E-Discovery Costs

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The widespread use of computers for recordkeeping, communication and information storage has vastly expanded the breadth of potential discovery in litigation. Although technology is helpful in the sense that it makes fuller disclosure possible, it also creates an unfortunate paradox. The cost of sorting and producing all the relevant information in a party's possession may put litigation beyond the economic ability of a vast number of litigants. Thus, it is necessary to ask such questions as: How much discovery is enough? Do all cases justify the same type of disclosure? Should there be some rule of proportionality that governs production based upon the issues in the lawsuit?

This observation from 2008 by the Honourable Madam Justice Conrad in Innovative Health Group Inc. v. Calgary Health Region (Can. Alta. C.A.) reflects a paradox that remains largely unaddressed in the Canadian jurisprudence: The exorbitant costs of disclosure in the era of Big Data, which represent as much as 75 percent of overall litigation expenses. These costs have grown disproportionately to the costs of prosecuting or defending the underlying case. Therefore, cases involving e-discovery often present a Hobson's choice: Comply with broad requests for documents at a cost greater than the lawsuit's value, or settle.

In response to the impracticality of linear review, new technologies are evolving to reduce the burden of e-discovery. Although Canadian courts have yet to address the use of these tools, some judges in the UK and US have welcomed them, particularly in light of recent emphasis on the concept of proportionality. Their decisions can inform Canada's adoption of technology to address proportionality and limit the cost of e-discovery.

The Intersection of Technology and Proportionality

Proportionality applies a cost-benefit analysis to discovery. Essentially, the inquiry balances the demands of discovery—including effort as well as expense—against the likely benefits of this discovery. While this has been a tacit undercurrent in rules governing civil litigation in Canada, the UK, and the US, recent developments have brought this issue to the forefront in Great Britain and America.

The United Kingdom

The underlying principle of the UK Jackson reforms, which became effective on April 1, 2013, is proportionality. In particular, the purpose of the e-disclosure amendments contained in Practice Direction 31B is to "encourage and assist the parties to reach agreement in relation to the disclosure of Electronic Documents in a proportionate and cost-effective manner."

Based on the new rules, judges now have the express power to require parties to set and exchange budgets for the entire case at the outset of a matter, including forecasts for disclosure costs. Throughout the matter, the judge will monitor the parties' expenditures to make sure that the case—and disclosure—remain proportionate. As part of this budgeting exercise, parties must undertake in-depth disclosure planning. For example, counsel must meet with representatives from the organization's business units as well as their IT personnel to determine the proper scope of potentially relevant data.

Furthermore, in most cases, parties now have the option to choose from a range of six menu options for disclosure rather than just standard disclosure. The options range from "no disclosure" to turning over the "keys to the warehouse," meaning a party turns over all of its documents and then allows the opposing party to select the ones it wants to use.

Well before these amendments, at least one UK court had addressed the use of software to temper the scope of disclosure through proportionality. In Goodale v. The Ministry of Justice, Senior Master Whitaker suggested that the case was "a prime candidate for the application of software that providers now have, which can de-duplicate that material and render it down to a more sensible size and search it by computer to produce a manageable corpus for human review—which is, of course, the most expensive part of the exercise." He also acknowledged his awareness of "software that will effectively score each document as to its likely relevance and which will enable a prioritization of categories within the entire document set." In other words, the judge encouraged parties to use advanced tools such as technology-assisted review (TAR) to manage their data.

Likewise, Practice Direction 31B acknowledges the significant role technology plays in e-disclosure; it includes the directive that "technology should be used in order to ensure that document management activities are undertaken efficiently and effectively." In meeting to prepare for the case, the parties are obligated to discuss the "tools and techniques (if any), which should be considered to reduce the burden and cost of electronic documents." In its list of tools, the Practice Direction includes "agreed software tools."

The United States

Although the 2006 amendments to the US Federal Rules of Civil Procedure (FRCP) referred to proportionality in limiting discovery of ESI where it is "not reasonably accessible because of the costs and burdens of retrieving it," the concept has not been consistently applied in practice. Currently,

several proposed amendments to the FRCP are targeted at improving the proportionality of discovery. In addition to other rules reducing the number of interrogatories, requests for admission, and depositions, a proposed revision to Rule 26(b)(1) would explicitly limit the scope of discovery so it is "proportional to the needs of the case."

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Unlike the UK's Practice Direction, the FRCP does not specifically address the use of technology. However, to meet the proportionality principle, parties are increasingly turning to technology to control costs, a trend reflected in recent US case law. In 2012, US federal and state courts began to recognize the role Technology-assisted Review (TAR) can play in keeping discovery costs in check. In the seminal case of Da Silva Moore v. Publicis Groupe (S.D.N.Y. Dec. 3, 2012), Magistrate Judge Andrew J. Peck of the Southern District of New York approved the use of TAR for several reasons, including "the need for cost-effectiveness and proportionality under Rule 26(b)(2)(c)" when managing a vast amount of data.

Advanced Analytics: The New Gold Standard for Proportionate Discovery

As the rules and case law show, courts continue to become increasingly receptive to the use of technology in e-discovery. In line with these developments, The Sedona Canada Commentary on Proportionality in Electronic Disclosure and Discovery published in October 2010 encourages parties to consider "[t]he value of technological tools and approaches to reduce the volume of irrelevant and/or duplicative information" in weighing the burden and cost of e-disclosure. Advanced analytics can satisfy the proportionality goals expressed in all three jurisdictions: They lessen the burden of e-discovery on two fronts by culling down data volumes and pinpointing the evidence needed to support a case.

Culling can be accomplished through a number of tools. Two of the simplest are de-duplication, which removes exact duplicates from a collection, and deNISTing, which removes operating system, program, and application files. Mass tagging capabilities also can reduce the amount of effort a data set requires. As an example, near-duplicate analysis collects multiple versions of the same document and highlights the differences among them. One reviewer then compares the documents to each other, leading to greater consistency and efficiency than when these documents are scattered among a review team. Another tool, email redundancy and thread management, can group email messages fully contained in subsequent emails within the same thread, allowing reviewers to tag an entire document family at once.

Furthermore, various filtering techniques can narrow the scope of a review. Keywords are one of the most popular tools for filtering documents. However, they also carry some risk. If the party chooses the wrong terms and the results are under-inclusive or over-inclusive, then it may give a false impression of the issues at stake in the matter. However, when combined with the use of other technologies, keywords become much more useful. For instance, concept analysis groups documents based on similar topics or concepts, revealing the potentially responsive documents in a collection. Based on this better understanding of their data's contents, counsel can work with linguists to identify more focused keywords.

TAR, the most advanced discovery tool on the market, automates the document review process. In using TAR, experienced attorneys familiar with the legal and factual issues in a case code a seed set of documents for relevancy and privilege. This seed set is then fed to a computer, already programmed to uncover the logical reasoning of the seed set. Sophisticated algorithms then apply that logic across the entire data population. This process is repeated, training the computer until its coding decisions are acceptably similar to the human-coding decisions.

TAR has multiple cost-saving applications in e-discovery. For example, it can be used along with other tools to reduce the review population, and it can help isolate the most highly relevant documents by prioritizing them. Prioritization has two benefits: (1) it allows reviewers to zero in on the most critical documents that yield better understanding and guide strategy decisions at the inception of a matter, and (2) it allows lower-cost resources, such as contract attorneys, to review documents of lesser significance.

Conclusion

As Canadian practitioners struggle to keep the scope and cost of e-disclosure proportionate, they should look to the cost-effective, defensible use of advanced analytical tools to reduce document collections and speed review used in the UK and US.

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