive or proprietary business information that may be disclosed through 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, or 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 legislation¹⁰⁵ governing the collection, use and disclosure of personal information¹⁰⁶ 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.

¹⁰² 2002 CanLII 3615 (ON.S.C.).

¹⁰³ 2003 CanLII 15592 (ON.S.C.).

¹⁰⁴ 2004 BCSC 1653.

¹⁰⁵ 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. 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, c. F-15.01; *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.

¹⁰⁶ 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, parties must comply with the applicable local discovery rules. At the same time, where there is related litigation in other forums or jurisdictions, parties 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 conflicts that are forum-related 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 a 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 (e.g. 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 a party's non-compliance with such an order.

Generally, deficiencies in disclosure have been reflected in costs awards (whether for the other party's out-of-pocket expenses, or wasted costs),¹⁰⁷ or the drawing of an adverse inference.¹⁰⁸ 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*¹⁰⁹ 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*¹¹⁰ 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.*¹¹¹ 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 as early as possible, whether in the form of Anton Piller orders or through more conventional document preservation orders.¹¹²

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

¹⁰⁸ *Logan v. Harper*, 2003 CanLII 15592 (ON.S.C.).

¹⁰⁹ 2000 CanLII 17170 (ON. C.A.), 49 O.R. (3d) 699.

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

¹¹¹ 2006 MBQB 90, 202 Man.R. (2d) 278.

¹¹² *CIBC World Markets Inc. v. Genuity Capital Markets*, 2005 CanLII 3944 (ON.S.C.); *Canadian Derivatives Clearing Corp. v. EFA Software Services Ltd.*, ABQB 425, 294 A.R. 182; *Portus Alternative Asset Management Inc. (Re)* (2005), 28 O.S.C.Bull. 2670.

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

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 party¹¹⁴ imposed monetary sanctions or made extraordinary costs awards,¹¹⁵ made findings of liability,¹¹⁶ and have even entered default judgment.¹¹⁷

There have been instances in the United States in which courts have contemplated sanctions for “purposeful sluggishness” or, in other words, they have equated undue delay in fulfilling production obligations with failure to meet production and discovery obligations.¹¹⁸ It is essential that parties realistically assess the time and cost involved in meeting production obligations so that sufficient time may be allowed in the litigation timetable and, if necessary, time extensions may be sought in advance from the court. Parties not armed with accurate technical information when timetable orders are made or undertakings are given run the risk of subsequent sanctions if they do not comply in a timely fashion.

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 of 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 a 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*¹¹⁹ cited in *Brandon Heating*.¹²⁰ 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.

¹¹³ 212 F.R.D. 212 (S.D.N.Y. 2003).

¹¹⁴ *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. Ill. 2003).

¹¹⁵ *Qualcomm, Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008).

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

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

¹¹⁸ See *In Re: Seroquel Products Liability Litigation*, 2007 WL 2412946 (M.D. Fla. Aug. 2007).

¹¹⁹ *Zelenski v. Jamz et al.*; *Zelenski v. Houston*, 2004 MBQB 256, 189 Man.R. (2d) 151.

¹²⁰ *Brandon Heating and Plumbing (1972) Ltd. et al v. Max Systems Inc.*, 2006 MBQB 90 at paras. 23-24, 202 Man.R. (2d) 278.

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.¹²¹ 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.¹²²

In *Ontario v. Johnson Controls Ltd.*¹²³ the Court was critical of 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.

[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 risk 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*¹²⁴ 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.

¹²¹ *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001).

¹²² See above Comment 3.e under Principle 3.

¹²³ 2002 CanLII 14053 (ON.S.C.).

¹²⁴ 2005 CanLII 22134 (ON.S.C.).

Principle 12

The reasonable costs of preserving, collecting and reviewing electronically stored information will generally 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.¹²⁵ The issue of cost allocation of electronically stored information has not been resolved in Canada.¹²⁶ However, when documents are produced, the opposing party is responsible for the immediate costs of the production, 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.¹²⁷

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 respecting cost-shifting 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 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.

¹²⁵ 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."

¹²⁶ *Bank of Montreal v. 3D Properties (Bank of Montreal v. 3D Properties Inc. et al)*. (No. 1), [1993] S.J. No. 279 (QL), 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."

¹²⁷ For example, s. 3.1 of the Supreme Court of British Columbia's *Practice Direction Regarding Electronic Evidence* (July 2006), online: The Courts of British Columbia <<http://www.courts.gov.bc.ca/sc/ElectronicEvidenceProject/ElectronicEvidenceProject.asp>>, 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*.

It could also be argued, in Canada, that the costs of producing accessible electronically stored information may 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 cost rules to be clarified so that internal discovery costs are regarded as a recoverable disbursement in appropriate cases.

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.¹²⁸ 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 as early as possible.

¹²⁸ *Barker v. Barker*, 2007 CanLII 13700 (ON S.C.) The defendants moved for orders requiring the plaintiffs to pay one-third of the cost of scanning, and coding, the documents - the other two-thirds to be borne equally by the Crown and the defendant physicians. The motions were opposed by the plaintiffs. The Court agreed that the benefits to the plaintiffs justified an order for the sharing of the costs of conversion.

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 States 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 WGSSM 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 for further details on our Working Group Series and the Membership Program.

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