

# Discovery of “inaccessible” e-documents

Gillian Coumbe, Barrister, Auckland,  
considers the new High Court Rules on e-discovery

One of the most contentious areas of electronic discovery is disclosure of “inaccessible” documents. These are documents that no longer reside on the active computer system, and are not archived in a readily retrievable form — for example, deleted documents stored on disaster recovery storage media such as back-up tapes. Once a paper document has been shredded or otherwise destroyed, it is gone. Deletion of an electronic document does not get rid of it. The document may still be recoverable from back-up media, or the computer hard drive. The continuing existence of deleted documents provides a tempting target for further discovery, often in pursuit of the elusive “smoking gun” e-mail.

In the early days of electronic discovery, particularly in the US, the ability to access an opposing party’s deleted documents was seen as a novel and often irresistible opportunity, leading to intrusive and oppressive discovery requests. However, the trend now in many jurisdictions is towards reigning in this aspect of electronic discovery. Experience indicates that the huge cost and burden of restoring inaccessible documents is often wholly disproportionate to the number of responsive documents found. As it turns out, there rarely is a smoking gun.

The High Court Amendment Rules (No 2) 2011, which came into force on 1 February 2012, reflect this trend. Three rules in particular are significant:

- r 8.12, subcll (4) to (6), provides that discovery does not normally extend to inaccessible documents, now labelled “non-primary” documents;
- r 8.3(2) imposes an obligation to preserve electronic documents in a “readily retrievable form”. This is intended to ensure that relevant electronic documents do not become inaccessible;
- r 8.22 expressly provides for cost-shifting: a party who seeks an order for discovery of inaccessible documents may have to foot the bill.

These new rules do not effect radical change. They largely codify principles that the courts had already been developing for dealing with electronic documents under the general discovery rules. However, their introduction does signal that discovery of inaccessible documents should be the exception rather than the rule.

## WHAT ARE INACCESSIBLE DOCUMENTS?

If managed appropriately, electronic discovery can be an efficient and economic exercise. Advances in e-discovery software can “analyze documents in a fraction of the time for a fraction of the cost”: Markoff, “Armies of Expensive

Lawyers Replaced by Cheaper Software”, (*The New York Times*, online ed, 4 March 2011). However, it can also result in huge inefficiencies and costs, particularly where the scope of discovery is extended to “inaccessible” documents.

“Accessible” documents are commonly understood as being documents that are stored in a readily retrievable form, namely:

- active data: documents on a party’s online computer system; or
- nearline archival data: documents stored in a manner that anticipates future business use and is readily retrievable and permits efficient searching. This includes portable data devices (such as CDs, DVDs, memory sticks and portable hard drives), and other locations that can be accessed automatically through the network.

“Inaccessible” documents, by contrast, typically have to be restored or otherwise manipulated to be readable. Examples include:

- offline archival data: documents stored on archival media that require special equipment or software to access.
- back-up data: documents that are stored on back-up tapes or other back-up media for disaster recovery purposes. Back-up tapes contain a “snapshot” of documents on a computer at a point in time, and any documents that have been deleted from the computer or server after the back-up was made would remain on tape. However, because back-up tapes store data in a random way, often without indexes, their restoration into a readable form can be expensive.
- residual data: deleted, fragmented or damaged documents. Data that is deleted from the active computer system may remain somewhere on the free space of the computer hard drive until overwritten. To the extent that it has not been overwritten, the deleted data may be recoverable using special forensic methods.
- legacy data: documents that have become unreadable because they were created on now obsolete computer systems, with obsolete hardware or software components. To access the documents the former IT environment must be reconstructed.

The restoration of inaccessible data may require specialist computer experts. In addition, the process of searching non-indexed data for relevant documents may be very time-consuming.

The search and retrieval of accessible documents can of course also become uneconomic, where the sheer volume of

documents is disproportionate to the amount in issue. Proportionality can, however, be achieved by a tailored discovery order under rr 8.5 and 8.12(1)(c). The focus of this article is on inaccessible documents — documents that are inherently unable to be readily retrieved. What do the new rules say about when those documents should be discovered?

### THE NORMAL SCOPE OF DISCOVERY

The normal or default rule now is that the scope of discovery does not include inaccessible data. Rule 8.12, subcls (4) to (6), provides:

- (4) A discovery order does not require a party to discover electronically stored information that is not primary data.
- (5) Despite subcl (4), the judge may order a party to discover electronically stored information that is not primary data if the judge is satisfied that the need for, and the relevance and materiality of, the non-primary data sought justify the cost and burden of retrieving and producing that data.
- (6) For the purposes of this rule, primary data means active data and readily retrievable archival data.

Under this rule, a discovery order (and hence a reasonable search) will ordinarily extend only to “active data” and “readily retrievable archival data”, namely, what is described above as accessible data, now called “primary” data. It does not extend to “non-primary”, that is, inaccessible, data. The producing party will therefore not normally be required to attempt to search back-up media, to retrieve deleted files, or to re-establish obsolete systems.

This is consistent with discovery rules that have been adopted in other jurisdictions in recent years. For example, para 24 of Practice Direction 31B (E&W), which came into effect on 1 October 2010 and supplements Part 31 of the Civil Procedure Rules 1998, states:

The primary source of disclosure of Electronic Documents is normally reasonably accessible data. A party requesting under rule 31.12 specific disclosure of Electronic Documents which are not reasonably accessible must demonstrate that the relevance and materiality justify the cost and burden of retrieving and producing it.

Similarly, under r 26(b)(2)(B) of the US Federal Rules of Civil Procedure (significantly amended in December 2006) a responding party need not, unless good cause is demonstrated, produce electronically stored data from sources it identifies as “not reasonably accessible”. Comparable rules have also been adopted in Australia and Canada.

As stated above, the tide has been turning against intrusive discovery requests for inaccessible documents. The rule changes reflect this. It is now recognized that requests of this kind frequently impose an onerous burden, often for limited return. For example, restored back-up tapes may contain massive amounts of irrelevant information and few relevant and previously undisclosed documents.

### WHEN IS DISCOVERY OF INACCESSIBLE DOCUMENTS JUSTIFIED?

Unless the parties agree to extend their search to inaccessible documents, the requesting party will need to apply for an order for tailored discovery under rr 8.5 and 8.12(1)(c), or for particular discovery under r 8.19. In either case, the

requesting party will need to meet the balancing/proportionality test in r 8.12(5). The “need for, and the relevance and materiality of, the ‘non-primary data’ must justify the cost and burden of retrieving and producing that data”.

Discovery of inaccessible documents may be needed where a key document or class of documents is known to reside only in inaccessible form, and there is no other, more accessible, source. That will frequently be the case where, for example, emails have been deleted. But demonstrating need will not be sufficient. The onus will be on the requesting party to satisfy the court that the exercise is also likely to yield sufficient documents of sufficient probative value to justify the exercise. The parties will usually need to file affidavits (including from computer or forensics experts) setting out the technical restoration and search processes required, and the time and cost estimates for those processes. That will often be a contentious issue. In addition, the requesting party will need to establish an evidential foundation for an expectation that the restoration and search process is likely to yield sufficient documents that are relevant and significant.

The test in r 8.12(5) reflects the principles the courts have already been evolving in this area. For example:

*NGC New Zealand Ltd v Todd Petroleum Mining Company Ltd* HC Wellington CIV-2004-485-1753, 29 March 2006. Todd applied for an order for further discovery requiring NGC to review its back-up tapes (for a 30 month period) to recover the emails of current and former NGC staff. When NGC had moved premises and changed its email system all emails prior to that date were deleted and stored on back-up tapes. NGC opposed the order on the grounds that retrieval of the emails would involve an oppressive financial burden, estimated at between \$15,000 and \$45,000. The Associate Judge granted the order on the grounds that relevant emails were likely to be found and the cost of retrieval was modest in comparison with the amount at stake in the litigation (\$5m–\$8m). This order was subsequently confirmed on review by Simon France J, 22 September 2006, at [27] to [34] (although a cost-shifting order made by the Associate Judge was set aside, as discussed below).

*Commerce Commission v Telecom Corporation of New Zealand Ltd* (2005) 18 PRNZ 170 (HC). Telecom was ordered by Wild J to restore an initial test sample of back-up tapes for the 1999 year to recover deleted emails. Wild J also made a cost-shifting order, directing that the costs of the test sample be shared 50/50 between the Commission and Telecom, but that order was overturned on appeal ((2006) 18 PRNZ 251 (CA)), so that the costs of the sample discovery were to be borne by Telecom in the normal way].

*Slick v Westpac Banking Corporation (No 2)* [2006] FCA 1712. Westpac’s email system had been decommissioned and replaced in 2002/03. At that time a “snapshot” back-up was taken for the sole purpose of disaster recovery. In order to access the back-up tapes it would be necessary to rebuild the legacy system, a process that was estimated to take at least three months and cost over \$600,000. In addition, Westpac’s document servers were replaced in 2003/04, when a new operating system was introduced, and that legacy server environment would also have to be rebuilt. The additional cost estimate was at

least \$500,000. The Court declined the application for further discovery. There was only a “theoretical possibility” that something relevant might turn up, and this was “well and truly outweighed” by the cost and burden to Westpac of rebuilding the former electronic environments.

*Leighton Contractors Pty Ltd v Public Transport Authority of Western Australia* [2007] WASC 65. The plaintiff sought an order that deleted emails covering a two and a half year period be recovered from back-up tapes. The defendant had already voluntarily taken steps to recover five months’ worth of deleted emails. The Court stated that if the defendant had not embarked on the course of recovering the deleted emails “it may have been appropriate to relieve the defendant from the obligation of discovering those documents”. That was because the burden of giving the discovery was “disproportionate to the potential probative value” of the electronic information sought. However, because the defendant had already started the process the Court ordered the defendant to search the restored back-up tapes and, depending on the rate of responsive documents found, left open the possibility of ordering further discovery of documents from the remaining back-up tapes. This case also illustrates the danger of doing too much. If the defendant had not already begun restoring back-up tapes, the Court likely would have declined to make the order.

*Digicell (St Lucia) Ltd v Cable & Wireless Plc* [2008] EWHC 2522 (Ch), [2009] 2 All ER 1094. The Court ordered the defendants to restore back-up tapes and conduct a search of the email accounts of seven of the defendants’ former employees. Their email accounts had been deleted from the relevant server after their employment ended, but likely existed on back-up tapes. The defendants claimed that the cost of restoration would be prohibitive (700 tapes at £100 per tape for grouping and cataloguing, and £225 per tape for the restoration) and unlikely to yield many relevant documents. The Court considered that the tapes were likely to yield relevant emails of “great significance”, and ordered that the search be done.

*Fiddes v Channel 4 TV Corporation* [2010] EWCA Civ 516. The Court of Appeal upheld a decision of the High Court refusing to order the respondents to search back-up tapes for deleted emails covering a four-month period. The appellant had not shown that there was a sufficient likelihood of retrieving any emails that were both relevant and significant. It was entirely a matter of speculation whether the search would produce anything relevant and, if it did, whether would help the appellant’s case or undermine it.

Many cases could not of course sustain the added expense of discovery of inaccessible data, which can push discovery costs well beyond the norm, to prohibitive levels. The new r 8.14(3) sends a clear message that discovery of inaccessible data is not to be encouraged, and that an application for discovery of such data will be robustly scrutinised by the court.

### **A word of caution**

Parties also need to be careful what they wish for. If an application for discovery of inaccessible documents is granted, that could still potentially have negative consequences for the requesting party.

The restoration and search process may prove to be more expensive or time-consuming than expected. If disputes arise between the parties as to the proper scope, and the mechanics, of that process once it is under way that may disrupt or delay the progress of the litigation.

Next, the very nature of inaccessible documents, such as those stored on disaster recovery back-up tapes, means their precise contents cannot be known in advance. The discovery exercise necessarily involves a speculative element. The yield of responsive documents may be much lower than anticipated. It may turn out to have been a fruitless exercise.

Furthermore, an application for discovery of inaccessible documents may be met with an application by the producing party for a cost-shifting order under r 8.22(1), discussed below. If such an order is made, the requesting party may have to pay significant costs up front.

Even if no cost-shifting order is made, if the requesting party is ultimately unsuccessful in the substantive proceeding, some of the costs of restoration and search may be included in a final costs award against it. As the Court of Appeal noted in *Telecom* (at [18]) the costs schedule is predicated on the premise that the winning party can normally expect a contribution from the losing party towards every step it has been required to take, including discovery.

All of this adds to the responsibility on the requesting party to be satisfied, in advance, of the likely overall utility of any application.

## **OBLIGATION TO PRESERVE DOCUMENTS**

Rule 8.3 now expressly records a party’s obligation to preserve documents:

### **8.3 Preservation of documents**

- (1) As soon as a proceeding is reasonably contemplated, a party or prospective party must take all reasonable steps to preserve documents that are, or are reasonably likely to be, discoverable in the proceeding.
- (2) Without limiting the generality of subclause (1), documents in electronic form which are potentially discoverable must be preserved in readily retrievable form even if they would otherwise be deleted in the ordinary course of business.

The need to preserve relevant documents has particular importance for electronically stored information, for two main reasons. First, electronic documents are stored on a wide variety of devices and in multiple locations, often under the immediate control of many different custodians. Sources of electronic documents extend well beyond a party’s main servers and computer hard drives including, for example, storage media such as floppy discs, optical discs (DVDs and CDs), and memory sticks; smart phones; laptops; home computers, voicemail, websites, archival and back-up media, and so on.

Secondly, the dynamic nature of electronic documents means that they can inadvertently be altered or deleted far more easily than paper documents. For example, computer systems automatically recycle and reuse memory space, altering potentially relevant information, even if no deliberate modifications are made. Merely opening a digital file changes information about that file. In addition, most companies have document retention policies under which electronic documents (including emails) are routinely deleted and storage media such as back-up tapes are routinely recycled.

Unless steps are actively taken to locate and to preserve electronic data it may be deleted from the active online computer system, and back-up media may be overwritten, in the ordinary course of business. In short, accessible data may be rendered inaccessible and inaccessible data may be lost altogether.

### When is the obligation triggered?

Rule 8.3(1) states that the preservation obligation arises when a proceeding is “reasonably contemplated”. The proceeding need not have commenced. This codifies the existing case law. In the *Telecom* case, the Court of Appeal accepted the Commission’s submission that Telecom’s obligation to preserve relevant documents

was triggered from the time the proceeding was reasonably contemplated. This occurred when the Commission began its investigation and issued s 98 notices under the Commerce Act 1986 in mid-1999. Telecom acknowledged that the proceeding was in contemplation by “no later than early June 2009”. Proceedings were not actually commenced by the Commission until 31 July 2000.

The US Courts have also held that the duty to preserve attaches once litigation is reasonably contemplated (*Zubulake v USB Warburg LLC* (“*Zubulake IV*”) 220 FRD. 212; 2003 US Dist LEXIS 18711 (SD NY October 22, 2003)). In that case, the duty to preserve arose some four months before the plaintiff filed a complaint with the Equal Opportunity Commission and some ten months before the Court proceedings were filed.

In the UK and Australia, the courts had been less enthusiastic about recognising a duty to preserve documents prior to the commencement of proceedings, although they accepted that adverse inferences might be able to be drawn from a failure to preserve: *Earles v Barclays Bank PLC* [2009] EWHC 2500 (Mercantile); *British American Tobacco Australia Services Ltd v Cowell* [2002] VSCA 197. However, para 7 of Practice Direction 31B now imposes a duty to preserve as soon as litigation is contemplated.

Rule 8.3 places an onerous responsibility on parties, and their legal advisers. Given the ease with which electronic documents can be deleted or altered in the ordinary course of business, legal advisers will often need to act quickly when first instructed, to ensure that parties are informed of this obligation and how to meet it.

### What steps are needed?

The obligation is to take “all reasonable steps to preserve” relevant documents. The new rules do not include a checklist of the practical steps that may need to be taken. It is left to the courts to develop guidelines as cases come before them. What steps may be appropriate will depend on the circumstances, but in general will likely include:

- putting in place an immediate “litigation hold”. This should be issued to all key personnel, and re-issued periodically during the case, so that new employees are aware of it. Compliance with the hold may need to be monitored. The hold is essentially an instruction to staff to cease or suspend personal document manage-

ment practices that could result in the modification of relevant documents in the ordinary course of business, such as the deletion of emails. If the party has an existing document retention policy, that will usually need to be modified or suspended to achieve this;

- ensuring that any relevant online documents of key personnel, whether created before or after the duty to

preserve attaches, are not deleted from the active computer system, but are preserved in a separate electronic file or readily retrievable archive;

- if necessary, creating litigation copies of potentially relevant data sources, for example, forensic copies or “mir-

ror images”, so as to preserve potentially relevant metadata, or to preserve database information;

- ensuring that existing back-up tapes and other back-up media storing the documents of key personnel are preserved, if the data is not otherwise available. For example, any such back-up media should be segregated so that it is not recycled and overwritten.

The decisions in *Zubulake IV* above and in *Zubulake v UBS Warburg LLC*, 2004, US Dist LEXIS 13574 (SD NY July 2004) (“*Zubulake V*”) provide useful guidance as to the steps a party may need to take to preserve electronic documents, and the obligations of the party’s legal advisers.

The documents should, so far as practicable, be preserved in electronic form, and if necessary in native file format, to facilitate listing of documents (Sch 9, Part 1, cl 4(3)), and to ensure that subsequent production and inspection obligations are met. The Rules require that documents be produced in pdf image form, unless otherwise agreed. However some electronic documents do not lend themselves to conversion to image form, and will need to be preserved in native format. Obvious examples are databases or complex dynamic spreadsheets: Sch 9, Part 2, cl 8 (5). Relevant metadata may also need to be produced in native format: Sch 9, Part 2, cl 11(4).

The obligation is to take “all reasonable” steps, not to leave no stone unturned. A party cannot be expected to take every conceivable step to preserve all documents that may potentially be relevant. It is a matter of achieving a proper balance between the need to preserve relevant information and the need to continue routine computer operations critical to a party’s activities. Again, this places an onerous responsibility on legal advisers.

The *Telecom* case provides a striking example of a failure to preserve. Telecom’s failure was two-fold:

- first, even though a legal proceeding was in contemplation from June 1999, Telecom did not put in place a litigation hold or modify its document retention policy. Instead, Telecom continued to delete the emails of key personnel from its active computer system, so that those emails were not preserved in a readily retrievable format but only resided on back-up tapes; and
- after the legal proceeding had commenced, Telecom made changes to its IT environment that would cause

difficulties in restoring the back-up tapes containing the deleted emails. Telecom did not restore the back-up tapes prior to the change to the system, or make adequate provision for the migration of data. That meant the back-up tapes could not be accessed by the current operating system.

Restoration of the back-up tapes, therefore, required the re-establishment of the dis-used IT environments in which the documents were created. Telecom was ordered by the Court of Appeal to restore a sample of the back-up tapes at its own cost, estimated at as much as \$800,000 (although the Court thought that it was more likely to be nearer \$200,000 to \$300,000).

### Preservation of inaccessible documents

Even though discovery, including the reasonable search obligation in r 8.14, will not ordinarily extend to inaccessible documents, that judgment may not always be able to be made at the outset of litigation. A justification for seeking an order for discovery of inaccessible data may emerge only as the case progresses. Therefore, if a party is aware that relevant information can only be obtained from a source other than the active or archived electronic information, that source should also be considered for preservation. Thus, if the emails of key personnel reside only on back-up tapes, those tapes should (subject to a reasonableness standard) be retained and segregated, so they cannot be overwritten.

Electronic documents must be preserved in “readily retrievable form”. However, that would not normally require a party to convert data that is already inaccessible into a readable format, for example, by restoring back-up tapes. Again, if back-up tapes or other media are known to contain documents of key players, it is sufficient to segregate them so that they are available for later restoration, if ordered during the proceeding. An exception to this may be where a party makes changes to its IT system that will render the tapes unable to be restored (as occurred in the *Telecom* case), in which event the party may need to restore the back-up tapes, or make other provision for the migration of data, before the IT changes are made.

If documents are not preserved and become inaccessible (or more inaccessible), and if an order for particular discovery is later sought, the failure to preserve will be a relevant factor counting against the making of any cost-shifting order, as discussed below.

### COST-SHIFTING

“Cost-shifting” refers to the shifting of costs from the producing party to the requesting party. It reverses the usual “producer pays” rule. Where discovery of inaccessible documents is sought, costs will be likely to be high. A specialist computer expert or computer forensics expert may need to be retained. The usual presumption that the producing party bears the costs may therefore impose an unfair burden on that party.

The US courts have led the way in developing principles for shifting all or part of the cost to the requesting party in cases involving inaccessible documents. Normally, only the

costs of restoration and searching are shifted. The responding party still bears the cost of reviewing and producing electronic data, once it has been converted into an accessible form

Rule 8.22 expressly permits cost-shifting. It provides, in so far as relevant:

#### 8.22 Costs of discovery

- (1) If it is manifestly unjust for a party to have to meet the costs of complying with an order made under this subpart, a Judge may order that another party meet those costs, either in whole or in part, in advance or after the party

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**legal advisers will often need to act quickly when first instructed, to ensure that parties are informed of this obligation and how to meet it.**

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has complied.

- (2) Despite subclause (1), the court may subsequently discharge or vary an order made under that subclause if satisfied that a different allocation of those costs would be just ...

Cost-shifting is a concept that has already been recognized by our courts. The courts have until now relied on the general power contained in r 7.45 (formerly r 236), which permits the court to make an interlocutory order subject to any “just” terms or conditions. In the *Telecom* case the Court of Appeal held that there was jurisdiction under then r 236 to make a cost-shifting order, but reversed an order made by the High Court requiring the Commission to pay 50 per cent of Telecom’s costs of restoring back-up tapes. It was Telecom’s own default in failing to preserve relevant documents on its active computer system that had rendered the documents inaccessible. Telecom was therefore required to restore the back-up tapes entirely at its own cost. In *NGC New Zealand v Todd Petroleum*, the High Court (Simon France J) also accepted it had jurisdiction to make a cost-shifting order.

#### When will cost-shifting be ordered?

Rule 8.22 is expressed in general terms, and does not expressly record the circumstances when cost-shifting may be appropriate. Rather it is left to the discretion of the Court. It is therefore likely that, in relation to inaccessible documents, the cost-shifting principles that the Courts have already been developing will continue to provide guidance, and to evolve, under the new Rule. The reference to “manifestly unjust” in subcl (1) indicates that a high threshold test is intended.

In the *Telecom* case the Court of Appeal accepted that the balancing factors recognized by the US Courts in *Zubulake v USB Warburg LLC* (“*Zubulake I*”) 217 FRD 309; 2003 US Dist LEXIS 7939 (SDNY, May 13, 2003) and *Wiginton v CB Richard Ellis Inc* 2004 US Dist. LEXIS 15722 was “of value until the Rules Committee deals with the matter in this country”. These factors are set out below. The first seven factors were formulated by the Court in *Zubulake I* and the eighth factor in *Wiginton*:

- the extent to which the discovery is specifically tailored to discover relevant information;
- the availability of such information from other sources;
- the total cost of discovery compared with the amount in issue;

- the total cost of discovery compared with the resources available to each party;
- the relative ability of each party to control costs and its incentive to do so;
- the importance of the issues at stake in the litigation;
- the relative benefits to the parties of obtaining the information; and
- the importance of the requested discovery in resolving issues in the litigation.

The Court of Appeal in *Telecom* held that the *Zubulake/Wigginton* factors were not, however, exhaustive. The Court accepted the Commerce Commis-

sion's submission that an additional relevant factor, was "a failure to preserve potentially discoverable documents". If a producing party has by its own wrongful conduct caused or contributed to the data being inaccessible — by not complying with its preservation obligations — then that will count against cost-shifting. Telecom's own failure to preserve the relevant emails had brought about the need to recreate the former IT system and the consequent high cost of retrieval. The Court of Appeal therefore allowed the appeal from the High Court's 50/50 cost-shifting order and directed that Telecom undertake the discovery at its own expense in the normal manner, stating:

[54] We are satisfied that Telecom should have archived, stored and maintained in an accessible form, information of the sort which is now sought. Its failure to do so must be laid at its door.

Subsequently, in *NGC New Zealand v Todd Petroleum Simon France J* followed the *Telecom* decision in setting aside an earlier costs-sharing order made by the Associate Judge. The Court seems to have based its decision in part on the fact that NGC failed to preserve emails at a time when it was "aware of a possible significant breach of the contract".

Now that the preservation obligation has been codified in the rules, a failure to comply with that obligation causing

documents to become inaccessible, will continue to have prominence as a relevant factor in a cost-sharing context.

#### **A further word of caution**

If a requesting party successfully resists a cost-sharing order, that may not necessarily be the end of the matter. For example, if the discovery exercise does prove to be of little utility, the producing party might then seek a new or varied order for cost-shifting under rules 8.22(1) and (2). Alternatively, if the requesting party is unsuccessful in the substantive hearing, the costs of restoration may come back to bite in the form of a significant disbursement recover-

able as part of a costs award. Of course, where the additional discovery costs are the result of a failure by the producing party to preserve data they should not normally be recoverable in a costs award, whatever the outcome of the litigation.

As stated above, parties need to be careful what they wish for. The full implications of pursuing discovery of inaccessible documents, and pursuing or resisting a cost-shifting application, need to be carefully weighed.

#### **CONCLUSION**

The new rules contain a clear and welcome presumption against discovery of inaccessible or "non-primary" documents. Parties wishing to access deleted documents will need to make a compelling case, and will need to be confident of the ultimate utility of the exercise. Discovery in most cases will therefore be confined to accessible or "primary" documents. But that is not the end of the story. Preservation will be of the utmost importance in the electronic context. It is an onerous obligation, and important and difficult judgment calls will need to be made by parties and their legal advisers in order to comply. If reasonable steps are not taken to preserve documents, the courts will more readily entertain an application for discovery of the deleted documents and decline to shift the costs of retrieval. □

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## the failure to preserve will be a relevant factor counting against the making of any cost-shifting order

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