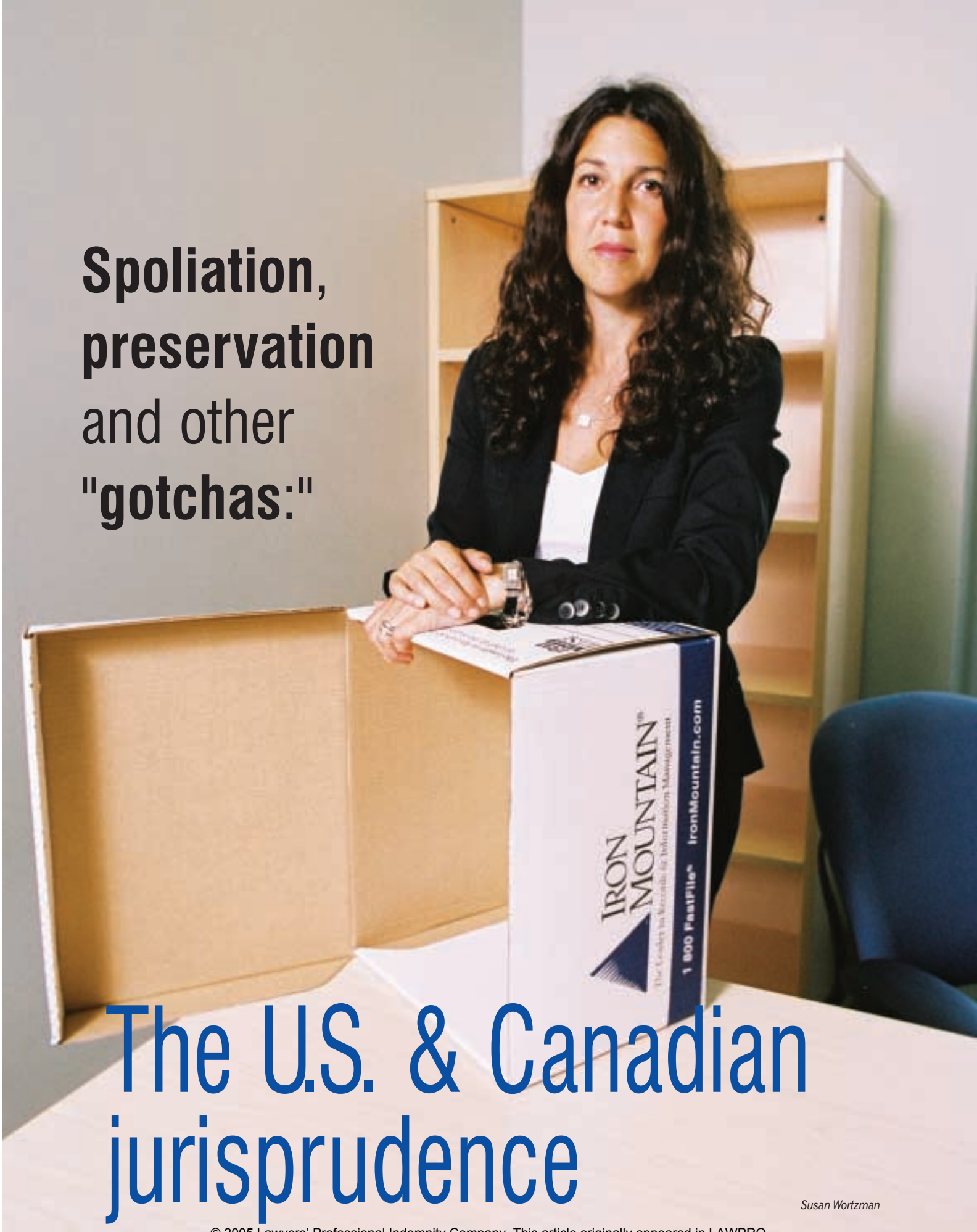

Spoliation, preservation and other "gotchas:"

The U.S. & Canadian jurisprudence

Susan Wortzman

With the explosion of e-mails, and other forms of electronic evidence, the preservation or failure to preserve electronic evidence is becoming a focus of litigation in the United States and Canada. However, while the recent U.S. decisions of *Zubulake v. UBS Warburg*, LLC, No. 2 Civ. 1243, 2004 WL 1620866 (S.D.N.Y. July 20, 2004) [*Zubulake V*] and *Coleman v. Morgan Stanley*, 2005 WL 679071 (Fla. Cir. Ct. March 1, 2005), [*Morgan Stanley*] have attracted tremendous attention from U.S. corporations, in-house counsel and the broader legal and business communities, there remains limited jurisprudence in Canada. In Canada, judicial reasoning exploring the obligations of parties to produce electronic evidence remains in its infancy. Consequently, the Canadian courts have been looking to U.S. jurisprudence for guidance in developing our own case law on e-discovery issues.

e-Discovery in the United States

The two American cases which are highlighted illustrate the myriad of problems that companies are experiencing with e-Discovery. Both had interlocutory decisions dealing with the destruction of electronic evidence and final judgments were released in both cases in May 2005. The results were staggering by Canadian and U.S. standards.

• Zubulake v. UBS Warburg (Zubulake V):

The *Zublake* case became widely known for its five interim rulings on electronic discovery issues, in particular with respect to the focus on the scope of production due to the volume of electronic evidence, cost-sharing, and most importantly, the ruling relating to UBS Warburg's destruction of relevant e-mails and its failure to ensure that all relevant electronic evidence was preserved. A federal jury awarded Laura Zubulake with US $29 million in damages for her claim of gender discrimination against her former employer UBS Warburg. More than two-thirds (US $20 million) of that amount was awarded as punitive damages.

• Coleman (Parent) Holdings, Inc. v. Morgan Stanley Co., Inc.:

After suing Morgan Stanley for fraud and conspiracy in connection with Coleman's sale of stock in Coleman Inc. to Sunbeam Corporation in return for Sunbeam stock, Coleman sought access to Morgan Stanley's internal files including e-mails. 1,300 pages of e-mails and subsequently certified compliance with the order to produce, Morgan Stanley failed to make Coleman aware of additional backup tapes and potentially relevant material. As a result of a finding by the court that Morgan Stanley acted in bad faith, and failed knowingly and deliberately in its duty to preserve and produce e-mails, a jury awarded the plaintiff, Coleman US $604 million in compensatory damages and US $850 million in punitive damages. Morgan Stanley is appealing.

e-Discovery in Canada

The *Rules of Civil Procedure* in Ontario and the relevant cases provide that the obligation to produce all documents relating to any matters in issue extends to electronic evidence. While there have been few cases in Canada to provide guidance on electronic discovery, the cases of *CIBC World Markets Inc. v. Genuity Capital Markets*, [2005] O.J. No. 614 (Ont. S.C.J.) [Genuity] and *Portus Alternative Asset Management Inc. et. al., Re* (2005), 28 O.S.C.B. 2670 (O.S.C.) [Portus] suggest that production obligations are very broad and may entitle an opposing party to image and store the contents of a party's Blackberries, computers, and other similar electronic devices of "every nature and kind" that they may have in their "possession, power, ownership, use or control, directly and indirectly." This broad order could include such devices regardless of whether they were located at the office premises or private homes, and regardless of whether these devices were owned or used by other individuals such as spouses or children.

In addition, counsel for both parties could be required to communicate with all independent service providers with whom the parties had contracted for service to ensure that any relevant deleted documents would be preserved and included in the affidavit of documents.

The obligation to preserve electronic evidence

In the United States, the obligation to preserve has been held to be an ongoing obligation which arises as soon as litigation is reasonably anticipated. It is reasonable to assume that this obligation is similar in Canada. The *Zubulake* case has proven integral in establishing in the U.S. that a party's discovery obligations do not end with the implementation of a litigation hold. Rather, preservation must be a joint effort between both the party and their counsel. While a party must be the one to institute a litigation hold, counsel must oversee, and take affirmative steps to ensure compliance. This compliance includes the obligation on both the party and its counsel to make certain that all sources of potentially relevant information are identified and placed on hold. Both the party and counsel must be in communication with the company's information technology department, and in some cases, counsel should run a system-wide key word search to ensure relevant information is preserved.

Another key factor is that it is not only the party against whom spoliation is alleged who has an obligation to preserve electronic evidence. If a party is determined to seek sanctions against another for spoliation, it must be able to come to court with clean hands and be willing to produce its own electronic documents to the court.

Spoliation of electronic evidence

As can be seen by the Zubulake decision, sanctions for the intentional deletion of relevant evidence can be severe. In that

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)