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Action 33: A. Doyle, with assistance from the Graduate Research Assistants assigned to case study 10(1), to develop “what if” scenarios to demonstrate e-mail management issues and concerns that would resonate with Dr. Kurth and other senior managers (J. Mohan)

Preface

It was decided at the May 2008 InterPARES 3 TEAM Canada Plenary Workshop to create a “what if” scenario document regarding the management of electronic mail (e-mail). The purpose of this document is to explain the consequences of poor e-mail management and convince organizations, or specific departments within them, that the acts of creating, storing, and preserving e-mails cannot and should not be overlooked or taken lightly.

While doing the background research for this action item, it soon became clear that there was no clear way to formulate a “what if” document due to the scant amount of Canadian law literature that offered few, if any, bottom-line court ruling figures (i.e., the penalties and fines that the judges handed down to parties). In part, this is due to the fact that the discovery process is meant to occur in advance of the trial in order to allow each party to ascertain the cited claims and strength of the case (and in some situations, prevent the case from proceeding to trial).¹ Another explanation for the lack of Canadian case law literature on e-discovery is that, while some costly cases have occurred in the United States, to date, no similar high profile cases exist in Canada. As such, the scenario situations quickly deviated into a broader examination of Canadian case law regarding rulings on electronic discovery (e-discovery), specifically those pertaining to e-mail.

Equally important to organizations and their departments is to understand what documents are discoverable and in which circumstances. While it may be the general belief that they sky is the limit in terms of what a party may request for discovery, Canadian courts have dictated otherwise. There has been a surprising amount of sympathy toward those parties facing requests for discovery. In particular, the courts have been vehemently opposed to ‘fishing expeditions’—or those requests for documentation that lack sufficient evidence to justify them; yet, this hardly means organizations are off the hook (so to speak). In the following document, “Canadian E-Discovery Case Law,” several of the cases show that it only takes one e-mail (the smoking gun) for a judge to expand the scope of discovery or find a party at fault. Additionally, what is implied in nearly all these cases, especially those where documents have been produced, is that the supplying party had the ability to retrieve them, and in those instances where this has not happened the court typically admonishes the party and rules in favour of the requesting side.

It is the purpose of this document to shed some light on the positions of the Canadian judicial system and where it currently stands in terms of e-discovery and even e-mail discovery. Although it does not address bottom-line financial figures, it should motivate organizations to realize that the courts take e-discovery very seriously and that there are major consequences if a request for discovery is upheld but not satisfied.

¹ Archibald, Todd L. and James C. Morton, *Discovery: Principles in Practice* (Toronto: CCH Canadian Limited, 2004), 3.

Canadian E-Discovery Case Law

Introduction

During the past ten years, there can be little doubt that electronic discovery (e-discovery) has become one of the biggest topics in case law throughout North America. With digital information being created, stored, and managed at an exponential rate, requests for discovery, or access to information, may start a daunting and costly process for all parties involved. Yet, this does not mean that an organization facing litigation will endure a crippling financial burden. Recently, Canadian courts have shown some sympathy toward parties confronting discovery requests, but they still hold parties accountable for the creation, maintenance, and preservation of their records.

Canada has not yet experienced high profile cases similar to those that have occurred in the United States, such as *Zubulake v. UBS Warburg* (2003 & 2004), *U.S. v. Arthur Anderson* (2004), and *U.S. v. Philip Morris* (2004), where judges imposed stiff, multi-million dollar fines and penalties upon the defendants while lambasting them for poor records management practices. Instead, Canadian courts have dealt with much smaller cases, motions, and appeals that, despite the lack of large fiscal outcomes, have established some trends toward what documentation may or may not be discoverable.

In Canada, one of the first cases to deal with the discovery of electronic information occurred in 1982 with *Peter Kiewit Sons Co. of Canada Ltd. (c.o.b. Kiewit-Ceco) v. British Columbia Hydro & Power Authority*.² In this case, the plaintiff, Peter Kiewit Sons Co. of Canada Ltd., requested thousands of documents from BC Hydro. While the British Columbia Supreme Court did not allow such a request, it recommended that the scope of discovery be narrowed or that the plaintiff pay for the costs of retrieval. More importantly, it became evident that the courts had a new type of dilemma to deal with—balancing requests for thousands, if not tens of thousands, of records against the request’s relevancy and the ability by the sequestered party to recover the records. Since *Peter Kiewit Sons Co. v. BC Hydro*, the courts have sought to better define what is meant by “discovery,” a term that, in the electronic age, could seemingly mean a request for an endless amount of information. Yet, as justices Barry Strayer, Karen Sharlow, and Brian Malone observed in their 2003 ruling on an appeal of *Bristol-Myers Squibb Co. v. Apotex Inc.*, “One of the purposes of discovery is to simplify proof at trial and another is to narrow the issues which remain in dispute.”³ During the past ten years, the courts have been determined not to let go of the reigns of e-discovery requests and have adhered to a restricted view (albeit a very broad one) of discoverability.

This annotated bibliography takes a closer look at recent Canadian rulings regarding e-discovery. While it covers a broad range of e-discovery cases that deal with a variety of different document types, such as hard drives, computer files, and diskettes, it primarily concentrates on those cases that have involved electronic mail (e-mail).⁴ In only a couple of instances are financial figures

² [1982] B.C.J. No. 1599.

³ [2003] F.C.J. No. 1725, paragraph 14.

⁴ For a more comprehensive list, the Sedona Canada Working Group (WG7) has also compiled and regularly updates an extensive case law digest on e-discovery (<http://www.lexum.umontreal.ca/e-discovery/digests-common.html>). This report intends to compliment, rather than substitute the digest.

determined during the motions and appeals, so readers may benefit the most by learning which circumstances warrant the allowance of discoverability and which do not.

Regardless of what is or is not discoverable, ultimately, it is up to the records creator to ensure the security and control of its records. Organizations may want to think twice before quickly having a service provider store inactive records before they are scheduled to be destroyed.⁵ Additionally, an organization should carefully evaluate how its employees create and manage their e-mails, paying close attention to potential security holes for hackers that may easily find their way into certain e-mail systems such as Hotmail or Yahoo! To date, there has yet to be an e-discovery case where a party could not produce messages because they had been compromised by an external party, but there have been several cases (all of which have occurred in the United States) where failure to disclose e-mails has caused a judge to rule that jurors may infer that the missing e-mails would reflect negatively upon the party unable to produce the messages.⁶

The cases that follow are listed alphabetically by categories determined by the author, with each category containing a brief description about its contents. In a few situations, a single case may pertain to multiple categories. In these instances, the cases have been cross-referenced with the main entry and abstract included in the section that is most pertinent to the case. Each entry contains a series of data about the case, starting with the case name. The date provided is the month and year of the court ruling followed by the court jurisdiction, with the court’s location completing the section.

Finally, this document should not be taken as inclusive of all e-discovery cases having occurred in Canada, but every effort has been made to include all the seminal cases. Given judges’ reliance on past rulings, many cases have not been annotated but included in the footnotes. It is anticipated that subsequent drafts of this document will also examine cases in the United States that have dealt with e-discovery.

Canadian Cases

Contractual Agreements

In 2005, the Association for Information and Image Management (AIIM) and Kahn Consulting conducted a survey on e-mail and learned that this means of communication is being used for nearly all types of correspondence—from mundane and ordinary messages to messages containing sensitive and confidential information, as well as contract negotiations, human resource discussions, and invoice deliveries.⁷ Recently, several cases have tested the validity of an e-mail as contract in court, especially when there has been no corresponding hardcopy that has been physically signed by the parties. The courts have stated that e-mail may be a contractual agreement if the wording of the body warrants it to be as such.

⁵ Claburn, Thomas, “GE Money Backup Tape with 650,000 Records Missing At Iron Mountain,” *Information Week* (January 18, 2008).

⁶ See *Zubulake v. UBS Warburg IV* (2004, 229 F.R.D. 422) and *Nursing Home Pension Fund v. Oracle Corp.* (Sept. 2008, No. C 01-00988 SI).

⁷ AIIM and Kahn Consulting, “Struggle Continues between how Organizations use Electronic Communications Technology and how they are Managed” (March 2, 2005).

Atlantic Chemicals Trading of North America, Inc. v. Morizon Holdings Ltd. (c.o.b. Morizon Vitamins (China) Ltd.) [June 2005] – British Columbia Supreme Court (Vancouver, BC)⁸

In this case, the plaintiff, Atlantic Chemicals Trading, filed suit against the defendant, Morizon Vitamins, for damages for failure to deliver goods. The only evidence to prove that a contractual agreement had been made were e-mails containing purchase order information and invoices (a formal contract had not been signed). The e-mails made it clear that a negotiation over a product had occurred, thus supporting the claim of Atlantic Chemicals Trading.

The court ruled in favour of Atlantic Chemicals in terms of \$124,504.05 for loss of commission and compensation of the balance of wired funds.

Front Carriers Ltd. v. Atlantic & Orient Shipping Corp. [January 2006] – Federal Court (Vancouver, BC)⁹

In this maritime case, an e-mail was used as evidence of an agreement that took place between the two parties, even though no signed agreement existed. The judge stated that maritime business transactions typically occur via e-mail and that “there was a binding charterparty, and the fact that it occurred by means of an email exchange as opposed to a signed agreement is not material to the full and frank disclosure requirement of the Mareva injunction.”¹⁰ Though no specific financial terms were declared at the time of the ruling, the costs would be in favour of the plaintiff.

Kravchenko-Roy v. Canada (Attorney General) [October 2007] – Federal Court (Ottawa, Ont.)¹¹

This case involved several e-mails that mistakenly informed Kravchenko-Roy that she was to receive a promotion from a temporary position she held with the Public Service Commission of Canada. A human resource employee erroneously sent Kravchenko-Roy the e-mails as she was not to receive the new position. The court sided with the Attorney General, noting that the initial e-mail did not amount to an appointment because it was sent by a person unauthorized to do so. The judge admonished the Commission for poor personnel management and stipulated that each party pay its own costs.

Stella-Jones Inc. v. Hawknet Ltd. [February 2005] – Federal Court (Montréal, Quebec)¹²

This was a pre-trial procedure involving a motion by the defendant, Hawknet Ltd., to determine whether the parties had reached a contractual settlement with the plaintiffs, Stella-Jones Inc. An e-mail exchange was cited as evidence because it discussed an agreement between the two parties. The judge deemed the e-mail thread to be insufficient evidence to support a question of law. Due to the lack of clear evidence, the judge dismissed the defendant’s motion.

Discovery of a Person

Discovery requests have not always been limited to simply documents. It has been well established that a person is discoverable but similar to the documents themselves, there has to be

⁸ [2005] B.C.J. No. 1446.

⁹ [2006] F.C.J. No. 26.

¹⁰ Ibid., Paragraph 22. A Mareva injunction is a “temporary injunction that freezes the assets of a party pending further order or final resolution by the Court” (<http://www.duhaime.org/LegalDictionary/M/MarevaInjunction.aspx>).

¹¹ [2007] F.C.J. No. 1445.

¹² [2005] F.C.J. No. 248.

substantial evidence of relevance.¹³ The courts continually must face inquiries about whether an actual person and his/her “insider” knowledge about a certain person, party, or organization may be used in court. In the single case cited here, a person’s e-mail address became the relevant link supporting the request for discovery.

Klemke Mining Corp. v. Shell Canada [December 2002] – Alberta Court of Queen’s Bench (Judicial District of Edmonton)¹⁴

The central issue in this case was that the plaintiffs, Klemke Mining Corp., sought the “discovery” of Katherine Sibold so she could be required to testify to what she heard and saw in important meetings in the presence of the defendants, Shell Canada. Shell denied that Sibold was an employee and claimed therefore that she should not be permitted to disclose the information. Despite the defendant’s argument, the judge ruled that Sibold had been associated with Shell in more than a secretarial role. This was determined by the fact that Sibold held an e-mail address with Shell. Thus, under Albert Court Rule 200(1), the judge ruled that she was an employee and what she saw and heard at the meetings was discoverable.

For a subsequent ruling regarding the admissibility of specific evidence in this case, see: *Klemke Mining Corp. v. Shell Canada Ltd.* ([2006] A.J. No. 395).

Excessive Burden

In some instances, while documents may be accessible and retrievable, to do so may place a financial burden on one of the parties.¹⁵ Though the courts have no definitive definition of the phrase “excessively burdensome,” they have taken into consideration the time, skill, and finances required for a party to follow through with a discovery request.

Canada (Commissioner of Competition) v. Air Canada [July 2000] – Federal Court of Canada - Trial Division (Ottawa, Ont.)¹⁶

In 2000, the Commissioner of Competition investigated Air Canada for possible predatory pricing and abuse of dominant marketing position. Air Canada responded by filing a motion to set aside an *ex parte* order requiring it to produce records and prepare written return of information. The original order requested the disclosure of electronic documents that required Air Canada to review computer hard drives and electronic mail of all employees with relevant information. Air Canada argued that the request for the production of electronic documents was “excessively burdensome” given the number of employees and e-mails that would have to be retrieved. Due to the Commissioner’s unfamiliarity with Air Canada’s recordkeeping practices, the matter of discovering these documents was left to later adjudication following discussion between counsels.¹⁷

With the exceptions to the e-mails, the judge dismissed Air Canada’s motion to dismiss the request for discovery.

¹³ For example, see *Cominco Ltd. v. Westinghouse Can. Ltd.* ([1979], 11 B.C.L.R. 142) and *Allarco Broadcasting Ltd. v. Duke* ([1981] B.C.J. No. 1707).

¹⁴ [2002] A.J. No. 1617.

¹⁵ In the wake of *Zubulake v. UBS Warburg IV* (2004) U.S. courts have begun to separate costs of discovery. While the Canadian courts have become quite aware of the excessive cost of the discovery process (*Peter Kiewit Sons Co. of Canada Ltd. (c.o.b. Kiewit-Ceco) v. British Columbia Hydro & Power Authority* ([1982] B.C.J. No. 1599)), the courts have yet to divide the costs between the two parties.

¹⁶ [2000] F.C.J. No. 1177.

¹⁷ No additional information could be found about the final outcome of these discussions.

Roeske v. Grady [February 2007] – British Columbia Supreme Court (Vancouver, BC)¹⁸

This is an application by the defendant for an order that the plaintiff, Roeske, provide the defendants, Grady, her PowerBook computer, including, but not limited, to the computer’s hard drive and any removable floppy CD or other DVD disks containing data originating on her computer. The plaintiff alleges she sustained injuries in two motor vehicle accidents, adversely affecting her ability to work. The nature of the injuries or injury claimed is mild traumatic brain injury. Roeske objected to the request, especially the part that sought to mirror her personal computer’s hard drive, saying it would be an invasion of privacy.

While the judge argued that the hard drive could be accessible,¹⁹ in this case the time factor became one of the primary reasons for rejecting the defendant’s request. The call for discovery came too close to the date of the trial which would have placed an extra burden on the plaintiff and did not allow sufficient time to address privacy concerns with the hard drive: “taking account of the marginal value for trial purposes and the onerous burden it would put on the plaintiff late in the day, I conclude that I should exercise my discretion in this matter in favour of the plaintiff.”²⁰

Spar Aerospace Limited v. Aerowerks Engineering Inc. [August 2007] – Alberta Court of Queen’s Bench (Judicial District of Edmonton)²¹

In this discovery case, the plaintiff, Spar Aerospace Limited, sought an extraordinary number of records in lieu of the execution of an Anton Pillar order.²² The defendants, Aerowerks Engineering Inc., did not adhere to the request, which included “all relevant communications between any of the defendants and the Hercules Cascade consortium, Cascade (or any other consortium member), or the Department of National Defense regarding the relationship between the defendants and any of those parties; all relevant e-mails from or to Tyler Pahl, Steven Gentles and Kevin Morris....” While the retrieval of all the appropriate documentation may have tipped the cost/benefit ratio that helps determine the extent to which documents may be discovered,²³ because the parties involved were IT savvy, the judge determined that a balance in the ratio could be maintained. Additionally, some of the defendants’ e-mails indicated that not all

¹⁸ [2006] B.C.J. No. 3402.

¹⁹ The judge based his ruling, in part, on *Northwest Mettech Corp. v. Metcon Services Ltd.* ([1996] B.C.J. No. 1915) where it was determined that a hard drive is not a document but a medium on which documents reside. A more recent case has likened a hard drive to an electronic filing cabinet with the entire cabinet not being discoverable but individuals folders within it being accessible (*Innovative Health Group Inc. v. Calgary Health Region* ([2008] A.J. No. 615)). To date, this case offers one of the most thorough examinations of e-discovery regarding “proportionality,” that is, balancing the nature and scope of the litigation against the relevance of the requested information, its importance to the case, and the costs, burden, and delay that a party may experience in the process.

Additionally, this case refers to an older, non-electronic case to justify its ruling. The judge cites *Lazin v. Ciba-Geigy* ([1976] 3 W.W.R. 460 (Alta.S.C.(A.D.))). In this case, the presiding judge ruled that a diary, *in its entirety*, “cannot be called a ‘document.’ Rather it is a series of documents bound together for convenience.” This judgment was based on the 1918 decision in *Royal Bank v. Wallis* ([1918] 2 W.W.R. 620, 13 Alta. L.R. 416, (1918) 41 D.L.R. 383), where it was determined that entire financial books (such as a ledger or account book) cannot be discovered in their entirety because of private information that may be irrelevant to the case; as such, only the relevant parts may be discoverable.

²⁰ [2006] B.C.J. No. 3402, paragraph 32.

²¹ [2007] ABQB 543.

²² An Anton Pillar order is issued when one party fears that the other party may destroy evidence in the face of litigation. When delivered, the order allows for one party to “drop in” on the other party, provided advanced notice is given, and seize that the appropriate information (*Anton Pillar KG v. Manufacturing Processes Ltd.* [1976] 1 Ch. D. 55, 1 All E.R. 779 at 781 (C.A.)).

²³ The judge stated: “It appears to be accepted in Canadian practice that the obligation of discovery is tempered by the application of proportionality or cost/benefit ratio: in Alberta, this means that records must be disclosed if they are not only relevant, but also material” (paragraph 57).

the relevant ones were initially produced and the rest would need to be retrieved. The court ruled that, in the case of deleted or destroyed records, the defendants “can, and should, list on their affidavit of documents all of the material and relevant records that have been deleted if no electronic or paper copy exists.”²⁴ Furthermore, “In the exceptional circumstances here ... the defendants were required to list all deleted and destroyed records, and were required, moreover, to make reasonable efforts to produce those deleted records.”²⁵

A subsequent appeal of the ruling would be dismissed and the defendants were still obligated to produce the requested documentation.²⁶

Spielo Manufacturing and Manship v. Doucet and Dauphinee [November 2007] – New Brunswick Court of Appeal²⁷

This is an appeal of a judgment rendered on June 29, 2007 where the then defendants, Spielo Manufacturing and Jon Manship, were accused of violating a discovery order.²⁸ In that ruling, the judge ordered the defendants to provide access to their computer system and back files to the plaintiffs. The defendants appealed this decision on account that to abide by this order would be too costly, result in an excessive burden and delay on the parties. Yet, in this case, the judge dismissed the appeal because the appeal occurred at the wrong point of time in the judicial process and it was clear that Spielo and Manship never complied with the previous judge’s orders.

See also:

Adroit Resources Inc. v. Tres-Or Resources Ltd. ([Format of Disclosure](#))

Jay v. DHL Express (Canada), Ltd. ([Records Management](#))

Fishing Expeditions

Simply requesting documents from the opposing party does not guarantee the requesting party access to them. There have been numerous cases that have sought large number of documents (regardless of their type or format) but provided insufficient evidence showing how the documents are relevant to the case. These broad and unsubstantiated requests are ‘fishing expeditions’ and the courts have displayed little patience or latitude for them. As explained in *Monarch Marking Systems Inc. v. Esselte Meto Ltd.*, a fishing expedition in the context of discovery was clarified as a situation in which “the plaintiff wishes to maintain his questions, and to insist upon answers to them, in order that he may find out something of which he knows nothing now, which might enable him to make a case of which he has no knowledge at present.”²⁹

Bristol-Myers Squibb Co. v. Apotex Inc. [November 2003] – Federal Court (Toronto, Ont.)³⁰

This is an appeal of an initial copyright infringement case. Displeased by the documentation that Bristol-Myers Squibb Co., the plaintiff, provided upon the initial request,

²⁴ 2007 ABQB 543, paragraph 66.

²⁵ *Ibid.*, paragraph 67.

²⁶ *Spar Aerospace Ltd. v. Aerowerks Engineering Inc.* [2008] A.J. No. 113.

²⁷ [2007] N.B.J. No. 510.

²⁸ *Doucet v. Spielo Manufacturing Inc.* [2007] N.B.J. No. 254. This is one of the few instances where a monetary figure has been stated in a case ruling. In this situation, the discovery process, had cost each side nearly a quarter of a million dollars resulting in the production of over 100,000 pages of documentation. Also see *Doucet v. Spielo Manufacturing Inc.* [2006] N.B.J. No. 299 which was the original ruling.

²⁹ [1983] F.C.J. No. 151. Also see *Reading & Bates Construction Co. v. Baker Energy Resources Corp.* ([1988] F.C.J. No. 1025) and *Dufault v. Stevens* ([1978] B.C.J. No. 1219).

³⁰ [2003] F.C.J. No. 1725.

Apotex Inc., the defendant, sought additional evidence from the company. In his judgment, justice Strayer remarked that the “scope of discovery” is primarily based on relevance and may be established by a “train of inquiry” that may advance a plaintiff’s case.³¹ Yet, discovery may be denied if: 1) the answer is not likely to advance the questioner’s legal position; or 2) the answer would require much time and effort and expense and its value would appear to be minimal; or 3) the question is part of a “fishing expedition.” In this case, the judge believed that Apotex was on a fishing expedition and ruled that certain documents such as memoranda, e-mails, correspondence and others did not have to be disclosed. The court did not completely close the door on what was discoverable and permitted the plaintiff access to other documentation *if sought*. The appeal was divided with “costs in the cause.”

An appeal of this case was dismissed in 2007. See: *Bristol-Myers Squibb Co. v. Apotex Inc.* (2007).³²

Desganage v. Yuen (June 2006) – British Columbia Supreme Court (Vancouver, BC)³³

In this ruling, Desganage, the plaintiff, sought a wide variety of documentation from the defendant, including documents and e-mails from her personal computer as well as any computer games she may have owned and played. The judge dismissed the request citing that the request was a fishing expedition. The files were being sought because they *may have* contained information assisting the defendant’s case, but Yuen did not provide sufficient evidence to prove their relevance. Also, the judge declined the defendant’s request to access Desganage’s Palm Pilot and internet browser’s history because this would compromise her private interests and give unnecessary access to privileged information.

Gagliano v. Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities – Gomery Commission) [June 2006] – Federal Court (Montreal, Quebec)³⁴

Under Rule 317 of the Federal Court Rules (Material in the Possession of a Tribunal),³⁵ both parties made requests for materials in two parts. The materials requested from the Commission were, in part, fulfilled as e-mails were produced in response to “Part I” of the request, but the Commission objected to “Part II.” The court agreed with the Commission stating that the “relevancy of these materials is too speculative, and the applicants have engaged in an improper fishing expedition with regards to these requested materials in an attempt to build their case.”³⁶ During this ruling, the judge cited numerous rulings where courts have rejected broad requests for document discovery.³⁷ The court ordered that “costs are in the cause.”

³¹ For a case dealing with “train of evidence,” see: *Boxer and Boxer Holdings Ltd. v. Reesor, et al.* ([1983], 43 B.C.L.R. 352 (B.C.S.C.)).

³² [2007] F.C.J. No. 1597.

³³ [2006] B.C.J. No. 1418.

³⁴ [2006] F.C.J. No. 917.

³⁵ The rule reads: (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested; (2) An applicant may include a request under subsection (1) in its notice of application; (3) If an applicant does not include a request under subsection (1) in its notice of application, the applicant shall serve the request on the other parties (http://laws.justice.gc.ca/en/showdoc/cr/SOR-98-106/bo-ga:l_5-gb:s_317/en#anchorbo-ga:l_5-gb:s_317).

³⁶ [2006] F.C.J. No. 917, paragraph 88.

³⁷ *Bradley-Sharp v. Royal Bank of Canada* ([2001] F.C.J. No. 1561); *Atlantic Prudence Fund Corp. v. Canada (M.C.I.)*, ([2000] F.C.J. 1156); and *Paukuutit, Inuit Women's Assn. v. Canada* ([2003] F.C.J. No. 230).

Intel Corp. v. 3395383 Canada Inc. [February 2004] – Federal Court (Toronto, Ont.)³⁸

Appealing a prior ruling,³⁹ Intel Corp., the plaintiff, sought a copy of every e-mail received at the e-mail address by the defendant. The court denied the request on the grounds it was a fishing expedition, ruling that the “questions, as posed, are too broad and represent an improper attempt to elicit information when the Plaintiff itself is unaware of any instances of actual confusion, as alleged in the pleadings.”⁴⁰

Nicolardi v. Daley [February 2002] – Ontario Superior Court of Justice⁴¹

Resulting from *Nicolardi v. Dhillon*,⁴² this motion concerns the obligation of a party to produce documents stored on a computer. Nicolardi, the plaintiff, sought to access Daley’s computer hardware for the purpose of determining whether relevant documents have been omitted from production. Daley represented a law firm and an initial order rejected the request due to privacy concerns and irrelevance. Later, the computer in question had its files purged and, even though the plaintiff provided a computer expert to retrieve the missing files, the judge still denied the request on account that Nicolardi was on a fishing expedition. Master Ronald Dash states in his ruling:

Investigating a party’s computers is a very intrusive exercise exposing all of a party’s stored data... Safeguards would therefore be required to ensure that the firm’s duty of confidentiality to other clients is not breached... It is not sufficient for a client to say in the course of a lawsuit, “I believe there are more documents,” or “it appears to me that documents are being hidden.” That would be no more than a fishing expedition. There must be specific evidence of non-disclosure.⁴³

Pritchard v. Crosfield [January 2005 (Oral judgment) & August 2006 (Released)] – British Columbia Supreme Court (Powell River, BC)⁴⁴

On November 7, 2001, Kathleen M. Pritchard, the plaintiff, was injured in a motorcycle accident resulting in brain damage. Her suit against Walter C. Crosfield, the defendant, is for a loss of income, loss of opportunity, and interference with a business and day-to-day activities. This motion, raised by the defendant is in response to this suit. Crosfield requested Kathleen M. Pritchard to produce an “excessive list” of documents stored in electronic format, including information from home computer that she used for work-related purposes. The judge allowed the motion in part. The judge ruled that requests for personal e-mails, internet searches, and to have a computer expert “strip” the home computer of all information were part of a fishing expedition and invasion of privacy. Pritchard was required to produce all business related documents from her home computer, which included e-mail.

³⁸ [2004] F.C.J. No. 251.

³⁹ *Intel Corp. v. 3395383 Canada Inc.* ([2003] F.C.J. No. 1150).

⁴⁰ [2004] F.C.J. No. 251, paragraph 33.

⁴¹ [2002] O.J. No. 595.

⁴² [1999] O.J. No. 323.

⁴³ *Ibid.*, paragraphs 31-33.

⁴⁴ [2005] B.C.J. No. 3032.

Ritchie v. 830234 Ontario Inc. (c.o.b. Richelieu Hardware Canada Ltd.) [January 2008] – Ontario Superior Court of Justice (Thunder Bay, Ont.)⁴⁵

Ritchie, the plaintiff, argued in this wrongful termination suit there were e-mails exchanged between his manager, the regional manager and another member of management on the evening of his termination which should have been produced. Richelieu, the defendant, claimed the request to disclose the e-mails was too broad since it had 1100 employees and all e-mails (except one) had been purged. At no time during the hearing was there sufficient evidence that other e-mails existed that would have supported the plaintiff’s claim. While the court ordered any e-mail exchanges between the managers to be produced if they could be retrieved, the court ruled that Ritchie failed to provide convincing evidence that additional correspondence existed. The court defended its decision by referring to *White v. Winfair Management Ltd.*, where it was stated: “The onus then is on a party alleging that relevant documents have been omitted from an affidavit of documents to lead convincing evidence, as opposed to mere speculation, as to the existence and relevance of the documents sought.”⁴⁶

Vector Transportation Services Inc. v. Traffic Tech Inc. [March 2008] – Ontario Superior Court of Justice⁴⁷

In a case similar to *Desganage v. Yuen*,⁴⁸ this is an appeal by Traffic Tech and Cox from a master’s decision ordering Cox to produce his personal laptop to a forensic data recovery expert who would inspect the computer for e-mails containing names of the plaintiff’s clients or customers. The judge dismissed the appeal arguing that the master did take into consideration cost of retrieval and evidence to support relevancy and importance of information sought.

Yeung v. Manufacturers Life Insurance Co. [February 2008] – British Columbia Supreme Court (Vancouver, BC)⁴⁹

Yeung, a quadriplegic as the result of a fall from a ladder, sought documentation from the defendant that may have proved that the 365-day limit for filing an insurance claim contained ambiguous wording. While the motion was dismissed on account that the request for discovery was excessive and deemed to be a fishing expedition, the judge stated that “this application seeks documents which are beyond what is required of a party to produce. It is based on mere speculation at best and is based on the plaintiffs’ interpretation of what the policy says, not necessarily what the court will ultimately determine what the policy says.”⁵⁰ The ruling is also significant because it continued to establish the precedent that the courts were rebuking the “Peruvian Guano” case, a precedent on relevance established in 1882 that made the range of discoverable documents nearly endless.⁵¹

⁴⁵ [2008] O.J. No. 492.

⁴⁶ [2005] O.J. No. 1542, paragraph 9.

⁴⁷ [2008] O.J. No. 1020.

⁴⁸ See page 10 in this document for an abstract of this case.

⁴⁹ [2008] B.C.J. No. 261.

⁵⁰ *Ibid.*, paragraph 20.

⁵¹ *Financiere et Commerical du Pacifioque v. Peruvian Guano Co.* ((1882) 11 Q.B.D. 55). As recently as 2008, at least one case has upheld the “Peruvian Guano” decision regarding relevancy (*Gemini Helicopters Inc. v. Cappsco International Corp.* ([2008] B.C.J. No. 1963)). While few in number, some courts and judges have sought to “limit” the scope of discoverability contrary to the “Peruvian Guano” precedent (*Centura Building Systems Ltd v. Blackcomb Mountain Developments Ltd.* (2007 BCSC 939); *Mordo v. Nitting* (2006 BCSC 765); *Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen* (2006 BCSC 554); *Lambert Fenchurch Ltd. v. Specialty Underwriting Services Ltd.* (2001 BCCA 498); and *Peter Kiewit Sons v. B.C. Hydro* ((1982), 36 B.C.L.R. 58)).

See also:

Logan v. Harper ([Format of Disclosure](#))

Format of Disclosure

There is an ongoing debate as to the format of discoverable documents—which does the court prefer: the hardcopy paper records or the electronic copies in their native state? While there is little doubt that electronic copies are admissible in court, in some instances, it is quite possible that one of the parties may produce hardcopies of electronic records but the other party wishes to see the electronic versions. Currently, the trend is to allow access to the electronic records in instances where the native format may provide additional evidence than a paper copy of the document.

Adroit Resources Inc. v. Tres-Or Resources Ltd. [September 2008] – British Columbia Supreme Court (Vancouver, BC)⁵²

This was an application submitted by the defendant, Tres-Or Resources Ltd., to have severed claims submitted against it by Adroit Resources Inc. and that these claims be heard prior to the trial of other claims. The court upheld the application but in doing so ordered that all evidence be reviewed. In doing so, Adroit Resources made additional requests for discovery including e-mails and spreadsheets in their native format. Tres-Or countered by arguing that it had already produced 1,600 e-mails and providing any more would be an excessive burden to the company given the resources needed to retrieve, review, and convert the messages to TIFF images so sensitive client information could be redacted. Also, Tres-Or asserted that a large portion of the e-mails could not be retrieved in their native format because solicitor-client privilege would be jeopardized since it is not possible to redact metadata from the electronic documents. The judge sided with Tres-Or, saying the company had produced all relevant messages. Adroit also sought spreadsheets in their electronic format because they “may contain useful information about how the documents were created and that electronic data from surveys would be of assistance to its experts in preparing reports.”⁵³ The judge concurred with this argument and ordered Tres-Or to produce the spreadsheets in their native format.

Andersen v. St. Jude Medical Inc. [January 2008] – Ontario Superior Court of Justice⁵⁴

This judgment is one of several involving mechanical heart valves and other heart-repair devices produced by St. Jude Medical Inc., the defendants and used by Yvonne Anderson and Sharon Frost, the plaintiffs.⁵⁵ The plaintiffs claimed their health was severely compromised as a result of the devices and sought compensation. This judgment pertains to the Artificial Valve Endocarditis Reduction Trial (AVERT) database, in which the plaintiffs sought better copies of the electronic documents and access to the original data maintained by the defendants. Furthermore, they also wanted an audit trail to verify the authenticity of the electronic records.

Contrary to a previous ruling ordering the defendants to produce the database in its native format,⁵⁶ St. Jude Medical Inc. provided the data in a “redacted freeze format.” Privacy is the major concern from defendants’ perspective as the database contains confidential health information of its patients. Despite this claim, the judge ordered that the plaintiffs were to be

⁵² [2008] B.C.J. No. 1701.

⁵³ *Ibid.*, paragraph 81.

⁵⁴ [2008] O.J. No. 430.

⁵⁵ *Andersen v. St. Jude Medical Inc.* ([2002] O.J. No. 260).

⁵⁶ *Andersen v. St. Jude Medical Inc.* ([2006] O.J. No. 3659).

allowed access to the original database and “take copies,” though the judge instilled confidentiality and sealing orders, as well as allowed the defendants to redact information to protect the personal information. The judge supported his order by citing the Ontario Task Force on e-Discovery and Sedona Canadian Guidelines on e-discovery.

Logan v. Harper [October 2003] – Ontario Superior Court of Justice⁵⁷

This was a motion by the plaintiffs, Logan and others, for the production of documents from the defendant, Health Canada. At issue was whether the federal government was required to swear an affidavit of documents and which documents were relevant. Health Canada argued that only documents relating to teflon-proplast implants were relevant, while the plaintiffs argued that all documents relating to temporomandibular joint implants were relevant. Also, there were issues as to whether paper copies of electronic documents were necessary, if the plaintiffs were entitled to examine the originals, and if Health Canada must provide its software for searching and viewing the documents. Finally, the plaintiffs sought an order requiring representatives of Health Canada to answer discovery questions and to re-attend for discovery.

The motion was allowed in part. The judge ruled that all documents concerning temporomandibular joint implants were relevant and needed to be produced with the inspection of original documents permitted as necessary, though the plaintiffs were not entitled to automatic inspection of all originals. On the other hand, Health Canada was not required to produce paper copies in addition to the electronic copies. Health Canada was to provide the plaintiffs with information as to obtaining the software used by it in creating and searching the electronic documents. Finally, due to the large number of records sought in this case, the court ruled that in order to handle them as efficiently as possible, a “custom designed documentary identification and retrieval system” be used.⁵⁸

The case has had two appeal rulings. See: *Logan v. Harper* ([2004] O.J. No. 4132) and *Logan v. Harper* ([2005] O.J. No. 2523).

Martin v. Standard Life Assurance Co. [September 1992] – Manitoba Court of Queen’s Bench (Winnipeg, MB)⁵⁹

In 1992, Martin, the plaintiff, filed a wrongful dismissal claim against his former employee, Standard Life Assurance Co., the defendant. Martin sought computer print-outs but the company argued this information contained private information that the plaintiff should not be granted access to. As a compromise, Standard Life had informed Martin of the nature of print-outs, but not the details of them; this still did not suit Martin. The judge ruled that while all the information on the print-outs was not discoverable, some of it was and ordered the defendants to provide the plaintiff names and contact information from the print-outs.

R. v. Beauchamp [April 2008] – Ontario Superior Court of Justice⁶⁰

The central question in this decision is whether “the Crown must provide disclosure to the accused of a copy of encrypted files, located on a hard drive, seized by the police under

⁵⁷ [2003] O.J. No. 4098.

⁵⁸ *Ibid.*, paragraph 23. The order to create a document retrieval system has also occurred in other cases (*Solid Waste Reclamation Inc. et. al. v. Philip Enterprises Inc. et. al.*, ((1991) 2 O.R. (3d) 481 (Gen. Div.)) and *Mirra v. Toronto Dominion Bank* ([2002] O.J. No. 1483)).

⁵⁹ [1992] M.J. No. 450.

⁶⁰ [2008] O.J. No. 1347.

search warrants, where the Crown has not been able to de-encrypt the files, and as a result has no knowledge of the information contained therein.”⁶¹ It was determined by the judge that the accused had the ability to access the encrypted files since they created and used the files and to allow them access to the files again would potentially be an invasion of privacy for the personal information located on the hard drive. Furthermore, the judge stated that the applicants had not offered any evidence to show how the encrypted information could be used to advance a defense or to make a decision which could affect the conduct of their defense. While the application was dismissed, the judge left open the possibility for the defendants to re-present their motion if they show relevancy and pertinence to their defense.

R. v. Therrien [April 2003] – British Columbia Supreme Court (Vernon, BC)⁶²

This is an application by Rene Therrien, a person accused of killing two people, whom argued that while the Crown provided documents in electronic form, he sought them in paper format because he lacked the necessary means and experience to access the documents (at the time of the judge’s decision, he was being held at a correctional facility). The material provided by the Crown was presented to the plaintiff in the form of an external hard drive. The judge sought to determine whether the materials the Crown provided were “reasonably accessible.”⁶³ The judge determined that because a computer could be purchased and maintained in Therrien’s cell and that he possessed a basic means of computer skills to access the hard drive,⁶⁴ the electronic format of the documents presented a better means of accessibility than had the Crown provided the documents in paper format.

Walter Construction (Canada) Ltd. v. Greater Vancouver Sewerage and Drainage District [October 2003] – British Columbia Supreme Court (Vancouver, BC)⁶⁵

This is a breach of contract case. Walter Construction filed suit against Greater Vancouver Sewerage and Drainage District (ABR) for breach of contract. While ABR provided 168 boxes of documentation, it did not provide others, arguing they were not relevant. Additionally, ABR provided hardcopies of electronic documents, but Walter sought the electronic versions. The judge ordered ABR to turn over the electronic records, citing the “Peruvian Guano” case⁶⁶ to justify the discovery request, but he commented that it “is unfortunate that the nature of Walter’s claim against ABR requires such extensive production of documents, which will likely be expensive.”⁶⁷

⁶¹ Ibid., paragraph 1.

⁶² [2005] B.C.J. No. 3146.

⁶³ Ibid., paragraph 27.

⁶⁴ In his ruling, the judge referred to *R. v. Rose* ([2002] Q.J. No. 8339 (S.C.)) where the judge dismissed the notion of lack of experience with technology as a viable defense: “I said in a light vein that it is probably now incumbent for those of us of a somewhat older generation to get with the program... I gain strength from the notion that the Statutes of Canada are now published in CD ROM, that’s all they’re available in, and one has to take this disk and manage with it somehow or other, in order to have access to it. That’s called progress, and along with that comes, I think, the obligation for those in our business to have more than a passing familiarity with this thing called the computer” (paragraph 14).

⁶⁵ [2003] B.C.J. No. 2389.

⁶⁶ *Financiere et Commerical du Pacifioque v. Peruvian Guano Co.* ((1882) 11 Q.B.D. 55).

⁶⁷ Ibid., paragraph 18.

Illegal Acquisition of Documentation

In some situations, one party may seize information and documentation from another party based on an Anton Pillar order.⁶⁸ As the following case shows, where the acquiring party has gone beyond the boundaries of the order, there is the potential for these “discoverable” documents to be rendered unusable in court. This said, relevance and importance of the documentation may trump any illegal acquisitions.

Solara Technologies Inc. v. Beard [July 2007] – British Columbia Court of Appeal (Vancouver, BC)⁶⁹

This appeals case involves a single e-mail. In a 2005 ruling between the two parties,⁷⁰ a judge prohibited the plaintiffs from using an e-mail as evidence due to violating the conditions of an Anton Pillar order. The appeals court ruled that the previous judge erred in prohibiting the use of this e-mail because it was relevant to the issues between the parties. The previous decision was overruled and the appeal was upheld.

Partial or Incomplete E-mails

Not only may an original received or sent e-mail be used as evidence in court, but so also may an incomplete message received by a third party. Though there is little precedent for this type of evidence, it may be interested to see how judges handle partial messages in future rulings.

Singh v. Canada (Minister of Citizenship and Immigration) [January 2008] – Federal Court (Edmonton, Alberta)⁷¹

Rarely during a legal proceeding is new evidence allowed to be introduced, but this case proved to be an exception. Singh’s application for permanent residency as a skilled worker was denied, but he claimed that the visa officer erred in his findings. Singh presented the court with an e-mail reply his co-worker received regarding the conditions for the visa application process. While the e-mail did not contain the original message and was sent to a third party, it disclosed relevant information that contradicted the visa officer’s judgment in denying the application. Based on the new evidence, the judge granted that the application be reassessed.⁷²

Privacy

One substantial defense against discovery requests is the concern over divulging private information. Courts have taken this matter very seriously and continue to ensure that they balance the right to privacy of parties owning information with the right of the requesting parties having a legitimate need to that information. Despite recent rulings that appear to favour the protection of privacy over the allowance of discovery, at least one judge, in a non-electronic discovery case, has stated: “Loss of privacy is not generally a bar to discovery.”⁷³

⁶⁸ See note 22 for a definition of an Anton Pillar order.

⁶⁹ [2007] B.C.J. No. 1693.

⁷⁰ *Solara Technologies Inc. v. Beard* ([2005] B.C.J. No. 1146).

⁷¹ [2007] F.C.J. No. 101.

⁷² In 2008, Singh’s application was once again denied and his attempt to have it reviewed again was dismissed by the Federal Court of Alberta ([2008] F.C.J. No. 65).

⁷³ *Tupper (Guardian ad litem of) v. Holding* ([2003] B.C.J. No. 216), paragraph 8.

Air Canada v. WestJet Airlines Ltd. [May 2006] – Ontario Superior Court of Justice (Toronto, Ont.)⁷⁴

Air Canada, the plaintiff, filed a motion requesting an order confirming that if any privileged documents were inadvertently produced by it during litigation, such productions would not constitute a waiver of privilege. They also sought an order to confirm that if documents were produced during the production process, such production would not constitute an admission of the relevance of all or a portion thereof. In other words, Air Canada was willing to provide a substantial amount of documentation to West Jet but with the caveat that if any of those documents contained private information they could not be used in court. The motion was dismissed on account of Principle #10 of the Sedona Principles. This principle states that parties should choose keywords to search through documents but, more importantly, that the documents should also be reviewed (an action that Air Canada did not want to perform due to the expense involved). In his ruling, the judge writes:

it does not follow from my conclusions that each and every page of each and every document must [sic] be manually reviewed. Presumably different categories of documents will require different levels of review. It is up to Air Canada and its counsel to determine to what extent a detailed review of the electronic documents must be conducted. They must do so, however, cognizant of the obligations under the Rules of Civil Procedure regarding the production of documents that include the requirement that an officer of the corporation swear an affidavit of documents that confirms that a “diligent search” has been conducted for all documents.⁷⁵

Chadwick v. Canada (Attorney General) [June 2008] – British Columbia Supreme Court (Vancouver, BC)⁷⁶

Following the deaths of the plaintiffs’ spouses in a helicopter crash, the plaintiffs brought product liability actions against manufacturers of the helicopter, its parts and Transport Canada. The defendants sought an order for production of the deceased’s personal computer hard drive for analysis by a computer forensic expert selected by the defendants. Previously the defendants had asked plaintiff’s counsel to review the hard drive, and to produce all the relevant documents found there, but the defendants were dissatisfied with the results of the search, and wanted their own expert to review the hard drive. The judge allowed the defendants’ application.

The judge said that some decisions in discovery cases regarded a hard drive as analogous to a single document, and in other cases as a file cabinet full of document some of which might be relevant and others irrelevant.⁷⁷ In this case the judge held the analogy to a filing cabinet did not apply. He allowed the defendants to have their own expert examine the hard drive on account that the plaintiff’s counsel refused could not provide the court sufficient evidence verifying the thoroughness of which its computer expert analyzed the hard drive and thus could not prove that all relevant documents were retrieved.

⁷⁴ [2006] O.J. No. 1798.

⁷⁵ *Ibid.*, paragraph 17.

⁷⁶ [2008] B.C.J. No. 1225.

⁷⁷ *Desgagne v. Yuen et al.* [2006] BCSC 955 (see page 10 in this document) and *Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen*, [2006] BCSC 554. Also see note 19 for additional information.

Ireland v. Low [December 2006] – British Columbia Supreme Court (Chilliwack, BC)⁷⁸

This case revolves around the disclosure of private documentation on a home personal computer. Ireland, the plaintiff, claims damages for injuries sustained in a motor vehicle accident which Low, the defendant, built and sold. While the court ruled that “electronic data stored on a computer’s hard drive or other magnetic storage device fall within the definition of “document” under the Rules of Court,”⁷⁹ it did not allow the discovery to proceed. Ireland cited the “Peruvian Guano” case⁸⁰ as an argument for discovering documents that had been deleted but could be retrieved by a computer expert. The court did not think that the 1882 ruling held much water in this situation because privacy issues trumped discoverability and the cost would be exceedingly high to recover the deleted files.

Pacific Concessions, Inc. v. Weir [December 2004] – British Columbia Supreme Court (Vancouver, BC)⁸¹

Even in cases where e-mails have been disclosed, it is quite possible that they may lead to a judge ordering additional discovery to be conducted, as was the situation with this case. The plaintiff and defendant disputed whether or not a single e-mail represented the waiving of solicitor-client privilege. The judge stated that the e-mail did waive this privilege, and further ordered other correspondence (written or oral) to be produced:

I conclude that solicitor-client privilege has been waived with respect to the email of February 1, 1999 and any communications passing between the defendants and their solicitor in response to the issues raised in the email. In the circumstances of this case, fairness and consistency require further disclosure to the plaintiff. It would be unfair to permit Mr. Weir to pick and choose which aspects of his communications with his solicitor to place in evidence before the court to support his case, while claiming privilege in respect of other related communications that may be relevant to these proceedings.⁸²

Reichmann v. Toronto Life Publishing Co. [November 1988] – Ontario, High Court of Justice⁸³

One of the first cases involving e-discovery in Canada involved drafts of a manuscript Reichmann, the plaintiff, had on a computer disk that the defendants, Toronto Life Publishing Co., requested. The case emanates from a previous ruling where Elaine Dewar was ordered to turn over to the publishing company drafts of a manuscript that was to be published by the company.⁸⁴ In the first case, the court justified the discovery by citing the “Peruvian Guano” case,⁸⁵ though Dewar opposed the decision due to privacy concerns. Upon appeal, the computer disk became the focus of the court. The judge, while admitting he did not fully comprehend all the technologies involved, ruled:

It seems fair to conclude that the definition contained in the rule was drafted to meet the problems created by the use of computers to store information. It may be

⁷⁸ [2006] B.C.J. No. 1592.

⁷⁹ *Ibid.*, paragraph 6. Also see *Northwest Mettech Corp. v. Metcon Services Ltd.* ([1996] B.C.J. No. 1915 (S.C.-Master)) and *Prism Hospital Software Inc. v. Hospital Medical Records Institute* ([1991] B.C.J. No. 3732 (S.C.)) ((1882) 11 Q.B.D. 55).

⁸¹ [2004] B.C.J. No. 2653.

⁸² *Ibid.*, paragraph 22.

⁸³ [1988] O.J. No. 961.

⁸⁴ *Reichmann v. Toronto Life Publishing Co.* ([1988] O.J. No. 961). ((1882) 11 Q.B.D. 55).

that there is a lacuna. That would appear to be so if information can be derived from possession of the disk which is not provided by the product of the disk. On that assumption I think that the disk is comprehended in the wider definition of document referred to in the earlier authorities, however remote computer technology was from the contemplation of those who created those authorities. It would be inconsistent with the current trend in production and discovery to hold otherwise.⁸⁶

The judge ordered that the disk be produced.

See also:

Adroit Resources Inc. v. Tres-Or Resources Ltd. ([Format of Disclosure](#))

Roeske v. Grady ([Excessive Burden](#))

Records Management

In Canada there have only been a few cases where the court has focused solely on an organization’s records management process to arrive at its decision. Since no general precedent has yet materialized, this section includes a few cases where parties have been accused of destroying evidence in the face of litigation, though it should become apparent that the courts have not yet punished those instances of guilt like the courts have in the United States.

Alvi v. YM Inc. (Sales) (c.o.b. Stitches) [September 2003] – Ontario Superior Court of Justice⁸⁷

This is a wrongful termination suit filed by Alvi, the plaintiff, against YM Inc., the defendant. YM was found negligent for its actions in firing Alvi and ordered to give him back pay with interest. One of the deciding factors for the judge was YM’s inability to find Alvi’s employment records after 5 years, even though the Employment Standards Act states personnel files may be disposed of after 3 years. In his judgment, the judge 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.⁸⁸

Possibly indicative of the lack of Canadian cases that deal with retention and disposition schedules, to date, this ruling has not been cited in any other case.

⁸⁶ [1988] O.J. No. 961, paragraph 5.

⁸⁷ [2003] O.J. No. 3467.

⁸⁸ *Ibid.*, paragraph 48. Emphasis added.

Canadian Derivatives Clearing Corp. v. EFA Software Services Ltd. [May 2001] – Alberta Court of Queen’s Bench (Calgary, AB)⁸⁹

In the course of this case, EFA was accused by the Canadian Derivatives Clearing Corporation of destroying evidence in bad faith, even after an Anton Pillar⁹⁰ order had been issued. This case involved both paper and electronic records. Regarding the paper records, the judge ruled that “the evidence shows no risk that such documents will be destroyed, or would have been destroyed had EFA received notice from CDCC of the action.”⁹¹ As for the electronic data, the judge took a slightly different stance. Earlier in the ruling he stated:

Electronic data poses a particular challenge. Merely printing out material from the mirror image copy will be unsatisfactory. Data deleted from a disk drive may be recoverable. Information about the creation, revision and deletion of data may surface. One of CDCC’s goals is to trace the travels of its Confidential Information through EFA’s system. CDCC suspects that it may be able to find an inappropriate informational link between the CDCC and NexClear projects. That endeavour would require certain computer expertise, and may be the subject of a further hearing before this Court. For that purpose, preservation of the mirror image copy is essential. Given what is now known about the release of at least some of CDCC’s Confidential Information to NexClear and its consultants, this cannot be described as a fishing expedition.⁹²

As a result of these observations, the judge ordered that “mirror images” of EFA’s computers be preserved and retained and that “EFA is entitled to a copy of the mirror image, if a copy can be made without compromising the integrity of the one currently held by the bailiff.”⁹³

Dreco Energy Services Ltd. v. Wenzel [August 2008] – Alberta Court of Queen’s Bench (Judicial District of Edmonton, Alberta)⁹⁴

This is a corporate commercial and intellectual property lawsuit during a case management hearing. In the case, Dreco Energy Services Ltd., the plaintiff, sought to dismiss the cost and fees associated with conducting forensic information retrieval from Wenzel’s, the defendant, computers. In a 2006 judgment, the judge ordered Wenzel to pay a \$75,000 fine for destroying evidence (this was on top of a \$136,000 contempt penalty) and informed Wenzel that all necessary measures be taken to retrieve the lost information.⁹⁵ Following this order, a court-appointed forensic expert retrieved over 470,000 records (files and e-mails)—a costly process that the plaintiff initially paid for and sought reimbursement. But during the course of the forensic examination, the expert determined that, contrary to the 2006 ruling and accusation that Wenzel had destroyed information in violation of a court order, the defendant had not reformatted or erased any information from its servers or hard drives. The judge ordered that the allegations of the destruction of evidence be taken to trial.

⁸⁹ [2001] A.J. No. 653.

⁹⁰ See note 22 for the definition of an Anton Pillar order.

⁹¹ *Ibid.*, paragraph 59.

⁹² *Ibid.*, paragraphs 51-52.

⁹³ *Ibid.*, paragraph 60.

⁹⁴ [2008] A.J. No. 890.

⁹⁵ *Dreco Energy Services Ltd. v. Wenzel* (2006 ABQB 356).

Jay v. DHL Express (Canada), Ltd. [February 2008] – Prince Edward Island Supreme Court - Trial Division (Charlottetown, PEI)⁹⁶

This is a breach of contract case involving the destruction of evidence. Jay, the plaintiff, sought waybills and associated invoices that produced following the breach. The initial motion of litigation was in 2000 but requests for the documentation did not occur until 2005. Despite the five-year gap, DHL claimed they had the documentation. Between 2000 and 2005, most waybill became digital and in 2005, DHL experienced a server crash that eliminated the pointers to the waybills. Additionally, DHL had also destroyed all paper waybills per its nine-month destruction policy (a policy that was unknown to the plaintiff until 2007). As a result of the server crash, the pointers needed to retrieve the waybill files had also been erased, rendering the data difficult but not impossible to retrieve. DHL cited the expense it would take to retrieve the documents, but the court shrugged this aside, citing *Anderson Preece Associates Inc. v. Dominion Appraisal Group Inc. et al.*, where it was ruled that the “respondents are required to provide discovery of all material and relevant documents. In this case, production of documents is essential to the law suit; therefore, the fact that production will be expensive for the respondents does not relieve them from the obligation to provide adequate discovery of the documents.”⁹⁷ Despite the court siding with the plaintiff, it was acknowledged that DHL may not be able to produce the documents since they either no longer existed or the company could not afford to retrieve them.

Murphy Battista v. McGivern [September 2007] – British Columbia Supreme Court (Vancouver, BC)⁹⁸

This case involved the discovery of documentation and failure of disclosure. Battista, a law firm, filed suit against McGivern for breach of contract and fiduciary duties. Soon after documentation had been disclosed, it was believed that McGivern failed to make full disclosure of documents that they had listed on six affidavits.⁹⁹ The court admonished the defendant’s actions and poor records management practices, but there was not enough evidence to support the claim that McGivern did not disclose all relevant documentation. The court dismissed the motion with the costs being in the cause.

Sexual Harassment

Sexual harassment suits may be one of the greatest fears among organizations. Office antics combined with ill-intended e-mails have the potential to cause serious litigation concern for some places. While the following case deals more with the failed review process of the Canadian Human Rights Commission, it should be noted that e-mails were a part of the evidence cited in the suit.

Pezzente v. Rogers Communications Inc. [July 2005] – Federal Court (Vancouver, BC)¹⁰⁰

In September 2000, while working for Shaw Cable, Pezzente alleged she was sexually harassed. She asserted that in addition to inappropriate physical contact she also received inappropriate e-mails. In November, citing a sub-par performance record, Rogers (which had

⁹⁶ [2008] P.E.I.J. No. 15.

⁹⁷ 2000 ABQB 254, paragraph 30. Also see: *Andrei v. Regina (City)* ((1994), 117 Sask.R. 161 (S.C.Q.B.)).

⁹⁸ [2007] B.C.J. No. 2012.

⁹⁹ For additional disclosure cases see: *Foundation Co. of Canada Ltd. v. Burnaby (District)* ([1978] B.C.J. No. 557) and *D. Grant Macdonald Capital Corp. v. TeleBackup Systems Inc.* (2000 BCSC 464).

¹⁰⁰ [2005] F.C.J. No. 1209.

taken over Shaw Cable) terminated Pezzente from her position. In July 2001, she filed complaints with the Canadian Human Rights Commission against Rogers, but the Commission dismissed her claim, citing that Rogers had already conducted an internal investigation into the matter and found no wrong doing on their part. The Federal Court ruled that the Commission was wrong with its decision based on the fact that the Commission did not interview any of the witnesses proposed by Pezzente. The court ordered a review of the case, not to mention that the finding of the Commission be rendered null-in-void.

Trademark Infringement

With businesses and organizations constantly struggling to defend their own interests and shares of the market, they typically are quick to action when seeing the illegal use of one of their products.

Dursol-Fabrik Otto Durst GmbH Co. KG v. Dursol North America Inc. [September 2006] – Federal Court (Toronto, Ont.)¹⁰¹

This case involved the Dursol North America Inc. facing 13 counts of contempt of court stemming from a 2004 court order involving trademark infringement. In August 2004, the defendants were prohibited from selling or marketing wares in association with the name ‘polisol,’ ‘autosol,’ or ‘dursol.’ As approximately 130 e-mails would subsequently show, the defendants blatantly violated this order. Yet, it was not the body of the e-mails that doomed the defendants; rather, it was the senders’ e-mail address that contained the prohibited names. The court declared that the defendants were in contempt of court on numerous accounts and thereby ordered to pay a \$20,000 fine, \$135,001.90 in legal fees and \$8,952.62 in disbursement fees.

¹⁰¹ [2006] F.C.J. No. 1411.

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