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Moving, and managing, mountains of data

MICHAEL BENEDICT

It was once considered a costly impediment to settling legal disputes efficiently, but as it has exploded, electronic data is becoming increasingly manageable — if the right steps are followed.

Karen Brookman, president and co-founder of Toronto-based Commonwealth Legal, an electronic evidence management firm, says new technology can now be used to fight the excesses produced by old technology.

"A year ago, a Canadian corporation approached us worried about the cost of producing a large volume of electronic documents," Brookman says. "The company was facing a $500,000 legal bill to review evidentiary documents for discovery."

The client was defending a class action lawsuit and had to produce all the relevant documents. To meet this requirement, the company first identified those individuals potentially involved in the dispute. "The IT department copied their hard drives. They came up with about one million documents."

"They used some basic searching technology to reduce that cache. The software relied primarily on a date range and that eliminated some 400,000 documents. But that was as far as they could go. They faced sending the remaining documents to their lawyers for review and estimated that cost $500,000," Brookman says.

Karen Brookman, president and co-founder of Toronto-based Commonwealth Legal, uses technology to beat back the expense associated with an avalanche of paper documentation.

"Because of the large volume of e-mails, we decided to use an advanced software called Clearwell that quickly indexes and categorizes documents. It identifies irrelevant data like e-mails from iTunes as well as specific file types like PowerPoint presentations. In hours, the legal team culled the collection and reduced the volume to 100,000 potentially relevant documents.

"Then, outside counsel conducted a more formal review and ultimately produced less than 10,000 pieces for opposing counsel. That's 1 per cent of what they started with. In document review, it used to be that volume equaled cost, but no longer. By effectively renting Clearwell on our platform, the company saved several hundred thousand dollars. And they could have avoided a lot of hassles if they had a proper document management system in place."

The story illustrates the main point in a recent e-discovery research study conducted by Robert Half Legal, a global legal placement and consulting firm. "Controlling costs requires a robust records management plan that is put in place long before a company receives an e-discovery request," says the report, "Overcoming the e-Discovery Challenge."

With an estimated 500 billion e-mails transmitted through the Internet daily, data management can seem daunting indeed. But it doesn't have to be. "Although the introduction of successive technological innovations — from smartphones to social networking to cloud computing — have made discovery more complicated, taking a proactive approach to data retention and management can make the process more effective and considerably less overwhelming," the study says.

"If you manage information well, e-discovery becomes manageable," says Susan Wortzman, founder of Wortzman Nickle, a law firm that provides e-discovery and records management advice for both lawyers and corporations. "A few years ago, we were dealing with gigabytes of information; now, it's terabytes. Reducing volumes before the process begins is critical."

Even if a company is not vulnerable to lawsuits, Wortzman says it makes good business sense for them to develop policies and procedures for storing electronic information efficiently and securely. "Employees otherwise spend a lot of time managing information."

To better serve their corporate clients, some of the country's largest firms have brought the latest e-discovery technology into their offices. "When the digital era arrived, both we and clients turned to vendors for help," says Thomas Sutton, chair of the litigation support services steering committee at McCarthy Tétrault in Toronto. "But that can put a strain on what was a direct relationship between the lawyer and client. Now, we have built capacity so we can resume that close contact.

"We still use vendors, but only in cases where there's a high volume of documents or the need for outside expertise such as a foren-

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Push: Senate urged to kill controversial labour union bill

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protection of documents and information caught by solicitor-client privilege is critical to how our legal system works," Mazzuca said. "Any client — whether it's a trade union or an employer — should be confident that the information and the documents and the discussions that they have with their lawyer are protected."

He noted Bill C-377 contains two specific exemptions from the bill's financial reporting requirements for solicitor-client privileged information — disbursements for "legal activities" (an undefined term), and secondly, disbursements related to activities "other than those that are primarily carried on for members of the labour organization or labour trust."

That leaves many activities typically carried out by labour lawyers, such as union organizing, lobbying or political activity, ostensibly subject to the bill's reporting obligations, Mazzuca said.

"I'm sure lawyers would want to argue that the solicitor-client privilege concerns would override the specific wording in the bill, but the way the bill is structured right now, those type of…activities would not be subject to solicitor-client privilege," he said.

Mazzuca suggested corporate counsel and securities law lawyers should also take a closer look because Bill C-377 extends its new disclosure requirements to "labour trusts" — a term which, at press time, included any trust or fund that has trade union members in it, excepting registered pension plans.

"The breadth of the definition is still far too wide," Mazzuca said, adding that it could impose heavy administrative and cost burdens, for example, on any mutual fund owned by a union member. Training trust funds established by employers, and employers and unions, and other supplementary benefit arrangements for the benefit of union members, could also be caught, he added.

"Our submission to Parliament was 'if you are targeting trade unions, this definition of labour trust certainly casts the net far too wide and should be basically deleted from the bill.'"

Indeed, the CBA argues the best-case scenario is for the Senate to kill the entire bill (the FLSC commented only on solicitor-client privilege). Bill C-377 "is going to have very serious and dramatic impact on the entities that are caught by its disclosure requirements," predicted Mazzuca, of Toronto's Koskie Minsky. "Just the administrative burden placed on these organizations is going to be immense, and also by their very nature, if you look at trade unions, they're in the business of negotiating and when you're negotiating you have to keep some of your cards very close to you. But what this bill does is it requires the unions to publicly display their finances and their financial position, but their counter party to these negotiations [employers] doesn't have to do likewise. So it certainly places them at a disadvantage."

Hiebert argues C-377 would survive the *Charter* challenges already threatened by unions, but the British Columbia MP's confidence is not shared by the CBA, which represents 37,000 lawyers.

"The bill interferes with the internal administration and operations of a union, which the constitutionally protection freedom of association precludes," said the three chairs of the CBA's constitutional, privacy, and pension and benefits law sections, in a joint submission to Parliament last September.

They noted it remains "unclear what issue or perceived problem the bill is intended to address."

"Bill C-377 is fundamentally flawed and triggers serious concerns from a privacy, constitutional and pensions law perspective," they reiterated to the Senate this month. "Our preference would be to have the bill defeated."

Bill C-377 would require labour organizations and labour trusts to produce detailed and extensive financial information to the Minister of Revenue, that would then be posted on the Canada Revenue Agency's website in a searchable form.

The broad array of information may have to be particularized to include the salaries and benefits paid to particular officers, directors, trustees, employees and contractors, which the CBA says raises privacy concerns.

Moreover, labour organizations would be required to file statements with the minister detailing their disbursements for political activities, lobbying, organizing and collective bargaining — subjects which concern their membership but not "the public at large," the CBA says.

It predicts that the cost of the new disclosure and compliance costs "will be staggering" for pension and benefit plans, since the bill mandates disclosure of expenditures over $5,000 and many thousands of pension and benefit payments exceed this amount. Moreover, "the bill requires disclosure of the name and address of the person to whom these payments are made and it is quite possible that requiring that the purpose and description of the payment be disclosed will require the disclosure of sensitive medical and financial information."

Under the bill, any labour organization or labour trust convicted of failing to properly disclose to the government would face fines of $1,000 per day of non-compliance, to a maximum of $25,000.

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Prison system criticized over grievance procedures

CHRISTOPHER GULY

The inmate grievance process at Canadian jails impedes prisoners' access to justice, according to the head of a British Columbia non-profit organization that provides free legal counsel to inmates.

"When prisoners call us with a legitimate problem, their only remedy is usually through the grievance system, which frustrates them and leaves them feeling that we might as well have told them to go screw themselves in terms of any legal advice we can offer," says Jennifer Metcalfe, executive director of the Prisoners' Legal Services (PLS) in Abbotsford, B.C, which handles about 1,750 prisoner issues each year.

The Correctional Service of Canada (CSC) "doesn't recognize the role of lawyers and won't accept a grievance unless it's submitted by a prisoner on one of its forms," explains Metcalfe, who adds that's a challenge for most inmates unfamiliar with the law, particularly incarcerated offenders with mental disabilities.

Inmates with a complaint face a four-level grievance process that begins with an institutional grievance co-ordinator at the facility; if unresolved, the matter continues up the chain to the warden, the CSC's regional office and, finally, Ottawa.

Even if PLS is involved in providing legal advice, the CSC will communicate only with the inmate and therefore "makes it impossible" for PLS to act for inmates, Metcalfe says.

According to the CSC, grievances range from complaints about segregation status, amenities (food, clothing) to various other conditions in the institution.

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In the 2011-2012 fiscal year, 5,882 offenders filed 26,717 complaints and grievances. As of Feb. 26, 71 per cent of them were resolved within the institution, while nearly nine per cent were settled at the national level, says CSC spokeswoman Melissa Hart. More than 200 grievances were deemed to be "frivolous, vexatious or not in good faith."

Metcalfe says that if PLS's clients are "savvy enough and hold on to the paperwork, we can help them through it." But more often than not, she explains that clients end up writing their own grievances and responses that «aren›t necessarily well crafted and aren›t as likely to be successful because they don›t include all the issues that may be reviewed by a human rights tribunal or court.»

Metcalfe, who practises administrative law, believes the CSC's complaint and grievance process is "designed to exhaust" inmates rather than provide them with any relief.

"There are delays at every one of the four levels of the process and the remedies are pretty useless," she says, adding that the CSC will only address one issue even if there are more cited in a complaint.

"Our clients have to go through this long process that's hard to navigate and requires them to be diligent enough to follow through with before they can file a complaint with a human rights commission or apply for judicial review in most cases."

CSC policy states that the director responsible for offender redress — on behalf of the commissioner in Ottawa, the final stage of the grievance process — must render a decision within 80 working days of the initial receipt of a complaint. The griever "must be informed, in writing" of any reasons for any delay "and of the date by which the decision will be rendered." Furthermore, the "decision maker may choose to address all of the issues [if two or more complaints are submitted on a similar issue] in one response." In addition, the CSC allows an inmate to take a complaint or grievance to court or a human rights tribunal, and upon completion, request that the original complaint be reactivated.

However, a recent Federal Court decision questioned "the extent to which the CSC has complied with its statutory obligations to provide inmates with an effective grievance procedure."

In *Spidel v. Canada (Attorney General)* [2012] F.C.J. No. 1024, Justice Anne Mactavish found that Michael Aaron Spidel, who is serving a life sentence in B.C. for second-degree murder, received as many as eight extension letters "before actually getting a substantive response to his grievance… whether the case was a 'routine' or a 'high priority' grievance."

In granting Spidel a judicial review, the judge found the CSC's assistant commissioner for policy "failed to address central aspects" of Spidel's grievance, "and as such, the decision…to provide for any corrective action…was unreasonable."

Justice Mactavish set aside the decision and sent the case back to the assistant commissioner for redetermination. The CSC did not appeal the ruling and has complied with the court's order, said spokeswoman Christa McGregor in an email, who added that the federal agency could not comment on the specifics of an offender's case, "including grievances."

Metcalfe hopes the ruling will prompt the CSC to implement the recommendations of administrative law scholar David Mullan's 2010 external review of its offender complaints and grievance process.

He suggested that every maximum and medium-security institution designate a mediator — beyond the one institution with such a role — to comply with s. 74(2) of the *Corrections and Conditional Release Regulations*, which requires that "every effort" be made by staff and inmates "to resolve [issues] informally through discussion."

Mullen also called for the elimination of the second (regional) level in the grievance process, since it only weeds out or resolves about half of the matters that go to it, and "it further delays the process often to the significant disadvantage of offenders."

The CSC plans to eliminate that second level by 2014-2015, which will result in a cost savings of about $1.6 million.

Hart says the correctional service has also implemented a pilot alternative dispute resolution project in five maximum- and five medium-security institutions across the country that focuses on informally resolving offender concerns when they first emerge, to both reduce the number of grievances and resolve issues expeditiously. She adds about one-third of complaints and grievances have been resolved at federal institutions where the project is in place.

B.C. criminal defence lawyer John Conroy believes inmates should have quicker access to the courts or an independent decision-maker to review and resolve "significant and serious" complaints.

"The problem seems to be a polarized situation of us versus them, which doesn't seem to lend itself to a timely response by the correctional service," said Conroy, whose practice is based in Abbotsford. "The challenge is to create a system that is effective and efficient and which enables people to resolve a complaint in a peaceful manner and as expeditiously as possible."

Equilibrium: As e-discovery volume rises, costs stabilize

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sic accountant. And then they are directed by counsel and client, acting together."

At the same time, Sutton says that some clients have become sophisticated users of new data management technology to meet regulatory requests and potential suits. "They turn to us for legal assistance, because we have the capacity to provide seamless electronic co-operation."

As a result, Sutton adds, e-discovery costs have stopped their steep increase and are stabilizing or decreasing.

At Borden Ladner Gervais, the volume of in-house, e-discovery activity has doubled in the past year, according to Michael Condé, the firm's Vancouver-based national director of litigation support. "We can handle cases involving up to 100 gigabytes," Condé says. "It's more efficient to have the lawyers and the e-discovery process in the same location. And for smaller matters, it's much faster than outsourcing."

BLG will reach out to a vendor if the case is very complex or the timelines can't otherwise be met. But the firm has the capacity to handle sophisticated actions on its own. Condé tells of a recent review where the firm started with two terabytes, or more than 18 million documents, that it reduced to 4,000 in four weeks. "If it were paper, the process would have taken months or even years," Condé says. "It saved the client a bundle."

Still, challenges remain. The Robert Half Legal study found that 27 per cent of 350 lawyers surveyed in North America's largest firms or corporations felt unprepared to handle an unexpected request for discovery. While that means nearly three-quarters *were* ready, "it can be pretty costly for that other group who are not," says Charles Volkert, executive director of San Francisco-based Robert Half Legal.

Besides taking a proactive approach to data management, the study recommends that in-house counsel need to be aware when they require outside legal help and provider services to assist in the e-discovery process. And it cautions that even the latest technology, such as predictive coding, has its limitations as well as benefits.

"Lawyers are not technology leaders and not always sure how to guide clients," says Toronto-based information governance lawyer and consultant Martin Felsky. "Technology is changing rapidly, and law firms are generally not equipped to handle that."

Indeed, Condé and Sutton agree that keeping up with new software and methods for finding, collecting, reviewing, producing and preserving documents is their biggest challenge. "The trick will be to make sure we re-invest to stay abreast of evolving technology," says Sutton. "How will we triage, how will we use computer-assisted review and how will we decide what will be seen by lawyers and by which ones?"

In the end, there will always be a role for lawyers in the e-discovery process, even though the days of sorting through dozens of bankers' boxes belong to a bygone era. Legal eyes will now, ideally, be needed only at the end of the document culling process, not throughout. "The old approach was particularly taxing for our younger lawyers," Sutton says. "They are much happier when they can bring a value-add to the process."

In fact, Commonwealth Legal's Brookman adds that younger lawyers are already thinking in e-discovery terms. "They grew up with technology. For them, there's not a choice."