decision, Justice Scheindlin held that a party seeking sanctions for spoliation must establish:

1. the party had an obligation to preserve the evidence;
2. the records were destroyed with a "culpable" state of mind (this includes ordinary negligence); and
3. that the destroyed evidence was relevant.

In 2000, the decision of the Ontario Court of Appeal in *Spasic v. Imperial Tobacco Ltd.* (2000), 49 O.R. (3d) 699 (Ont. C.A.) established that spoliation can be an independent tort. Since that time there has not been a case which precisely defines what constitutes spoliation of electronic evidence in Ontario. However, the *Genuity* and *Portus* orders suggest that the court has taken a broad approach to what actions may constitute spoliation. In certain circumstances, the courts may be prepared to provide the moving party with broad powers of investigation and protection, including Anton Piller orders if it is feared that relevant information may be destroyed.

Preservation letters

In all cases where parties expect the opposing party will have electronic evidence, it is wise to send a preservation letter early in the process, notifying opposing counsel of the need for the electronic evidence to be immediately preserved. Absent such a letter, opposing parties may argue that they were not aware that backup tapes were being deleted or that e-mails were being regularly deleted through an automated process. The volatility of electronic evidence must be considered. Due to the ease with which parties can delete relevant information, everybody must be on notice as to exactly what must be preserved to comply with their obligations pursuant to the *Rules of Civil Procedure*.

Most of our cases will involve some form of electronic evidence. Our clients are communicating via e-mail, wordprocessing documents, fax machines and through voicemail. All of these are potential sources of electronic evidence. Over the next few years we can expect that the Canadian courts will be faced with some of the issues that have been the subject of the U.S. proceedings.

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The issue of costs

The costs associated with electronic discovery can be astounding due to the volume of electronic information available. For unprepared litigants, the cost to preserve, search and quickly produce electronic evidence can be prohibitive.

The court has discretion to manage and monitor the costs resulting from discovery requests, and to give interim orders concerning costs.[1] In general, a party bears its own cost of reviewing and editing its own documents, whereas the requesting party bears the cost of copying the information: See Rule 1.03(1) and 30.04 (7) of the *Rules of Civil Procedure.*

However, case law and cost allocations specific to electronic documentary discovery occasionally deviate from these general rules by shifting the cost of production and reproduction of electronic documents to the party making the request.

The mere fact that electronic discovery is at issue should not change the rule that the producing party presumptively pays for the production. Cost shifting should be considered only when electronic discovery imposes an undue burden or expense on the producing party. This question usually turns on whether the electronic information is kept in an accessible or inaccessible format, which in turn depends on the type of media used to store the information. Data stored online or near line, on optical disks, or on magnetic tape are usually accessible; backup tapes and fragmented data are usually not.

There is little Canadian jurisprudence on this issue. Foundation for this principle is set out in the Rule 1.03(1) of the *Rules of Civil Procedure* which provides that the Rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

American jurisprudence however, has examined this issue in greater detail. An eight-factor test was set out in *Rowe Entertainment v. the William Morris Agency* 205 F.R.D. 421 (S.D.N.Y. 2002), affirmed 2002 WL 975713 (S.D.N.Y. May 9, 2002) ("Rowe"), which was in turn modified by the court in *Zubulake v. UBS Warburg LL* 2003 W.L. 21087884 (S.D.N.Y. May 13, 2003) ("Zubulake").

1 Section 131(1) of the Courts of Justice Act, R.S.O. 1990, c. C.43; Organ v. Barnett (1992), 11 O.R. (3d) 210 (Gen. Div.); B.C. Building Corp. v. BT & NPLC (1995), C.P.C. (3rd) 313 (B.C.S.C.); Dulong v. Consumer Packaging Inc., (2000) O.J. 161 (Q.L.) (January 21, 2000, Ontario Master)

The following are the factors that have been considered in determining whether or not the cost of electronic discovery and production should be shifted to the requesting party:

1. the extent to which the request is specifically tailored to discover relevant information (no more "any and all");
2. the availability of such information from other sources (know where to look);
3. the total cost of production, compared to the amount in controversy;
4. the total cost of production, compared to the resources available to each party (costs can be much higher than in the paper world, if experts are involved and legacy and backup systems must be accessed);
5. the relative ability of each party to control costs and its incentive to do so;
6. the importance of the issues at stake in the litigation (which will rarely play a part in the analysis, but if it does it is the most important factor); and
7. the relative benefits to the parties of obtaining the information (the least important).

Prior to any order being made shifting costs, tangible evidence of what evidence backup tapes (or other inaccessible sources of data) might have to offer, in the form of a sample, may provide the court with sufficient evidence to determine the extent to which such electronic evidence is available from the particular electronic source at issue. The results of any such search conducted by way of a sample, as well as the time and money spent, can be produced to the court in an affidavit provided by the producing party.

Only the cost of restoration and searching should be taken into account in any cost-shifting analysis. The responding party should always bear the cost of reviewing and producing electronic data once it has been converted into an accessible form.

Although the electronic means of communicating and recording transactions has lead to various efficiencies and lowered costs in some industries, it has also given rise to a whole new set of costs: Key are the administrative costs associated with developing a proper records management and retention program designed to assist in the retrieval of documentation required for day-to-day business, as well as those documents that may be subject to production in court proceedings!

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