

# **E-DISCOVERY AND COVERAGE LITIGATION**

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## INTRODUCTION

The emergence of the internet and electronic methods of communication present significant challenges for traditional discovery practices. Discovery of documents is already a time-consuming and expensive aspect of routine litigation. The expanding use of, and dependence on, e-mail technology is creating new demands on counsel and litigants to conduct detailed reviews of electronic communications to determine whether they are protected by solicitor-client and/or litigation privilege. The manner in which electronic communications are disseminated within an organization may result in a waiver of privilege and the loss of the privacy and protection afforded by the privilege doctrine.

This paper considers e-discovery obligations within the context of coverage litigation and discusses the potential impact of e-discovery obligations on its conduct. While focussing on the Ontario E-Discovery Guidelines issued in the fall of 2005, reference will be made to the various initiatives within Canada to articulate and establish best practices for e-discovery that Canadian litigation counsel will be expected to follow in our courts and the pre-Guidelines jurisprudence will also be canvassed.

The advent of e-discovery obligations will increase the burden on counsel for the insurer in coverage litigation and the attendant expense to insurance companies. Coverage counsel must become intimately familiar with their client's document retention policies and data retention architecture. Early consideration of e-discovery requirements by coverage counsel is now necessary due to the technological processes that must be invoked as soon as litigation is reasonably expected, the requirement to establish a litigation hold within the insurance company and need to put the policyholder on early notice of the insurer's expectations regarding preservation of e-documents, and the range of documents to be reviewed for potential relevance and privilege. Important

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The logo for the law firm Blakes, featuring the name "Blakes" in a stylized, cursive script font.

tactical decisions now need to be made at an early stage of the litigation, particularly as they relate to the form of e-documents to be produced. Emerging e-discovery obligations, which are now in the process of being adopted across Canada, will cause a seismic shift in the dynamics of coverage litigation given the degree of consultation and cooperation now required between opposing counsel for effective, mutual disclosure if the parties are to effectively manage the volume of e-documents during the discovery phase of the litigation process.

## **1. The E-Discovery Guidelines and Practices – Current Status<sup>1</sup>**

Since 2002, there has been considerable activity in Canada in the e-discovery area, although Canada still lags somewhat behind the United States in the development and adoption of principles, rules and jurisprudence concerning e-discovery obligations.

In November 2003, the Discovery Task Force issued a report in which it outlined guidelines or “best practices” for the discovery process in Ontario. The Task Force wanted these guidelines to be understood before any potential rule changes were made to implement the guidelines. The best practices were intended to complement, not supplement, the discovery rules in the *Rules of Civil Procedure*. A key principle articulated by the Discovery Task Force was that relevance for the purpose of disclosure and production should take into account necessity, cost and timeliness.

In 2004, a sub-committee of the Discovery Task Force was formed to deal with the specific issue of e-discovery. The E-Discovery Sub-Committee was chaired by the Honourable Mr. Justice Colin Campbell. It issued its first draft of Guidelines for the Discovery of Electronic Documents (the “Guidelines”) in Ontario in October 2005. The Guidelines responded to the recommendation in the Report of the Task Force on the Discovery Process in Ontario that a “best practices” manual be developed to address

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<sup>1</sup> A significant part of the discussion in this paper on the E-Discovery Guidelines and the related case law commentary was developed and written by my litigation colleague, Kathryn Manning, who currently serves on the E-Discovery Implementation Committee.

the discovery of electronic documents (called “e-documents” in this paper). They are intended to develop as technology changes and the bench and bar gain more practical experience with e-discovery.

In 2006, the Ontario Bar Association and the Advocates Society collaborated to establish the E-Discovery Implementation Committee (“EIC”) to work towards implementing within the Ontario court system and the litigation bar, in a practical and meaningful way, best practices with respect to electronic discovery. The EIC recently prepared and published for comment a number of precedents (model orders, discovery requests, preservation letters and a “meet and confer” agreement). The EIC’s role includes liaising with and educating the judiciary on electronic discovery issues and the model documents; liaising with and educating the bar; obtaining feedback from the judiciary and the bar with a view to improving the model documents and/or creating additional ones; addressing the utility of and/or drafting an e-discovery practice direction; and addressing the utility of and/or drafting proposed revisions to Rule 30 to deal with e-discovery issues.

On a national level, a number of the individuals who helped develop the Ontario Guidelines have recently joined with other practicing lawyers, judges, in-house counsel and law society representatives across Canada. Working with the organizers of The Sedona Conference and observers from the U.S. federal judiciary, they formed The Sedona Canada Working Group 7 (“Sedona Canada”). In January 2008, this group published The Sedona Canada Principles Addressing Electronic Discovery. The Sedona Canada Principles are intended to be consistent with the Federal Rules in the United States, while allowing for substantive differences in local discovery practices. Certain provinces and the federal tax court are now considering adoption of the Sedona Canada Principles, formal rule changes or the issuance of practice directions. The Supreme Court of British Columbia already issued a practice direction regarding electronic evidence on July 1, 2006. The Alberta Court of Queen’s Bench released Civil

Practice Note 14 – Guidelines for the Use of Technology in litigation on May 30, 2007 and has essentially adopted the Ontario Guidelines.<sup>2</sup>

Finally, the Canadian Judicial Council approved a Model National Practice Direction in September 2007 which is anticipated to be posted momentarily on the LexUM E-Discovery Portal any day. The provincial Chief Justices will thereafter be requested to issue Practice Directions consistent with the model direction to ensure uniform e-discovery practices and standards in court proceedings across Canada.

## **2. What are Electronic Documents?**

The term “document” is broadly defined in the Ontario *Rules of Civil Procedure* and includes “data and information in electronic form.” E-documents can therefore take a number of different forms, including:

- (a) word processing files, power points and excel spreadsheets;
- (b) e-mails, outlook calendars and web pages;
- (c) information stored in any number of electronic devices such as cellular phones, Blackberries, Personal Assistants (“PDAs”), voicemail systems, and fax machines; and
- (d) information stored on a wide variety of media such as: computer drives, floppy disks, CDs, DVDs or zip drives.

The potential scope of the definition of “document” means that parties’ production obligations in coverage litigation have the potential to be extremely onerous because parties have to search for, retrieve and review large volumes of information in a variety of forms. As discussed below, participants in coverage litigation need to make an early and informed determination of the types of e-documents that may potentially be relevant

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<sup>2</sup> See, for example, *Shell Canada Limited v. Superior Plus Inc.*, 2007 ABQB 739 (CanLII).

in the dispute and take the appropriate steps to preserve, retrieve, review, classify based on privilege and produce the non-privileged e-documents.

### **3. Scope of Discovery in Coverage Litigation**

Before discussing the best practices applicable to e-documentary discovery and how they might impact the conduct of coverage litigation during the discovery process, it may be helpful to identify some of the production and scope of discovery issues that commonly arise in coverage litigation.

#### **(i) Potentially Discoverable Documents**

There are many types of documents that are potentially discoverable in a coverage action, depending on the nature of the claim. Within the files of the insurer, these documents may include:

1. the underwriting files
2. underwriting guidelines and manuals
3. the claims file (excluding privileged documents)
4. the files maintained by independent adjusters
5. e-mails, voice mails, memoranda, correspondence and other communications within the insurance company and, on occasion, between the insurer its affiliates if they are providing underwriting or claims management services to the insurer
6. communications between the insurer and the broker
7. claims handling procedures and manuals
8. communications with reinsurers
9. communications with expert witnesses
10. investigative files maintained by legal counsel, if retained for that purpose
11. legal opinions of internal legal counsel

12. legal opinions of external legal counsel
13. the underlying file in any third party litigation giving rise to the coverage dispute

The policyholder will have a distinct set of documents that will be relevant to the underlying first party loss or third party liability, settlement or judgment which give rise to the coverage action. It will also have documents germane to the application for insurance itself and the negotiation, documentation and performance of the insurance contract, including communications with its brokers that will not necessarily be duplicated within the insurer's underwriting files.

There are two limiting principles that will operate to delineate the scope of documentary production in the coverage litigation in Ontario: (1) the "semblance of relevance" of the document to the matters in issue and (2) any intervening solicitor-client and/or litigation privilege.

#### **(ii) Semblance of Relevance Test**

The semblance of relevance test is a low threshold and has been criticized as permitting fishing expeditions and driving up expense in the discovery process. Master MacLeod recently described the word "semblance" in the test as "unfortunate" because the word seems to many to import a concept of a remote possibility of relevance, which is not what Justice Steele intended when he articulated the test in *Kay v. Posluns*.<sup>3</sup> "Semblance" has been interpreted more recently as meaning *apparently* relevant, however considerable latitude will be given to the examining party because he or she does not know the information known to the opposing counsel.<sup>4</sup>

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<sup>3</sup> *Anderson v. St. Jude Medical Inc.*, 2006 Can LII 31906 (Ont. S.C.) at para. 23.

<sup>4</sup> *Ibid.*, at para. 23.

While it is beyond the scope of this paper to provide an exhaustive discussion of how the semblance of relevance test is applied in coverage litigation, the scope for discovery is very broad although some limitations have been recognized. For example, the law is reasonably clear that, absent unusual circumstances, the *level of the reserves* established by the insurer is immaterial to a bad faith claim and not discoverable.<sup>5</sup> Documentation with respect to the drafting history of policies may be discoverable, where the material contained the insurer's knowledge of the meaning of the policy at the time it was in existence. In *Royal & SunAlliance Insurance Co. of Canada v. Lombard Canada Ltd.*,<sup>6</sup> which involved a dispute among underwriters, Spiegel J. ordered the production of an underwriting file, stating:

“The underwriting file, detailing the formation of the contract, could assist in interpreting the contract by demonstrating the parties’ original understanding of what the contract would cover. Just as a first draft to a contract could be seemingly relevant to the interpretation of the second and final draft, the underwriting files could be relevant in interpreting the final insurance contract.”

However, insurers will likely not be required to search their records for interpretive documents for the period after the expiration of the policy.<sup>7</sup>

In coverage litigation involving allegations of misrepresentation, material non-disclosure or material change in risk, the policyholder will be particularly concerned to examine the underwriting files of the insurer which may contain information about the insurer's analysis of the risk, its interpretation of coverage and rating information about the scope or extent of the risks to be covered. Where the defendant insurer seeks to avoid the insurance contract for material non-disclosure, it will be relevant to determine not only what a prudent underwriter would have done in comparable circumstances but also

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<sup>5</sup> *Osborne v. Non-Marine Underwriters, Lloyd's London*, [2003] 5 C.C.L.I. (4<sup>th</sup>) 124, 68 O.R. (3d) 770, [2003] O.J. No. 5500 (per Blair, J.).

<sup>6</sup> (2003), 2003 CarswellOnt 2560 (Sup. Ct.) reversing in part (2003), 2003 CarswellOnt 2629 (Master); affirmed (2005), 17 C.C.L.I. (4<sup>th</sup>) 108 (Div. Ct.).

whether the underwriter who wrote the policy would have regarded the undisclosed information as sufficiently important to justify a refusal to underwrite the risk or to charge a higher premium or, after the policy had been issued, to avoid it.<sup>8</sup> Where rectification of the policy is sought by the policyholder, the underwriting file and communications with the broker before and after issuance of the policy and possibly communications with reinsurers may be directly relevant to the resolution of the issues.

### **(iii) Claim-Related Investigations and the Inception/Cross-over of Litigation Privilege**

In addition to claiming indemnity under the policy, allegations of bad faith are often advanced by insureds in coverage litigation, in support of claims for punitive damages and sometimes as a tactic or lever to broaden the scope of discovery, embarrass the insurer and encourage early settlement. The policyholder will allege that the insurer failed to conduct a reasonable (or any) investigation or failed to assess the merits of the claim in a balanced and reasonable matter.<sup>9</sup> The insurer's response to such allegations is typically to positively aver that the insurer acted in good faith with specifics of the investigative/evaluative steps taken, rather than simply deny the allegations. The insurer's claim file will be relevant to whether it acted in good faith (but not likely to the issue of whether there is coverage). As will be discussed below, the assertion by the insurer that it acted in good faith will not automatically constitute a waiver of privilege;

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<sup>7</sup> *Noranda Metal Industries Ltd. v. Employers Liability Assurance Corp.* (2000), 23 C.C.L.I. (3d) 60, 49 C.P.C. (4<sup>th</sup>) 336 (Ont. Sup. Ct.).

<sup>8</sup> *Nuvo Electronics Inc. v. London Assurance*, [2000] O.J. No. 2241 (Ont. S.C.); *1013799 Ontario Ltd. v. Kent Line International Ltd.*, [2000] O.J. No. 3074 (Ont. S.C.).

<sup>9</sup> See *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters* (2000), 184 D.L.R. (4<sup>th</sup>) 687, where O'Connor J.A. observed that the duty of good faith requires an insurer to act both promptly and fairly when investigating, assessing and attempting to resolve claims made by its insured (at para. 27). O'Connor J.A. went on to state: "The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy. The duty of fairness, however, does not require than an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith." (at para. 29).

however, the investigation conducted by the insurer and the facts determined in the course of that investigation of the claim will be discoverable, subject to any applicable claims for solicitor-client or litigation privilege.

Litigation privilege encompasses communications between the client or his or her solicitor and third parties if made for the solicitors' information for the purpose of pending or contemplated litigation. Special regard must be had to situations where a document or report is created for a two-fold purpose, one of which is to assist counsel in litigation. For the privilege to attach, the purpose of submission to the legal advisor in view of litigation must be a *dominant purpose* for which the relevant document was prepared. Dominant purpose does not mean sole purpose, however. If an investigation and the reports about it have a dual purpose, one of which is to assist in anticipated litigation, the duality of purpose does not mean that litigation cannot exist; a document may be prepared for a multitude of purposes and if the dominant purpose is to assist in anticipated litigation, the litigation privilege applies to the document.<sup>10</sup>

An insurance company investigating a policy holder's loss is not considered to be in a state of anticipation of litigation. Documents prepared by an insurer and underwriter after investigation of a claim begins but prior to communication to the insured of the denial of the claim will not automatically be subject to litigation privilege.<sup>11</sup> The date when litigation privilege commences typically requires a "*reality*" to the insurer's anticipation of litigation<sup>12</sup> or a "reasonable prospect of litigation".<sup>13</sup> The act of retaining counsel does not automatically set the time when litigation privilege commences, otherwise insurers could retain counsel for the purpose of gaining the protection of litigation privilege. However, retaining counsel may provide appropriate evidence of the dominant purpose of litigation and that something more than the mere likelihood of

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<sup>10</sup> *Mamaca v. Coseco Insurance Company*, 2007 CanLII 54963 (ON S.C.).

<sup>11</sup> *Primosig v. Scottish & York Insurance*, [2006] O.J. No. 3752 (Ont. S.C.J.).

<sup>12</sup> *General Accident Assurance Co. v. Chrusz*, (1999), 45 O.R. (3d) 321 (Ont. C.A.).

<sup>13</sup> *Scopis Restaurant Ltd. v. Prudential Assurance co. of England Property & Casualty Canada*, [1999] O.J. No. 1319 (Ont. Gen. Div.).

litigation existed.<sup>14</sup> Prior to that time, the information gathering is probably more in the nature of investigation and, in the normal course, litigation would not be the dominant purpose of an investigation until a decision is made to deny the claim.<sup>15</sup>

The privilege analysis becomes complicated when the investigation is conducted by external counsel. In *Davies v. American Home Assurance Co.*,<sup>16</sup> Blair J. (as he then was) agreed that the evidence as to the manner in which the claim was processed is relevant to a bad faith claim, that the information available to the insurer upon which it decided whether or not to pay the claim is critical and that solicitor-client privilege cannot be raised to protect communications during the investigation, evaluation, assessment and decision stages unless those communications are otherwise legitimately the subject of privilege. Blair J. noted that an insurer may not protect investigative information that it has gathered and that would otherwise be producible behind the cloak of solicitor-client privilege, simply by the expedient of placing control of the claim investigation in the hands of its lawyer. However, the legal opinion rendered by the lawyer to the client based upon the information obtained in the course of that investigation is another matter. That remains privileged, unless the insurer puts its state of mind an issue, as discussed below, or otherwise waives the privilege.<sup>17</sup>

#### **(iv) Bad Faith Allegations and their Impact on Privilege Post *Blank***

As a result of *Davies v. American Home Assurance Co.*, the law appears reasonably clear in Ontario that the mere assertion of a bad faith claim against an insurer will not be sufficient to destroy the solicitor-client privilege attaching to communications of legal opinions from the insurer's counsel to the insurer. Blair J. stated that "such an intrusive undermining of a fundamental protective principle of substantive law cannot be justified

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<sup>14</sup> *Klair v. Security National Insurance Co.*, [2006] O.J. No. 4016 (Ont. S.C.J.) (a property insurer reasonably contemplates litigation against its own insured when it has a reasonable suspicion of arson and retains counsel soon thereafter).

<sup>15</sup> *Refco Futures (Canada) Ltd. v. American Home Assurance Co.*, [2004] O.J. No. 1720 (Ont. S.C.J.).

<sup>16</sup> *Davies v. American Home Assurance Co.*, [2002] O.J. No. 2696 (Div. Ct.).

<sup>17</sup> *Ibid*, at para. 23.

on legal or policy grounds.”<sup>18</sup> The functional purpose of solicitor-client privilege has been described as going to the very heart of the administration of our legal system; all persons, whether natural, corporate, or governmental, must have access to expert legal counsel without fear that this recourse may be used to their detriment.<sup>19</sup> Blair J. noted that the pleading by an insurer that it acted in good faith does not waive privilege:

“The point is that ... privilege ..., when properly asserted, trumps relevance in almost all circumstances. This is its very nature. There is no “bad faith insurance claim” exception to either litigation privilege or solicitor-client privilege that creates a special rule for bad faith claims against insurers and consigns the normal rules respecting privilege to other claims. The same rules apply in all cases.”<sup>20</sup>

The scope of litigation privilege was carefully considered in the 2006 decision of the Supreme Court of Canada, *Blank v. Canada (Minister of Justice)*,<sup>21</sup> in which the court described the purpose of litigation privilege as creating a zone of privacy in relation to pending or apprehended litigation. The privilege may retain its purpose and effect where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. In *Blank*, the Supreme Court of Canada was considering the Minister’s claim of privilege over documents prepared for the dominant purpose of an earlier criminal prosecution relating to environmental matters where the charges were quashed, and new charges laid by way of indictment which were subsequently stayed. Blank then sued for damages from the federal government for abuse of prosecutorial powers, fraud, conspiracy and perjury and sought civil redress for the manner in which the government had conducted the prosecution. While affirming the scope of litigation privilege, the court recognized that litigation privilege does not trump relevance in all circumstances, stating:

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<sup>18</sup> *Ibid*, at para. 17.

<sup>19</sup> See the discussion of the law of privilege in *Guelph (City) v. Super Blue Box Recycling Corp.*, [2004] O.J. No. 4468 (Ont. S.C.J., Corbett J.) (“*Guelph*”).

<sup>20</sup> *Davies, supra*, at para. 27.

<sup>21</sup> [2006] 2 S.C.R. 319 (S.C.C.).

“The litigation privilege would not in any event protect from disclosure evidence of the claimant party’s abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one’s own misconduct can never be exposed to the light of day.

Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground.”<sup>22</sup>

The above dicta in *Blank* therefore leaves open the possibility for a party to obtain access to documents which are subject to litigation privilege where actionable misconduct is demonstrated on a *prima facie* basis. The Ontario Divisional Court recognized the possible applicable in insurance coverage litigation of the *Blank* actionable misconduct exception (to trump litigation privilege) in *Smith v. London Life Insurance Company*,<sup>23</sup> however, it concluded that something more was required than an allegation of actionable misconduct in the pleading. In that case, the Divisional Court made an order for the defendant insurer to deliver a further and better affidavit of documents individual listing the documents for which privilege was claimed and particularizing the ground on which the privilege was being claimed. It was then left open to the plaintiff to bring further proceedings concerning the production of the documents for which privilege was claimed. Once a ruling was made on the validity of the claim for litigation privilege, the Divisional Court stated that a further review may be required of the privileged documents to determine whether or not the production of such documents may be required on the actionable misconduct ground set out in *Blank*.

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<sup>22</sup> Ibid, at paras. 44 and 45.

<sup>23</sup> 2007 CanLII 745 (Ont. S.C.D.C.).

In *Mamaca v. Coseco Insurance Company*,<sup>24</sup> Justice John MacDonald stated that “an insurer’s bad faith in the handling of its insured’s accident benefits claim is actionable misconduct”<sup>25</sup> and interpreted the *Blank* decision as overruling the conclusion earlier reached in *Samoila v. Prudential of America General Ins. Co. (Canada)*<sup>26</sup> that in bad faith claims between insured and insurer, the nature of their relationship, the insurer’s responsibilities and the insured’s need for proof of bad faith are a sufficient basis for ordering disclosure of the insurer’s claims file, despite its assertion of litigation privilege. MacDonald J. outlined the preferred course of action to be followed by the course in determining the validity of the claim for litigation privilege and then whether disclosure should nevertheless be ordered due to actionable misconduct:

“I think the preferred course is to determine first whether litigation privilege exists, and not to combine that hearing with a hearing in which the party seeking disclosure attempts to prove a *prima facie* case of actionable misconduct. Of course, if the party asserting litigation privilege fails to prove that it applies, there is no need for a “misconduct hearing”. If litigation privilege is established, a separate hearing to determine whether there is a *prima facie* case of actionable misconduct avoids the risk of procedural unfairness, and the substantive risk of the separate issues being merged in a fashion which could deprive the litigation privilege of its proper role in the adversarial process. Rules 30.04(6) and 30.06(d) may well play a role in the resolution of these issues. However, I would think their proper role should be determined by reference to the adversarial process, and to the fact that Masters and Judges are not engaged in an inquisitorial process.”<sup>27</sup>

While litigation privilege will trump relevance in most cases, including where bad faith is alleged, there is no guarantee that the privilege will prevail where the incidents of bad faith relate to the conduct of the proceeding itself or any prior, related proceeding between the parties. It remains to be seen how far the actionable misconduct exception

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<sup>24</sup> *Supra*.

<sup>25</sup> *Ibid*, at para. 14.

<sup>26</sup> (2000), 50 O.R. (3d) 65 (S.C.J.).

<sup>27</sup> *Conseco*, *supra*, at para. 49.

will be extended beyond the conduct of the proceedings to the conduct of the underlying investigation and decisions relating to the denial of the claim, where a claim for litigation or even solicitor-client privilege might otherwise be made.

**(v) Waiver by Disclosure or Reliance and other Exceptions**

There are limited circumstances where privileged communications may nonetheless be compelled from a party asserting its privilege. The first and most frequently invoked instance is waiver. In *Davies v. American Home Assurance Co.*, Blair J. noted that:

“One of the ways in which solicitor-client privilege may be waived is where the party asserting the privilege places its state of mind in issue by attempting to justify its position on the grounds of detrimental reliance upon the legal advice received”.<sup>28</sup>

Other exceptions to the principle of solicitor-client privilege include:

1. where the purpose of the privileged communication is in furtherance of unlawful conduct, which may extend to perpetrating tortious conduct;<sup>29</sup>
2. where public safety is at risk;
3. where there is a genuine risk of a wrongful conviction; or
4. where privilege has been abrogated by statute.<sup>30</sup>

When a privilege is waived, the waiver applies to the entire subject matter of the communications; the party may not “cherry pick” privileged communications, disclosing

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<sup>28</sup> *Supra*, at para. 23.

<sup>29</sup> *Dublin v. Montessori Jewish Day School of Toronto*, 2007 CanLII 8923 (Ont. S.C.) per Perell J. The client’s intention to commit a wrongful act is the key determinant as to whether the communication is privileged. It must be shown that the client had an illegal purpose in mind [which may extend to the commission of a tort or actionable misconduct such as bad faith] and that the lawyer either shared that illegal purpose or was deceived as to the client’s purpose (at para. 33).

<sup>30</sup> *Guelph, supra*, at para. 76.

what is helpful for that party in claiming privilege over the rest. In *Guelph*, Corbett J. made reference to the general statement of principle about privilege in Wigmore:

“Where legal advice of any kind is sought from a professional legal advisor in [his or her] capacity as such, the communications relating to the purpose made in confidence by the client are at [its] instance permanently protected from disclosures by [the client] or by the legal advisor; except that the protection be waived.”

Corbett J. then discussed two ways in which waiver may occur: waiver by disclosure and waiver by reliance. He noted that waiver by disclosure is “perilous for counsel and parties alike”:

“Under a strict application of the Wigmore principle, the smallest slip in production or at discovery could ground a claim that privilege has been waived over the entirety of a solicitor’s file. The rise of e-mail and fax communication has made this all the more delicate, since accidents are bound to happen. The courts have tended to excuse “slips” which result in an inadvertent disclosure on the basis that the disclosing party did not intend to waive privilege, and the disclosure was a mistake or made without appreciation of the effect of the disclosure. However, the line between excusable “slips” and disclosure leading to blanket waiver of privilege is by no means clear, and the cost to litigants of vetting documents for privilege is staggeringly high. These developments, alone, warrant a serious rethinking of a blanket principle that disclosure *simpliciter* gives rise to waiver”.<sup>31</sup>

Corbett J. dealt with the consequences of a party disclosing the receipt and reliance upon legal advice during the discovery process. He expressed the view that such a disclosure is not sufficient to give rise to waiver of privilege. Where the reliance on the legal advice will be relied upon at trial in respect to a substantive issue between the parties, Corbett J. considered that to be another matter and referred to this situation as

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<sup>31</sup> *Guelph*, *supra*, at para. 81.

“waiver by reliance”. He held, however, that mere disclosure, by itself, that legal advice was received and followed to explain why a party did something should not be sufficient, by itself, for a waiver of privilege. Only when the party puts the substance of the advice in issue in the legal proceeding will the privilege will be lost. Solicitor-client privilege will not be waived, however, by disclosing that a solicitor’s advice was obtained. It is waived only when the client relies upon the receipt of the advise to justify conduct in respect to an issue at trial.<sup>32</sup>

In discussing when a waiver by disclosure and waiver by reliance can occur, Corbett J. made the following observations about the changing roles of lawyers in an increasingly regulated and complex society:

“Lawyers today are called upon to provide a broad range of advice to ever large groups of people in respect to ever broadening areas of legal regulation. The relationship between solicitor and client is not framed by the solitary meeting between individual client and individual professional advisor. The changed context in which legal advice is sought and provided is matched by the changes of the technologies of communication that make it ever harder to ensure absolute non-disclosure of that which is intended to be confidential. Substantive reliance must be distinct from narrative accuracy. If asked the question: Q.: “Why did you send this letter to my client? A.: “My lawyer told me to (or, on legal advice)”, then the answer may well be the accurate and indeed only response. Perhaps, the more artful answer to the question is: “The answer to that question is privileged” (an answer that conveys much the same meaning, while observing the traditional requirements of non-disclosure). Waiver by disclosure should not be a matter of artistry in the discovery process. Nor should it be confused with waiver by reliance”.<sup>33</sup>

Corbett J.’s discussion in *Guelph* of waiver by reliance, particularly as it might potentially apply to bad faith coverage litigation, is noteworthy. Corbett J. observed that in most

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<sup>32</sup> Ibid at paras. 87 and 88.

<sup>33</sup> Ibid at para. 92.

commercial disputes, the intention of the parties should be irrelevant. Where a party relies upon legal advice in the performance of a legal obligation, it is generally no defence to a claim for breach of that obligation that the breacher was following legal advice. The question is – did the breacher breach? If yes, then what are the damages? The ethical dimensions of the law of obligations are never far from sight. The expanded availability of punitive damages in contract and tort cases (which includes insurance coverage claims) has given rise to more of these claims, thus putting the defendant's motive and state of mind an issue. The flexible approach of Canadian courts to claims of breach of fiduciary duty, and analogous duties of public authorities raises a broader range of contexts in which the intention and motives of the parties may be an issue:

“Most claims in a commercial law context will have little or nothing to do with what the parties intended or felt, but rather with what they were obliged to do, and what they did in fact. However, in many of these cases, allegations will be made on the basis of theories of liability tied to intention or motive, in addition to contract law theories of liability. This is one of the consequences of the growing confluence of tort and contract law into a general law of obligations. And so, allegations of lack of good faith, intentional breach of obligation, and/or bad faith will be made more often than such allegations were made out at trial. And when the allegations are made, the state of mind of the parties, the reasons why they did the things they did, will be an issue”.<sup>34</sup>

Corbett J. then noted, at paragraph 97 of his reasons, that privilege can be claimed regardless of the opposite party's allegations. Thus, the assertion by a policy holder that an insurer acted in bad faith will not automatically give rise to a loss of privilege or implied waiver. Corbett noted, however, that when faced with a claim of bad faith, a party that responds by relying on good faith conduct as a result of following legal advice will thereby waive its privilege.

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<sup>34</sup> Supra at para. 95.

**(vi) Common Interest Privilege**

Common interest privilege is a form of privilege which arises when two or more parties have a common interest in litigation and exchange information for the dominant purpose of informing each other of the facts or issues involved in the litigation in which they share a mutuality of or the “self same” interest.<sup>35</sup> The relationship of insurer and reinsurer is often cited as an example of mutual interest supporting a common interest privilege. In *Chrusz*, Carthy J.A. writing the majority reasons recognized the existence in Ontario of common interest privilege:

“While solicitor-client privilege stands against the world, litigation privilege is a protection only against the adversary, and only until termination of the litigation. It may not be inconsistent with litigation privilege vis-à-vis the adversary to communicate with an outsider, without creating a waiver, but a document in the hand of an outsider will only be protected by a privilege if there is a common interest in litigation or its prospect...

[Citing *United States of America v. American Telephone and Telegraph Company* 642 F. 2d 1285 at pp. 1299 – 1300:]...The existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege. But “common interests” should not be construed as narrowly limited to co-parties. So long as transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts. Moreover, with common interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary. When the transfer to a party with such common interests is conducted under a guarantee of confidentiality, the case against waiver is even stronger.”<sup>36</sup>

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<sup>35</sup> Being sued by the same plaintiff will not necessarily create a common interest, where different, conflicting causes of action are asserted: *Hospitality Corp. of Manitoba Inc. v. American Home Assurance Co.*, [2004] M.J. No. 274 (Man. C.A.).

<sup>36</sup> *Supra*, at pp. 337 – 338.

Documents which are subject to claims for litigation privilege may lose the benefit of that protection if forwarded to third parties who do not have a “self-same” interest or a true mutuality of interest. In *Canadian Pacific Ltd. v. Canada (Competition Act, Director of Investigation & Research)*,<sup>37</sup> Farley J. suggested one way to ascertain if divergent parties had a common interest was whether it was reasonably possible for the same counsel to represent all parties. This may be a narrower statement of the test than is appropriate.

In *Supercom of California Ltd. v. Sovereign General Insurance Co.*,<sup>38</sup> Wilson J. refused to extend the notion of common interest privilege to apply to all insurer members of the ICPB cooperatively fighting the “plague of potential insurance fraud by plaintiffs” through the sharing of information derived from reports submitted by members about claims, which information was entered into a computerized national database of insurance loss information derived from those reports. ICPB argued that the insurers shared a common interest in pooling this type of information, thereby protecting the values and goals of society and ensuring that reasonable insurance premiums are kept at reasonable levels for honest members of the public. Wilson J. did not consider this type of mutual concern among insurers to create a common interest, as where there are multiple policies in force, each insurer will be battling each other to see which is ultimately responsible for the plaintiff’s loss. Moreover, the relationship between individual insurers and the ICPB was not one that in the opinion of the community should be sedulously fostered. While acknowledging that insurance fraud is a serious social problem adversely affecting the public and that there are plaintiffs that abuse and attempt to deceive for advantage,

“...the reality is that the insurance industry is big business with the overriding objective of making a profit. Unfortunately, all too often that profit is at the expense of a deserving plaintiff that does not have the tenacity or the resources to litigate when their claim has been denied.

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<sup>37</sup> [1995] O.J. No. 4148 (Gen. Div.).

<sup>38</sup> (1998), 37 O.R. (3d) 597 (Gen. Div.).

Abuse exists on both sides of the equation. The issue is not whether the ICPB is entitled to conduct their activities to protect their members. The issue is whether in the context of litigation, as a consequence of the pooling of information, the plaintiff is entitled to production of investigative documents submitted to the ICPB in relation to their claim.”<sup>39</sup>

Justice Wilson then noted:

“It must not be forgotten in weighing the public policy aspects of this case that insurers are subject to the obligations of good faith to their insured. The insured and the insurer do not begin their relationship as adversaries. They become adversarial only when a claim is denied. An insured purchases insurance anticipating protection, not litigation. Disclosure of investigative documentation concerning this claim may provide some advantage to the plaintiff in this case. The disclosure may well advance the search for truth which is the cornerstone of the adversarial system...It would, in my view, be contrary to the interests of our adversary system to grant to the powerful insurance industry the rights and the advantage of freely pooling information to ICPB investigators without the obligation of advising the plaintiff of the nature of the information received. To do so would create a very uneven playing field. The principles of waiver of privilege are well founded. A litigant cannot take a position inconsistent with privilege and maintain the privilege. To extend the principles of common interest to the ICPB and its members in the insurance industry would be a quantum leap from the limited extent of common interest privilege developed to date in the case law.”<sup>40</sup>

If co-litigants are going to share information that they have developed independently, or work together to investigate and share information or documentation prepared in contemplation of litigation, it is desirable to have a common interest agreement in place, confirming the existence of the common interest, the obligations of confidentiality and the manner in which information is to be shared. While there is no guarantee that the

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<sup>39</sup> Ibid at pp. 12 – 13 (QL version).

<sup>40</sup> Ibid at pp. 14 – 15 (QL version).

execution of such an agreement will be dispositive of whether a common interest actually exists, it will assist the parties in arguing that there was no intention to waive litigation privilege.

#### 4. **The *Vioxx* Decision: When Hitting “Send” Means Adieu to Privilege**

##### (i) **Need to Act in Legal Capacity**

Solicitor-client privilege attaches equally to communications with in-house and external counsel, provided that counsel is acting in a legal capacity. The issue of the capacity in which in-house counsel was acting when receiving and generating communications with other employees of a corporation was the key issue in the seminal e-discovery decision of the United States District Court in *Re Vioxx Product Liability Litigation*<sup>41</sup>. *Vioxx* was a multidistrict litigation in which Merck produced over 2 million documents and asserted attorney-client privilege to approximately 30,000 documents, amounting to nearly 500,000 pages. The Court appointed a renowned expert on privilege, Professor Paul R. Rice of American University's College of Law, as a Special Master pursuant to Rule 53 of the *Federal Rules of Civil Procedure* to review 2,600 representative documents and to make recommendations as to whether or not Merck's claims for privilege should be upheld.

In its judgment affirming the Special Master's report, the District Court noted that it is well-accepted that attorney-client privilege applies to corporations:

“The fictitious legal entity is the client that cannot speak, but that entity is personified by the employees who represent its interests and speak on its behalf. Consequently, it protects communications between those employees and corporate legal counsel on matters within the scope of their corporate responsibilities, as well as communications between corporate employees in which prior advice received is being

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<sup>41</sup> United States District Court, Eastern District of Louisiana, MDL No. 1657, August 14, 2007.

transmitted to those who have a need to know in the scope of their corporate responsibilities.”<sup>42</sup>

The troublesome aspect of the communications in the *Vioxx* case was the requirement that legal advice or assistance must be sought and given for the privilege to apply. Because of the findings made about the *capacity* in which the lawyers participated, Merck was ordered to produce thousands of internal electronic documents which it had argued were protected by attorney-client privilege. The District Court held that communications by a lawyer acting in a business capacity are not privileged. The *Vioxx* decision is instructive in discussing the unique role of the in-house counsel in a corporate setting, particularly in a highly regulated environment, and the challenges facing counsel and litigants in establishing and maintaining a claim for privilege in such an environment.

In *Vioxx*, the District Court remarked on the fact that e-mail has made it convenient to simply copy legal counsel on every communication that might be seen as having some legal significance at some point in time, whether or not it is “ripe for legal analysis”. As a result, counsel is brought into business communications at a much earlier stage than he or she was in the past when communications occurred through hard copy memoranda. The early involvement of legal counsel was noted by the court as being:

“... beneficial for corporations because the lawyers are some of the most intelligent and informed people within corporations. Lawyers not only help corporate clients avoid legal problems before they arise, their business, technical, scientific, promotional and public relations judgment has frequently proven invaluable. In addition, because they are part of a word crafting profession, more often than not, they are excellent writers and editors. The benefit from this expanded use of lawyers, however, comes at a cost. This cost is in the form of differentiating between the lawyer’s legal and business work when the attorney-client privilege is asserted for their communications within the corporate

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<sup>42</sup> Ibid at p. 13.

structure. The privilege is only designed to protect communications seeking and rendering legal services.”<sup>43</sup>

**(ii) Mixed Purpose Communications**

The District Court noted that legal counsel does not always render, and is not always expected to render, exclusively legal assistance. Often business advice needs to be mixed with legal advice so that the legal advice is fully understood and followed by the client. Similarly, when legal documents are reviewed by a lawyer, it is common for a lawyer to correct grammatical mistakes and propose alternative language that will best serve the client’s interests. When these non-legal services are mixed with legal services, the District Court noted that it does not render the legal services any less protected by the privilege. In fact, they both are protected when they are inextricably intertwined. The test for the application of the attorney-client privilege to communications with legal counsel in which a mixture of services are sought is whether counsel was participating in the communications primarily for the purpose of rendering legal advice or assistance. Therefore, merely because a legal issue can be identified that relates to ongoing communications does not justify shielding the communications from discovery. The lawyer’s role as a lawyer must be primary to his or her participation.<sup>44</sup>

**(iii) Merck’s Pervasive Regulation Theory**

The burden of persuasion on all elements of attorney-client privilege is exclusively the proponent’s. The number of lawyers or non-lawyers with whom a communication was disseminated is not dispositive. The District Court noted that a communication could be with several lawyers and one non-lawyer and lose its primary legal purpose gloss, if a non-lawyer was sent the communication for non-legal purposes. In order to establish the context and purpose for the legal purpose for the communication, the proponent of

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<sup>43</sup> Ibid at p. 15.

<sup>44</sup> Ibid at p. 16.

the claim for privilege must be prepared to explain and document through affidavits, if necessary, from individuals with personal knowledge of the communications in question. Merck failed to provide this type of detailed support for its claims for privilege because it relied primarily in argument on a theory based on the *pervasive regulation* of the drug industry and legal counsel's inherent role in that process. Merck argued that because the drug industry is so extensively regulated by the FDA, virtually everything a member of the industry does carries potential legal problems vis-à-vis government regulators. The District Court acknowledged that without question, the pervasive nature of governmental regulations is a factor that must be taken into account. However, drug companies cannot reasonably conclude from the fact of pervasive regulation that virtually everything sent to the legal department, in which the legal department is involved, will automatically be protected by attorney-client privilege. The District Court noted that while such an argument is intriguing because it would minimize the time and expense involved in both corporations ascertaining and documenting privilege claims and judges ruling upon those claims, the theory is unrealistic. Indeed, the Court noted that:

“Accepting such a theory would affectively immunize most of the industry’s internal communications, because most drug companies are probably structured like Merck where virtually every communication leaving the company has to go through the legal department for review, comment, and approval. The fact that the industry is so pervasively regulated does not justify dispensing with each company’s burden of persuasion on the elements of attorney-client privilege. Indeed, many of the documents that we examined appear to reflect far more technical, scientific, promotional, marketing, and general editorial input from lawyers than would be expected of a legal department primarily concerned about legal advice and assistance.”<sup>45</sup>

In the result, the Special Master recommended, and the District Court agreed, that many of the privilege claims for lawyers’ responses should be denied because of the concern that the scope of “assistance” had gone beyond legal. The District Court

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<sup>45</sup> Ibid at p. 19.

acknowledged that the providing of comments by a lawyer on legal instrument should be privileged. They had a problem, however, when the lawyers made extensive grammatical, editorial, and word choice comments on non-legal type communication, such as scientific reports, articles, and study proposals.

**(iv) Broad Dissemination of E-Mails**

One of the interesting features of the *Vioxx* case was that e-mails would often be addressed to multiple legal and non-legal people within the corporation. Merck argued that these e-mails should be protected by attorney-client privilege even though the distribution pattern circumstantially indicated that communications served both legal and non-legal purposes, and therefore, were not primarily for legal advice or assistance. Merck argued that the distribution to every department of the company was part of a collaborative effort to accomplish a legally sufficient draft. Therefore, Merck argued that through the responsive commentary of every other department within the company, Merck's in-house attorneys were using the other departments as their necessary agents in their attempt to give the most effective legal assistance.

The District Court rejected this argument for several reasons. First, it noted that in every company all departments are part of a "collaborative effort". If a product was not scientifically or medically valid, it would not be marketable. To say that wide dissemination to non-lawyers within a company for their technical input is still primarily legal makes no more sense than saying that communicating with in-house counsel is primarily scientific because scientific validity is at the heart of the FDA regulations and, as a consequence, of what lawyers must be concerned about in public statements, advertisements and labels.

Secondly, the District Court rejected the "collaborative effort" argument because if successful, it would effectively immunize all internal communications of the drug industry, thereby defeating the broad discovery authorized in the *Federal Rules of Civil*

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*Procedures.* This would preclude plaintiffs from discovering communications that might be vital to claims of knowledge, failure to timely warn and intentional misrepresentation. “To permit the attorney-client privilege to have such an impact on the discovery process would be allowing the tail to wag the dog”.<sup>46</sup>

**(v) Lawyer as Corporate Decision Maker**

The District Court was also concerned that the role that the internal legal counsel played in Merck essentially bordered on that of a corporate decision maker, rather than a legal advisor. Where this change of role occurred, the corporation did not have the right to delegate to attorneys and then insist that the decisions they make should be immune from discovery. The Court noted that when a corporate executive makes a decision after consulting with an attorney, his decision is not privileged whether it is based on that advice or even mirrors it.<sup>47</sup> The District Court found that the structure of Merck’s enterprise, with its legal department having such broad powers, and the manner in which it circulates documents, has consequences that Merck must live with relative to its burden of persuasion on the privileges asserted. For example, when Merck simultaneously sends e-mails to both lawyers and non-lawyers, it cannot usually claim that the primary purpose of the communication was for legal advice or assistance because the communication served both business and legal purposes. The subsequent conveyance of privileged documents to other corporate personal can only remain privileged when those additional recipients are being sent the documents only to apprise them of the legal advice that was sought and received:

“Modern technology has made it possible for attorneys to electronically respond with their advice on the non-privileged attachments to the original mixed purpose communications. This is done through electronic line edits that reveal the lawyer’s proposed additions and deletions when explanatory comments were desired. Through the line edits, Merck has

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<sup>46</sup> Ibid at p. 23.

<sup>47</sup> Ibid at p. 25.

claimed that what was otherwise discoverable, as a mixed purpose communication, is now made non-discoverable because of the manner in which its lawyers *chose* to reveal their advice. This is not acceptable. Merck cannot be permitted to deprive adversary of discovery by voluntarily choosing to electronically superimpose that legal advice on a non-privileged and, therefore, discoverable communications”.<sup>48</sup>

The District Court established substantive guidelines to determine whether and in what circumstances claim for privilege within a corporate context can be established and maintained. The most fundamental guideline was that when e-mail messages were addressed to both lawyers and non-lawyers for review, comment, and approval, the District Court concluded that the primary purpose of such communication was not to obtain legal assistance since the same was being sought from all. Neither the messages nor their attachments were found to be protected by the attorney-client privilege because, while the exposure of such e-mail messages reveals the contents of what had been communicated to the lawyer, revealing this information on the face of discoverable documents breaches the confidentiality of that communication to the attorneys and therefore destroys the attorney-client privilege protection. The corporation’s choices of the means and formatting of communications between their lawyers and employees cannot limit their adversary’s rights to discovery of what is otherwise non-privileged and discoverable.

The District Court also commented on e-mail threads – series of e-mail messages in which attorneys were ultimately involved which were usually inappropriately listed on the privilege log as one message. The Court emphasized the importance of each e-mail communication being assigned separate bates numbers and identified separately in the privilege log:

“Simply because technology has made it possible to physically link the separate communications (which in the

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<sup>48</sup> Ibid at pgs. 26-27.

past would have been separate memoranda) does not justify treating them as one communication and denying the demanding party a fair opportunity to evaluate privilege claims raised by the producing party.”<sup>49</sup>

The District Court concluded by making the following observations:

“With the ever expanding use of, if not dependence on, e-mail technology, courts will increasingly be called upon to review electronic communications to determine whether they are protected by the attorney-client privilege. The primary challenge for the courts in this area is one of organization and administration. For example, it is essential that all e-mail threads be grouped together, rather than dispersed throughout several boxes of documents when produced for in camera for inspection by the courts. Another challenge is created by the sheer volume of documents that must be reviewed in complex cases. The number of potentially relevant documents often reaches in the millions. It takes a legion of attorneys and paralegals to cull through the documents to recommend and decide whether each document is responsive to a request and if it should be produced, or whether it is instead non-responsive or privileged. In such a milieu there is a strong bias in favour of non-production. Such circumstances also create opportunities for the attorney who concludes that delay is strategically desirable.

When privilege is claimed on 30,000 documents, amounting to nearly 500,000 pages, as occurred in this case, the courts are severely taxed. When the task of reviewing is shifted to outside experts, costs mount. In the long run, such a situation is detrimental to the litigants, the courts, and our system of justice. Some acceptable solutions must be devised, one which fully protects the rights of the litigants to claim privilege and at the same time is more feasible for the courts, less expensive for the parties, and less time consuming for everyone involved.”<sup>50</sup>

The reasons disclose that up to that point in time, the Special Master and his Special Counsel had incurred U.S. \$400,000 in fees and expenses in reviewing approximately

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<sup>49</sup> Ibid at pg. 36.

<sup>50</sup> Ibid at p. 40.

2,600 representative documents over the course of three months. The costs of this special review were paid equally by the parties.

The *Vioxx* decision is one of a number of significant rulings in the United States which consider the production obligations of litigants under the *Federal Rules of Civil Procedure*. While the Ontario Guidelines E-Discovery have now been referred to in certain Ontario cases,<sup>51</sup> a number of cases have considered more generally issues arising in the context of electronic discovery under our *Rules of Civil Procedure*. These cases will be discussed below in the context of the applicable principles in the Guidelines.

## 5. The Guidelines

### (i) Overview

The Guidelines define “e-discovery” as the “preservation, retrieval, exchange and production of documents from electronic sources in electronic form.” The term “e-discovery” is also used to include the use of automated tools to produce documents in electronic form. The Guidelines make a distinction between what they define as e-discovery and the *processes* whereby documents from hard copy sources are produced in electronic form or paper copies of electronic documents are printed out for production in litigation, neither of which constitute e-discovery under the Guidelines. The Guidelines are intended to be practical and promote cooperation among opposing counsel and parties in order to streamline the e-discovery process and to focus on what is truly relevant and necessary. The Guidelines have not been formalized into the Ontario *Rules of Civil Procedure* and it is expected in Ontario that a practice direction will ultimately be issued rather than a formal amendment to the rules.

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<sup>51</sup> *Sycor Technology Inc. v. Kiaer*, [2005] O.J. No. 5395 (Master) [*Sycor*]; *Air Canada v. Westjet Airlines Ltd.*, [2006] O.J. No. 1798, 81 O.R. (3d) 48; *JDS Uniphase Inc. v. Metconnex Canada Inc.*, [2006] O.J. No. 4148 (Master).

The *Rules of Civil Procedure* already expressly include electronic documents in the scope of discovery under Rule 30.01(1) which provides that “a document” includes “data and information in electronic form.”<sup>52</sup> In addition, Rule 1.03 provides that “document” includes data and information in electronic form and goes on to define “electronic” very broadly as including documents “created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those needs”.<sup>53</sup>

## (ii) Key Issues and Terminology

The stages of the e-discovery process do not themselves differ from those involved in discovery of traditional hard copy documents. Those steps are:

- (a) location of potential document sources;
- (b) preservation of potentially relevant materials;
- (c) review of documents for relevance, privilege and other issues; and
- (d) production to other parties for use in court proceedings.

However, when these steps involve electronic documents, there are some unique and challenging issues that the parties need to address.

### (a) *Locating e-documents – What and Where?*

When dealing with electronic documents, the first issue to be addressed is what to locate. Documents are generally referred to as “electronic” if they exist in a medium that can only be read through the use of computers. This includes the items described

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<sup>52</sup> *Rules of Civil Procedure*, Rule 30.01(1)(a).

<sup>53</sup> *Rules of Civil Procedure*, Rule 1.03.

above and includes several species of data and information stored on computers known as active data, archival data, back-up data, meta-data, residual data or replicate data.

Briefly, these terms mean the following:

- **“Active data”** – Data that is currently used by the parties in their day-to-day operations. This data should be straight-forward to identify and access using the current systems. However, because this data is in active use, significant issues may arise for lawyers concerning the need to preserve the integrity of this data for litigation, to design and manage searches to avoid business disruption, and to separate relevant from irrelevant information.
- **“Archival data”** – Data organized and maintained for long-term storage and record-keeping purposes. Some systems allow users to retrieve archival data directly, but others require special equipment or software, and the involvement of IT staff.
- **“Back-up data”** – Similar to archival data, except the term refers to an exact copy of system data, which serves as a source for recovery in the event of a system problem or disaster. Back-up data is usually stored separately from active data, and is distinct from archival data both in the method and structure of storage that reflects its intended uses. Back-up data is usually not accessible to ordinary system users and requires special (and frequently expensive) intervention before it is “readable”.
- **“Meta-data”** – Electronic information recorded by the system about a particular document, concerning its format, and how, when, and by whom it was created, saved, accessed or modified. Most e-mail software records the dates and times e-mails are created, sent, opened and saved as well as the names of the originator, all recipients and anyone to whom the e-mail was blind copied. Most word processing software records who created or modified a document as well

as the dates and times of document revisions. Meta-data will be relevant in litigation where the evolution of documents and state of mind is an issue, and may be relevant to the authenticity and admissibility and evidence of the e-documents with which it is associated where disputed.

- **“Residual data”** – Any information that remains stored on a computer system after a document has been deleted. The computer does not necessarily wipe clean the disk or memory space in which the file was stored, but merely tags it as reusable by the system. Deleted data may not become truly unavailable until the space is reused. Through the use of special forensic methods, residual data may be recoverable.
- **“Replicate data”** – Data created when a software program, such as a word processor, makes periodic back-up files of an open file. Each time a new back-up file is created, the previous back-up file is typically deleted or tagged for reuse.

The next issue in locating electronic documents is where to locate them. In coverage litigation, it will be critical for insurer’s counsel to identify the computer systems that a party has or had during the relevant time of the litigation that may contain relevant data or information. This may prove even more challenging where computer systems have been upgraded or computers or other electronic devices have been thrown out because they are obsolete. In *Nicolardi v. Daley*<sup>54</sup> the plaintiff initially brought a motion to compel the defendants to produce all of the records on the firm’s computers as they related to the action in which the defendants acted as solicitors for the plaintiff. The defendants had refused this request on discovery. On the initial motion, the court denied the plaintiff’s request that a computer expert be appointed to examine the defendants’ computers. As contrary opinions were expressed regarding whether “purged”

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<sup>54</sup> [2002] O.J. No. 595 (S.C.J.).

documents could be retrieved, the court held that it would need expert evidence to satisfy it that such information could in fact be retrieved.

Following the initial motion, the plaintiff instructed his solicitors to retain a computer data recovery expert to provide the evidence the court required. The plaintiff then initiated a second motion to require the defendants to produce all computer hardware containing any documentation created in the action in which the defendants had acted. It was only upon the return of this second motion that defendants' counsel informed the court that the computer may actually have been discarded. The motion was adjourned and ultimately, it was determined that the original computer that held the files at issue had in fact been replaced and the data had never been transferred.

The court then considered whether the motion for inspection was well founded and whether the defendant solicitor should bear the plaintiffs costs thrown away in obtaining expert evidence. The court noted that relevant documents on a computer that have been purged must be listed in Schedule C if there are no electronic or paper copies in existence.

The court dealt with the issue of the sensitivity and intrusion of investigating a party's computers by stating the safeguards would have to be implemented to ensure that the data recovery software used was sensitive enough to search for and recover only relevant documents. An undertaking by the expert, the plaintiff and his solicitors not to review, retain or disclose unrelated documents was also required. The court also held that before a motion for the examination of a computer will be granted, the moving party must have sufficient evidence of a real likelihood that relevant documents not disclosed or produced either exist or may once have existed, on the computers. It must not be a "fishing expedition". On the facts, the court held that there was sufficient evidence to demonstrate a real likelihood that the requested documents probably once existed. However, because the computer no longer existed and the files were not transferred, there was no electronic data to examine.

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The court went on to hold that the plaintiff should be fully indemnified for its costs thrown away. Had the plaintiff known that the computer did not exist at the initial return date, it would not have argued that refusal and would thereby probably have avoided the costs award at that motion, the costs of the expert and the costs of the second motion to compel inspection. It is therefore important to determine at the outset of litigation what computers or other electronic devices are available from which to retrieve relevant information or data.

There are a number of challenges involved in assessing and locating what computer systems and data a party has or had at the relevant time and where they are located. In particular, the Guidelines note that some items might be in use by individuals or in storage in different areas or departments. The same document might therefore be stored in multiple locations or in different electronic formats, which will increase the volume of documents that must be reviewed for production. The sheer volume of data can be enormous because of the expanding use of computer systems in business and their increasing storage capacity. In addition, things like e-mail are now used so frequently that the volume may be staggering when a search is first done for potentially relevant e-mails.

Another challenge clients and litigators will face is the difficulty of reading data that is stored using obsolete programs or devices. The assistance of IT personnel will therefore be critical. The problem of recovering data using obsolete software or devices arises in litigation where the document inquiries extend back to the 1990's. While Microsoft Outlook may be the norm today, making the extraction of emails, creation of PST files and their review a "do-able" exercise, there was more variation in e-mail programs used at the end of the twentieth century and many of these programs are no longer routinely supported in organizations.

Hidden data or information associated or related to electronic documents should also be considered, particularly in cases where issues of authorship or authenticity are raised with respect to a document. Noted above are the definitions in the Guidelines of various types of hidden data, including: “meta-data”, “residual data” and “replicant data”. Parties must therefore review the issues in the litigation at the outset in order to determine whether hidden data needs to be reviewed for relevance and in doing so, they should keep in mind the Guidelines’ principle, outlined below, that a number of factors must be balanced to determine what e-documents should be produced, including cost, burden and the importance of the documents to the outcome of the litigation.

(b) *Preservation of Electronically Stored Documents*

The obligation to preserve electronically stored documents is the same as for paper documents. Once a party knows that litigation is threatened or pending, it must take steps to preserve all relevant documents, whether they are electronic or paper copies. It is therefore important for parties to make sure that their document retention policies specifically address e-documents and that there is a protocol in place for preservation of these documents (as well as hard-copy documents) when litigation is threatened, contemplated or commenced.

(c) *Electronic Document Review*

Like hard copy documents, electronic documents must be reviewed for relevance and privilege. However, the Guidelines note that effective review may be a challenge because of the volume and particular characteristics of electronic documents. For example, computer back-up tapes can store huge amounts of data, which would need to be converted back to readable form before they could be searched or printed in order to determine relevance. The volume of such data and the costs of conversion and review may be significant. Volume problems may also be exacerbated by the existence

of multiple duplicates of documents. The principles outlined below seek to balance these potential costs and the burden on producing parties with the importance of the documents in the litigation.

The fact that electronic documents may contain privileged, secret or other sensitive information, means that it is critical that e-documents be properly reviewed before they are produced. This may mean looking at the hidden data that may be associated with the e-documents to ensure that protected information is not inadvertently disclosed. It is therefore important to define relevance at the outset in order to ensure that the electronic documents that have to be reviewed and produced will be of use to the determination of the key issues in the action. As set out below, it is for this reason that the Guidelines advocate cooperation among the parties in order to narrow and define the issues and therefore the documents that will truly be relevant. Otherwise, the costs of litigation will skyrocket and what is already a lengthy and costly process may become even more so in order to deal with voluminous electronic production.

(d) *Production of Documents in Electronic Form*

Counsel must consider how documents will be produced. One key issue is when it is appropriate to produce only in electronic form (and in a native format) as opposed to producing electronically in addition to hard copies. While this issue often arises for “paper” documents that may be electronically databased, issues that must be addressed in dealing with e-documents include how to: allocate the cost of electronic production fairly, ensure that electronically produced documents are compatible with courtroom technology to facilitate production at trial, provide for the redaction of privileged and irrelevant material in electronic form, and ensure the appropriate retention of electronic records.

The Guidelines point out that these issues are very much affected by the availability of new technology and its use by lawyers and the courts. For example, many litigation

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The logo for Blakes, featuring the word "Blakes" in a stylized, cursive script font.

support software tools are designed to produce properly redacted versions of documents, to permit the creation of special fields for production of relevant meta-data and to allow the user to select which fields will be exported. In addition, lawyers are increasingly scanning hard copy documents so that they can be imaged and exchanged on CDs or via web-based software. Using the right litigation tools, it is then possible to include hard copy documents and e-documents within the same database.

### (iii) **Thirteen Principles that Should Guide the E-discovery Process**

Section C of the Guidelines outlines the 13 principles that the sub-committee recommends guide e-discovery in Ontario. Commentary is provided for each principle, which explains the philosophy behind the principle. The principles are organized into six categories: discovery of electronic documents, preservation of electronic documents, pre-discovery discussions, production of electronic documents, privilege and costs.

#### (a) *E-Discovery*

**Principle 1** is the basic rule that electronic documents that contain relevant data and information are discoverable pursuant to Rule 30.

**Principle 2** attempts to address the concerns outlined above with respect to the volume of potentially discoverable electronic documents and states that the parties' obligations with respect to discovery of e-documents are subject to balancing and may vary with:

- the costs, burden and delay that may be imposed on parties;
- the nature and scope of the litigation, the importance of the issues, and the amounts at stake; and
- the relevance of the available electronic documents and their importance to the court's adjudication in a given case.

The Commentary to this Principle notes that meta-data may contain relevant information to the litigation or to the authorship or authenticity of a document, which might not be available from paper production of an electronic document. It may therefore be necessary for litigants to consider whether to use forensic techniques to recover back-up or obsolete sources in order to find relevant meta-data, which can be costly. The Guidelines recommend that the most cost-effective method be used to locate, preserve, review and produce electronic documents. While electronic documents may be easier to search than printed or scanned copies, they may also be more voluminous, and therefore, ultimately more costly to retrieve and review.

Some of these issues were judicially considered prior to publication of the Guidelines. For example, in *Sourian v. Sporting Exchange Ltd. (c.o.b. as Belfair)*,<sup>55</sup> Master Macleod considered whether an entire electronic database should be produced and, if so, how to ensure that irrelevant information would be excluded. If the entire database was not produced, some form of report would have to be generated or created to produce a subset of relevant data organized in readable form. The Master held that to make such an order would be “onerous and intrusive”<sup>56</sup> and that, given the low utility that the particular data at issue would have, the court should not make the order sought. However, the Master did order the defendant not to purge the database until a final resolution of the action and held that this order was not a bar to any subsequent request for information from the database should the interests of justice so require.

Master MacLeod discussed the nature of an electronic database in this decision. He noted that an electronic database falls within the definition of “document” in rule 30.01(1)(a) which defines document as including “a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and data and information in electronic form”. He noted that the challenge in dealing with a database, however, is that a typical database would contain a great deal of information that is not relevant to

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<sup>55</sup> [2005] O.J. No. 753 (Master).

<sup>56</sup> *Ibid*, at para. 12.

the litigation. He stated that in fact a database is more akin to a filing cabinet or document warehouse than to a single document. Unless the entire database is to be produced electronically together with any necessary software to allow the other party to examine its contents, what is produced is not the database but a subset of the data organized in readable form. This is accomplished by querying the database and asking the report writing software to generate a list of all data in certain fields having particular characteristics.

The *Sourian* case involved a dispute over the placing of a bet on an electronic betting exchange. Master MacLeod observed that a report could likely be produced from the defendant's database listing all bets under a particular user's name with full specifics including the nature of the bet and the IP address from the computer. He noted:

“Like other documents, unless such a report is generated in the usual course of business, the new document, the requested report (whether on paper or on CD-ROM) would have to be created or generated. Ordering a report to be custom written and then generated is somewhat different than ordering production of an existing document. I have no doubt that the Court may make such an order because it is the only way to extract the subset of relevant information from the database in usable form. On the other hand, such an order is significantly more intrusive than ordinary document production. A party must produce relevant documents but is not normally required to create documents. Accordingly, such an order is discretionary and the Court should have regard for how onerous the request may be when balanced against its supposed relevance and probative value.”<sup>57</sup>

*Sourian* is therefore a good example of how the courts will balance the moving party's interests in complete production with the responding party's interests in minimizing cost and inconvenience.

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<sup>57</sup> Ibid, at para. 12.

**Principle 3** states that in most cases, the primary source of e-documents should be a party's active data and any other information that was stored in a manner that anticipated future business use and that still permits efficient searching and retrieval. This Principle reflects a recognition that there are going to be many sources of electronic documents that may have little or no relevance to the outcome of the action and that the scope of searches must be narrowed accordingly in order to contain production costs. This realistic approach to production of e-documents has already been recognized in the Ontario courts. For example, in *Dulong v. Consumer Packaging Inc.*,<sup>58</sup> the court refused to grant the plaintiff's motion for an order that the corporate defendant search its entire computer system for e-mail relating to matters in issue in the litigation. The request was refused on the ground that doing so would, "having regard to the extent of the defendant's business operations, be such a massive undertaking as to be oppressive."<sup>59</sup>

The Commentary to Principle 3 cautions that if a party is aware or ought reasonably to be aware that the specific, relevant data or information can only be obtained from a source other than the active and current archival data sources, that source should at least be preserved and listed appropriately in the party's affidavit of documents. This will then allow the other side to assess whether it wants to attempt to have the data produced.

**Principle 4** states that a responding party should not be required to search for, review or produce documents that are deleted or hidden, or residual data such as fragmented or over written files, absent agreement or a court order based on demonstrated need and relevance. In the Commentary to Principle 4, the Guidelines state that, unless residual or replicant data or other material that is not accessible except through forensic means is known or should reasonably be known to be available and relevant, it need not be preserved or produced. However, if such data is considered relevant, parties

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<sup>58</sup> [2000] O.J. No. 161 (Master).

<sup>59</sup> *Ibid*, at para. 21.

should request its preservation as early as possible in order to avoid inadvertent deletion or claims of deliberate destruction. It is therefore important for parties to consider at any early stage whether these forms of data will be relevant to the issues in the action and to send out a preservation letter to the other side as quickly as possible.

(b) *Preservation of Electronic Documents*

**Principle 5** states that as soon as litigation is contemplated or threatened, parties should immediately take reasonable and good faith steps to preserve relevant electronic documents. In practice, Canadian courts may ultimately link the date when the preservation obligation arises to the date of commencement of litigation privilege. Principle 5 goes on to state that it is unreasonable to expect parties to take every conceivable step to preserve *all* documents that may be potentially relevant. It is therefore necessary for counsel to advise clients about their obligations as early as possible and to recommend steps that may be prudent or required to implement what the Guidelines term a “litigation hold”. These steps may in appropriate cases, include:

- (i) the collection of all relevant document retention, back-up, archiving and destruction policies;
- (ii) issuing appropriate instructions to all staff to suspend personal activities and practices that could result in the destruction or modification of relevant electronic documents, such as deletion of e-mail box entries and archives;
- (iii) creating litigation copies of potentially relevant active data sources or back-up data, to preserve potentially relevant meta-data; and
- (iv) suspending overwriting of back-up tapes and other document retention practices that could result in the destruction or modification of relevant electronic documents in the ordinary course of business.

The Guidelines recommend that where applicable, electronic document retention policies should be shared so that the parties are aware of what e-documents may exist and what may no longer be accessible. While parties to litigation don't usually share such information at the onset, from a practical standpoint, if this suggestion is followed it will, at an early stage in the litigation, alert all parties to what documents are or are not available.

**Principle 6** states that the parties should place each other on notice with respect to preserving electronic documents as early as possible as electronic documents may be lost in the ordinary course of business. It is therefore important for parties to consider what the other side may have in its possession that should be preserved and to send out a preservation letter.

In the spirit of cooperation outlined in the Guidelines, **Principle 7** states that the parties should discuss the need to preserve or produce meta-data as early as possible. In addition, parties who consider meta-data relevant, should notify the other party immediately.

The obligation to preserve all potentially relevant electronic documents may extend to the parties' service providers. For example, in *CIBC World Markets v. Genuity Capital Markets*,<sup>60</sup> a decision pre-dating the Guidelines, Justice Farley ordered that counsel send a joint letter to all independent service providers to advise that they should preserve any relevant material in their respective servers. The court noted that it may be helpful for the defendants to obtain copies of such contents applicable to them as they prepare their affidavits of documents, particularly as relevant documents may have been "deleted" from their electronic devices in the normal course.<sup>61</sup>

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<sup>60</sup> [2005] O.J. No. 614 (S.C.J.) [*CIBC World Markets*].

<sup>61</sup> *Ibid*, at p. 3, para. 7.

(c) *Pre-Discovery Discussions Between Counsel – “Meet and Confer”*

**Principle 8** is the “meet and confer” principle and states that “as soon as practicable and on an ongoing basis, counsel are encouraged to meet and confer regarding the location, preservation, review and production of electronic documents”. Principle 8 also suggests that counsel seek to agree on the scope of each party’s rights and obligations and a process for dealing with them.

The need for collaboration among counsel to deal with e-discovery has already been discussed by the Ontario court. In *Sycor Technology Inc. v. Kiaer*,<sup>62</sup> the court found that “dealing with databases and other electronic documents requires procedural collaboration and a healthy dose of pragmatism and common sense”<sup>63</sup>. In that case, the Master suggested that at the very least, the parties should consider the electronic production of documents that is required and the potential use of computer experts to identify what exists and what is truly relevant. The court ultimately adjourned the motion *sine die* and ordered that the defendant provide a list of documents to the other parties and that the parties then discuss the method and costs of production.

In its reasons, the court also directed the parties to the Guidelines issued by the Discovery Task Force. Until a practice direction is issued in Ontario, we will likely see our courts increasingly turn to the Guidelines in determining e-discovery issues.

Following Principle 8 will require a level of cooperation that, while not unheard of, is fairly unusual in most litigation in this jurisdiction. However, given the potential for the overly-broad scope of electronic documentary production, this guideline makes good sense. The Commentary to Principle 8 outlines a number of issues that may require early discussion such as: the relevant time period; the identity of individuals likely to have created or received relevant e-documents; which computer systems or media

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<sup>62</sup> *Sycor*, supra.

<sup>63</sup> *Ibid*, at para. 2.

existed and are available relating to this specific period; and in what form documents from relevant periods should be produced. The relevant issues will depend upon the type of case and parties involved, which is why early discussion between counsel will be important.

Because decisions will need to be made about what e-documents to search for, retrieve and produce, the process whereby data has been screened, reviewed and ultimately either removed or produced will be very important. The Commentary to Principle 8 therefore recommends that the producing party be in a position to produce an affidavit or other documentation detailing the data acquisition process and describing the pre-production processing of the data, for example, how duplicate documents have been identified and treated such as identical e-mails delivered to different mailboxes.

Counsel will need to become reasonably familiar with their client's document retention policies and data retention architecture. Preparation with the insurer's IT department prior to any meet and confer may be essential to a successful conference, particularly to be able to explain why certain types of electronically stored information is irrelevant or not readily accessible.

**Principle 9** recognizes the need to define the scope of e-discovery prior to commencing oral examinations for discovery. The Principle notes that this can best be achieved if the parties' requests for preservation and pre-discovery meetings between counsel are as specific as possible in identifying what is requested, what is being or not being produced and the reasons for any refusals. The Commentary to Principle 9 stresses that boiler plate approaches, which often seek all e-mail, databases, word processing files or whatever other electronic documents the requesting party can describe by category, should be avoided. Counsel are instead encouraged to target particular electronic sources, documents or time frames that they contend are truly important to resolve the case. The Commentary also recommends that the parties identify the form in which they wish electronic documents to be produced.

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Absent exceptional circumstances where it is truly necessary, the Commentary states that the parties should generally not require production of hardware media such as computer hard drives. The example given for exceptional circumstances is where a party has reasonable grounds to believe that documents (or the meta-data associated with documents) have not been produced and are likely still stored on a computer hard drive or other electronic storage medium, and the other side disputes this belief, inspection of the storage medium itself would be the only solution. In *Hummingbird v. Mustafa*,<sup>64</sup> Master Sproat ordered Hummingbird to provide an identical copy of the hard drive from the defendant's computer at the defendant's costs or, alternatively, a redacted copy of the hard drive at Hummingbird's cost. This order was made when the cost and time associated with retracting relevant documents was expensive and lengthy in comparison to the ease with which the hard drive could be imaged, with the relevant meta-data preserved. If the hardware media is to be produced for inspection and copying, appropriate safeguards would have to be in place to protect the producing party's non-relevant or privileged data contained in the storage device. The Guidelines note that this form of relief is normally only available by order under section 101 of the *Courts of Justice Act* in the form of an injunction akin to a Anton Piller Order.

The Guidelines acknowledge that it may be impractical or prohibitively expensive to review all the available electronic information for relevance and privilege. **Principle 10** therefore states that a party may satisfy its obligation to produce relevant electronic documents in good faith by using electronic tools and processes (such as data sampling, searching, or the use of selection criteria) to identify the documents that are most likely to contain relevant data or information. Where possible, the Commentary states that parties and counsel should agree in advance on the search methods and selection criteria or search terms that will be used. If there is no agreement on this issue, parties should record and be prepared to disclose any limits on the searches they have undertaken should the issue be raised by the other side.

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<sup>64</sup> 2007 CanLII 39610(S.C.).

Principle 10 was considered by the Ontario Court in May 2006. In *Air Canada v. WestJet Airlines Ltd.*,<sup>65</sup> Justice Nordheimer rejected Air Canada's submission that its proposed manner of identifying, searching for and filtering its electronic documents for privilege and relevance was adequate. Air Canada had identified relevant search terms and sent them to WestJet's counsel to get their agreement on the terms to be used. WestJet suggested many additional search terms, some of which Air Canada accepted, but no agreement was reached. After using its electronic search terms, Air Canada then used an electronic filter to identify privileged documents. It proposed to produce the resulting electronic documents without any further review for either relevance, privilege or confidentiality. WestJet objected to Air Canada's lack of manual review.

Although the court accepted that the first part of Air Canada's approach was appropriate (the use of electronic search terms to identify the apparently relevant documents), it did not accept that Air Canada's intention not to manually review the resulting documents was validated by Principle 10 or was consistent with the *Rules of Civil Procedure*. The court held that the Commentary to Principle 10 confirms that some form of further review is contemplated after the electronic search has been completed. The Commentary expressly refers to a "detailed review for relevance and privilege". While Justice Nordheimer accepted that in some cases such a detailed review might be conducted electronically, in the circumstances of this case, a detailed review could not properly be accomplished other than manually.

Because Air Canada had commenced this proceeding and chose to cast its claim in a manner that made the documents at issue relevant, the Court was unmoved by Air Canada's complaint that a manual review would be too time consuming and expensive. The court did acknowledge, however, that each and every page of each and every document did not have to be manually reviewed and stated that different categories of documents would require different levels of review.

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<sup>65</sup> [2006] O.J. No. 1798 (S.C.J.).

(d) *Production of Electronic Documents*

When it comes to production of electronic documents, **Principle 11** states that parties agree early in the litigation process on the format in which the documents will be produced. Production in electronic form is recommended where it will:

- provide more complete relevant information;
- facilitate access to the information in the documents, by means of electronic techniques to review, search or otherwise use the documents in litigation process;
- minimize the costs to the producing party; or
- preserve the integrity and security of the data.

The overriding principle is that if the parties must produce a document in electronic form if for any reason related to the litigation, it is not sufficient to produce a print out or scanned version of a document.

When will an electronic document in its native format be preferable? Excel spreadsheets have the potential for hidden columns and comments which may not be disclosed when printed in hard paper copy. It is also possible to embed hidden comments in power points. These comments may be missed altogether if counsel agree to accept only hard copy reproductions of electronically stored information.

The Commentary to Principle 11 also states that production of voluminous documentation in a form that does not provide meaningful access should be avoided. This Principle is reflective of Justice Cumming's holding in a motion in the *Wilson v. Servier Canada Inc.*<sup>66</sup> class action. In *Wilson*, the plaintiff moved for an order directing one of the defendants to consent to the release of part of a database, or the objective

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<sup>66</sup> [2002] O.J. No. 3723.

field electronic coding within the database, created by a party to the US multi-district diet drugs product liability litigation. The defendants had refused to produce CD-ROMs and electronic databases prepared for their own use in respect of their documents. They did, however, agree to provide an index to the database in word format. Plaintiff's counsel argued that the voluminous documents were simply not searchable using this index. The court held that production of voluminous documentation in a form that does not provide meaningful access is not acceptable and that it is implicit to an affidavit of documents that a defendant give meaningful access to its documents through the electronic database that it has prepared. Justice Cumming held that "in this Court's view, the production of documents implies meaningful access to those documents through an electronic database, at least when the database has already been prepared by the defendant for its own purposes."<sup>67</sup> This was the situation here. The court went on to hold that if any electronic mechanism to facilitate access was available it should be obtainable by the plaintiff.<sup>68</sup>

Parties will therefore have to consider exchanging electronic databases when they produce their documents. In doing so, they will also have to ensure that they are producing only non-privileged information and not the lawyer's work product, documents that are subject to litigation privilege (including common interest privilege) or legal advice that is subject to solicitor-client privilege.

In the Commentary to Principle 11, the Guidelines also recommend that where there is voluminous documentation and digitizing documents may be appropriate or where documents need to be organized in a common, indexed fashion, parties should attempt to agree on a protocol to address these issues and for sharing the costs involved. In doing so, however, parties are cautioned to avoid the loss of privilege or the production of irrelevant material.

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<sup>67</sup> Ibid, para. 12.

<sup>68</sup> Ibid, para. 39.

(e) *Privilege*

**Principle 12** provides that “where appropriate during the discovery process, parties should agree to measures to protect privileges and other objections to production of electronic documents.” Litigants are cautioned that e-discovery sometimes involves a heightened or special risk of inadvertent or unintended disclosure of privileged information. The examples of these risks listed in the Commentary to Principle 12 are:

- production of large volumes of electronic documents, for electronic searching, such as a computer hard drive or back-up tapes; and
- an Anton Piller<sup>69</sup> injunction, search warrant or other order for immediate production of documents to an adverse party, without prior review for privilege.

The Commentary therefore recommends that counsel discuss how to protect privileged documents at the outset of litigation. Because of the potentially large volume of electronic documents, review for privilege will take time and counsel are therefore encouraged to agree on measures to prioritize review and streamline production of non-privileged material without the loss of privilege. The Commentary also notes that special issues may arise with any request to inspect hardware media such as computer hard drives and that parties should therefore consider how to guard against the release of proprietary confidential information and protect personal data if such media are to be inspected.

In *CIBC World Markets*, the court addressed the protection of solicitor-client privilege in the context of an order that electronic documents be preserved without being reviewed by the plaintiff or its counsel. Undertakings had been given by the defendants to the effect that they had “nothing to hide/destroy” thereby avoiding a finding having to be

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<sup>69</sup> An Anton Piller Order is often called a “civil search warrant” and is an order whereby a party is permitted to enter another party’s premises to search for and retrieve relevant documents.

made that there was an extremely strong prima facie case in the context of an Anton Piller order. The court held that this was to be interpreted as equivalent to an Anton Piller order but without the plaintiffs or their counsel having any access to or seeing anything seized pursuant to the order. Access to the electronic devices (including computers and Blackberries) was permitted for imaging and storing in a safe manner their contents including devices located at any office or home, whether owned by the defendants or their spouses, children or other relatives. An issue of privilege arose because one of the defendant's spouses was a retired lawyer. Her legal files therefore had to be protected and the court ordered that she and her husband's counsel review the imaged file index to see if privilege should be claimed over any documents.

(f) Costs

**Principle 13** recognizes that the general rule for costs of e-discovery should be the same as for production of paper documents. Pending final disposition of the proceeding, the interim costs of preservation, retrieval, review, and production of electronic documents will be borne by the producing party. The other party will have to incur the costs of making a copy of the productions for its own use. This Principle notes that it may be appropriate, in special circumstances, for the parties to arrive at a different allocation of costs on an interim basis, which may occur either by agreement or by court order.<sup>70</sup>

In the context of costs, the Guidelines were considered by the Ontario court in *JDS Uniphase Inc. v. Metconnex Canada Inc.*<sup>71</sup> The dispute in that case centered on whether the defendants should be reimbursed their payment of one half of the plaintiffs' cost of producing its summation database with the same level of functionality as that of the defendants. While the parties had followed the Guidelines and agreed to use a

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<sup>70</sup> See *Barker v. Barker*, 2007 Can LII 13700 (ON S.C.) (Plaintiffs ordered to pay 1/3 of the costs of scanning and coding of documents done by the defendants); *Logan v. Harper*, 2003 Can LII 15592 (ON S.C.) (plaintiff to absorb cost of purchasing software to review e-documents produced by defendant; court not to be involved in balancing litigation resources).

common source and a common format for the production of their e-documents, what the court called the “critical degree of functionality” was not agreed upon. The defendant opted for the higher level of functionality. The Master held that the plaintiffs’ offer to pay one half of the increased cost was a reasonable compromise and refused the order sought by the defendants. He did, however, leave it open to the defendants to recover this amount if they were ultimately successful at trial. In his Reasons, Master Beaudoin also held that to require the plaintiffs to reimburse these costs, he would require additional information with respect to the long-term benefits of producing the e-documents in the enhanced format. This case was not one where either party was unable to bear the costs of the complex and expensive litigation. To make the order sought, the Master would require “clearer evidence that the production of the database in the revised format was of benefit to both parties in the litigation or to the court or that the costs of the electronic production resulted in a disproportionate burden for one of the parties.”

## 6. Conclusions

The advent of e-discovery obligations will not expand the substantive areas of inquiry that are already fair game in coverage litigation. The new obligations will, however, have a very significant impact on the manner in which coverage counsel prepare for and execute their “game plans” in responding to (or initiating) coverage litigation. The e-discovery Guidelines, if strictly applied by the courts, will require an unprecedented degree of consultation and cooperation between parties to a coverage dispute. Disclosure will be required of information regarding document retention practices that, if not adhered to by the parties, could feed spoliation motions for costs, procedural sanctions such as exclusion of evidence or dismissal. An insurer’s failure to preserve documents once it reasonably anticipates – or ought to reasonably anticipate – litigation could provide evidence that a policyholder may rely upon in arguing a *prima facie* case of actionable misconduct in order to invoke the *Blank* exception to litigation privilege.

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<sup>71</sup> [2006] O.J. No. 4148 (Master).

Further, insurers may be required to list in Schedule C to an affidavit of documents any relevant documents on a computer system that have been purged if no electronic or paper copies are available, which will be a major headache and drive up costs.

Coverage counsel will need to acquire a new set of e-discovery related tools and develop a command of a new vocabulary, becoming familiar with the insurer's document retention practices and data retention architecture. If insurers wish to control the costs of discovery in coverage litigation, they will need to become familiar with the requirements of e-discovery and develop protocols and consistent practices which ensure timely and complete preservation of electronically stored information. Consideration will need to be given to exchanging electronic databases in the production process and steps taken to ensure only non-privileged documentation is disclosed. Insurers will need to work closely with their coverage counsel in realistically addressing the e-discovery requirements of a case at the very outset and in identifying the preservation requirements that should be required of the policyholder to ensure a balanced and meaningful discovery process in compliance with the Guidelines.

To avoid the type of discovery headaches that occurred in *Vioxx*, insurers should be careful about the way in which they involve their internal legal departments in the discussion of business or other non-legal issues that may ultimately be germane in a coverage dispute. Where legal advice is sought from internal counsel in an insurance company about a potential coverage litigation matter, care should be taken not to disseminate that advice electronically or beyond those persons who genuinely need to receive the advice to inform their decisions and actions.

Privilege issues will become even more vexing as e-discovery evolves in Canada. While we have fairly well defined doctrines for litigation privilege and solicitor-client privilege, common interest privilege is not as well developed, although recognized. It requires special attention by litigants if they wish to marshal common resources and share work product to control the costs of litigation and streamline communications.

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Coverage litigation is already challenging enough in the current legal and business environment. The new e-discovery obligations will raise significant procedural, substantive and tactical issues that must be addressed by insurers and their counsel if they are to effectively investigate, litigate and ultimately prevail in these types of disputes.

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