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Red Hot Topics in Construction Law

E-Issues in Construction Disputes

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E-Issues in Construction Disputes

Introduction

Chief Justice McLachlin of the Supreme Court of Canada, in the summer of 2009, noted that fewer construction cases are being tried due to complexity, time, preservation of relationships, cost, risk of outcome and other such factors."[1] There is no doubt that litigation is and continues to be the most popular method of dispute resolution for construction disputes. Nevertheless, many construction disputes are resolved by out of court settlements negotiated between the parties following the commencement of litigation for a number of reasons, including those identified by Chief Justice McLachlin.

The problem is that the cost of litigation and the time it takes to resolve disputes, contributes to the hardship being suffered by the parties to a construction dispute. Contributing to the staggering costs of litigation is the fact that construction litigation is particularly document intensive with an increasing number of documents, communications, and plans being exchanged and stored electronically. A typical construction project generates electronically stored information from numerous different sources, including email, word documents, excel spreadsheets, financial and accounting data, CAD drawings, Primavera P6 (formerly, "Primavera Project Management"), and other construction industry programs that can be utilized only by a party with a valid license.

There are advantages, however, to the proliferation of electronically stored information ("ESI). The increased use of electronic communication in business has created a proliferation of potentially-available tangible evidence for use in future litigation. One of the obvious strengths of electronic evidence is the increased availability of the written word - coupled with other electronic crumbs, including bits and bytes, to establish facts and events. Many of these "written words," together with their associated "bits and bytes," will fall under the definition of business records with the ensuing result that courts will defer to the computer-generated or ESI, given its tremendous degree of circumstantial trustworthiness. In addition, e-discovery is more intrusive. Private conversations based on mindless chatter, which were once commonplace "at the water cooler," are now committed to writing in emails and instant messages, creating a document which may be produced and used against its drafter in future litigation.

As more information is being created through electronic means, the need to store large quantities of electronic information has also expanded. The challenges of storing vast quantities of electronically generated information have given rise to additional challenges in terms of the ability to preserve that information and retrieve it.

This paper proposes to assist the reader's awareness of the need to identify sources of potentially relevant and discoverable electronically stored information, the need to preserve that information, together with the need to develop practical strategies to address these increasingly challenging duties within the context of construction litigation. In addition, we propose to examine some of the amendments made to the *Rules of Civil Procedure* and to examine their impact in construction lien disputes.

[1] The Honourable Mr. Justice Ricchetti and Timothy J. Murphy, "Construction Law in Canada", LexisNexis, Chapter 11, Construction Disputes, at p. 223.

The Impact of the New Rules on Construction Law Cases

Ontario's new *Rules of Civil Procedure*, which came into force in January of 2010 were introduced to help make the civil justice system more accessible and affordable to the citizens of Ontario.[2] We have now experienced almost a year of jurisprudence and experience with the new Rules. Some litigation practitioners complain that the new rules have "front end loaded" the process. Arguably, the new rules require lawyers and their clients to think more strategically about their claim or their defence including paying particular attention on the preparing of the pleadings, which frame the issues of the case going forward.

Documentary Production and the Rule Changes

The Rules have been amended from their previous form which required a party to disclose every document "relating to any matter in issue" to the new language which requires a party to disclose every document "relevant to any matter in issue." This amendment is intended to have the effect of narrowing the scope of documentary production.

The pleadings are therefore now especially important as they help to frame the issues by which the courts will determine what documents are relevant to the issues and therefore what documents must be produced by the parties. The Ontario *Rules of Civil Procedure* provide that:

> Every pleading shall contain a concise statement of the material facts on which the party relies, but shall not include evidence by which those facts are to be proved.

In *National Trust Co. v. Furbacher*[3], the Court stated that "the function of pleadings is to:

> (i) define with clarity and precision the question in controversy between the litigants;
>
> (ii) give fair notice of the precise case which is required to be met and the precise remedies sought; and
>
> (iii) assist the Court in its investigations of the truth and the allegations made."

The *Construction Lien Act* (the "*Act*") does not provide for examinations for discovery and therefore leave must be obtained pursuant to section 67(2) before a right of discovery arises. Orders for production and discovery require justification to the Court and in many jurisdictions details are required of the issues to be examined upon, the length of time for examinations and the parties to be examined, among other issues.

Section 67(3) of the *Act* provides that:

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[2] G.D. Watson and M. McGowan, "Amendments to the Rules", Ontario Civil Practice – Transition Guide 2009/2010, Carswell, May 2009.

[3] *National Trust Co. v. Furbacher* 1994] O.J. No. 2385 at para. 9.

> Except where inconsistent with this Act and subject to subsection (2) the Courts *of Justice Act*, the *Rules of Court* apply to pleadings and proceedings under this *Act*.

Section 67(2) of the *Act*, specifically states that interlocutory steps other than those provided in the *Act* itself shall not be taken, except with consent of the Court obtained on proof that the steps are necessary or would expedite the resolution of the issues in dispute.

Discoveries or even affidavits of documents are therefore not automatic and the *Act* intends that the parties will obtain direction from the Court before engaging in costly interlocutory procedures. The procedure for each construction lien action must therefore be adapted to the needs of the action.

Assessing the Relevance of Construction Law Documents and the Proportionality Principle

The new *Rules of Civil Procedure* provide several important changes worth noting with respect to electronic discovery. The addition of proportionality language to Rule 1.04 now ensures that Courts shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved in the proceeding. As well, the process of electronic discovery is affected by Rule 29.1-Discovery Plan and Rule 29.2-Proproportionality in Discovery.[4] These rule changes mean that civil litigants in Ontario are required, pursuant to Rule 29.1, to consult and have regard to the *Sedona Canada Principles* in preparing a discovery plan for an action. The Sedona Canada Principles represents a "pioneering effort to state some fundamental concepts for e-discovery that are applicable to a wide range of cases in any jurisdiction." [5]

Before producing the entire project file, counsel for parties in construction disputes should carefully consider the issues raised in the pleadings and produce only those documents relating to the issues pleaded. Counsel and client should gather information about the sources needed to support or refute the allegations, and understand how likely each is to yield relevant information and how much disruption and cost would be involved in preserving and collecting them. By their nature, some facts are more difficult to prove than others and can expose the client to expense or intrusiveness while not contributing much to the resolution of the dispute.[6]

The Discovery Plan

There had been some debate as to whether or not, even in cases where leave for discovery is granted, the requirement for a discovery plan applies to construction law cases.

Rule 29.1 is a new Rule which establishes an obligation to meet, confer and to create a discovery plan before production and discovery get underway. The Rule provides that a Court may refuse discovery relief to parties that have not developed such a plan. The parties are specifically directed to consider proportionality which is a concept that is referred to in Rule 29.1, but which also now infuses all of the Rules by virtue of Rule 1.04 (1.1). As noted, it is also a specific requirement of all steps in a construction lien proceeding.

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[4] O.Reg. 438/08, Amending Reg. 194 of R.R.O. 1990 (*Rules of Civil Procedure*).

[5] *The Sedona Canada Principles*: Addressing Electronic Discovery, A Project of the Sedona Conference Working Group 7 (WGS 7), Sedona Canada, January 2008, at p. iii

[6] *The Sedona Canada Commentary on Practical Approaches for Cost Containment: Best Practices for Managing the Preservation, Collection, Processing, Review & Analysis of Electronically Stored Information*, Public Comment Version, A Project of the Sedona Canada Working Group 7 ("Sedona Canada"), April 2011, at 3.

Master McLeod, in the case of *Lecompte v. Doran*[7], was definitive when he stated that discovery planning is now required in all actions under the rules of civil procedure and that "this requirement will also apply in lien actions if leave for discovery is granted." Counsel should therefore ensure that a discovery plan is prepared in cases where leave for discovery has been granted, or, at the very least, that they have conferred with other counsel and discussed the need for a discovery plan prior to the first pre-trial or settlement meeting.

Master MacLeod considered these principles in adjudicating upon a motion brought by the plaintiff for a further and better affidavit of documents in *Lecompte v. Doran*[8]. *Lecompte v. Doran* dealt with a dispute involving a commercial/residential condominium mixed use project and a lien claim brought by the electrical subcontractor, which lien was bonded off by the general contractor. After the general contractor had paid down the lien by several hundreds of thousands of dollars and only about half a dozen issues appeared to be remaining in dispute, it appeared to counsel for the electrical subcontractor that the general contractor had "over-produced" documents to include everything exchanged between the parties during the course of the project.[9] The plaintiff requested that the Court order the defendant to revise its Affidavit of Documents in a manner that would result in a more "focused" documentary production. The plaintiff further argued that it should not be required to deliver an Affidavit of Documents and productions until the defendant improves its form of production. In dismissing the motion, Master MacLeod reasoned that, in light of the fact that the parties had not reached any previous agreement as to the form and terms of production, it was improper for the plaintiff to "launch an adversarial attack on a party that has prepared an affidavit of documents that complies with the rules in the absence of either an agreement or an order."[10]

Master MacLeod's reasons for reaching the above conclusion are instructive of the interplay between the *Act* and the *Rules of Civil Procedure* dealing with the requirement for disclosure and production, as well as the necessity for collaborative discovery planning. The Court accepted the proposition that the *Act* is intended to be of a summary character having regard to the amount and nature of the liens in question. Noting that discoveries and an affidavit of documents are not automatic under the *Act*, Master MacLeod stated that when parties proceed to deliver affidavits of documents in a lien action by agreement, they should discuss in advance how the documents are to be organized and produced and they should ensure the agreement is documented.[11]

In rendering his decision, Master MacLeod noted that in construction projects there are many potentially relevant documents, but there may be only a few that are truly probative of the issues in dispute and that listing the entire project file in an affidavit of documents may be an unhelpful step because it results in unfocused overproduction. Master MacLeod further noted that preserving the project file and internal communication such as email and making it available for inspection if necessary would be prudent. With respect to production in an action where there are a large number of documents, Master MacLeod advised that the parties should try to agree on a common methodology for identification and numbering, as well as electronic production and a searchable database.[12]

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[7] 2010 ONSC 6290 (CanLII).
[8] Lecompte v. Doran 2010 ONSC 6290 (CanLII).
[9] David Debenham, "Discovery Plans in Construction Lien Litigation", Ontario Bar Association, Construction Law Section, Volume 25, No. 3, April 2001, Construction Law Newsletter.
[10] *Ibid*. at para. 3.
[11] *Ibid*. at para. 7.
[12] *Ibid*. at para. 18.

In noting that frequently the Court will order the exchange of "Scott Schedules" in which each party is obliged to particularize the elements of its claims and identify the documents it relies upon for each, he ordered the parties to meet, confer and prepare a discovery plan. As noted by Master MacLeod in making the Order, discovery planning is now required in all actions under the *Rules of Civil Procedure*.

Discovery plans are intended to foster a more collaborative approach to discovery. The discovery plan requirement parallels Principles 4 and 5 of the *Sedona Canada Principles*. The "meet and confer" concept found in Principle 4 is intended to identify and resolve e-discovery issues early in the process so that all parties have a realistic understanding of what the discovery process will look like.

Principle 5 recognizes that the parties should only be obligated to produce relevant ESI that is reasonably accessible. Assessments of the cost and the burden of producing ESI need to be addressed at the outset of a project.

The discovery plan must address the scope of documentary discovery, the dates for service of affidavits of documents, information on the timing and costs of production, the names of persons to be produced for oral examination and any other relevant information that will improve the cost effectiveness of the proceedings.

Proportionality principles are relevant in the degree of detail required to be included in a discovery plan. In cases where there is a low dollar value at stake, or relatively few documents, it may not be necessary to enter into a detailed discovery agreement. In such a case a letter between counsel might be sufficient to constitute a discovery plan. In more complicated actions, parties should refer to Model Document #1 – Discovery Agreement authored by the Ontario E-Discovery Implementation Committee.[13] This Model document is a detailed and annotated template that confirms the points of agreement that should be sought on preservation, production and use of relevant documents. It also addresses the parties' plans respecting oral discovery.

It continues to remain uncertain however, as to how exactly judges and Construction Lien Masters in the various jurisdictions will choose to deal with the new rules regarding discovery plans and the time limits that have been imposed on examinations for discovery.

In Toronto, the discovery plan and time limits with respect to examinations for discovery may be addressed at the first Construction Lien pre-trial, which takes place after the matter has been referred to a Construction Lien Master, pursuant to section 58(1) of the *Act.* In other jurisdictions, these issues may be addressed in the context of a pre-trial or settlement meeting, which a party may request that the Court schedule by bringing a motion pursuant to section 60(1) of the *Act*.

Practice Tips for Preparing a Discovery Plan

The cost of processing, screening and reviewing ESI can easily run into the millions of dollars. Such a large expense early in the case can dramatically affect the parties' perception of the case and will drive

[13] Ontario 5-Discovery Implementation Committee Model Documents (8), "Model Document #1: Discovery Agreement" (Paper from the Sedona Canada Conference, Vancouver, British Columbia, September 16-17, 2009) at 2.

settlement decisions even without meaningful consideration of the merits of a case.[14] The answers to the following questions will assist in preparing a written discovery plan in the e-discovery context:

(a) What are the key issues and events for which relevant information must be produced? The issues should be unambiguous and as specific and fact-based as possible, so that the types and sources of information, the identities of the individuals involved and the date ranges for the searches can be established. If particulars are imprecise, what assumptions about the scope have been made?

(b) What is the composition of your e-discovery team? The team composition should include client Records and IT staff as well as persons knowledgeable of the events who can help define the scope of the collection. Who is the project manager and who is responsible for tracking the "chain of custody?"

(c) What types of information are significant and important? Types of information include, but are not limited to: electronic mail, instant messaging ("texting"), webcams, social media (Facebook, Youtube, Flickr, among others), collaboration systems and other "shared" communications, office documents, databases, business applications, web pages and tracking data generated by the computer such as browser history files. Only a small subset of types will be significant in most cases.

(d) What types of information are outside scope and will neither be preserved nor collected? What are the reasons for excluding the information? For example, if the events in dispute took place before 2009, it may be unreasonable to stop rotation of email backup tapes, although preserving the January 2009 tapes would be prudent in case messages had been deleted.

(e) Who are the key players, what are the roles they are alleged to have played and why are those roles significant to the dispute? The list of custodians will include the key players and possibly those who would have handled information at the direction or on the behalf of the key players.

(f) What date range defines the period of time when the events are alleged to have happened? For long periods, or legacy data, what software was used to create the documents or the data and is the software readily available? If not, how will the information be retrieved and processed? What is the likely cost and delay to retrieve and process the legacy data?

(g) Given the date range, the type of information and the custodians and their locations, which sources of information will need to be searched? Examples include but are not limited to: desktop computers, servers, CDs, USB keys, laptops, BlackBerrys and other PDAs. Note that in these days of "cloud computing" and "software as a service," some of these stores may not be under the direct control of the party but are nonetheless searchable: consider Google Docs, Yahoo mail, web forums, among others.

(h) What are the volumes of the different types of information?

[14] Jeffrey A. Andrews, "Harness the Power of EDD Planning" in *Texas Lawyer*, 10 April 2009, online: <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=12024297980848rss=ltn>.

(i) What measures have been taken to prevent relevant information from destruction or deletion? Such measures might include suspension of automatic file deletion programs or suspension of hardware replacements, or may just require a copy of the relevant contents from the sources (e.g. the mailboxes of all custodians who may have played a role in the events in dispute). If preservation requires the implementation of a "legal hold", how is the hold communicated to the custodians and how is compliance monitored?

(j) Given the number of custodians, the range of sources of information and the estimated volumes, what level of effort and length of time will be required to collect, catalogue and process the information?

(k) Is it necessary to address privilege, privacy or confidentiality issues?

(l) Given the volume and range of document types, how long will review and coding of the collection take? You may need both internal resources and third party litigation support service providers to assist with document review and coding. Determine what can effectively be done in-house. Can the parties agree on a common coding protocol? Be realistic in terms of the number of issues you have defined for coding. By increasing the number of issues, you lengthen the period of time it will take to complete the project and increase both the number of people needed for the project and the likelihood of internal inconsistencies.

(m) In what form will the ESI be organized and produced? Can the parties agree on using a common image format for exchanging ESI? Is specific hardware or software necessary in order for the information to be inspected? Are source documents available in hard copy and in digital format? Who will pay for paper copies if they are requested but have been produced in electronic form? Agreeing on a mutually acceptable format will save time and money.

Discovery of ESI in Ontario will now formally require the balancing of a number of considerations by both counsel and the bench, and this balancing act will hopefully make electronic discovery more focussed, more manageable and less costly. In the next few years before there is an adequate body of case law interpreting the amended *Rules*, it is incumbent upon counsel to exercise good judgment and discretion in applying the principles. These changes mean that "[e]xcessive zeal in denying production of documents, or insisting on excessive production, will be seen as a tactical play to return to the days of litigation by attrition, and we can expect our court to use a pragmatic and sensible approach in resolving these issues, reinforced by interlocutory cost orders and cost shifting where appropriate."[15]

A Case Study: *Bemar Construction (Ontario) Inc. v. Mississauga (City)*

In order to provide an illustration of the issues that arise with respect to e-discovery in the construction litigation context, this paper will consider the dispute that arose between a contractor and the owner with respect to a moderately complex construction project in *Bemar Construction (Ontario) Inc. v.*

[15] Kristin J. Littman, Peg Duncan, Kimberly A. Kuntz, and Andrew Wilkinson, "Proportionality: New Rules of Court Will Change The Landscape Across Canada" (Paper presented at the *Sedona Canada Conference*, Vancouver, British Columbia, September 16-17, 2009) at p. 8.

Mississauga (City.)[16] While this case does not deal with e-discovery issues directly, it provides readers with a factual background representative of the types of disputes that arise in construction litigation. Where appropriate, reference to the facts in *Bemar Construction* will be made to provide case examples of the issues specific to e-discovery explored in this paper.

By way of background, the plaintiff general contractor, Bemar Ontario, claimed against the defendant owner, the City of Mississauga (the "City"), for breach of contract or entitlement to damages on a quantum meruit basis. The City counterclaimed for the cost to complete the contract, as well as the cost of delays and deficiencies. The project involved the renovation of a historical residence in Mississauga, the Cawthra Elliot Estate (the "Cawthra Project"). A determination of the above issues required a 54 day trial and a review of extensive evidence by the Court. While a detailed review of the decision in respect of each item put in issue by the parties is beyond the scope of this paper, it is useful to briefly identify some aspects of the project which gave rise to the dispute and the relevant evidence that assisted the Court in reaching a decision.

In coming to a determination on the validity of the extra claims, the Court had regard to the terms of the contract, the drawings, the tender documents, the various change orders issued during the course of the contract, minutes of site meetings, and the issued site instructions. The Court then considered the defendant's argument that the plaintiff was not entitled to damages for any delay as it did not provide notice of any delay as required by the contract. The plaintiff argued that the delay was caused by the City and by several factors, including lack of a building permit, revisions to the electrical and HVAC systems, structural changes, sprinkler changes, site grading issues, and numerous change orders and site instructions. On the evidence proffered by the plaintiff, including correspondence exchanged between the parties, the Court concluded that the plaintiff failed to give proper notice to the City regarding particulars of delay, and as such, was precluded from claiming damages for delay. As the Court's reasons in disposing of the issues arising out of the above noted claims are not particularly relevant for the purposes of illustrating the various issues that arise in the context of e-discovery, a further discussion of those reasons is beyond the scope of this paper.

What is a Document?

The word "document" is defined broadly under the *Rules of Civil Procedure* of Ontario as including "data and information recorded or stored by means of any device."[17] As such, "document" in today's electronic age includes electronically stored information ("ESI"), or records in any format, including electronic documents received, created or stored electronically within any electronic system, including individual computers, laptops, palm pilots, voice records, network file servers, zip drives, computer logs, back¬up tapes and more.

As outlined in the Ontario Guidelines for E-Discovery, documents are generally referred to as "electronic" if they exist in a medium that can only be read through the use of computers, as distinct

[16] (2004), 30 C.L.R. (3d) 169 (Ont. Sup. Ct.).

[17] *The Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 30.01. See also Rule 1.03 which states that in the *Rules* "'document' includes data and information in electronic form", and "'electronic' includes created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means, and "electronically" has a corresponding meaning".

from documents that can be read without the aid of such devices.[18] It is also generally accepted that this definition includes many familiar types of electronic "documents," such as e-mail, web pages, word processing files, and databases that are stored on computer.[19] However, both the definition and case law suggest that a broader range of electronic "data and information" may also be encompassed in the notion of producible "documents" or "records".[20] The limitations on what may be included are not to be found so much in technical distinctions as they are in the familiar criteria of relevance.[21]

Electronic records consist of:

- data files created by word processing, spreadsheet or other application software;
- databases and structural information in such databases such as network activity logs and audit trails;
- electronic mail and information about electronic mail (i.e.. message contents, header information and logs of electronic mail system usage);
- information associated with electronic commercial transactions such as orders and payment records, electronic commerce transaction audit data, cookies and other on-line information;
- transfer files are also records as are web-site tracking records (i.e. information as to web page hits and usage and data regarding employee web use);
- on-line material that has been cached is another category of electronic records, as well as electronic calendars, telephone logs and contact managers.
- Every electronic file, document and transaction history is a record or piece of evidence that can be used to verify information or to demonstrate that a specific transaction, in fact, took place.

Why Electronic Evidence is Different

There are many ways in which electronic documents are different from paper or hard-copy documents.

(i) Volume

There are vastly more electronic documents than paper documents. Information technologies have led to an unprecedented proliferation and retention of large quantities of information. (The average hard drive on a personal computer is capable of storing the equivalent of a million pages of information or

[18] Karen Groulx, Kimberly A. Kuntz, and James Swanson, *Preservation and Legal Holds*. (The Sedona Conference Institute: 2009) at 1.
[19] THE SEDONA PRINCIPLES: Best Practices Recommendations & Principles for Addressing Electronic Document Production, A Project of The Sedona Conference ® Working Group on Best Practices for Electronic Document Retention & Production, published January 2004.
[20] *Ibid*.
[21] *Guidelines for the Discovery of Electronic Documents in Ontario* as submitted by Mr. Justice Colin L. Campbell to the Ontario Bar Association conference, "Electronic Discovery and The New ED Guidelines — A Roadmap for Dealing with Electronic Information, November 28, 2005, online: <www.oba.org/en/main/ediscovery_en/default.aspx>, at 3.

more.) Our ability to gather and to disseminate information now vastly exceeds our capacity to absorb and to analyze it.

(ii) Disorganized (Structured, Unstructured and Semi-Structured data)

Computer systems and databases and electronic storage are not designed in a manner that facilitates ease of production. While an organization's paper documents will often be organized into separate folders, filed in a filing cabinet in some type of logical fashion (such as by subject matter or client name), the organization's electronic documents could reside in numerous locations such as desktop hard drives, laptop computers, network servers, floppy disks and backup tapes co-mingled with records dealing with unrelated subjects and many different clients.

(iii) Duplicity

Unlike paper documents, while individual electronic copies may be easy to delete, finding and erasing all copies and traces of an electronic document can be much more challenging. In essence, electronic documents leave a trail of evidence that is harder to destroy than the paper copy of the "smoking gun."

(iv) Transient in Nature

On the other hand, electronic data is also more vulnerable than paper-based documents – they can be more easily altered or forged as compared with information contained on paper or microfilm. For example, one can "alter" or edit a document without re-keying all the words by just copying the text to another document, changing numbers and calculations in spreadsheets and changing photographs, audio and video data. These alterations may be undetectable.

Some forms of electronic data, such as text messages, are especially volatile and susceptible to overwriting. When dealing with such potential sources of evidence, one must take extra caution to ensure that relevant data is not lost. Unlike desktop computers that use hard drives, cell phones rely on flash memory, which is small and in turn causes information to be written over more rapidly.[22] In a recent United States decision, *United States v. Suarez,*[23] the court held that the Government violated its duty to preserve relevant text messages sent between a cooperating witness and FBI agents when the Government failed to retrieve the messages from the cell phones or from the FBI's network system.

(v) Hidden Information — Metadata

Colloquially referred to as "hidden data," there are essentially three sub-species within this broad category. The first is metadata, which consists of "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."[24] Metadata is "evidence, typically stored electronically, that describes the

[22] "Preparing for Cell Phone Data Discovery", KROLL ONTRACK: Information Management & Investigations (January 2011).
[23] 2010 WL 4226524 (D.N.J.).
[24] Working Group 7, *The Sedona Canada Principles – Addressing Electronic Discovery*, January, 2008 at p.3, online: University of Montreal <http://www.lexum.umontreal.ca/e-discovery/documents/SedonaCanadaPrinciples01-08.pdf>.

characteristics, origins, usage and validity of other electronic evidence."[25] Metadata is broken down into two basic categories: application metadata and system metadata, the fundamental difference being that in the case of the former, the data resides with the file to which it relates, whereas with respect to the latter, it is "stored externally and used by the computer's file system to track file locations and store demographics about each file's name, size, creation, modification and usage."[26]

The scope of a document's metadata is broad, encompassing 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."[27] The primary benefit of metadata is that it provides a party with information that would otherwise be unavailable in paper copy. Indeed, it is for precisely this reason that where one has access to metadata associated with a given document, it is the best evidence. From a practical perspective, the benefit of accessing metadata is that it provides lawyers with information to support or defend their client's cases, streamlines document review, and provides a more complete story about adversaries' documents.

Whether metadata will be of any value to a litigant will be determined by the scope of the issues presented in the litigation. In some cases it may be of no benefit at all. Indeed, much turns on the question of relevance, which at law necessitates that such information "increase or diminish the probability of the existence of a fact in issue"[28]. In this regard, although different in nature from the document to which it belongs, metadata has been characterized as "part of the substantive content of the document"[29] such that if it is "[...] determined that a particular document is relevant, the metadata in relation to such document should be produced."[30] At its core, metadata "describes how, when and by whom an electronic document was created, modified and transmitted."[31] For example, where the authorship of a document or of a modification to a document is at issue, for instance in a contract dispute, where iterations of an agreement are likely to have been exchanged on several occasions between the parties, metadata and specifically the ability to examine the history of changes associated with an electronic document may prove determinative. In short, if "the origin, use, distribution, destruction or integrity of electronic evidence is at issue, the 'digital DNA' of metadata is essential evidence that needs to be preserved and produced."[32]

Residual data consists of information remaining on a computer system after document deletion. Files are not completely deleted until overwritten by other files. Replicant data "is created when a software program, such as a word processor, makes periodic back-up files of an open file [...] to facilitate retrieval of the document where there is a computer malfunction."[33] Upon the creation of a new backup file, the existing file is deleted or tagged for re-use.

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[25] Craig Ball, "Beyond Data about Data: The Litigator's Guide to Metadata" online: <http://www.craigball.com/metadata.pdf>.
[26] *Supra* note 14 at 2.
[27] Sedona Principles, *supra* note 30 at p.3. An interesting and less obvious example of metadata occurs with some digital photographs, where a thumbnail of a photograph is embedded within the file. See <http://michaelzimmer.org/2006/06/13/the-hidden-photos-within-photos/> for more information.
[28] R. v. Griffin (2009), 307 D.L.R. (4th) 577 (S.C.C.), at para. 89, citing R. v. Arp, [1998] 3 S.C.R. 339 (S.C.C.), at para. 38.
[29] See Sedona Principles, *supra*, note 30 at 3, footnote 11.
[30] *Hummingbird v. Mustafa* (2007), 2007 CarswellOnt 6012 (Ont. Master) at para. 9.
[31] *Ibid*.
[32] *Supra* note 14 at 6.
[33] *Supra* note 25 at 6.

Many lawyers do not recognize that any subsequent manipulation of a given file, including a simple review of the evidence, however innocuous or inadvertent, may give rise to allegations of spoliation. The inherent fragility of metadata, was acknowledged by the *E-Discovery Guidelines*, which directs parties to discuss the need to preserve or produce meta-data as early as possible.[34]

Identifying Sources of Electronic Evidence

Maximizing the potential benefit of electronic evidence, on the one hand, and meeting one's preservation obligations, on the other, requires a basic understanding of the various types of data that exist. Active data, arguably the most readily accessible, consists of "data that is currently used by the parties in their day-to-day operations."[35] Practically speaking, active data includes any documents created by word processors, spreadsheets, email or any files created by the operating system. Such data usually must be viewed within an application (computer program) to be useful. By contrast, archival data "is data organized and maintained for long-term storage and record keeping purposes."[36] Typically such data results from the periodic transfer of data to other media such as CDs or network servers. Different still is backup data, which specifically "refers to an exact copy of system data [and] serves as a source for recovery in the event of a system problem or disaster."[37] This type of data is often not readily available to system users and may be stored off site. Accessing such data sometimes "requires special (and sometimes expensive) intervention before it is 'readable.'"[38]

The Proportionality Rule

It should be noted that, despite the availability of data such as residual data, archival data, or backup data, the principle of proportionality will limit the instances where such data must be produced. Proportionality dictates that discovery of relevant information available from multiple sources should be limited to sources that are the most convenient, least burdensome and/or least expensive.[39] In other words, only reasonably accessible and non-duplicative information in support of plausible causes of action should be requested or produced.[40] On the other hand, where there is evidence that the only source of potentially relevant information is not readily accessible (as a result of the organization's poor record keeping practices, for example), the proportionality principle should not assist the party in avoiding their production obligations. A court may choose to limit discovery of inaccessible media,

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[34] Task Force on the Discovery Process in Ontario, *Guidelines for the Discovery of Electronic Documents in Ontario*, Supplemental Report, October 2005 at 13. See Principle 7 and accompanying commentary.
[35] *Ontario Guidelines, ibid*. at 5.
[36] *Ontario Guidelines, ibid*. at 5.
[37] *Ontario Guidelines, ibid*. at 5.
[38] *Ontario Guidelines, ibid*. at 5.
[39] *The Sedona Canada Conference Commentary on Proportionality in Electronic Disclosure & Discovery: A Project of The Sedona Conference Working Group 7 (WG7)* Sedona Canada, (The Sedona Conference: October 2010) at p. 9 [Sedona Proportionality Commentary]
[40] *Ibid*, at 9. See also *Logan v. Harper*, 2003 CanUl 15592 (Ont. Sup. Ct.) at pan. 28, where the Court denied a request for further production made by the plaintiff, who obtained electronic copies of the documents sought, on the basis of proportionality. The Court reasoned that it was not necessary for the plaintiffs to obtain paper copies of every document and to inspect every original document in its original file folder in original order, with the production of the file tracking documents or stamps which show who within the defendant had possession of any file and at what time, as requested by the plaintiffs. The Court concluded that in the particular circumstances of the case with the volume of documentation involved, the plaintiff's demand was unrealistic, onerous, expensive and excessive. While there might be a right to inspect original documents and to obtain file tracking information or file organization where it is relevant, such rights should be exercised in a focused and targeted manner.

however, if the information stored on the tapes can be obtained from more accessible sources, such as hard copy records, testimony, or non-party discovery. For example, if the producing party can easily produce hard copies of emails, that party should not have to incur the costs of restoring back-up tapes containing the same e-mails, unless the electronic version of the emails contains information relevant to the issues of the matter not available in the hard copy (such as non-visible email metadata).[41]

To further illustrate the impact that the principle of proportionality may have on discovery, consider the following scenario. In response to a request for the production of e-mails of a former employee, the responding party explains that the e-mail stores of a former employee are no longer available in active storage but that the other custodians would have copies of e-mails they sent to or received from that employee. In such a scenario, the court, in responding to a request made by the opposing party for production of the back-up tape, would be unlikely to order production based on the principle of proportionality if there was evidence that the emails could be obtained from the other custodians. In this case, it may be necessary to sample the other custodians' mailboxes and the backup tapes to confirm that the emails do, in fact, reside in the other custodians' mailboxes. In addition to the fact that the information could be obtained more easily and conveniently from another source, there is low probability of finding additional relevant information in the backup tapes that contain the former employee's mailbox such that the marginal utility of this course of information does not warrant its cost.

The increased focus on proportionality in discovery, reflected in the changes to the *Rules of Civil Procedure* and recent judicial decisions emphasizing the importance of proportionate discovery, requires a fundamental shift in litigants and their counsel's approach to discovery. To achieve this shift, the default rule in favour of virtually unlimited discovery must be reversed and proportionality must replace relevancy as the most important principle guiding discovery.[42] This was the sentiment recently expressed by Master Short in *Warman v. The National Post Company, et al,*[43] a defamation case where the defendant sought production of the plaintiff's computer's hard drive on the basis that it contained documents relating to the main issues in the action. In considering the defendant's production request, Master Short engaged in a lengthy discussion of the principle of proportionality, noting that he had a duty to make an order proportionate to the case.

In his review and analysis of the role of proportionality in discovery, Master Short adopted the eight factor proportionality test for e-discovery identified by US Magistrate Judge James C. Francis IV in *Rowe Entertainment Inc. v. William Morris Agency, Inc*,[44] being:

A. the specificity of the discovery requests;

B. the likelihood of discovering critical information;

C. the availability of such information from other sources;

D. the purposes for which the responding party maintains the requested data;

E. the relative benefit of the parties of obtaining the information;

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[41] *Sedona Proportionality Commentary, Ibid*, at 10.
[42] See *Richard Warman v. National Post Company et al*, 2010 ONSC 3670 (Ont. Sup. Ct.) at para. 67.
[43] *Ibid*.
[44] 205 F.R.D. 421 (S.D.N.Y. 2002).

F. the total cost associated with production;

G. the relative ability of each party to control costs and its incentive to do so; and

H. the resources available to each party.[45]

Master Short concluded his analysis of the proportionality principle and the changes to the *Rules of Civil Procedure* incorporating proportionality into the rules by stating the following:

> **The time has come to recognize that the "broad and liberal" default rule of discovery, has outlived its useful life.** It has increasingly led to unacceptable delay and abuse. Proportionality by virtue of the recent revisions has become the governing rule. **To the extent that there remains any doubt of the intention of the present rules I see no alternative but to be explicit. Proportionality must be seen to be the norm, not the exception- the starting point, rather than an afterthought.** Proportionality guidelines are not simply "available". The "broad and liberal" standard should be abandoned in place of proportionality rules that make "relevancy" part of the test for permissible discovery, but not the starting point. If embraced by the courts, parties and their counsel, such proportionality guidelines offer hope that the system can actually live up to the goal of securing for the average citizen, a " just, speedy and inexpensive determination" of his or her case.[46]

On the specific question of whether the whole hard drive from the plaintiff's computer should be produced, Master Short canvassed numerous previous decisions dealing with production requests relating to electronically stored information, including *Vector Tech Transportation Services Inc. v. Traffic Tech Inc.*[47] and *Desgagne v Yuen,*[48] and noted that, generally, a mirror image of a hard drive is not subject to production. Instead, it is more appropriate, in light of the principle of proportionality, to limit any disclosure order to relevant items to be decided by an independent expert retained to review the hard drive.

In disposing of the motion, Master Short felt that a forensic examination of <u>some</u> of the available electronic data was justified, however, restricted that examination to very limited areas, to be made on a mirror image of Warman's hard drive and to be made by an independent, mutually acceptable expert.[49]

It is interesting that Master Short started his Judgment by quoting from Senator Barry Goldwater's 1964 acceptance speech at the 28th Republican National Convention, accepting that party's nomination for President, where Senator Goldwater stated as follows: "I would remind you that extremism in the defense of liberty is no vice. And let me remind you also that moderation in the pursuit of justice is no virtue." After delivering his reasons, Master Short concluded that "Senator Goldwater may have held the view almost 50 years ago that "moderation in the pursuit of justice is no virtue", but having regard to civil litigation in Ontario today, I remain convinced that proportionality **<u>is</u>**."[50]

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[45] *Supra* note 35 at para. 82.
[46] *Ibid*. at paras. 84 – 86.
[47] [2008] OJ.No. 1020 (Master).
[48] [2006] B.C.J. No. 1418 (BCSE).
[49] *Ibid*. at paras. 157-161.
[50] *Ibid*. at para. 200.

Identifying and preserving electronic relevant information: the duty to disclose, the litigation hold, and spoliation

The duty to preserve and to disclose every document relating to any matter in issue stems from the Ontario *Rules of Civil Procedure,*[51] which are triggered with the commencement of litigation. The duty to preserve, however, commences long before discovery and, in fact, even before a claim is made. The fifth principle of the *Ontario Guidelines* states: "[a]s soon as litigation is *contemplated or threatened*, parties should immediately take reasonable and good faith steps to preserve relevant electronic documents."[52] Similarly, principle 3 of the *Sedona Canada Principles*, states "[a]s 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."[53]

Whenever litigation is reasonably anticipated, threatened or pending against an organization, that organization has a duty to preserve relevant information. Determining when the duty to preserve is triggered may not always be readily apparent and always depends upon a number of factors, including the particular facts at issue. There are circumstances when the threat of litigation is not credible and it would be unreasonable to anticipate litigation based on that threat. The Sedona Canada Principles[54] suggest that a duty to preserve is triggered only when an organization concludes, based on credible facts and circumstances, that litigation or a regulatory proceeding is likely to occur.[55]

Once a trigger is ascertained, *The Sedona Canada Principles* require notice to be communicated to affected persons of the need for and the scope of preservation in both electronic and paper form.[56] The notice should describe in detail the kinds of information that must be preserved so the affected custodians can segregate and preserve it. The notice should also make reference to the volatility of ESI and that particular care must be taken not to alter, delete, or destroy it.[57] Prior to issuing the notice, it is important to consider the following issues:

- whether to use electronic search tools or methodologies which may assist in locating documents and keeping the volume of documentation manageable;
- whether steps should be taken to preserve or restore backup media, deleted information and metadata;
- whether forensic mirrored copies should be taken;
- what relevant information is actively being used and how to preserve a "snapshot" of this information;
- whether documents created using older systems are still accessible; and

[51] *The Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 30.02 (*Rules*).
[52] *Ontario Guidelines*, *supra* note 40, at 11. [Emphasis added]
[53] *Sedona Principles*, *supra* note 30. [Emphasis added]
[54] *Sedona Principles, supra* note 30.
[55] *Preservation & Legal Holds*, *supra* note 8 at 6.
[56] *Ibid*. at 10.
[57] *Ibid* at 15 -16.

- whether the assistance of third party experts, such as forensic consultants, is required.[58]

> **Case Study Example: While it is arguable that the numerous disputes between Bemar Ontario and the City during the course of construction were sufficient to trigger the duty to preserve, at the very latest, upon termination of Bemar Ontario, the City is obligated to issue an internal notice to management and employees connected to the project directing them to the procedures to be followed in carrying out the litigation hold.**
>
> **Conversely, Ryan, as principal of Bemar Ontario, should deliver a litigation hold notice to its employees.**

The "litigation hold" is the by-product of a party's disclosure obligations.[59] The underlying premise of the litigation hold is that parties to an action are obliged, from the moment litigation is contemplated or threatened, to take reasonable and good faith steps to preserve relevant ESI.[60] The litigation hold allows a party to meet its preservation obligations through the adoption of a protocol which stops normal course deletion and alteration of information.[61] Failure to fulfill one's duty to preserve through an effective litigation hold may lead to adverse evidentiary inferences, large fines, or liability under the tort of spoliation.[62]

Spoliation refers to the destruction, mutilation, alteration, or concealment of evidence,[63] including the negligent destruction or loss of ESI. As already noted, ESI can be easily and permanently lost or changed, simply by booting up a computer, opening a file, or installing new computer applications, or copying data from one media to another. In addition, automatic document purging systems can lead to the destruction of otherwise relevant evidence such as e-mails. A litigant can suffer adverse consequences in terms of penalties that may be imposed by a court for spoliation, costs and prejudice due to the loss or destruction of ESI caused by the failure to preserve such evidence. For example, Rule 30.08(1) of Ontario's Rules of Civil Procedure provides that if a party fails to produce a document that is favourable to their own case, that party may not be able to use the document at trial, and if the document is unfavourable, the Court has the discretion to make any order it deems just.[64]

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[58] *Ibid*. at 17.
[59] *Guidelines for the Discovery of Electronic Documents in Ontario* as submitted by Mr. Justice Colin L. Campbell to the Ontario Bar Association conference, "Electronic Discovery and The New ED Guidelines — A Roadmap for Dealing with Electronic Information, November 28, 2005 at 1.
[60] See Principle 5, Ontario Guidelines, *supra* note 25 at 12.
[61] Susan Wortzman, "*Spoliation, Litigation Holds and Preservation Orders — The New E-Discovery Guidelines*", (2005) OBA CLE — Electronic Discovery and the New ED Guidelines — A Roadmap for Dealing with Electronic Information at tab 6.
[62] *Guidelines for the Discovery of Electronic Documents in Ontario* as submitted by Mr. Justice Colin L. Campbell to the Ontario Bar Association conference, "Electronic Discovery and The New ED Guidelines — A Roadmap for Dealing with Electronic Information, November 28, 2005 at 3-5; Michael R. Arkfeld, *Electronic Discovery and Evidence*, (Phoenix: Law Partner Publishing, 2004), at 6-11 and 7-10.
[63] British Columbia Law Institute, "*Report of Spoliation of Evidence*" (2004) BCLI No. 34 at 1.
[64] *Preservation and Legal Holds: The Triggers and the Process*, p. 4, prepared by Karen Groulx, Peg Duncan and Shona Bradley, for the First Annual Sedona Canada Conference Institute's program entitled "Getting Ahead of the E-Discovery Curve" held October 23-24, 2008.

Additionally, the *Sedona Canada Principles*, recently incorporated into the Rules of Civil Procedure by Rule 29.03(4),[65] provide guidance with respect to issues arising out of spoliation of ESI. In particular, Principle 11 of the *Sedona Canada Principles* states that:

> 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 11e of the *Sedona Canada Principles* underscores the importance of establishing records management policies and the appropriate modification of such policies in the face of a litigation hold. It states that adherence to a reasonable records management policy should not lead to the imposition of sanctions, but cautions that adherence to such a policy in the face of reasonably contemplated or actual litigation is not appropriate.

From a practical perspective, successfully implementing the litigation hold requires a substantial amount of preliminary investigative work, which assists in establishing the outer boundaries of a party's preservation obligation. In order to make most efficient use of resources and contain costs, a party should first determine, by reference to the pleadings among other things, *who the key players are* within its organization, and further, *what the material timeline is*. Identifying these two key pieces of information will allow the party to focus its efforts and shape the breadth of the litigation hold in a manner that makes it manageable and effective.

> **Case Study: From the perspective of the City, the key players would include the City's solicitor, who may have been involved in the preparation of contracts, the City's internal supervising staff, including the City's Facilities and Project Management department, the Manager of Facilities Design and Engineering and the Project Manager , as well as consultants hired by the City to design and oversee the renovations, including the architect, the mechanical electrical engineer, and the structural engineering consultant.**
>
> **From the perspective of Bemar Ontario, the key individual is the principal of the company, Lawrence Ryan. However, Ryan would also need to identify key employees that may possess relevant knowledge of the particulars of the Project.**
>
> **The material timeline in Bemar Construction would commence at the time of the call for tenders and extend to the date of completion of the Cawthra Project by the City.**

With respect to isolating key individuals, the following are examples of steps that should be taken:[66]

I. Ascertain how each individual uses his or her computer and include those individuals' secretaries and assistants. (Documents drafted by a key party or witness may be stored on an assistant's computer).

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[65] See, Rule 29.1.03(4) of the *Ontario Rules of Civil Procedure, supra* note 52, which provides that in preparing a discovery plan, parties shall have regard to the Sedona Canada Principles regarding Electronic Discovery.

[66] Karen Groulx, "*Newest Technology Advances in E-Discovery that Could reduce cost and Time*", Insight Program, June 21, 2007 (Citing Alan Gahtan, Electronic Evidence, 1999, pp. 31-32).

II. Ascertain the identity of people who have access to relevant documents including any third parties who may have been provided with copies.

III. Determine the computer resources to which the individuals have access including the type of connections that exist between computer resources and others in the organization including e-mail and local area networks.

Having made these preliminary determinations, there are a number of steps that remain to be completed in order to carry out the litigation hold. Broadly speaking, in a typical case, at this point a party would proceed to:[67]

I. collect all relevant document retention, back-up, archiving, and destruction policies;

II. issue appropriate instructions to all staff, or at least to relevant staff, to cease or suspend personal activities and practices that could result in the destruction or modification of relevant electronic documents, such as the deletion of ESI;

III. create litigation copies of potentially relevant active data sources, for example by means of electronic backup or forensic copying of the documents, so as to preserve potentially relevant meta-data;

IV. cease or suspend the overwriting of back-up tapes, and other document retention practices that could result in the destruction or modification of relevant ESI in the ordinary course of business; and

V. document the steps taken.

Determining the types and sources of data that a party is obligated to preserve while subject to a self-imposed litigation hold is accomplished through the relevance inquiry, which limits the scope of the obligation to preserve documents. In this respect, preservation obligations for ESI are no different from preservation obligations for conventional paper documents. Succinctly put, "[a] party is under a duty to preserve what he knows, or reasonably should know, is relevant in an action."[68] What is relevant in a given case, the facts in issue, is determined by reference to the "substantive law relating to the particular [...] cause of action,"[69] bearing in mind that "[i]n a civil case, the facts in issue are established by the pleadings."[70] Therefore, counsel and their clients should consider which documents may be relevant and subject to the duty to preserve by reference to the pleadings. Conversely, pleadings should be drafted in a manner that will help ensure that relevant electronic evidence will be preserved and produced by the other parties. In that regard, precise and clear pleadings, including particulars of the

[67] See *Ontario Guidelines* commentary under Principle 5, *supra* note 25 at p.12. See also Brad Harris, "Eight Steps to Defensible Legal Holds", online: Fios, Inc. <http://www.fiosinc.com/e-discovery-knowledge-center/electronic-discovery-artic le. aspx?id=501&cid=encl-090212>.
[68] *Doust v. Schatz* (2002), 32 R.F.L. (5th) 317 (Sask. C.A.) at para. 27.
[69] Alan W. Bryant & Sidney N. Lederman & Michelle K. Fuerst, *The Law of Evidence in Canada*, 3rd ed. (Toronto: Lexis Nexis Canada Inc., 2009) at p.52. See also *Professional Institute of the Public Service of Canada v. Canada (Attorney General)* (2005), 2005 CarswellOnt 7981 (Ont. S.C.J.) at para. 41.
[70] *Ibid*. at 54.

party's claim or defence, permit both sides to understand what information will be necessary to the resolution of the dispute:[71]

> **Case Study: Often, construction litigation that puts in issue the scope of the contract, the validity of extras claimed by the contractor, and damages arising out of delay caused by the contractor or owner, generates voluminous relevant documents. Where damages for delay are alleged, as in *Bemar Construction*, it is arguable that all documents related to the construction project should be produced. However, to ensure production of electronically stored information can significantly advance your client's case, details of the claimed delays should be pled with particularity.**

It should be noted, however, that the proportionality principle modifies a traditional relevance inquiry by requiring parties to have regard to the time and cost associated with various stages of document production including preservation.[72] As stated by Judge Hughes in *Astrazeneca Canada, Inc. v. Apotex, Inc.*:[73]

> Thus, simply to say that a question is "relevant" does not mean that it must inevitably be answered. The Court must protect against abuses so as to ensure the just, most expeditions and least expensive (Rule 3) resolution of the proceeding not the discovery. Relevance must be weighed against matters such as among other things; the degree of relevance, how onerous is it to provide an answer, if the answer requires fact or opinion of law and so forth.[74]

The court's reasoning in *Shields Fuels, Inc. v. More Marine Ltd.*[75] in ordering further production of documents as requested by the moving party illustrates the analysis courts will undertake in weighing relevance against the cost and burden of producing a document. In this case, the plaintiff requested subsequent production of financial records so that the issue of financial means could be explored on discovery. The defendant had produced an unedited balance sheet, but the plaintiff considered the production insufficient to allow them to examine the defendant on the capacity to provide a bond. On the motion, the plaintiff requested an order to produce supplementary affidavits of documents listing the financial records for 2007 and 2008, including the monthly income statements and balance sheets. In opposition, the defendants stated it had produced all relevant financial records in its possession. The defendant explained that their A/R and A/P records update on payments made and then “disappear”. The defendant would have had to engage on contract the former employee who set up the financial system at a cost of $500-$750. The defendant also declined the plaintiff s offer to send a technician at its own expense to retrieve the information from the database and argued that it should not be required to expend time and resources to create tailor-made documents. The most relevant electronic data and information in the "control" of a party will be that which can be accessed by the party's computer users in the ordinary course of business, otherwise known as the active data. The Court held that:

> The rules should not be interpreted, however, so narrowly as to prevent a party from obtaining other relevant information, such as archival data that is still readily accessible and not obsolete. In exercising its discretion whether to compel production, the Court

[71] *Sedona Proportionality Commentary*, *supra* note 32 at 8.
[72] *Ibid*.
[73] 2008 FC 1301 (CanLII).
[74] *Ibid*. at para. 18.
[75] 2008 FC 947 (CanLII).

> should have regard to how onerous the request for a generated record may be when balanced against its relevance and probative value.[76]

The Court granted the order, concluding "[t]he information requested by (the Plaintiff) consists of basic archival accounting records that would be available to a company in the usual course of business."

The Data Map

IT personnel should be consulted in determining where relevant ESI may reside. They can provide such information regarding what systems are in place, the back-up procedure, the document and information management policies that are in place, etc. Through the use of a "data map," information regarding the type of ESI maintained by an organization and its location can be obtained. A data map is a visual reproduction of the ways that ESI moves throughout organizations, from the point of its creation to its ultimate destruction as part of the organization's information management and document retention program. In addition, the use of "early case assessment" software tools allows users to look at electronic records prior to extracting them and to select the data at source based on date filters and custodian search filtering which decreases the volume of ESI for further processing and therefore the processing costs.

To assist a party in defining its preservation obligations, principles 3 and 4 of the *Ontario Guidelines* discuss how the notion of relevance should apply to e-discovery in order to determine the types of electronic information subject to discovery, and therefore assist in defining the substance and scope of the litigation hold.

Principle 3 states:

> Litigants must exercise judgment, based on reasonable inquiry in good faith, to identify such active and current archival data locations that may be subject to e-discovery. However, if a party is aware (or reasonably should be aware) that specific, relevant data or information can only be obtained from a source other than the active and current archival data sources, then that source should be preserved.[77]

Principle 4 continues:

> A responding party should not be required to search for, review or produce documents that are deleted or hidden, or residual data such as fragmented or overwritten files, absent agreement or a court order based on demonstrated need and relevance.[78]

The second half of the Fifth Principle of the *Ontario Guidelines* is instructive in providing a limit to the scope of the duty of preservation, as "... it is unreasonable to expect parties to take every conceivable step to preserve all documents that may be potentially relevant."[79] The scope of what is to be preserved and the reasonable steps associated with meeting the obligation can vary widely depending on the claim's nature and the information at issue.[80] The obligation to preserve must be balanced against the

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[76] *Ibid*. at para. 13.
[77] *Ontario Guidelines, supra* note 25 at 11.
[78] *Ibid*.
[79] *Ontario Guidelines*, *supra* note 25, at 11.
[80] *Ibid*. at 18.

right of a party to manage its electronic information in an economic manner, including overwriting where appropriate.[81] Principle 1 of the *Sedona Canada Principles on Proportionality in Discovery* states that the burdens and costs of preservation should be weighed against the potential value and uniqueness of the information when determining whether its preservation is required.[82]

As contemplated by the requirements of Rule 29.1 of Ontario's *Rules of Civil Procedure*, parties should discuss what information is really relevant, material and probative of the issues in dispute. Not all sources are going to be as valuable as others, and some will be more expensive to produce because they are difficult to process or because they result in large volumes of duplicative and irrelevant information that must be culled and reviewed. At the initial discussion, parties should agree on steps required to preserve information.[83]

> **Case Study Example: As part of the initial discussion between parties regarding the scope of preservation and production, parties should identify key documents that are relevant to the issues in dispute. Some of the types of documents relevant to the issues in *Bemar Construction* included the tender documents, the various versions of the formal contract entered into by the parties, correspondence exchanged between key individuals, drawings and specifications with respect to the project, change orders, the construction schedule, subcontract between Bemar Ontario and Bemar Alberta, Notice and Directions to the City of Mississauga from Bemar Alberta, minutes of site meetings, site reports, cheques issued to Bemar Alberta, progress reports and statutory declarations. To the extent that these documents were created or exchanged electronically, the electronic data should be preserved.**

Each obligation imposed on a party as part of a step in the discovery process should further be considered against the proportionality principles found in both the *Ontario Guidelines* and the *Sedona Canada Principles*, and now referenced in the Ontario *Rules of Civil Procedure*. As a result there is a balancing effect taking place in Canadian jurisprudence to ensure that the obligations to preserve and produce documents, electronic or otherwise, are not made to be overly intrusive or onerous.

Before the actual collection of documents, parties should meet and confer to agree on how to focus the search for relevant information to reduce the quantity of irrelevant information. Parties need to balance the need for particular forms of ESI that are relevant and material to the issues in dispute against the cost of retrieving it. As such, parties should inform themselves of the costs involved in retrieving the information being sought by the opposing party. They may agree on the names of key custodians and restrict the collection to specific date ranges; they may go further and agree on what kinds of information can be excluded from production as being clearly irrelevant, such as e-mails from and to individuals known not to have been involved in any way with the events. Finally, they may agree to phase production so that documents meeting narrow search criteria will be examined by both sides to see what kinds of information is missing and still required.

A decision of the United States District Court of New York, *William A. Gros Construction Associates, Inc. v. American Manufacturers Mutual Insurance Company,*[84] is illustrative of the importance of conferring

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[81] *Sedona Principles, supra* note 30 at 13.
[82] See *Sedona Proportionality Commentary*, *supra* note 32.
[83] See *Sedona Principles*, *supra* note 30, and in particular, Sedona principle number 4, which states that 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.
[84] 256 F.R.D. 134.

with opposing counsel and agreeing on parameters with respect to the collection, preservation and production of relevant electronic documents. This case involved a multi million dollar dispute over alleged construction defects and delay in the construction of the Bronx County Hall of Justice. An issue arose as to the production of non-party emails of the construction manager, and in particular, how to separate project-related emails from the construction manager's unrelated emails. The Court considered each party's proposed search terms for distilling the emails, noting that while one party's search terms were too narrow, the other party's search terms were overly broad as they would entail production of the full email database. As there was virtually no input regarding the nomenclature its employees used in emails from the construction manager, the Court was left to craft a keyword search methodology for the parties without adequate information from the parties and the construction manager.

In its reasons, the Court chastised counsel for their failure to craft keyword searches with the input of those who wrote the emails, stating that:

> This opinion should serve as a wake up call to the Bar in this District about the need for careful thought, quality control, testing and cooperation with opposing counsel in designing search terms or "keywords" to be used to produce emails or other electronically stored information ("ESI").[85]

The Court went on to conclude that:

> Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI. Moreover, where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI's custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of "false positives." It is time that the Bar-even those lawyers who did not come of age in the computer era-understand this.

In Ontario, the need for collaborative conduct at the discovery stage stems from the recent changes to the *Rules of Civil Procedure* emphasizing proportionality as a key consideration in the discovery process and the push for a change in legal culture by the judiciary given the exponential growth of information.[86] In many cases, it is cost-prohibitive, if not impossible, to uncover and produce every potentially relevant document. Parties and their counsel should accept a change from requiring the production of all potentially relevant information to that which is truly necessary to the resolution of the conflict.[87]

Canadian courts have repeatedly held that ESI is producible and compellable in discovery.[88] The decision in *Cholakis* involved a dispute between brothers in which the plaintiffs complained that the defendant directors failed to manage a company in a reasonable and competent manner. In this case, the issue of whether paper-based production was adequate arose. Accounting information was produced by the

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[85] *Ibid*. at 1.
[86] Sedona Proportionality Commentary, *supra* note 32 at 4.
[87] With respect to narrowing the scope of relevant information, see the change to the wording of Rule 30.02(1) effective as of January 1, 2010 where the reference to "relating to any mater in issue" was replaced with "relevant to any matter in issue". This change, recommended by Justice Osborne, was intended to replace the "semblance of relevance" test with a simple relevance test.
[88] *Cholakis v. Cholakis* (2000), 2000 CarswellMan 7 (Man. Q.B.).

defendants for the plaintiff, who in turn sought further production of accounting data on a computer disk. It was ordered by a Master that the defendants produce accounting software along with accounting data that had been or would be produced in paper on a floppy disk. On appeal from this order, the basis for the defendant's objection was that this information had already been produced in paper form. The plaintiff took the position that the information stored on the computer would allow him to perform certain accounting functions much more efficiently than having to input a massive amount of data from paper documents. In citing *Reichman v. Toronto Life Publishing Co. (No. 2)*,[89] the Court concluded that the information stored on the disk came within the definition of a "document" and as it contained relevant information, it was therefore producible. The Court further stated that "[t]he interests of broad disclosure in a modem context require, in my view, the production of the information in the electronic format when it is available."[90]

Similar reasoning was applied by the Court in *Walter Construction v. Catalyst*[91] where the Court ordered production of electronic documents despite the plaintiff's objection that the documents sought by the defendant had already been produced in hard copy. Having regard to the definition of "document" in the *Rules of Civil Procedure*, the Court found that the plaintiff was entitled to have access to the electronic documents.[92] It is noteworthy that in this case the producing party gave no justification for their statements about the burden or cost associated with production. As such, the case is illustrative of the principle that refusals to requests for production, not based on relevance or privilege, should include details of the burden, cost, delay, and/or prejudice on which the refusing party is basing its position.[93]

The above decisions underscore the importance of meeting with opposing counsel early on in litigation to discuss and agree on the format of production.[94] In fact, the manner by which the information will be produced is one of the factors the parties must include in their discovery plan as mandated by the *Rules of Civil Procedure*.[95]

Collecting Electronic Information from One's Own Client: The importance of information management and records retention policies

In order to ensure that construction litigants meet their disclosure obligations in the electronic age, the development and implementation of a records management policy is essential. A document retention policy formalizes a company's protocol for saving and discarding documents received or created in the ordinary course of business. The numerous types of documents that may be relevant to a construction dispute, and which may have been created, stored and exchanged electronically, include RFP/bid/tender documents and information, CAD drawings and site plans, financial information, scheduling documents, project communications, and change order details.

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[89] *Reichman v. Toronto Life Publishing Co. (No. 2)* (1988), 66 O.R. (2d) 65 (H.C.J.).
[90] *Ibid*. at para. 30.
[91] 2003 BCSC 1582.
[92] *Ibid*. at para. 38.
[93] See Sedona Proportionality Commentary, *supra* note 32 at 16.
[94] See Justice C. Campbell's endorsement of the Discovery Plan agreed to by the parties in *Enbridge Pipelines Inc. v. 13P Canada Energy Company*, 2010 ONSC 3796, where Justice Campbell commended counsel for the responsible and cooperative manner in which they achieved agreement on a Discovery Plan. Justice Campbell incorporated the Discovery Plan into an Order and attached it as an appendix to the decision.
[95] See Rule 29.1.02(3) of the *Rules of Civil Procedure*, *supra* note 52.

Taking appropriate measures with respect to data retention and preservation long before conflict arises is critical to avoiding the imposition of potentially serious judicial sanctions.[96] It is also the most logical place to start. Being proactive in this regard involves developing and implementing procedures and policies for preserving and producing potentially relevant ESI, and establishing processes to identify, locate, retrieve, assess, preserve, review and produce data[97] as well as a policy which establishes routine retention and destruction guidelines.[98] Organizations that adopt policies and procedures which define a preservation decision-making process help to ensure that appropriate and reasonable steps are taken to ensure that potentially relevant ESI is preserved and also help an organization to defend a decision not to preserve where that decision is based upon a reasoned corporate policy.

A Records Management Policy could also include:

- Information about an organization's information management structure as reflected in a data map[99]
- Guidelines for the routine retention and destruction of ESI as well as paper, and account for necessary modifications to those guidelines in the event of litigation
- Processes for the implementation of legal holds, including measures to validate compliance
- Processes for auditing IT practices to control data proliferation (redundant backups, use of links to documents rather than attachments, etc.) and to institutionalize other good record-keeping practices, and
- Guidelines on the use of social media in the business context.

It should also be noted, however, that in cases involving allegations of fraud, conspiracy, misappropriation of funds, or unlawful disclosure of confidential information, the relevant ESI (which would likely include the metadata) may not fall under the category of a business record listed in the Records Management Policy. Thus, while a Records Management Policy should be consulted at the identification and the preservation stage of e-discovery, the examination and consideration of such a policy should not limit the level of inquiry to only those types of records listed in the Records Management Policy.

While the development of an appropriate records retention policy will vary from case to case, a systematic approach toward its development is ideal. For example, how long to keep a document, when and how to store the document, and how to dispose of the document, will depend on the type of

[96] See Principle 11 of the Sedona Canada Principles and accompanying commentary, *supra*, note 30 at 36.
[97] *Supra*, note 30 at 13 under heading "Comment 3.b. Preparation for Electronic Discovery Reduces Cost and Risk".
[98] *Ibid.*
[99] A data map is a visual reproduction of the ways that electronically stored information (ESI) moves throughout organizations, from the point it is created to its ultimate destruction as part of the organization's information management and document retention program. Data maps address how people within the organization communicate with one another and with others outside the organization. A comprehensive data map provides legal and IT departments with a guide to the employees, processes, technology, types of data, and business areas, along with the physical and virtual locations of data throughout the organization. It includes information about data retention policies and enterprise content management programs and identifies servers that contain data for various departments or functional areas within the organization.

document. Legal and regulatory requirements may also dictate what documents must be kept and for how long. The following inquiries should therefore be made in the course of developing a document retention policy:[100]

I. Is there a legal requirement for keeping the document? Legal requirements include federal and provincial laws concerning various regulated matters, such as employment records, health and safety records, tax records, etc;

II. After the item is used for its intended purpose, what other purpose could it serve? Could it be used to support or oppose a position in an investigation or lawsuit? Could it support a tax deduction or balance sheet item? Could it support or explain a business decision?

III. What is the consequence of not being able to locate the document? If the document was destroyed pursuant to a records-retention program and no threat of litigation was pending at the time, the issue will be how reasonable the document retention/destruction program was. If the document is central to a lawsuit and is suddenly destroyed after litigation is commenced or threatened, the presumption will be that the destruction was accomplished deliberately.

IV. Can the item be reliably reproduced elsewhere if needed? Is the information available from another database or source?

V. Once the possible use of a particular item is determined, the question becomes how long to retain the document. This question is answered by taking into account the relevant statutes of limitations, being the time period within which a lawsuit must be commenced for a particular claim after the basis for the claim is discovered, as well as any retention periods stipulated by law, such as income tax statutes.

Outside of the litigation arena, an effective document retention policy can also reduce the burden/costs of storing irrelevant and obsolete documents, can assist in the identification and retrieval of documents and can facilitate the review of a large number of documents in an efficient manner. Another equally important purpose is to ensure that relevant and potentially useful records are retained which serves to preserve corporate memory and enhance productivity.

Best Practices to Contain Costs

The recent amendments to the Ontario *Rules of Civil Procedure*[101] introducing the concept of proportionality to the discovery process recognize the unique problem presented by ESI. The sheer volume of data, the number of locations where electronic data may be stored, the relative permanence of this data, and the costs and burden that may be imposed on the party subject to the preservation obligation, requires preservation measures to be proportionate. Principle 4 of the *Sedona Canada Principles on Proportionality in Discovery* dictates that requests for further production should be reasonably specific and targeted.[102] The onus to establish that specific additional documents exist and

[100] Barbara Weil Gall, "Document Retention Policies: Legal Reasons to Keep E-mail, Web-Pages and Other Records, online: Gigalaw <http://www.gigalaw.com/articles/2000/-all/gall-2000-09-all.html>.
[101] *Supra*, note 52.
[102] *Sedona Proportionality Commentary, supra* note 32.

are relevant to the substantial issues in dispute rests with the party seeking production. Several recent cases have dealt with this issue, where courts have denied broad production requests and instead substituted narrower and more specific orders for production that place a smaller burden on the parties.[103]

For example, in *Vector Transportation Services, Inc. v. Traffic Tech, Inc.,*[104] a case about a wrongful solicitation of clients by a former employee, the defendant appealed a master's order to produce the laptop he uses for work purposes to a forensic data recovery expert who would inspect the computer for emails containing names of the plaintiff's clients or customers. The defendant claimed these emails were not produced because they had been deleted. The Court concluded that the master had been correct to order the production of relevant electronic evidence on the laptop and noted that the master's order asked for a highly targeted search of the recovered contents of the laptop.

In *Borst v. Zilli*[105] Master Brott considered the proportionality principle in granting a costs shifting order. The parties had reached an agreement to retain an independent computer consultant ("ICC") who would obtain a copy of the computer data and an independent solicitor ("ISS") who would review the documentation for relevancy and privilege. The parties disagreed about who should pay for the ICC and the ISS. The defendants contended that because the plaintiffs sought the information they should pay. Master Brott stated:

> The Sedona Canada principles recognize that when considering disclosure requests and standards for disclosure the courts must balance a number of factors. The courts apply the principle of proportionality to ensure that the costs of discovery do not unduly interfere with a just, speedy and inexpensive resolution of a dispute.

Master Brott noted that the plaintiffs' request to conduct the inspection of the computer data was similar to an inspection under Rule 32, and therefore, it was appropriate for the plaintiffs to bear the full cost of the ICC. With respect to the costs of the ISS, Master Brott noted that the review to be done by the ISS as to relevancy and privilege could have been done by the defendant's counsel, however, as the plaintiffs were presumably not content to proceed on that basis, the parties retained the ISS. Taking into account the principles of proportionality and the costs factors in Rule 57, Master Brott ordered the costs of the ISS to be shared equally by the parties.

Similarly, the Ontario E-Discovery Implementation Committee emphasized the principle of proportionality in its "10 Guiding Principles to Minimize E-Discovery Costs." It should be noted that under the proportionality principle, relevance is not the determining factor regarding one's obligation to disclose and produce. Other factors to be considered include the cost of production, importance of the records, importance of the case, and the amount of money at issue.[106] Litigants should also proactively

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[103] See *Vector Transportation Services Inc. v. Traffic Tech Inc.* (2008), 58 C.P.C. (6th) 364; [2008] O.J. No. 1020 (Ont. Sup. Ct.) and *Matheson v. Scotia Capital Inc.*, [2008] O.J. No. 3500 (Ont. Sup. Ct.).

[104] *Vector Transportation*, ibid.

[105] [2009] O.J. No. 4115 (Ont. Sup. Ct.).

[106] See the Ontario E-Discovery Implementation Committee's *10 Guiding Principles to Minimize E-Discovery Costs.* 2010, online: <http://oba.orgienfpublicaffairs_enie-discovery/modelprecedents.aspx>.

seek to reduce costs by considering the main types of costs arising from the discovery process and making informed decisions about whether to incur the specific cost, and how to keep the cost low.[107]

With respect to minimizing costs by taking proactive pre-litigation steps, the Ontario E-Discovery Implementation Committee advises that the following actions should be taken:

I. Implementing a records management system, which can reduce the universe of records to be searched, and can facilitate the process of identifying repositories of potentially relevant records.

II. Implementing a discovery readiness plan in advance that includes procedures and forms for implementing a litigation hold, designates a person responsible for responding to discovery requests, prescribes procedures for conducting searches for relevant records, and identifies any internal IT personnel or external litigation support consultants the party may wish to contact.

III. Counsel should have precedents available to assist and advice the client in the discovery process, such as precedent memos explaining the litigation hold process, precedent preservation letters, meet and confer agreements, information packages on the discovery process, chain of custody documentation, etc.[108]

With respect to minimizing costs during litigation, the Ontario E-Discovery Implementation Committee suggests that litigants:

I. Reduce the involvement of lawyers where appropriate, such as where e-discovery search software can be used to identify relevant documents.

II. Reduce the involvement of consultants where possible.

III. Limit the scope of e-discovery by limiting the range of records to be produced by date, author, recipient, custodian, file format, data type, and search terms.

IV. Parties conduct e-discovery by agreement where possible, cooperating with one another to reduce costs and streamline the proceedings.

V. Make effective use of litigation software to copy, index, search, filter, de-duplicate, code, review and produce ESI. [109]

At the pleadings stage, focus on what information is needed to resolve the dispute

By focusing on what information is needed to resolve the dispute at the pleadings stage, parties may be able to reduce costs associated with discovery by being mindful of the allegations advanced and the evidence needed to support the allegations. In other words, the implications for time-consuming

[107] See *supra* note 115, at 2. Note that the Ontario E-Discovery Implementation Committee has identified legal fees, consultants' fees and employee time as the three main types of costs incurred in the course of completing the e-discovery process.
[108] *Ibid*. at 3.
[109] *Ibid*.

discovery should be considered in deciding on what claims or defences to advance. Counsel should advise parties to avoid allegations or defences that cannot be substantiated or justified, since courts can and will take unfounded claims into account when awarding costs.[110]

Thinking early about information sources allows a party to consider likely custodians and arrange for whatever steps might be needed to preserve their data. It also clarifies what types of information may contain relevant information (e.g. financial records, images, voice logs, metadata, communications, etc.) and whether the party's computer systems team needs to take action to capture files (such as shared drives) that may not have any identifiable custodian. Additionally, where the other party's pleadings are not clear enough to guide the preservation or selection of relevant information, it is reasonable to ask particulars about each allegation or defence to direct what information is needed.

Develop a Project Plan

In reviewing documents for privilege and relevance, consider whether lawyer time and the associated cost can be reduced by eliminating some documents from review based on its likelihood of not yielding unique relevant information. For example, where the collection of documents includes all messages received and sent by key custodians within a timeframe, messages between the key custodians and others who were known to have played no role in the events in dispute, including notifications from news services, spam and other unsolicited material can be excluded from the beginning. Communications between key custodians need to be reviewed but will appear in both inboxes and in sent boxes. If there are no grounds to believe that the messages would have been deleted, it may be reasonable to exclude the messages from key custodians in the inboxes of other key custodians, as a means to avoid reviewing duplicates. Because the complete mailbox is still available, a further search in the inboxes is possible if gaps are suspected.

The approach described above works for small collections being reviewed by one person at a time – for example, first by a paralegal or junior to find all potentially relevant documents and then by the lawyer to confirm the relevant material. All assumptions and decisions need to be documented in case they are challenged by the opponents.

Larger collections involving more custodians, larger volumes and teams of reviewers benefit from automated tools and a more structured process. A combination of electronic tools and trained lawyers is the best approach for an effective and efficient review and is endorsed by The Sedona Canada Principles. Counsel should select appropriate review tools to minimize the cost of the review and to ensure that the review is effective.

Use automated tools where appropriate for the job

The National Model Practice Direction For the Use of Technology in Civil Litigation, published by the Canadian Judicial Council in 2008, encourages the use of automated tools where "a substantial portion of the Potentially Discoverable Documents consist of Electronic Material; the total number of Potentially Discoverable Documents exceeds 1,000 Documents or 3,000 pages; there are more than three parties to the proceeding; or the proceedings are multi jurisdictional or cross-border."[111]

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[110] *Lewis v. Cantertrot Investments Limited*, 2010 ONSC 5679 (Can111), *Ault v. Canada (Attorney General)*, 2010 ONSC 1423 (Can.LII). *Lewis* surveys the law in paragraphs 76 and 77.

[111] Available online: <http://wvvw.cjc-ccm.gc.ca/cmslib/general/JTAC%2ONational%20Model%20Practic(1).pdf>

Software tools in the e-discovery market offer essentially three types of functionality that can aid in the control of costs:

- Analyses of the content and metadata of the universe of information to help with the selection of relevant information
- Removal of irrelevant and duplicative information
- Progress reporting, performance metrics, audit logs and dashboards to help with the management of the process

In selecting processes and tools, organizations should consider the size of the case, the volume and type of information, the variety of sources, the related cost, burden on and disruption of normal business activities, and whether the selected process is reasonable and justifiable if put to the test of objections from the opposing side.

Who bears the cost: cost shifting

As a general proposition, while "the interim costs of preservation, retrieval, review and production of electronic documents will be borne by the party producing them,"[112] the cost associated with the reproduction of these documents is to be borne by the party requesting them.[113] As a consequence, in the context of electronic discovery, a party may be faced with extraordinary costs and disbursements in meeting its disclosure obligations, which may in effect prevent it from having its case decided on the merits. Moreover, the cost implications associated with carrying out one's discovery obligations in the e-discovery context can be determinative because it forces a party to choose settlement over reviewing what is effectively truckloads of data. While it is generally the case that a portion of the costs associated with these efforts may only be recouped by the successful party at the end of the litigation,[114] the court has the discretion to make interim costs orders.[115] Where accessing the data may require extraordinary effort and cost, because of the media on which the data is stored, "[.. .] 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."[116]

Existing jurisprudence on the issue of cost-shifting with respect to electronic documents in the Canadian context is scarce. It should be noted that although there is a wealth of American jurisprudence on this issue, given fundamental differences between the United States and the common law jurisdictions in Canada with respect to how the issue of costs is resolved, its relevance in the Canadian context is

[112] *Supra* note 26 at 17.
[113] See sub-rule 30.04(7) of the *Rules of Civil Procedure*, *supra* note 52.
[114] See *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* (1985), 51 O.R. (2d) 23 (Ont. Sup. Ct. – Div. Ct.), at 32. But also see *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 (S.C.C.), a case in which the Court held that as an exception to the general rule, interim cost awards should only be made where certain conditions are met.
[115] Groulx, Karen, "*The Issue of Costs*", LawPRO Magazine, September 2005, VoL4, Issue 2, at p.9. See s.131(I) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 which operates in conjunction with Rule 57.01(1) of the *Rules of Civil Procedure*, which lists factors that a court may consider when awarding costs.
[116] See *supra* note 30 at p.39, under the commentary relating to Principle 12.

limited.[117] In *Bank of Montreal v. 3D Properties,*[118] the defendant applied to the Court for an order compelling the plaintiff financial institution to produce various documents including computer records, discs and tapes. Though the Court would allow the defendant's request, it saw fit to impose all reasonable costs associated with searching for, locating, editing and producing the sought-after documents on the applicant, leaving what constituted "reasonable costs" to be determined as between the parties, or by the Court upon further application should they be unable to reach a consensus. By contrast, in *Cholakis*, the Court ordered that the defendants would bear the costs of reviewing and modifying its software in order to limit its production of data in accordance with an earlier court order. It further held that the expense involved in carrying out this task "may be a disbursement to be considered in an Order for costs at a further stage in the proceedings."[119]

In *JDS Uniphase Inc. v. Metconnex Canada Inc*.,[120] both parties agreed, by way of written agreement, to exchange and produce their respective documents in a common format, namely a "summation" database, and retained the same service provider to accomplish this task. After receiving the plaintiff's materials, the defendant concluded that they had serious deficiencies. After some negotiation, the parties agreed that the plaintiff would produce a database with the same functionality as that of the defendant, which involved an additional cost, one half of which the defendant agreed to pay. The defendant ultimately sought to have its one-half contribution to this cost reimbursed. The Court refused to grant this relief, concluding that the dispute might have been caused by a lack of familiarity with e-discovery rather than any intent to shirk discovery obligations. Given the plaintiff's offer to pay half of the additional cost to bring its database up to the higher standard, the Court was unprepared to grant the relief sought absent "additional information with respect to the long-term benefits of producing the electronic database in the enhanced format."[121] Alternatively, the Court required evidence that "the costs of the electronic production resulted in a disproportionate burden for one of the parties,"[122] which was not the case here as the Court noted that both parties were able to pay for the costs of litigation.

In *Barker v. Barker,*[123] the Plaintiffs commenced an action against the Province of Ontario and two individual doctors with respect to treatment they received at a provincial mental health centre. In an effort to satisfy their disclosure obligations, the defendants proposed digitizing documents consisting of the medical and personal records of the plaintiffs in the possession of the Crown. These amounted to between 50,000 and 100,000 documents, and converting them to a digital format would cost between $160,000 and $383,000. The defendants sought an order requiring the plaintiffs to fund one third of the cost of conversion. The plaintiffs objected to this request primarily on the basis that they were impecunious and that such an award would force them to abandon their claim. The Court ultimately ordered that the plaintiffs pay one-third of the costs of conversion, on a provisional basis. It noted that: "the benefits for the litigation process from electronic storage, coding and other retrieval facilities are likely to be far more significant in cases like this where productions are old, fragile and voluminous"[124] and further that there were "very substantial continuing benefits to the plaintiffs and the court that are

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[117] The United States does not follow the same "loser pays" model to costs apportionment that is prominent in Canadian common law jurisdictions. See Glenn A. Smith, "E-discovery: Can the Clients Afford It?" online: SLAW <http://www.slaw.ca/2009/01/10/e-discovery-can-the-clients-afford-it>.

[118] *Bank of Montreal v. 3D Properties* (1993), 1993 CarswellSask 159 (Sask. Q.B.) *[Bank of Montreal]*

[119] *Ibid*. at para. 35.

[120] *JDS Uniphase Inc. v. Metconnex Canada Inc.* (2006), 2006 CarswellOnt 6264 (Ont. S.C.J.).

[121] *Ibid*. at para. 12.

[122] *Ibid.*

[123] *Barker v. Barker* (2007), 2007 CarswellOnt 2448 (Ont. S.C.I.).

[124] *Ibid*. at para. 14.

likely to be obtained from the conversion of the defendants' productions into electronic form"[125] beyond the discovery phase.

Conclusion

In principle, e-discovery is the same as any other type of document discovery. However, as is evident from the above discussion, the practice of actually retrieving electronically stored information also makes e-discovery unique from other types of documentary discovery. The actual physical location of ESI varies on a spectrum between accessible and easily produced to inaccessible, difficult and expensive to produce. Many factors have to be considered when requesting or responding to a request for production of ESI. These factors include: recognizing the potential volume of documents, considering the use of key search terms to help to identify relevant documents, deciding what type of information is actually needed, locating the key players, and taking steps to ensure that electronic evidence is not lost through ordinary usage. The benefits of ESI should not be overlooked and lawyers who do so risk leaving potentially critical information undiscovered.

Just as the use of computers has increased efficiency in communications with clients and productivity in our respective practices, there is a vast potential for the benefits of technology to assist in making documentary discovery more fruitful. I encourage you to consult the e-Discovery Guidelines and Sedona Canada Principles which were prepared to provide guidance to members of the Ontario Bar in dealing with e-discovery issues.

Other E-Issues In Construction Disputes

Electronic Tendering

Though technically speaking, Electronic Tendering (e-tendering) is an alternative to traditional methods of tendering (meaning tendering which takes place via the submission of hard copy documents), this process is governed by the same rules, and is subject to the same principles as traditional methods of tendering. Unlike the other "alternatives to traditional tendering practices" listed above, e-tendering involves the creation of a binding contract A, and the entering into of a subsequent contract B.[126] E-tendering, and the obligations undertaken by its participants are no less stringently enforced than traditional tendering merely because of the medium by which the tendering documents are communicated.

The popularity of e-tendering is on the rise. Currently, tendering for Canadian government procurement takes place through the MERX system, which allows bidders to obtain tender information online. As yet, tenders related to the MERX system are submitted in hard copy, but it is likely development in this area will permit the electronic submission of bids in the future.[127] In other countries, e-tendering is also

[125] *Ibid.* at para. 15.

[126] The first case from which the modern legal framework of tendering flows is *The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, (*Ron Engineering* [1981] 1 S.C.R. 111 [*Ron Engineering*], This case established the legal framework governing the tendering process. This framework operates as follows: the submission of a bid which complies with tendering documents in response to a request for tendering forms a binding contract, "contract A". Once the winning bidder is successful in the tendering process, the contract of construction contemplated by the bid submitted in contract A is formed. This contract is called "contract B".

[127] Sandori, *supra* note 23 at 341.

increasing in popularity. In particular, e-tendering is used for some procurement by the United States federal government and by some state governments.

The e-tendering process may involve a variety of steps, but some common steps in the process are:

A. The tender is prepared and posted;

B. The prospective bidder registers;

C. The prospective bidder obtains the request for tenders electronically;

D. The prospective bidder is trained and briefed on the technology;

E. The bidder prepares and submits the tender;

F. The bids are opened by the owner after the close of tendering.[128]

Law relating to e-tendering

In Canada, only one case has directly addressed the issue of e-tendering: *Coco Paving (1990) Inc. v. Ontario (Minister of Transportation)*. This case involved the submission of a tender via the Ministry of Transportation of Ontario's (MTO) online tendering system. The tendering party, Coco Paving, submitted its bid on time, but as a result of a computer malfunction, the bid was not received on time by the MTO. The tendering documents prepared by the MTO did not provide the MTO the discretion to accept late (and therefore non-compliant) bids, and consequently, Coco Paving's bid could not be accepted.[129]

The tendering documents provided for an alternative form of bid submission in case a bidder's computer system malfunctioned. In the event of a computer malfunction, bidders were directed to submit their tenders via facsimile to the MTO's fax number, and were required to contact the MTO's help desk no later than 30 minutes prior to tender opening.[130] All bids submitted via the MTO's online tendering system were to be received by the MTO no later than 3:00 PM on April 29, 2009.[131] Coco Paving argued that its bid could be accepted based on the fact that it was irrevocably sent to the owner in satisfaction of the tendering documents. The Court of Appeal stated:

> Relying on s. 22(1) of the Electronic Commerce Act, 2000, S.O. 2000, c. 17, Coco argues that its bid is presumed by operation of law to have been sent to the MTO when the bid entered an "information system" outside Coco's control. The effect of this presumption, Coco says, is that its bid was "sent" to the MTO at

[128] Nancy Shapiro, "Electronic Tendering—Welcome to the 21st Century," Koskie Minsky LLP online: <http://www.kmlaw.ca/upload/ELECTRONIC_TENDERING_revised_Dec_051-MiscPub.pdf> accessed November 28, 2011, at pages 1-2.
[129] *Coco Paving*, *supra* note 14 at para. 10.
[130] *Ibid.*, at para. 16.
[131] *Ibid*., at paras. 6-7

> 2:50 p.m. on April 29, 2009 - before Tender Closing. We do not accept this submission.

In the opinion of the Court, the tendering documents required more than the tender being merely *sent* before the opening of tenders. Rather, the documents specifically stated that the tender must be *received* prior to the opening of tenders.[132]

Lastly, the privilege clause inserted in the tendering documents was not, in the opinion of the Court, specific enough to permit the MTO to accept Coco Paving's non-compliant bid. The Court said:

> We recognize that s. 11.1 of the tender documents authorizes the MTO, in its discretion, to "waive formalities as the interests of the Ministry may require". However, in the absence of clear language in s. 11.1 or elsewhere in the tender documents indicating that, in the discretion of the MTO, a late bid or a substantially non-compliant bid may be accepted, s. 11.1 can-not be construed so as to permit the acceptance of a bid that is submitted late. This is particularly so where - as here - other compliant bids were received and where an expansive interpretation of the discretion afforded under s. 11.1 would result in the displacement of an otherwise compliant and likely successful bid.[133]

The finding of the Court with respect to the effectiveness of the privilege clause is in keeping with the aforementioned leading cases regarding tendering generally, and the enforceability of privilege and exclusion clauses further discussed below.

The consequence of *Coco Paving* is that it illustrates that Courts will utilize the analytical framework established for traditional methods of tendering when assessing e-tendering disputes. In *Coco Paving*, whether or not Coco Paving's bid could be accepted depended on whether or not it complied with the terms of contract A, as formed by the tendering documents. The fact that the tenders were to be submitted electronically did not lessen the obligations imposed by the traditional law of tendering on both bidder and owner.

A more difficult situation might arise where tendering documents are not as clearly drafted as those in *Coco Paving* were. In that case, the times at which tenders were to be received were explicitly stated, as were alternative procedures for the event of computer system failure. If, as an alternative possibility, tendering documents prescribed the time at which tenders must be *sent*, the provisions of the *Electronic Commerce Act* would govern. The relevant provision of the *Electronic Commerce Act* is set out for ease of reference below:

> 22. (1) Electronic information or an electronic document is sent when it enters an information system outside the sender's control or, if the sender and the addressee use the same information system, when it becomes capable of being retrieved and processed by the addressee.
> (2) Subsection (1) applies unless the parties agree otherwise.

[132] *Coco Paving*, *supra* note 14 at paras. 24-25
[133] *Ibid.*, at para. 11.

> (3) Electronic information or an electronic document is presumed to be received by the addressee,
> (a) if the addressee has designated or uses an information system for the purpose of receiving information or documents of the type sent, when it enters that information system and becomes capable of being retrieved and processed by the addressee; or
> (b) if the addressee has not designated or does not use an information system for the purpose of receiving information or documents of the type sent, when the addressee becomes aware of the information or document in the addressee's information system and it becomes capable of being retrieved and processed by the addressee.[134]

The difficulty in any such case would likely be the ability of each side to lead evidence through which it could prove the propriety of its actions. In *Coco Paving*, the Court accepted evidence regarding the functionality of computer systems during the time period at issue.

E-tendering is seen by some scholars as a way in which to decrease the significant costs of tendering and to make the tendering process more accessible.[135] The use of e-tendering is likely to continue to increase with the passage of time. Nevertheless, it does not appear that the approach of Canadian appellate courts towards e-tendering will be substantially different from their approach to traditional methods of tendering. Ultimately, the specific guidelines to bidders established by the tendering documents will govern contract A, and the requirements of fairness and equality in treatment of all bids will continue to prohibit owners from accepting non-compliant bids.

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[134] *Electronic Commerce Act 2000*, S.O. 2000, Chapter 17 at s. 22.

[135] Ichiro Kobayashi, "Private Contracting and Business Models of Electronic Commerce," in 13 U. Miami Bus. L. Rev. 161 at pages 15-16 (Q.L.).

APPENDIX

The Initial Client Interview: Identifying and Locating potential document sources

As with traditional hard copy documentary discovery, the first stage in the e-discovery process involves obtaining input from the client as to the location of potential document sources. The discussion that follows provides some guidelines to conducting an initial client interview that will assist the client and counsel in preserving and collecting all relevant documents.

(I) Overview and Common Technology

During the initial client interview, once a lawyer has a grasp on the facts giving rise to the dispute, the next question that arises is what evidence is potentially relevant to the issues at hand. The question is what evidence must be located and in what form. The term document is defined in the Ontario *Rules of Civil Procedure* to include "data and information in electronic form".[136] Generally speaking, documents are referred to as "electronic" if they exist in a medium that can only be read through the use of computers, as separate and distinct from documents that can be read without the aid of hardware and software.

The next obvious question concerns the computer system the client has, or had at the relevant time, that may contain relevant data or information. Again, depending on the nature of the case, the answer may include enterprise systems[137] or networks, as well as personal computers (desktops, laptops, and even hand-held devices), and even individual components and media relating to them, such as memory chips, magnetic disk devices (such as computer hard drives or floppy disks), optical disks (such as DVDs or CDs), and magnetic tapes.

The variety of electronic hardware and media involved can expand the volume of potentially relevant EST and can greatly increase the cost of documentary production. For instance:

- some of the items may be in use by potential witnesses or in storage in different departments within an organization, and the relevant documents may be in a number of different electronic formats which require analysis to narrow the scope of production requests;

- copies of the same document may be stored in multiple locations in the course of normal business operations: for example, an email sent from one person to another on a network server may be saved by the sender and each recipient on their personal computer, and further copies may be saved by the system for several purposes; and

- relevant documents, including email, may have become unreadable over time because of the unavailability or obsolescence of key software or hardware components.[138]

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[136] Rules of Civil Procedure, *supra* note 52.

[137] Enterprise Systems or an Enterprise Information System is generally any kind of computing system that is of "enterprise class". This means typically offering high quality of service, dealing with large volumes of data and capable of supporting some large organization ("an enterprise").

[138] *Ontario Guidelines, supra* note 25 at 3.

The nature of electronic evidence can make the process of locating and assembling electronic documents for litigation purposes more difficult than their paper-based equivalents. Where a lawyer represents an organizational client, the involvement of the client's IT staff or independent service provider is often essential to ensure that all relevant documents are identified and properly preserved.

Discussions with IT staff also help both counsel and the client to grasp the proper terminology which can assist in the search for potentially relevant ESI and the identification of issues to be addressed such as the cost of retrieving inaccessible or legacy data[139]. New civil practice rules recognize the principle of proportionality[140] in the discovery process. Only reasonably accessible and non-duplicative information in support of plausible causes of action should be requested or produced. In advising clients on how to conduct a complete search, lawyers should consider a number of possible sources of data:[141]

- **Active Data:** This is data that is currently being produced by the parties in their daily operations. Active data is typically easiest to identify and the least costly to produce because it is readily available on the client's current electronic systems.

- **Back-up Data:** This is data that is maintained for long-term storage and record-keeping purposes or as a source of recovery in the event of a system problem or disaster. This type of data is generally maintained through a separate source than active data, and is separate from archival data both in method and structure of storage. Back-up data is generally not readily accessible to ordinary system users, and will typically require special expertise to become readable. The retrieval of this kind of data is often expensive.

- **Archived Data:** This data is data that is not in frequent use and that has been maintained for long-term storage and record keeping purposes. Depending on the nature of the storage system, different degrees of difficulty may be experienced in locating documents within a system archive.

The three types of data noted above each constitute a distinct set of electronic data and information serving different functions, and are typically representative of a particular moment in time. Given this fact, it is important to ascertain whether or not relevant ESI may only be found on back-up sources and if so, what time period is covered by a particular back-up source.

It is also important for lawyers to be aware that a number of electronic sources, for example, Internet web-pages or database systems, may be under constant revision as new information is published on the site or added to the system. If such ESI is not located expeditiously, available active copies may not reflect what the data actually looked like at the time relevant to the litigation. As such, lawyers should be prepared to question clients, from the initial client meeting

[139] See definition at page 40 herein.
[140] See *Spar Aerospace Limited v. Aeroworks Engineering Inc.*, 2007 ABQB 543, aff'd 2008 ABCA 47. See The Sedona Conference®, the Sedona Canada Commentary on Proportionality in Electronic Disclosure and Discovery (Phoenix: The Sedona Conference®, October 2010) (Public Comments Version).
[141] See The Sedona Conference® Glossary for E-Discovery and Digital Information Management. A Project of the Sedona Conference® Working Group on Electronic Document Retention and Production (WG1) RFP + Group, May, 2005.

onward, to confirm which of the available versions of documents are the best evidence for litigation purposes.

In general, the electronic documents most frequently requested and produced are those generated by word processing software, databases, spreadsheet applications, electronic mail, and other similar programs. These documents are quite easy to identify and locate. However, lawyers should be aware that numerous other types of "data and information" can come to exist within a computer system, in order to assess how and if they are relevant to the litigation. These can include, but are not limited to, web-pages, browser history files and cellular phone logs.

There are other types of hidden data or information that are recorded by electronic systems about particular users or particular documents which should be considered. Metadata[142] can include information about how, when and by whom a word processing document was created or provide the times and user identification for entries into an electronic database. It is now well established that any "data or information" that can be compiled into a viewable form, whether available in print or on an electronic device or screen, is potentially within the definition of "document" under Rule 30.01 of the *Ontario Rules of Civil Procedure*.

Other frequently used terms include:

- Metadata (data about data): refers to electronic information that is recorded by the system about a particular document, concerning its format, and how, when and by whom it was created, saved, assessed, or modified. Most word processing software records who created or modified a document, as well as the date and times of document revisions. Most email software records the dates and times emails are created, sent, opened and saved as well as the names of the originator and all recipients, including those blind copied. Some metadata, such as file dates and sizes, can easily be seen by users: other metadata may be hidden or embedded and unavailable to computer users who are not technically adept. Metadata is generally not reproduced in full form when a document is printed.

- **Residual Data**[143]: refers to any information that remains stored on a computer system after a document has been deleted. The computer does not necessarily wipe clean the disk or memory space in which the file was stored, but merely "tags" it as reusable by the system. The deleted data may not become truly unavailable until this space is re-used. Deleted files or fragments of deleted files are often retrievable for some period of

[142] Metadata (also known as embedded data) means "data about data". It is information contained within the electronic version of a document that may not be apparent in a print-out of the same document.

[143] Principle No. 6 of the *Sedona Canada Principles* states that "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 6a suggests that deleted or residual data that can only be accessed through forensic means should not be presumed to be discoverable and ordinarily, searches for electronically stored information will be restricted to a search of active data and reasonably accessible online sources. The "evaluation of the need for and relevance of such discovery should be analyzed on a case by case basis" as "only exceptional cases will turn on "deleted" or "discarded" information". With regard to metadata, some parties may be opposed to a general waiver of production of metadata; however, parties may be able to agree to limit production of metadata to specific fields.

time after deletion. This kind of information is only recoverable using special "forensic" methods, and is unlikely to have significance in most litigation.

- **Replicant Data:** is created when a software program, such as a word processor, makes periodic backup files of an open file (for example, at five minute intervals) to facilitate retrieval of the document where there is a computer malfunction. Each time the program creates a new back-up file, the previous back-up file is deleted, or tagged for reuse.[144]

- **Legacy Data:** is information in which an organization may have invested significant development resources and which has retained its importance but has been created or stored by the use of software and/or hardware that has become obsolete or replaced ("legacy systems"). Legacy data may be costly to restore or reconstruct when required for investigation or litigation analysis or discovery.[145]

- **Transient Data:** Data that is created within an application session. At the end of the session, it is discarded or reset back to its default and not stored in a database.

(II) Inquire About the Client's Document Retention Policy

At an initial client meeting, it is important to ask questions regarding what information an organization creates and the ways in which this information is used and stored. It is also prudent to ask questions regarding an organization's document retention practices which inquiries will assist in revealing the clients computer systems and data sources. The following questions should be asked of an organizational client:

- Do you have a document retention (or records management) policy? If so, is it a written policy?

- If yes, when was the policy implemented?

- Does the document retention or records management policy include an electronic document readiness plan?

- Is the policy enforced? By whom? How?

- If yes, did the policy change during [insert relevant time period]?

- If yes, are you prepared to produce the policy/policies or electronic discovery readiness plan?[146]

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[144] *Ontario Guidelines, supra* note 25 at 5.

[145] See The Sedona Conference® Glossary for E-Discovery and Digital Information Management, A Project of the Sedona Conference® Working Group on Electronic Document Retention and Production (WG1) RFP + Group, May, 2005.

[146] For a detail discussion of this issue see The Sedona Conference® "Jumpstart Outline" prepared by Ariana Tadler for The Sedona Conference® Institute's program entitled "Getting Ahead of the e-discovery Curve: Strategies to Reduce Costs & Meet Judicial Expectations" held March 13-14, 2008.

In this regard, counsel should ensure that the following individuals have been consulted:

- members of the business units or departments responsible for the subject area relevant to the litigation (who will be able to assist in identifying factual issues that may arise in the case and the documentation/ESI relevant to those issues);
- an individual knowledgeable about the client's records management practices, including archiving procedures and policies regarding the back-up and preservation of ESI;
- an individual familiar with the client's information technology systems and architecture;
- an individual in a position of responsibility and influence who is knowledgeable regarding the operations and internal relationships within the client organization, who will be able to identify the most efficient means of locating and identifying relevant sources of information and who will be able to answer the tough questions, such as the importance of the litigation to the organization at issue;
- an external service provider, who can assist in ensuring that the right questions are asked regarding the possible sources of data;
- in-house counsel (to the extent an organization has internal counsel), who should be closely involved in the discussions involving the identification, location and preservation of relevant documentation and ESI.[147]

(III) Identifying the Key Custodians of Electronic Documents

In order to identify the sources of potentially relevant documentation, including ESI, it is important to identify the key participants or custodians of potentially relevant information. In conferring with your client, they should be asked the following types of questions:

- Given the facts of the case, who are the key custodians of potentially relevant information?
- To what extent has the information in the possession, custody or control of the key custodians been preserved? For example, have any of the key custodians left the organization and if so, what steps were taken to preserve information in their custody, possession or control?
- What efforts have been made to date and what, if any additional efforts are underway to preserve the information?[148]

[147] "Preparing for a Meet & Confer: Reflections on Best Practices", Robert Deane, Kelly Friedman, Ronal Hedges, Glenn Smith, for the First Annual Sedona Canada Conference® Institute's program entitled "Getting Ahead of the E-Discovery Curve" held October 23-24, 2008

[148] For a detail discussion of this issue see The Sedona Conference® "Jumpstart Outline" prepared by Ariana Tadler for The Sedona Conference® Institute's program entitled "Getting Ahead of the e-discovery Curve: Strategies to Reduce Costs & Meet Judicial Expectations" held March 13-14, 2008.

In a perfect world, the client will have a records retention plan that incorporates a litigation hold/electronic discovery plan, that identifies a team of people who are entrusted with the task of identifying, collecting and preserving potentially relevant ESI and paper records. However, many, if not most, organizations do not have a highly developed policy in place, or if a formal written policy exists, they do not actively or systematically adhere to that policy.

Even where a records retention policy is in place, it is necessary to determine whether or not the relevant evidence has been identified, located and preserved. The following questions should therefore be asked concerning the client's current and former databases and file servers on any potentially relevant networks.

(IV) Inquire About the Client's Computer System and Network

To best preserve relevant information and locate it, at the outset, learn and understand the following about your client's computer system:

- What are the various locations of computer data files used in the organization, both active and archived (this may include computer files on an employee's computer or other device, whether at home or at the office). In this regard, it may be necessary to identify the key employees whose computer data files may be relevant;

- Determine what databases, e-mail, word processing documents and other computer data are relevant to the dispute;

- Do you use, for any purpose, customized applications programs? If yes, please describe;

- Determine the cost of locating, reviewing and producing relevant information (this would include the cost to convert or extract data from legacy systems into a useable format for analysis and production);

- Determine the structure of the e-mail system. (Since e-mail is one of the most sought-after forms of electronic information, one must have a clear understanding of a client's e-mail system. This should include present and prior e-mail systems that the client used at the time period relevant to the litigation, such as Lotus Notes, Microsoft Outlook, etc.);

- Determine what document and other computer data file retention policies are in place, and whether there is an immediate necessity of stopping the deleting or purging of data files that may be relevant to the case;

- Determine accessibility issues for each computer location, device or media such as passwords, security and encryption keys;

- Determine if transient electronic data may be relevant and if necessary to enable the party to continue business in the normal course, consider segregating responsive electronic data on a dedicated computer for storage and review;

- Determine the necessity of retaining a forensic specialist to assist in the discovery and/or disclosure of computer data;

- Avoid spoliation charges by ceasing the automatic recycling of back-up tapes and installation of new hardware once you are put on notice that a claim is going to be asserted; and

- Determine the capability of your client to search and retrieve data requested by the opposing party.

A Word About Email

Email is relevant to most every case in today's world. As such, questions should be posed of your client in situations where email evidence will be a significant component of the documentary production. The questions below help to illustrate the kinds of inquiries that may be relevant to many cases today:

- Identify the systems (client and server-side applications) used for email and the time period for the use of each system, including any systems used at facilities located overseas or at other offices;

- Do you maintain email servers at any of all of the company's divisions/business units/locations/offices that exist separately or in addition to the company wide server?

- Are end-user emails that appear in any of the following folders stored on (i) end¬user's hard-drives, (ii) an email server, or (iii) a server of a third party application service provider:

- in box

- sent items

- delete or trash folder

- end user stored mail folders?

    (i) Have any of your e-mail systems changed since [insert relevant time period]?

    (ii) Did you, at any time, have a system that maintained electronic copies of all emails sent or received by certain of your employees? Do you have such a system now?

    (iii) If so, describe the systems and date(s) of first use.[149]

A Word About Network Servers and Data Storage

To best preserve relevant information and locate it, at the outset, learn and understand the following about your client's network servers:

[149] For a detailed discussion of this issue see The Sedona Conference® "Jumpstart Outline" prepared by Ariana Tadler for The Sedona Conference® Institute's program entitled "Getting Ahead of the e-discovery Curve: Strategies to Reduce Costs & Meet Judicial Expectations" held March 13-14, 2008.

- Do you use, for any purpose, a network-based operating system? If yes, please describe.

- Do you have a system that serves to back up the information managed and/or stored on the network(s)?

    (i) If yes, do you have at least one computer backup of each of your network servers for each month for the period [insert relevant time period]?

    (ii) If not, for which months do you/ do you not have at least one complete backup?

    (iii) For those months, if any, for which you do not have a complete backup, do you have incremental backups or other backups for which a full backup can be created of all data as of a given date in each such month?

    (iv) If so, please describe the nature of such incremental or other backups and identify the months for which you have them.

- Can specific files contained on network backups be selectively restored?

    (i) How? By what means?

    (ii) Have you ever done this before?

    (iii) In what context? Is the context such that the data restored might be deemed relevant in the context of the current litigation?

- As a matter of firm policy, do you overwrite, reformat, erase, or otherwise destroy the content of the backups of your network servers on a periodic basis?

    (i) If so, under what circumstances?

    (ii) If so, what is the rotation period?

- Do you maintain a company-wide intranet or other database accessible to any or some employees that provides/stores potentially relevant information? [Consider being more specific, eg, regarding [a particular subject]?

- Do you maintain network servers at any or all of the Company's divisions/business units/locations/offices/subsidiaries that exist separately from or in addition to the Company wide server(s)?

(i) If yes, to what extent do any of those servers store any potentially relevant information in the context of this litigation?

Ask follow-up questions consistent with the network server-based questions above.[150]

(I) The Nature of the Case Will Assist

In many respects, the approach to identifying potentially relevant ESI should be no different than the approach one would take in a traditional paper case. At the outset of the litigation, counsel needs to review with the client, the nature of the claim or defence. Such an analysis necessarily must include the elements of the alleged causes of action together with the asserted or potential defences. The nature of the dispute will help to determine the kinds of documentation that are relevant to the issues. In addition, counsel needs to review with the client the key players or participants within the organization, the kinds of documentation, both paper and electronic, that is generated by the organization and where the potentially relevant ESI may be found. Counsel must now integrate knowledge of the client's organization and internal policies, procedures, practices and relationships, its system architecture (data map) with a thorough and thoughtful understanding of the nature of the case at hand.

It is important to note that the nature of the case will help to define the type and source of ESI that should be sought. For example:

- A case involving internet usage will focus on internet logs, usage patterns, browser history, downloaded Internet files, etc;

- The documentation relevant to a breach of contract case may include mails between two parties that set out the terms of the agreement or electronic data generated by an electronic ordering system pursuant to which an order was confirmed for shipment as well as the standard "contract" document which may or may not be an electronic document;

- A wrongful dismissal case or case involving misuse or theft of confidential information by a former employee may concern the "unlawful use" by that employee of the internet to "transfer" corporate information via email to their new employer. Similarly, a wrongful dismissal case may involve employees engaged in other illicit activities such as viewing of pornography from corporate computers. This type of case will also focus on downloaded internet files, internet logs, e-mail, cookies, temporary files, websites stored on favourite folders, and would mostly likely require hard drives to be mirror-imaged[151] or "ghosted" to "preserve" the evidence and ensure that the chain of custody is maintained.

[150] The Sedona Conference@ "Jumpstart Outline" prepared by Ariana Tadler for The Sedona Conference@ Institute's program entitled "Getting Ahead of the e-discovery Curve: Strategies to Reduce Costs & Meet Judicial Expectations" held March 13-14, 2008.

[151] Mirror-imaging is a forensic document retrieval and retention procedure designed to capture and preserve the relevant metadata before it is intentionally or mistakenly altered through usage. This process ensures the integrity of an electronic record at a specific point in time.

- A party's network or Intranet may also contain relevant data and shared areas such as public folders, discussion databases and shared network folders, that do not belong to any specific employee but which might be relevant to a lawsuit involving product liability issues;

- In cases involving allegations of fraud, theft of confidential information or where the "chain of custody" of computer usage or abuse of computer usage is relevant, it is important to take steps to preserve that chain of custody. It is in these kinds of cases that metadata is most likely to be relevant and producible. Therefore, unless the producing party is aware or should be reasonably aware that particular metadata is relevant; the producing party should have the option of producing all, some or none of the metadata.

- A case involving a business dispute concerning anti-competitive matters would be more likely to focus on electronic messaging, customer databases, memos and letters, sales figures and marketing messages.