From Peruvian Guano to Electronic Records: Canadian E-Discovery and Records Professionals*

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RÉSUMÉ L'augmentation exponentielle des documents numériques a mené les archivistes et les gestionnaires de documents à développer des approches de plus en plus sophistiquées pour gérer et conserver ces documents, non seulement pour appuyer les opérations quotidiennes d'une organisation, mais aussi pour faciliter le repérage de ces documents dans l'éventualité d'un procès. Le processus d'administration de la preuve électronique a ajouté des nouvelles pressions aux responsabilités des professionnels de l'information, puisque les organisations sont tenues responsables des documents qu'elles rendent disponibles aussi bien que de ceux qu'elles ne peuvent pas fournir. En Amérique du Nord, les décisions des tribunaux américains par rapport aux questions de l'administration de la preuve électronique ont grandement éclipsé celles des tribunaux canadiens. Cet article fournit une perspective historique de l'émergence de l'administration de la preuve électronique au Canada et commente des liens entre les professionnels de l'information et les nombreuses décisions judiciaires canadiennes, de même qu'avec le processus d'administration de la preuve électronique.

ABSTRACT The exponential growth of electronic records has led archivists and records managers to develop ever more sophisticated approaches to manage and preserve these records, not only to support an organization's daily operations but to alleviate the records retrieval burden in the event that the organization encounters litigation. The electronic discovery process has added additional pressure to the responsibilities of records professionals by holding organizations accountable for the documentation they disclose as well as that which they cannot produce. In North America, American

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court rulings on e-discovery issues have largely overshadowed those in Canada. This article provides a historical perspective of the emergence of e-discovery in Canada, and discusses the relationship records professionals have with numerous Canadian judicial decisions and the discovery process.

Introduction

The digital age has posed many new challenges for modern society. Rapidly changing digital and communication technologies, the ability to copy and disseminate documents with the push of a button, and an exponential increase in the volume of information to be managed have caused information professionals to re-examine long-standing principles and practices. Just as archivists and records managers have been at the forefront of adapting to these new challenges, other professions find themselves in similar situations. Among those is the legal profession. Since the nineteenth century, lawyers and judges have relied on the pre-trial procedure of discovery, the process of "identifying, locating, securing, and processing information and materials for the purpose of obtaining evidence for utilization" in legal action.[1] Until recently, discovery has received little attention by legal professionals since locating, identifying, reviewing, and preparing paper-based information for a legal proceeding has typically been a straightforward process. The ability to create and transmit information in electronic form has changed this. The discovery of electronically stored information (ESI), referred to as electronic discovery or e-discovery, has attracted more attention from lawyers and judges because the size and scope of the process has dramatically increased. As legal teams search for ways to expedite identifying, retrieving, reviewing, and producing all relevant information for litigation, it has become apparent that records professionals may play an important role in this legal process.

This article focuses on two aspects of e-discovery. First, it discusses the origins of the discovery process and the rise of e-discovery in Canada. This historical glimpse provides an important context for understanding many of the current challenges facing organizations that may encounter litigation. Second, the article raises issues related to the roles and responsibilities of records professionals during discovery. Due to their professional obligations and the policies they oversee, archivists and records managers not only help ensure the preservation of the appropriate documentation but facilitate its access and retrieval while being able to better account for its absence.[2] As the costs of

1 "The Sedona Conference Glossary: E-Discovery & Digital Information Management," in *The Sedona Conference*, 2nd ed. (December 2007).

2 Throughout this article, the terms "preservation" and its verb "preserve" are used in the legal sense, that is, to retain information for the duration of a legal proceeding.

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litigation continue to rise, primarily due to the expenses associated with the discovery process, records professionals may help their respective organizations reduce financial pressures associated with legal action by curtailing the time and resources needed to retain, acquire, and produce documentation; in doing so, these actions also reduce the risk of court-issued fiscal or other legal penalties.

Discovery Defined

During the discovery process, an organization's legal team must work with records professionals, IT staff, and other employees to efficiently identify, preserve, and retrieve all the necessary, relevant information for a judicial proceeding. Once the appropriate information is obtained, it must be reviewed to verify that it is relevant and not a privileged document;[3] it then must be prepared (i.e., transferred into the appropriate form or requested format) and delivered to the requesting party.[4] Because certain information may be sensitive in nature or potentially damaging to the organization's legal case, it is not uncommon for parties to contest the disclosure of information for various reasons, such as excessive burden in retrieving it, privacy concerns, or an insufficient argument to warrant its production. Despite the claims that a party may make in order to prevent the discovery of some information, it is clear that failing to adhere to discovery orders is a serious offense; violating these requests may cause an organization to lose credibility within its field, face crippling financial penalties, or incur prison sentences for its senior management.

The purpose of discovery is to either make a case or realize there is no case to be made.[5] This does not mean that "discovered" documents would be admissible as evidence in court: discoverability does not equate to admissibility. Justice C.R. Wimmer of the Saskatchewan Court of Queen's Bench made this apparent in his ruling in *Milton Farms Ltd. v. Dow Chemical Canada Inc.* (1986) where he stated, "[o]ne object of the rule is to permit a plaintiff access to documents and information by which relevant facts might be manifested. It does not follow that because a plaintiff is, upon discovery, given access to documents or information that they will, of themselves, constitute admissible

3 A party has a legal right to withhold certain information considered as private, such as communications between the party and its attorney. Such information may be withheld unless the opposing party "can show that (1) the information is directly relevant to the case, and (2) the need for the information outweighs the defendant's need for nondisclosure." Bryan A. Garner, ed., *Black's Law Dictionary*, 9th ed. (St. Paul, MN, 2010), s.v. "privacy privilege."

4 For a thorough outline of the discovery process see the "Electronic Discovery Reference Model," available at http://edrm.net (accessed on 10 January 2010).

5 Paul Matthews and Hodge M. Malek, *Discovery* (London, 1992), p. 3.

evidence…."[6] As observed in *Bristol-Myers Squibb Co. v. Apotex Inc.* (2003), the ultimate objective of the discovery process is to "simplify proof at trial and … to narrow the issues which remain in dispute."[7] Unfortunately, this does not always occur, especially in the digital world. Electronic information has only compounded the discovery process and, in many instances, made it extremely contentious.

By the early 1980s, legal professionals realized that electronic information would quickly become an integral, albeit challenging, component of the discovery process.[8] While few would argue that ESI is any less discoverable than its paper counterpart, several authors have identified certain key characteristics of ESI that distinguish it from analogue formats.[9] First, the vast number of electronic documents and their dispersal throughout an organization add to the cost and burden of the discovery process by requiring extensive staff time to assist the legal team. There are also risks associated with the persistence of ESI. Simply pressing the "delete" key is not enough to purge a document from a computer system, and North American courts have ordered organizations to recover "deleted" information so it may be disclosed. Furthermore, the improper handling of deleted ESI (e.g., utilizing software that eliminates deleted information) may raise spoliation issues.[10] The dynamic nature of ESI (i.e., the notion that it is easy to duplicate, move, and manipulate), not only presents challenges in locating and preserving it, but also, as George Paul writes, threatens a document's integrity and authenticity.[11] Finally, ESI also poses privacy and accessibility concerns.[12] In many cases, the sheer volume of

6 *Milton Farms Ltd. v. Dow Chemical Canada Inc.*, [1986] SJ No. 600 (QL), QB No. 2805 of 1983 JCS. Due to the extensive number of court cases cited in this article and their heavy use of acronyms, readers should consult the Appendix for clarification of the abbreviations.

7 *Bristol-Myers Squibb Co. v. Apotex Inc.*, [2003] FCJ No. 1725 (QL) at para. 14, FCA 438.

8 David V. Kenner, "Computerized Litigation Support Systems and the Indigent: Discovery or Disaster," *Columbia Human Rights Law Review*, vol. 14, no. 1 (Spring–Summer 1982), pp. 143–74 and David U. Strawn, "Discovering Computerized Records," *American Bar Association Journal*, vol. 71, no. 4 (April 1985), pp. 72–74.

9 Cameron G. Shilling, "Electronic Discovery: Litigation Crashes into the Digital Age," *The Labor Lawyer*, vol. 22, no. 2 (Fall 2006), p. 209. See also Daniel R. Murray, Timothy J. Chorvat, and Chad E. Bell, "Taking a Byte out of Discovery: How the Properties of Electronically Stored Information Have Shaped E-Discovery Rules," *Uniform Commercial Code Law Journal*, vol. 41, no. 1 (2008), pp. 35–49.

10 Spoliation is the "intentional destruction, mutilation, alteration, or concealment of evidence." Garner, s.v. "spoliation." See also Shilling, p. 211.

11 George L. Paul, *Foundations of Digital Evidence* (Chicago, 2008), pp. 15–31.

12 In the 2009 Pennsylvania case of *Brooks v. Frattaroli*, PICS Case No. 09–1709 (CP Lebanon Oct. 5, 2009), Common Pleas Judge Bradford H. Charles stated: "Without question, discovery of ESI can provide unprecedented opportunities for determining truth and preventing fraud … On the other hand, unrestricted access to an opposing party's ESI creates tremendous potential for discovery abuse and invasion of privacy. Somehow, the legal system must develop a balanced approach that uses the truth gathering potential of

records to be preserved and disclosed has made it impractical for a legal team to review each item and determine if it contains privileged information that should not be disclosed. The increasing use of keyword searching to locate relevant documentation has increased the possibility that privileged information may be accidentally disclosed.[13] Also, because rendering ESI is dependent upon software to access and view it,[14] this may prevent the requesting party's access to the information if the party does not have the necessary technology and resources capable of rendering it. Legal professionals continue to grapple with these and other issues related to e-discovery, primarily based on developments in the United States.[15] Surprisingly, only a few authors have considered how the Canadian courts have approached e-discovery.

Literature Review

There are only a few major publications dedicated to e-discovery in Canada.[16] In addition to these works, the Continuing Legal Education Society of British Columbia held three legal seminars on electronic discovery between 2001 and 2008. Published in three separate volumes, the seminar materials include discussions about the emergence of e-discovery and privacy issues with email,[17] technology and admissibility issues,[18] and pre-litigation management and the handling of ESI.[19]

ESI without abusing a litigant's legitimate expectation of privacy." As cited in Peter Hall, "Pa. Court Weighs in on E-Discovery," *Pennsylvania Law Weekly* (19 October 2009), http://www.law.com/jsp/article.jsp?id=1202434690369&rss=newswire (accessed on 6 January 2010).

13 The Sedona Conference WG [Working Group] 1, "The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery," *The Sedona Conference Journal* 8 (Fall 2007), pp. 189–223.

14 Luciana Duranti and Kenneth Thibodeau, "The Concept of Record in Interactive, Experiential and Dynamic Environments: The View of InterPARES," *Archival Science* 6 (2006), pp. 26–33.

15 For an excellent bibliography of monographs, articles, and websites dating back to 1991, see Paul Richert, "Electronic Discovery Bibliography," *Akron Law Review* 42 (2009), pp. 419–30.

16 Bradley J. Freedman, "Discovery of Electronic Records Under Canadian Law: A Practical Guide," *Intellectual Property Journal*, vol. 18, no. 1 (May 2004), pp. 59–81; Oleh Hrycko, *Electronic Discovery in Canada: Best Practices and Guidelines* (Toronto, 2007); and Todd J. Burke and cont., *E-Discovery in Canada* (Markham, 2008).

17 Rupert M. Shore, *Electronic Evidence: Materials Prepared for the Continuing Legal Education Seminar, Electronic Evidence, held in Vancouver, B.C. on June 1, 2001* (Vancouver, 2001).

18 David Wotherspoon, *Electronic Evidence and eDiscovery: Materials Prepared for the Continuing Legal Education Seminar, Electronic Evidence and eDiscovery 2006: The Brave New World, held in Vancouver, B.C. on April 27, 2006* (Vancouver, 2006).

19 Graham J. Underwood, *Electronic Evidence: Materials Prepared for the Continuing Legal Education Seminar, Electronic Evidence 2007, held in Vancouver, B.C. on October 5, 2007*

Overall, these sources serve as surveys intended for lawyers, judges, and law students. While they all include discussions of Canadian rulings pertinent to the specific subject matter, none offers any insight into the historical development of e-discovery in Canada. As this article discusses, the root of several problems associated with e-discovery can be traced back to one nineteenth-century English ruling. This article contends that Canadian courts have stubbornly upheld this one ruling despite the drastic growth of information and its dynamic changes that warrant new approaches to the discovery process. Additionally, the majority of these documentary sources include varying amounts of analysis of American rulings on the subject of e-discovery. These discussions result from the presumption that American decisions influence the Canadian courts, which is debatable. For example, in a 2008 article in the *New York Times*, Adam Kiptak noted that from "1990 through 2002 … the Canadian Supreme Court cited decisions of the United States Supreme Court about a dozen times a year … In the six years since, the annual citation rate has fallen by half, to about six."[20] In support of Kiptak's observations, only a few Canadian e-discovery cases have referenced US court opinions, for example, *Roeske v. Grady* (2006);[21] *Air Canada v. WestJet Airlines Ltd.* (2006);[22] and *Zahab v. Salvation Army* (2008), which cites the now infamous *Zubulake v. U.B.S. Warburg LLC* (2004) case in its discussion of destruction of evidence and spoliation.[23] This is not to say that the lessons learned from American courts are not valuable. In fact, it is nearly impossible to exclude references to US decisions because these courts continue to serve as the vanguard for many e-discovery issues. This article limits the amount of attention given to American cases, not because they are unimportant, but in order to emphasize lesser-known Canadian rulings.

The legal literature also fails to acknowledge the roles that records professionals play in the e-discovery process. While Hrycko includes a short chapter on document retention policies, he overlooks the fact that records professionals are typically responsible for creating or implementing them.[24] Furthermore, Hrycko and other legal scholars argue that lawyers need to work with an organization's IT department in order to locate, retain, and retrieve the appropriate information for a case, neglecting the role of records professionals in understanding what information is produced within the organization and by whom. The only crossover between the legal profession and records profession-

(Vancouver, 2007).

20 Adam Kiptak, "U.S. Court is Now Guiding Fewer Nations," *New York Times* (18 September 2008), p. A1.

21 *Roeske v. Grady*, [2006] BCSC 1975.

22 *Air Canada v. WestJet Airlines Ltd.*, [2006] 81 OR (3d) 48 (ONSC), 267 DLR (4th) 483.

23 *Zahab v. Salvation Army*, [2008] 169 ACWS (3d) 918 (ONSC).

24 Hyrcko, pp. 107–12.

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als is from a small body of literature published by the Association of Records Managers and Administrators (ARMA). These few US-centric articles offer general guidance and practical advice for records professionals but typically lack any sort of case law or judicial analysis.[25]

The Origins of Discovery

The exact origins of the discovery process are unknown, but it is generally accepted that its first instances existed with Roman civil and canon law.[26] During this time, discovery served a different purpose: parties used it to give oral testimony to support their claims or argue their defense. Even when England adopted a form of discovery in its courts of equity, chancery, and law in the mid-fifteenth century,[27] the procedure was "intended not so much to inform the parties as to inform the decision maker," and "practical disclosure in chancery was only minimally and incidentally valuable to [parties] as a planning device."[28] This is contrary to its current role where, it has been argued, the discovery process is one of the most important phases of litigation. Only by the mid- to late-1800s, would it become the process by which it is known today.

The British *Evidence Act* of 1851 and the *Common Law Procedure Act* of 1854 sowed the seeds of modern discovery. These acts gave the common law courts the power to order general discovery without having to consult the Court of Chancery.[29] These seeds began to germinate in the 1870s with the introduction of the *Supreme Court of Judicature Act* of 1873 and its 1875 revision. The 1873 Act replaced the Court of Chancery, the Court of Exchequer Chamber, and the Court of Appeal in Chancery with the Supreme Court of Judicature.[30] The 1873 Act also contained a "Schedule: Rules of Procedure" section, which included a "Discovery" subsection listing three rules: Rule 25 – "right of dis-

25 John C. Montaña, "Legal Obstacles to E-Mail Message Destruction," *The ARMA International Educational Foundation* (2003); Deborah H. Juhnke, "Electronic Discovery in 2010," *Information Management Journal*, vol. 37, no. 6 (November/December 2003), pp. 34–42; Nikki Swartz, "Playing with Electronic Fire," *Information Management Journal*, vol. 41, no. 1 (January/February 2007), pp. 22–26 and "Putting Retention Management on the Right Track," *Information Management Journal*, vol. 41, no. 6 (November/December 2007), pp. 24–28; Karen Unger, "10 Critical Decisions for Successful E-discovery," *Information Management Journal*, vol. 41, no. 5 (September/October 2007), pp. 70–73; and John C. Montaña, "Strategies for Minimizing Litigation Risks, Costs," *Information Management Journal (Hot Topic Supplement)* 42 (March/April 2008), pp. 10–12.

26 Alan K. Goldstein, "A Short History of Discovery," *Anglo-American Law Review*, vol. 10, no. 4 (October/December 1981), pp. 264–65.

27 Gordon D. Cudmore, *Choate on Discovery* (Scarborough, 1993), p. 1–1; Robert B. White, *The Art of Discovery* (Aurora, 1990), p. 10, and Matthews and Malek, pp. 6–7.

28 Goldstein, p. 259.

29 Matthews and Malek, p. 7.

30 *Supreme Court of Judicature Act*, 1873, c. 66.

covery on interrogatories";[31] Rule 26 – "production of documents pleaded or proved"; and Rule 27 – "discovery as to documents." Two years later, the Act's revision included Order XXXI, "Rules of Discovery and Inspection," increasing the number of discovery rules from three to twenty-three. While discovery techniques and procedures would subtly change during the next century, these twenty-three rules would serve as the foundation to the discovery process in England and, subsequently, Canada.[32] In particular, Order XXXI would be the focal point for one of the most influential discovery rulings in Canadian case law history.

The "Age of Guano"

In Peruvian history, the period between 1840 and 1880 has been called the "Age of Guano."[33] During these forty years, Peru experienced an extraordinary economic boom from its exportation of guano, or bird excrement used for fertilizer. Historians have estimated that the country shipped more than eleven million tons of guano, generating more than US$750 million of revenue.[34] Although Peru's business spanned the globe, Britain imported nearly half of Peru's guano.[35] However, by 1879, the once flourishing guano trade virtually dissipated (primarily due to Peru's waging war against Chile), though at least one company, the Peruvian Guano Company, continued to operate.

In 1881, the Peruvian Guano Company filed a breach of contract suit against one of its British associates, the Cie Financière et Commerciale du Pacifique (hereinafter Pacific Finance Company). In the initial stages of litigation, the Pacific Finance Company produced its minute book, containing the company's proceedings as well as a few contractual documents, memos, and telegrams. As some of these documents referred to other potentially relevant materials, the Peruvian Guano Company requested that additional documentation be disclosed, based on the 1875 *Supreme Court of Judicature Act*, Order XXXI, Rule 12:

Any party may, without filing any affidavit, apply to a Judge for an order directing

31 According to White, "[i]nterrogatories are a system of discovery based upon the English practice. They are narrower in scope than oral examination" (p. 7, footnote 1).

32 Matthews and Malek, p. 7.

33 Paul Gootbenberg, *Imagining Development: Economic Ideas in Peru's "Fictitious Prosperity" of Guano, 1840–1880* (Berkeley, 1993), p. 1.

34 Ibid., p. 2. See also Gregory T. Cushman, "'The Most Valuable Birds in the World': International Conservation Science and the Revival of Peru's Guano Industry, 1909–1965," *Environmental History*, vol. 10, no. 3 (July 2005), p. 478, and W.M. Mathew, "Peru and the British Guano Market, 1840–1870," *The Economic History Review*, vol. 23, no. 1 (April 1970), pp. 112–28.

35 Mathew, pp. 112–13.

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any other party to the action to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question in the action.[36]

The Pacific Finance Company refused to produce the requested documents, arguing they were not obligated to do so since they had met the initial request (nothing stipulated they had to meet subsequent requests), and that the Peruvian Guano Company must prove that materials were willfully and wrongfully withheld. Justice Pearson of the Divisional Court ordered the Pacific Finance Company to disclose only those documents relating to contractual matters but nothing else. The Peruvian Guano Company appealed the decision. Though this appeal was upheld, a second appeal was made.

At the Queen's Bench Division Court of Appeal, Lord Justice Brett believed that the phrase in Order XXXI, Rule 12, "a document relating to any matter in question in the action" should be interpreted as broadly as possible.[37] This reasoning would lead him to issue what has become one of the most widely cited statements pertaining to discovery in Canadian case law. He declared:

> It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry.…[38]

Arguing that the documents requested by the Peruvian Guano Company may contain information which may support its case *or* the case of the Pacific Finance Company, Lord Justice Brett ordered that all the documents requested by the Peruvian Guano Company be discoverable. The decision would affect the Canadian judicial system in two ways. First, the ruling established the foundation of discovery in Canada for the next century,[39] arguably leading to

36 *Supreme Court of Judicature Act*, 1875, c. 77.

37 *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Co.*, [1882], 11 QBD 55 (CA), p. 62.

38 Ibid., p. 63, emphasis in original.

39 See *Aird v. Country Park Village Properties (Mainland) Ltd.*, [2002] FCJ No. 1131 (BC) (QL) at para. 9, 2002 FCT 837. See also *Middlekamp v. Fraser Valley Real Estate Board*, [1990] BCJ No. 523 (SC) (QL), 29 CPR (3d) 385 ("The classic test for the production of documents is set out in *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Co.*"); *Heffco Inc. v. Dreco Energy Services Ltd.*, [1995] FCJ No. 998 (FCT) (QL) at para. 11, 62 CPR (3d) 81 ("The defendants have a right to access to documents which may fairly lead them to a train of inquiry which may directly or indirectly advance their

fairer and more efficient resolutions of litigation situations. On the other hand, the "train of inquiry" clause made the scope of discovery virtually unlimited because nearly all documents pertaining to a matter may be considered relevant to a case.[40]

Herein lies one of the major challenges for the discovery process in Canada. The Peruvian Guano case has led to "broadening the avenues of fair and full disclosure to enable the party to advance his own case or to damage the case of his adversary."[41] In turn, this has caused problems of high costs associated with identifying, retrieving, reviewing, and disclosing the appropriate information, as well as prolonging pre-trial court proceedings as parties battle over documentation.[42] Even as ESI exacerbated many of these problems, the Peruvian Guano decision would go uncontested for over a hundred years – until one of Canada's first electronic discovery cases, where British Columbia Chief Justice Allan McEachern foresaw the perils and pitfalls of the broad definition of relevancy in a digital world.[43]

Peter Kiewit Sons Co. and the Rise of E-Discovery

In *Peter Kiewit Sons Co. of Canada Ltd. v. British Columbia Hydro & Power Authority* (1982), the plaintiff filed a breach of contract suit against BC Hydro & Power. During the early stages of litigation, BC Hydro & Power produced approximately thirty thousand documents as well as a twelve-page inventory of additional documents it was willing to make available. Yet, Peter Kiewit Sons sought more, arguing that the Peruvian Guano ruling justified this

case or damage the plaintiff's case: the leading authority for this proposition is *Compagnie Financière du Pacifique v. Peruvian Guano Co.*"); and *Eli Lilly Canada Inc. v. Novopharm Ltd.*, [2007] FCJ No. 1556 (ON) (QL) at para. 13, 2007 FC 1195 ("Peruvian Guano became part of the standard test of relevance, not only for the purpose of documentary disclosure, but for discovery at large").

40 Determining "relevance" has become a contentious issue among the courts. In *Reading & Bates Construction Co. v. Baker Energy Resources Corp.*, [1988] FCJ No. 1025 (FCT) (ON) (QL), 25 FTR 226, Justice McNair established a set of guidelines for determining relevance, the first principle being based on the Peruvian Guano ruling. He argued that, "[w]hat documents parties are entitled to is a matter of law, not a matter of discretion."

41 Ibid.

42 Harry Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London, 1996), p. 167.

43 One of the first Canadian cases involving the discovery of electronically stored information occurred in 1977 in *Deveau, Robert Deveau Galleries and International Fine Art Galleries v. the Greater Vancouver Antique Dealers Association et al.*, [1977] 3 BCLR 196 (BC [In chambers]). In this motion, Robert Deveau, the plaintiff, wanted to view the original tape of an interview conducted by British Columbia Television System (BCTV) in which slanderous remarks were made and subsequently broadcast. It was determined that a faithful copy of the tape would suffice instead of Deveau's watching the original tape at the television station.

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request. The debate made its way to the British Columbia Supreme Court.

Chief Justice Allan McEachern "respectfully" declined to follow the Peruvian Guano decision because "in a case such as this, where thousands or possibly hundreds of thousands of documents of only possible relevance are in question … [it] is not permissible, or reasonable … to require a party … to incur enormous expense in what may be a futile search for something which may not exist."[44] In other words, the broad scope of discovery, as declared by Lord Justice Brett, was more feasible in 1881 because the parties dealt with only a handful of materials. A hundred years later, the size and scope of discovery requests had increased exponentially, placing extra burdens on parties required to preserve, retrieve, review, and disclose tens of thousands, hundreds of thousands, or even millions of documents. Chief Justice McEachern cautioned that the escalating extent of the discovery process, along with the rising costs of litigation, might adversely affect a party's ability to prepare its claim or defense. While he could not have been more correct, his words have fallen upon mostly deaf ears.[45]

Sixteen years after Chief Justice McEachern issued his ruling, the Canadian Federal Court Rules finally incorporated electronic information into its definition of a "document." According to these Rules, a "document" is "information recorded or stored by means of any device and includes audio recording, video recording, film, photography, chart, graph, map, plan, survey, book of account or information recorded or stored by means of any device on which information is recorded or stored."[46] Thus, nearly everything, regardless of format, is discoverable.[47] This includes the contents of computer hard drives[48] (including

44 *Peter Kiewit Sons Co. of Canada Ltd. v. British Columbia Hydro & Power Authority*, [1982] BCJ No. 1599 (SC [In chambers]) (QL) at para. 23–24, 134 DLR (3d) 154.

45 According to the *Canadian Case Citations*, this case has been followed in only four other cases (though it has been considered in a number of other cases): *Boxer v. Reesor*, [1983] 43 BCLR 352 (SC); *Privest Properties Ltd. v. Foundation Co. of Canada*, [1991], 64 BCLR (2d) 41 (SC); *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada*, [1993], 29 BCAC 140 (CA [In chambers]), 48 WAC 140; and *British Columbia (Milk Marketing Board) v. Aquilini*, [1996] BCWLD 1950 (SC).

46 *Federal Court Act*, SOR/98-106, s. 222.

47 Freedman, pp. 64–65.

48 *Northwest Mettech Corp. v. Metcon Services Ltd.*, [1996] BCJ No. 1915 (SC [In chambers]) (QL) determined that a hard drive is not a document but a medium on which documents reside. More recently, in *Innovative Health Group Inc. v. Calgary Health Region*, [2008] ABCA 219, Madam Justice C.M. Conrad likened a hard drive to an electronic filing cabinet where the individual folders (not the entire cabinet) are discoverable. See also *Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen*, [2006] BCSC 554; *Desgagne v. Yuen et al.*, [2006] BCSC 955; and *Roeske v. Grady*, [2006] BCSC 1975.

"deleted" data[49]), as well as emails,[50] voice mail,[51] databases,[52] text messages,[53] websites (including Facebook),[54] blogs,[55] and Twitter messages.[56] Despite the change in format and media in which documentation is presented, the fundamental principles underlying the discovery process remain the same: information must be identified, preserved, collected, prepared, reviewed, and produced during this stage of litigation, regardless of its format. For records and legal professionals, the problem with electronic information lies not in understanding what is or is not discoverable; rather, it is the sheer volume of information that must be managed and the costs associated with appropriately disclosing the necessary information.

The Costs of E-Discovery

The financial impact of discovery has become one the process's greatest obstacles. In 1995, Woolf stated that the "key problems facing civil justice are cost, delay and complexity … [the] scale of discovery, at least in the larger cases, is completely out of control."[57] More recently, a 2009 report conducted by the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System echoed Woolf's conclusion (though made no reference to it). The Task Force bluntly argued that the discovery system in the United States, "though not broken, is badly

49 *Ireland v. Low*, [2006] BCSC 39. See also Andrew M. Mason, "Throwing Out the (Electronic) Trash: True Deletion would Soothe E-Discovery Woes," *Minnesota Journal of Law, Science & Technology*, vol. 7, no. 2 (May 2006), pp. 777–95.

50 *Singh v. Canada (Minister of Citizenship and Immigration)*, [2007] FC 69 (AB); *Atlantic Chemicals Trading of North America, Inc. v. Morizon Holdings Ltd. (c.o.b. Morizon Vitamins [China] Ltd.)*, [2005] BCSC 966; and *Front Carriers Ltd. v. Atlantic & Orient Shipping Corp.*, [2006] FC 18 (BC).

51 *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1992] 3 FC 155 (FCT) (BC).

52 *Sycor Technology Inc. v. Kiaer*, [2005] 144 ACWS (3d) 229 (ONSC) and *Andersen v. St. Jude Medical Inc.*, [2008] OJ No. 430 (SCJ).

53 At the time this article was written, there have been no reported cases in Canada involving the discoverability of text messages, though there have been a number of cases where text messages have been used in court as evidence. For example, see: *Insurance Corp. of British Columbia v. Husseinian*, [2008] BCSC 241; *R. v. Provost*, 2008 ONCJ 241; and *R. v. Bennett*, [2009] OJ No. 1088 (SCJ).

54 *Murphy v. Perger*, [2007] OJ No. 5511 (SCJ); *Kent v. Laverdière*, [2009] OJ No. 1522 (SCJ); and *Leduc v. Roman*, [2009] OJ No. 681 (SCJ).

55 *Mantua Books, Division of Senberg Management Ltd. v. Indigo Books & Music Inc.*, [2008] OJ No. 3332 (SCJ) and *Lougheed Estate v. Wilson*, [2009] BCJ No. 1264 (SC).

56 At the time this article was written, there have been no published cases involving the discovery of Twitter messages, though it is accepted that they are a discoverable technology. See Martha A. Mazzone, "The New E-Discovery Frontier: Seeking Facts in the Web 2.0 World (and other Miscellany)," *Boston Bar Journal* 53 (January/February 2009), pp. 8–11.

57 Woolf, pp. 7 and 8.

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in need of attention. In many jurisdictions, today's system takes too long and costs too much."[58]

Some estimates suggest that the discovery process may account for anywhere between 50 and 90 percent of *all* litigation costs.[59] In the United States, the Office of Federal Housing Enterprise Oversight spent nearly US$6 million, or 9 percent of its annual budget, responding to discovery requests in litigation involving Freddie Mac and Fannie Mae.[60] In *Doucet v. Spielo Manufacturing* (2007), Justice Lucie LaVigne of the New Brunswick Court of Queen's Bench estimated that during the case's first three years, each party had already spent over $235,000 retrieving and producing over 100,000 documents.[61] As Chief Justice McEachern would say in *Middelkamp v. Fraser Valley Real Estate Board* (1992), these costs may be attributed to the courts' "slavish adherence" to Peruvian Guano,[62] and it has become apparent that technology has created an unfortunate paradox for the discovery process. On one hand, it may make fuller disclosure possible, but, as the justices of the Alberta Court of Appeal remarked in *Innovative Health Group Inc. v. Calgary Health Region* (2008), the "cost of sorting and producing all the relevant information in a party's possession may put litigation beyond the economic ability of a vast number of litigants."[63]

Unlike the United States, Canada has no formal court rules or procedures for cost shifting.[64] Canadian federal and provincial civil procedure rules do not

58 Institute for the Advancement of the American Legal System, *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System* (Irvine, 2009), p. 2, http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4053 (accessed on 18 January 2010). This report disproves studies conducted in the 1980s by the Federal Justice Center and RAND Corporation arguing that there was no universal discovery problem (see Linda S. Mullenix, "The Pervasive Myth of Pervasive Discovery Abuse: The Sequel," *Boston College Law Review*, vol. 39, no. 3 [May 1998], pp. 683–90). The American College of Trial Lawyers report has been cited in the Canadian case *AstraZeneca Canada Inc. v. Apotex Inc.*, [2008] FC 1301 (ON), 337 FTR 107.

59 "Judicial Conference Adopts Rule Changes, Confronts Projected Budget Shortfalls," *The Third Branch: Newsletter of the Federal Courts*, vol. 31, no. 10 (October 1999), http://www.uscourts.gov/ttb/oct99ttb/october1999.html (accessed on 28 July 2009).

60 Andrew Conry-Murray, "Ease The Pain of E-Discovery," *InformationWeek* (1 June 2009), http://www.informationweek.com/news/global-cio/legal/showArticle.jhtml?articleID=217700666 (accessed on 24 July 2009).

61 *Doucet v. Spielo Manufacturing Inc.*, [2007] NBJ No. 254 (QL), 2007 NBQB 245. This is also a classic example of the extended duration caused by the discovery process, which had been ongoing for three years and it had yet to move beyond the discovery stage.

62 *Middelkamp v. Fraser Valley Real Estate Board*, [1992] BCJ No. 1947 (CA) (QL) at para. 18, 96 DLR (4th) 227.

63 *Innovative Health Group Inc. v. Calgary Health Region*, [2008] AJ No. 615 (QL) at para. 23, 2008 ABCA 219.

64 In the United States, Judge Scheindlin instigated the premise of cost shifting in her seminal rulings of *Zubulake v. UBS Warburg LLC*, 217 FRD 309, 311 (SDNY 2003) [also known as

stipulate which party should pay for the costs of discovery.[65] The court determines which party pays for the final costs on a case-by-case basis. For example, Alberta's Rules of Court state that, "the amount of costs and the party by whom or the fund or estate or portion of an estate (if any) out of which they are to be paid are in the discretion of the Court."[66] Each case begins with the premise that the producing party bears the costs of production (except for copies of documents and the discovery of persons, in which case, the requesting party pays).[67]

Canadian courts and lawyers have acknowledged that the Peruvian Guano ruling cannot continue to be the standard by which discovery requests are upheld. In an attempt to alleviate some of the burdens of discovery, the courts in British Columbia and Ontario have amended their court rules and procedures. These changes (which go into effect in July 2010) are designed to "limit the length and scope of discovery, and introduce the principle of proportionality into proceedings," that is, weighing the costs involved against the perceived importance and complexity of the case to determine if it should go forward.[68] While these changes may lessen some of the burden of discovery caused by Peruvian Guano, at least one lawyer from British Columbia believes the new rules may add to the cost of the discovery.[69] The exponential growth of ESI, coupled with the courts' obligation to hold organizations accountable for producing materials, will continue to make the discovery process costly, especially if the courts want to maintain fair proceedings. For example, Justice L.D. Wilkins of Alberta's Court of Queen's Bench argued in *Anderson Preece Associates Inc. v. Dominion Appraisal Group Inc. et al.* (2000) that, "the fact that production will be expensive for the respondents does not relieve [the defendants] from the obligation to provide adequate discovery of the documents."[70]

Zubulake I] and *Zubulake v. UBS Warburg LLC*, 216 FRD 280 (SDNY 2003) [also known as *Zubulake II*]. See also Shilling, pp. 217–25 and Mohammad Iqbal, "The New Paradigms of E-discovery and Cost-shifting: Determining who Pays for Electronic Discovery," *Defense Counsel Journal*, vol. 72, no. 3 (July 2005), pp. 283–97.

65 Susan Wortzman and Susan Nickle, "The Costs of E-Discovery: Traditional Rules May Not Apply," in *E-Discovery in Canada*, p. 87, and Hrycko, pp. 171–75.

66 *Alberta Rules of Court*, Alta. Reg. 390/1968, 2009, s. 601(1).

67 Hrycko, p. 172.

68 Katherine Reilly, "Dramatic Changes on the Horizon for B.C.'s Civil Procedure Rules" (24 February 2009), http://www.langmichener.ca/index.cfm?fuseaction=content.contentDetail&ID=10465&tID=244 (accessed on 8 January 2010). See also Daniel B. Garrie and Maureen Duffy-Lewis, "Conquering the Tower of e-Discovery Babel: New Age Discovery for the 21st Century," *Scripted*, vol. 6, no. 1 (April 2009), pp. 124–31.

69 Stan Rule, "New Civil Procedure Rules in British Columbia, Effective July 1, 2010" (7 July 2009), http://rulelaw.blogspot.com/2009/07/new-civil-procedure-rules-in-british.html (accessed on 8 January 2010).

70 *Anderson Preece Associates Inc. v. Dominion Appraisal Group Inc. et al.*, [2000] AJ No. 459 (QL) at para. 4, 2000 ABQB 254.

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Several years later, British Columbia Supreme Court Justice Victoria Gray in *Walter Construction (Canada) Ltd. v. Greater Vancouver Sewerage and Drainage District* (2003), made a similar statement when she ordered Greater Vancouver to produce a number of electronic documents in addition to the 168 boxes of documents it had already disclosed. She lamented that it is "unfortunate that the nature of Walter's claim against [Greater Vancouver] requires such extensive production of documents, which will likely be expensive. It is inevitable in light of the nature of the dispute."[71] The cost of preserving, retrieving, reviewing, and producing requested documentation is an inevitable expense, but, as will be discussed, records professionals may help alleviate some of these fiscal pressures.

Failure to Disclose

Though they are quite similar in language, most Canadian provinces and territories have their own procedural rules for addressing the failure to comply with discovery orders. For example, Rule 16.13(1), "Deletion or Destruction of Electronic Information," of Nova Scotia's Civil Procedure Rules reads:

> Deliberate or reckless deletion of relevant electronic information, expunging deleted information, or destruction of anything containing relevant electronic information after a proceeding is started may be dealt with under Rule 88 – Abuse of Process.

Additionally, Rule 16.13(2) states:

> Failure to comply with an order directing preservation of electronic information may be dealt with under Rule 89 – Contempt.[72]

Though most other provinces and territories do not contain such strong language, it is clear that the Canadian courts have little tolerance for a party unable to meet discovery demands. In 1998, Justice Peter G. Jarvis of the Ontario Court of Justice expressed this sentiment in *Bawas Gas Bars Ltd. v. Kiosses* (1998): "I have no sympathy," he declared, "for those who fail to produce relevant documents and fail to satisfy undertakings given on examination for discovery. The complete production of relevant documents and the reliability of counsel are important underpinnings of the civil litigation process."[73] The ease with which users can copy, manipulate, or delete electronic information places extra pressure on records professionals to not only account for all the records

71 *Walter Construction (Canada) Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2003] BCJ No. 2389 (QL) at para. 18, 2003 BCSC 1582.

72 *Nova Scotia Civil Procedure Rules*, 2009, sections 16.13(1) and 16.13(2).

73 *Bawas Gas Bars Ltd. v. Kiosses*, [1998] OJ No. 5450 (SCJ) (QL) at para. 35, 83 OTC 241.

of their organization but ensure that employees' records management practices do not put the organization at further risk during litigation.

In circumstances where a party does not produce the appropriate information, an accusation of spoliation (the act of intentionally or negligently destroying documents relevant to anticipated or actual litigation) may occur.[74] A party accused of this action may face severe consequences because spoliation is often associated with the maxim *omnia praesumuntur contra spoliatorem* (all things are presumed against the wrongdoer).[75] In other words, materials that cannot be disclosed (because they cannot be located or have been destroyed) may be assumed to be unfavourable to the party unable to produce them. In situations where the court determines that an act of spoliation occurred, the court may issue sanctions;[76] these penalties may include additional orders of discovery,[77] financial penalties,[78] or, in the event that the case proceeds to trial, an adverse inference ruling ("a detrimental conclusion drawn by the fact-finder from a party's failure to produce evidence that is within the party's control").[79] However, being accused of spoliation does not always result in sanctions, especially in Canada where the courts have deviated from *omnia praesumuntur contra spoliatorem*.[80]

74 Lloyd S. van Oostenrijk, "Paper or Plastic?: Electronic Discovery and Spoliation in the Digital Age," *Houston Law Review*, vol. 42, no. 4 (2005), pp. 1163–1203, and Thomas C. Tew, "Electronic Discovery Misconduct in Litigation: Letting the Punishment Fit the Crime," *University of Miami Law Review*, vol. 61, no. 2 (January 2007), pp. 289–330. In the United States there have been several high-profile cases involving spoliation of electronic information, the most notable being *Zubulake v. UBS Warburg LLC*, 217 FRD 309, 320 (SDNY 2003) and *Coleman (Patent) Holdings, Inc. v. Morgan Stanley & Co.*, No. CA 03-5045 AI, 2005 WL 674885 (Fla. Cir. Ct. 23 March 2005).

75 Ann McLean, "Report on Spoliation of Evidence," *British Columbia Law Institute Report No. 34* (November 2004), p. 3. See also *McDougall v. Black & Decker Canada, Inc.*, [2008] AJ No. 1182 (QL) at para. 15, 2008 ABCA 353 and *Commonwealth Marketing Group Ltd. v. Manitoba Securities Commission*, [2008] MBQB 319.

76 *Visx Inc. v. Nidek Co.*, [2000] FCJ No. 1535 (ON) (QL) at para. 9, 100 ACWS (3d) 327 ("Courts may impose sanctions where there is a failure to comply with the obligations imposed by the Rules of discovery"). For an elaborate analysis on sanctions see *The Pension Committee of the University of Montreal Pension Plan, et al. v. Bank of America Securities, LLC, et al.*, 05 Civ. 9016 (SAS) (SDNY 2010).

77 *Spar Aerospace Limited v. Aerowerks Engineering Inc.*, 2007 ABQB 543 and *Jay v. DHL Express (Canada), Ltd.*, [2008] PESCTD 13.

78 According to a report done by an American law firm Gibson, Dunn, & Crutcher, "fees and costs are the most common form of sanctions" in discovery cases; see "2009 Mid-Year Update on E-Discovery Cases" (Gibson, Dunn & Crutcher LLP, 2009), http://www.gibsondunn.com/Publications/Pages/2009Mid-YearUpdateonE-DiscoveryCases.aspx#1st (accessed on 8 January 2010).

79 Bryan A. Garner, *Black's Law Dictionary*, 8th ed. (2004), s.v. "adverse inference."

80 *McDougall v. Black & Decker Canada, Inc.*, [2008] AJ No. 1182 (QL) at para. 19. See also Todd J. Burke and Glenn Smith, "A Survey of E-Discovery Case Law in Canada," in *E-Discovery in Canada*, pp. 23–27.

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The precedent for the cautious approach to spoliation accusations was established in 1896 in the seminal case of *St. Louis v. Canada*, where a number of books and financial papers had been destroyed.[81] The Canadian Supreme Court unanimously ruled that the destruction of this evidence, though relevant to the case, did not constitute an act of spoliation because the materials had been disposed of without malicious intent and without the accused party having any awareness of impending litigation. Based on this ruling, in *Trans North Turbo Air Ltd. v. North 60 Petro Ltd.* (2003), Justice Veal of the Yukon Territory Supreme Court outlined a three-point test for determining if an adverse inference instruction to the jury (if the case makes it that far) should be issued.[82] First, it needs to be ascertained if "relevant evidence has been destroyed." If this criterion is met, then it must be established that "legal proceedings were pending" when the destruction occurred, and that it was an "intentional act indicative of fraud or intent to suppress the truth."[83] Though the first two conditions are by no means easy to ascertain (often a forensic scientist may be able to recover electronic materials originally perceived to be destroyed and inaccessible), the motive of intent often has the greatest bearing on a court's decision and the role of records professionals. Due to the seriousness of spoliation accusations, the accused party retains the right to defend itself against the claims.[84]

The Role of Records Professionals

As the costs for discovery and the stakes for disclosing information continue to escalate, records professionals play an increasingly important role in the discovery process. The role of archivists and records managers is to ensure their organizations know what documents exist, where they reside, and how best to preserve and retrieve them. One of the primary defenses against discovery costs is an organization's knowledge of what documentation it has and where this information is located. For any organization that has or is considering a records management program, one of the key components is the records survey or inventory. The information gathered from this survey becomes vital in the event of litigation. For organizations that have previously conducted such a survey, it is essential that it be kept up-to-date, as organizational functions change, and new records series emerge and old ones are closed.

81 *St. Louis v. Canada*, [1896] SCJ No. 5, 25 SCR 649.

82 Subsequent rulings have parsed this rule into two parts: the need to determine if the information has been destroyed, and if it was relevant to the proceedings (*Dyk v. Protec Automotive Repairs*, [1997] 151 DLR (4th) 374 (BCSC), [1998] 5 WWR 297).

83 *Trans North Turbo Air Ltd. v. North 60 Petro Ltd.*, [2003] YJ No. 47 (QL) at para. 78, YKSC 18.

84 *McDougall v. Black & Decker Canada, Inc.*, [2008] ABCA 353 and *R. v. La*, [1997] 2 SCR 680, 148 DLR (4th) 608.

Nearly all forms of information that an organization creates are discoverable; the records survey should account for them, as well as which functions create which documents and how employees manage them. The survey should record the presence of any information stored and managed on external or portable devices, the native format of this information, and how the IT department handles the migration of data, deleted data, and backup systems. Furthermore, archivists and records managers should know if employees use social networking sites such as Twitter or Facebook and/or if they contribute to blogs or other Internet sites during working hours; this information may also be deemed relevant during litigation, and thus be made discoverable. Depending on the size of the organization, in the event of litigation, it is unlikely that all of the organization's documents will be called into question at once; rather, only certain departments or units may be required to disclose information. A comprehensive records survey will help identify these key areas and assist in focusing the resources necessary to preserve and retrieve the appropriate information. Not only could these measures reduce some of the costs associated with the discovery process, they might also help ensure that discovery requests are satisfied.

Furthermore, records professionals can also account for why certain documents do *not* exist. While courts have admonished organizations for their poor records management practices,[85] there have been several instances where an organization's records retention schedules (or lack thereof) played a role in the court's ruling. As Jennifer Mohan explains, records schedules have been around since the late nineteenth century, as archivists became involved with them because of their "potential … to regulate destruction of large volumes of worthless records and preservation of valuable records."[86] While they continue to serve this purpose today, these schedules play a slightly different role from a legal perspective.

Retention and disposition policies serve as the front lines of defence during litigation, providing evidence for documentation that no longer exists and cannot be produced. According to Graham Underwood, a lawyer for the British Columbia government, a "properly implemented record management policy protects the client's business records, goodwill and reputation, intellectual property, confidentiality, and disadvantages if litigation should arise … if [such a policy] is not consistently followed, courts will view deviations from the policy with suspicion."[87] Similarly, Michael Arkfeld remarks that an "ill-conceived and unreasonable" retention schedule "will subject a company to severe legal exposure if responsive data to anticipated litigation is destroyed or

85 *R.A.R.B. v. British Columbia*, [2001] BCSC 917 and *Jay v. DHL Express (Canada), Ltd.*, [2008] PESCTD 13.

86 Jennifer A. Mohan, "Origin and Development of Records Scheduling in North America" (Master's thesis, University of British Columbia, 1994), p. 1.

87 Underwood, p. 1.1.7.

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if needed for compliance mandates."[88] Both situations have been addressed in recent Canadian cases.

The lack of a retention policy may add additional discovery costs for an organization immersed in litigation, as exemplified in *Glaxo Smithkline v. Canada* (2002). Glaxo Smithkline requested a representative of Apotex Inc. to provide an affidavit confirming that certain documentation no longer existed. Glaxo Smithkline's counsel interviewed Dr. Sherman, the chief executive of Apotex, and part of the examination concentrated on Apotex's record-keeping practices:

> Counsel: You don't seem to have a lot of documents left at Apotex dating back to those years. Is that about correct as a general statement? What is the retention policy?
>
> Dr. Sherman: There's no specific policy. People keep whatever they think is – needs to be kept, and the company has grown enormously. A lot of documents have been moved into storage. They're hard to find. If there are any, I don't know what there would be that would be relevant but ...
>
> Counsel: Did you keep Certificates of Analyses?
>
> Dr. Sherman: No.
>
> Counsel: For ranitidine? No, for ranitidine?
>
> Dr. Sherman: I wouldn't think so. Not going back that far. Not going back ten years, no.
>
> Counsel: Can you confirm that, that you don't have the Certificates of Analysis for the [1989 to 1993] period?
>
> Dr. Sherman: I don't know how one would confirm. They may be in boxes in storage somewhere. We have had so many staff changes and so many location changes. We have warehouses with different records in them and no one even knows what's there, and we do have to start throwing things out that are in storage that have not been thrown out. There may be records in there, but I couldn't really tell you.
>
> Counsel: As a policy, you normally keep Certificates of Analyses, I suppose?
>
> Dr. Sherman: No. Only as long as necessary to keep them.[89]

Based in part on this interview, Justice Eric Bowie believed that, "there may be other relevant documents and information that [Dr. Sherman] has been asked

88 Michael R. Arkfeld, *Electronic Discovery and Evidence* (Phoenix, 2006), p. 6.2D. See also Matthew J. Bester, "A Wreck on the Info-Bahn: Electronic Mail and the Destruction of Evidence," *CommLaw Conspectus* 6 (Winter 1998), pp. 75–88; Joseph P. Messina and Daniel B. Trinkle, "Document Retention Policies after Anderson," *Boston Bar Journal* 46 (September/October 2002), pp. 18–21; Bradley J. Freeman, "Discovery of Electronic Records Under Canadian Law – A Practical Guide," *Intellectual Property Journal*, vol. 18, no. 1 (May 2004), p. 80; David E. Ries, "Records Management: Current Issues in Retention, Destruction, and E-Discovery," *Pennsylvania Bar Association Quarterly* 78 (2007), pp. 139–59; Andrew R. Lee, "Keep or Toss? Document Retention Policies in the Digital Era," *Louisiana Bar Journal* 55 (December 2007/January 2008), pp. 240–47.

89 *Glaxo Smithkline Inc. v. Canada*, [2002] TCJ No. 528 (ON) (QL) at para. 6, [2003] 1 CTC 2258.

for that have not been, but could be, produced" and thus ordered him to conduct additional searches for the records.[90] The court did not impose any additional financial penalties, although renewing the search and retrieval process required an indirect cost in staff time to fulfill the demand. In other circumstances, the court has not been as forgiving.

In 1993, a woman was struck in the head by a piece of ice that fell from a building in Sudbury, Ontario. The building, owned by the Province of Ontario, was operated and maintained by Johnson Controls, Inc. The woman sued the Province for damages and the case was settled out of court for $245,000. Subsequently, in the case of *Ontario v. Johnson Controls* (2002), the Ontario government sought compensation from Johnson Controls for the cost of the settlement. Johnson Controls attempted to have the motion dismissed, arguing that it was not at fault and, even if its conduct warranted some blame, its contract with the Province had limited its duties to the extent it could not prevent the injuries to the woman. In attempting to prove its obligations with regard to servicing the building, Johnson Controls revealed during the discovery process that a box containing (possibly) relevant information had gone missing. Johnson Controls argued that the absence of these materials prejudiced its case and made it difficult to defend its position. Justice Donald Cameron rejected Johnson Controls' request to dismiss the motion, in part because:

> Johnson [Controls] bears substantial responsibility for any loss of its documents. There is no evidence of any document retention or destruction policy. A policy with a short retention period might offer some justification to dispose of "smoking guns" and other prejudicial evidence … The absence of a document retention policy also constitutes a failure to recognize the court's ability to draw an adverse inference in certain circumstances for failure to produce a document and a failure to address the practical need to retain documents once notice of a proceeding has been received.[91]

Justice Cameron opted not to draw an adverse inference or impose sanctions. In this situation, Johnson Controls was the party responsible for losing materials that would have only supported *its* claim; thus, the absent documentation had already caused enough damage to the company's case and did not warrant further penalties. Justice Cameron did, however, order Johnson Controls to pay half the Province's settlement costs.

Retention and disposition schedules also play an important role in criminal cases. In criminal law, the Crown has a duty not only to disclose, but also to preserve all relevant information pertaining to a case.[92] This contrasts with Canad-

90 Ibid., at para. 7.

91 *Ontario v. Johnson Controls Ltd*., [2002] OJ No. 4725 (SCJ) (QL) at para. 51, OTC 950.

92 Criminal law uses slightly different terminology for the discovery process using the term "disclosure" rather than "discovery."

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ian civil law where there is no common law duty to preserve property that may possibly be required for evidentiary purposes.[93] In these situations, undisclosed information may potentially cause prejudice against a party, thereby negating a fair trial. In order to make the strongest argument possible, it is not uncommon for parties to question why certain documentation has not been preserved and disclosed. Thus, to account for missing evidence, the court often scrutinizes the Crown's record-keeping practices and procedures to determine if the absence of materials resulted from unacceptable negligence,[94] deliberate concealment,[95] or the normal course of business.[96]

For example, in *R. v. Sivasubramaniya* (2002), the defendant filed an application claiming the Crown violated his rights according to sections 7 and 10 of the *Canadian Charter of Rights and Freedoms*.[97] To support his case, Sivasubramaniya sought 911 tapes and police videos relevant to his arrest for impaired driving in 2000. The Crown could not produce this evidence because the police service's retention policy stipulated that the tapes be destroyed after one month, unless required for court, a policy based on those of other police forces.[98] Justice Douglas found this completely unreasonable. He concluded that there

93 *Dawes v. Jajcaj*, [1999] BCJ No. 845 (QL) at para. 69, BCCA 237 and *McDougall v. Black & Decker Canada, Inc.*, [2008] AJ No. 1182 (QL) at para. 29. See also Freeman, p. 68.

94 *R. v. La*, [1997] 2 SCR 680.

95 *Murphy Battista v. McGivern*, [2007] BCSC 1172.

96 *R. v. Grimes*, 1998 ABCA 9; *R. v. Carosella*, [1997] 1 SCR 80; and *Purewal Blueberry Farm Ltd. v. Pitt Meadows (District)*, [2005] BCSC 1220. See also *Alvi v. YM Inc. (Sales) (c.o.b. Stitches)*, [2003] OJ No. 3467 (SCJ) (QL), OTC 799. This is a wrongful termination suit filed by Alvi. YM was found negligent for its actions in firing Alvi and ordered to give him back pay with interest. One of the main factors that caused the judge to side with the plaintiff was YM's inability to find Alvi's employment records after five years, even though the *Employment Standards Act* states that personnel files may be disposed of after three years. In his judgment, Justice Cameron writes:

> I am left with some question as to why Mr. Alvi's employment records and payroll records prior to December 15, 1995 were not produced. Counsel for YM advised that they cannot be found. The *Employment Standards Act* ("ESA") s. 16, requires retention of employment records for only three years after the employee ceases to be employed by the employer. Notwithstanding this provision, a properly run company should have a documents retention policy requiring retention of files for a reasonable period extending beyond the limitation period for civil cause of action in contract or tort and the limitation period for a reassessment under the *Income Tax Act*. Failure to do so risks a court making an adverse inference on the absence of evidence (at para. 48).

This ruling has not been referenced by any other Canadian court at the time of this article.

97 Section 7 of the Charter reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice," while section 10 stipulates: "Everyone has the right on arrest or detention: (a) to be informed promptly of the reasons therefor; (b) to retain and instruct counsel without delay and to be informed of that right; and (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful." *Canadian Charter of Rights and Freedoms*, 1982, sections 7 and 10.

98 *R. v. Sivasubramaniya*, [2002] OJ No. 195 (SCJ) (QL) at para. 44–45, 92 CRR (2d) 130.

"was no sound basis for the determination of a 30-day retention period...."[99] Though he believed the destruction of the evidence was "abusive," or unfair to the rights of the defendant, he noted that "the evidence does not establish that the destruction was for an improper motive, per se, neither does the evidence establish any proper motive."[100] In other words, the police were simply following a poorly constructed policy and did not intentionally destroy the tapes to prevent evidence from reaching court. Justice Douglas strongly criticized the police's actions, saying that, "the evidence shows a 'serious departure' from the obligation to preserve[,] which is based on an unacceptable degree of negligence. That negligence is general, in the sense that the records retention policy adopted shows a disregard for the many live issues regarding such tapes."[101] At least for these types of police videotapes, Justice Douglas argued that before ill-conceived retention periods are set forth in a retention schedule, the Crown must consider the value and purpose of the materials and how they may be used to prove the truth in court (by either party). As a result of the irresponsible destruction of the video tapes, Justice Douglas ruled in part, in favour of the defendant, and ordered a stay of prosecution.

R. v. Ward (2002) established that even a "reasonable" retention policy might still be considered inadequate if the organization fails to account for how it created its policy. This case involved documentation that the Clerk of the Ontario Court of Justice could not locate, but believed had been destroyed in accordance with its retention policies. However, Justice Ian Nordheimer did not concede the high ground to the Crown:

> I have virtually no information as to the specifics of the Ministry's document retention policy, and whether any consideration was given to the possible need for these documents for use in support of special pleas … I do not know if the Ministry, in adopting this policy, simply did not turn their minds to the effect on accused persons of destroying these documents or whether the possible impact was considered but a decision taken to accept whatever risks might arise from the consequence of it.[102]

Despite Justice Nordheimer's displeasure with the Crown, he ruled that the fact that the evidence could not be located, while "unsatisfactory," did not warrant a finding of unacceptable negligence in part because the evidence would have been insufficient to support the defendant's claim.

Contrary to these instances of the courts chastising poor records manage-

99 Ibid., at para. 47–48.

100 Ibid., at para. 63.

101 Ibid., at para. 75. See also *R. v. Bero*, [2000] OJ No. 4199 (QL) at para. 73, 137 OAC 336 ("The destruction of potentially relevant evidence is not satisfactorily explained where the destruction is occasioned by a failure to consider whether preservation of that evidence was necessary to meet the disclosure obligations of the Crown").

102 *R. v. Ward*, [2002] OJ No. 5398 (ONSC) (QL) at para. 10.

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ment practices and retention policies, there have been cases where such policies have helped vindicate a party unable to disclose information. For example, in *R. v. Carosella* (1997) the Sexual Assault Crisis Centre had destroyed a number of social worker notes in accordance with its retention policy. When considering if this action warranted a violation of the plaintiff's Section 7 Charter rights, the Supreme Court argued that to "a certain extent, the loss of material is quite inevitable, and penalizing the prosecution for each and every loss would have serious repercussions."[103] The Court ruled that the Centre's decisions did not constitute an abuse of process because it "was implementing a general policy designed to protect its clients' privacy…."[104] A similar situation occurred in *R. v. Smith* (2007) where Toronto police officers' notes, stemming from a 1992 incident, had been "destroyed in the normal course of implementing the records retention policy of the Toronto Police Services." The court proceedings from the same case had also been "destroyed under the records retention policy governing the court reporter."[105] Because the documentation had been disposed of in the normal course of business and according to retention policies, Justice W.B. Trafford did not hold the Crown liable for being unable to produce evidence that may have supported the defendant's position.

As the aforementioned examples show, when involved in litigation, an organization may come under greater scrutiny and pressure for what it cannot produce. Thus, an organization's retention and disposition policies may prove to be key factors to convince the court that information that cannot be disclosed resulted from its destruction in the normal course of business and not as a result of negligence or deceit.

However, in the digital age, retention policies need to account for more than just the records created by an organization's employees. To fully safeguard against sanctions, these policies should include procedures for the purging of deleted information from computer systems, as well as how often the institution's backup tapes are recycled. As established in *R. v. Ward* and, more recently, the US case of *Phillip M. Adams & Associates v. Dell Inc.* (2009), the courts expect an organization to explain and justify its retention policies, thus holding records professionals accountable for documentation that cannot be disclosed.[106]

Finally, once litigation is "reasonably anticipated" or a party receives a liti-

103 *R. v. Carosella*, [1997] SCJ No. 12 (QL) at para. 86.

104 Ibid., at para. 142.

105 *R. v. Smith*, [2007] OJ No. 2586 (SCJ) (QL) at para. 9 and 10, 74 WCB (2d) 537.

106 In *Phillip M. Adams & Associates v. Dell Inc., [*2009] WL 910801 (D. Utah March 30, 2009), the defendant argued that certain documents did not exist because they had been destroyed according to the company's retention and disposition policies. The judge dismissed this position because the defendant "lacked statements from management-level persons explaining its practices, or existence of any policies" (at *15).

gation hold (a legal order to preserve relevant information about a specific legal matter)[107] archivists and records professionals must suspend records disposition activities. It may be recalled that the second step of Justice Veal's sanctions test is to determine whether "legal proceedings were pending" when the destruction of documentation occurred.[108] Typically, if a judge learns that a party has destroyed information (intentionally or negligently) after it had reason to believe litigation was imminent, the court is more likely to penalize that party. Policies that inform employees about the need to suspend disposition schedules and procedures for the deletion of information should help protect against legal repercussions. This is not to say that all disposition schedules must be interrupted. Depending on the size of the organization and the legal matter, it is likely that only certain units may need to take extra steps to protect against the destruction of relevant documentation. Ultimately, comprehensive and up-to-date retention and disposition schedules, along with a policy that suspends the destruction of documentation once the organization is aware of pending litigation, may prove to be key factors to convince the court that an organization's inability to produce information in the course of legal proceedings was the result of records disposition in the normal course of business and prior to the awareness of litigation.

Conclusion

It is apparent that the Canadian courts are forging their own path in order to address the ever-expanding scope of discovery and the soaring costs of litigation in the digital era. Provinces and territories continue to develop new rules and procedures,[109] and Sedona Conference Canada will only continue to gain support as lawyers and judges rely on its recommendations and reports for legal guidance.[110] Yet, the Peruvian Guano ruling has not faded into obliv-

107 Paul G. Lannon, Jr., "The Duty to Preserve Electronic Evidence: When it is Triggered and How to Satisfy It," *Boston Bar Journal* 51 (March/April 2007), pp. 13–14, and Khristi D. Driver, "You've Got to Know When to 'Litigation Hold' 'Em: The Dangers of Failing to Preserve and Produce Electronically Stored Information," *The Alabama Lawyer* 68 (November 2007), pp. 445–50.

108 *Trans North Turbo Air Ltd. v. North 60 Petro Ltd.*, [2003] YJ No. 47 (QL) at para. 78.

109 See Reilly, "Dramatic Changes on the Horizon." Also, in 2005 the Task Force on the Discovery Process in Ontario released its "Guidelines for the Discovery of Electronic Documents in Ontario" (October 2005) providing guidance for parties and their counsel for meeting e-discovery requirements.

110 The Sedona Conference is "an institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights," http://www.thesedonaconference.org/ (accessed on 8 November 2009). In January 2008, the Sedona Conference Working Group 7, Sedona Canada, released its first publication: "The Sedona Canada Principles: Addressing Electronic Discovery," *The Sedona Conference* (January 2008). So far, these principles have been cited in two Canadian cases: *Vector Transportation*

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ion. As recently as April 2009, Justice Thomas J. Melnick of the British Columbia Supreme Court in *Bishop (Litigation guardian of) v. Minichiello* ordered the disclosure of the plaintiff's computer hard drive based, in part, on the Peruvian Guano ruling and its broad definition of relevancy.[111] While this order pertained only to the defendant's personal computer, it is alarming that the Peruvian Guano case remains firmly planted in the mindset of the Canadian courts, especially in an era where as much as 90 percent of an organization's records are in digital formats. This poses daunting challenges for records professionals who must account for, and maintain all, the records of their organization.

The implementation of reasonably designed retention and disposition schedules continues to be of vital importance to an organization. By legally justifying the destruction of documentation in both traditional paper and electronic formats, these policies effectively reduce the amount of information to be preserved, retrieved, and reviewed during litigation. Furthermore, these schedules help a party avoid being unable to explain why certain information cannot be disclosed. While archivists and records managers must ensure that records disposition is appropriately suspended when an organization reasonably anticipates litigation, records professionals also offer the knowledge needed to effectively and efficiently preserve, retrieve, and produce any documentation required during litigation. These actions will contribute to reducing the resources and ultimately the costs incurred in fulfilling judicial obligations.

Services Inc. v. Traffic Tech Inc., [2008] 165 ACWS (3d) 803 (ONSC), 58 CPC (6th) 364, and *Commonwealth Marketing Group Ltd. v. Manitoba Securities Commission*, [2008] MBQB 319.

111 *Bishop (Litigation guardian of) v. Minichiello*, [2009] BCSC 358.

Appendix

AB – Alberta
ABCA – Alberta Court of Appeal
ABQB – Alberta Queen's Bench
ACWS – All Canadian Weekly Summaries
AJ – Alberta Judgment
BCAC – British Columbia Appeal Cases
BCCA – British Columbia Court of Appeal
BCJ – British Columbia Judgment
BCLR – British Columbia Law Reports
BCSC – British Columbia Supreme Court
BCWLD – British Columbia Weekly Law Digest
BLR – Business Law Reports
CA – Court of Appeal
CF – Canadian Federal Court Reports
CJ – Court of Justice
CP Lebanon – US Common Pleas Court, Lebanon, Pennsylvania
CPC – Carswell's Practice Cases
CPR – Canadian Patent Reporter
CRR – Canadian Rights Reporter
CTC – Canadian Tax Cases
DLR – Dominion Law Reports
DTC – Dominion Tax Cases
D Utah – US District Court, District of Utah
FC – Federal Court
FCA – Federal Court of Appeal
FCJ – Federal Canadian Judgment
FCT – Federal Court of Canada, Trial Division
Fla. Cir. Ct. – US Florida Circuit Court
FRD – Federal Rules Decision
FTR – Federal Trial Review
JCS – Judicial Centre of Saskatoon
MBQB – Manitoba Queen's Bench
NBCA – New Brunswick Court of Appeal
NBJ – New Brunswick Judgment
NBQB – New Brunswick Queen's Bench
OAC – Ontario Appeal Cases
OJ – Ontario Judgment
ON – Ontario
ONSC – Ontario Superior Court of Justice
OR – Ontario Reports
OTC – Ontario Trial Cases

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PEIJ – Prince Edward Island Judgment
PESCTD – Prince Edward Island Supreme Court Trial Division
PICS – Pennsylvania Instant Case Service
QB – Queen's Bench
QBD – Queen's Bench Division
QL – LexisNexis QuickLaw
SAS – Statement on Auditing Standards of the American Institute of Certified Public Accountants
SC – Supreme Court
SCJ – Supreme Court Judgment
SCJ – Superior Court of Justice
SCR – Supreme Court Reporter
SDNY – US District Court, Southern District of New York
SJ – Saskatchewan Judgment
Sask. R. – Saskatoon Reports
SKQB – Saskatchewan Court of Queen's Bench
TCJ – Tax Court of Canada Judgment
WAC – Western Appeal Cases
WCB – Weekly Criminal Bulletin
WL – Westlaw database
WWR – Western Weekly Reports
YKSC – Yukon Supreme Court
YJ – Yukon Judgment

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