Staying Vigilant

Issues around e-discovery are only getting hotter; smaller companies, in particular, need to ensure they are prepared for litigation

By Kevin Marron

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Dominic Jaar doesn't want his company to learn the hard way about the horrendous costs of searching for evidence that is lost in cyberspace. An in-house counsel at Bell Canada, specializing in commercial litigation, Jaar makes it his mission to bring order to the potentially chaotic mass of documents that thousands of employees have created in millions upon millions of e-mails, word processing files, presentations, spreadsheets, instant messages, web pages and other electronic media. He wants to know in advance that he can find the needles in this digital haystack that he may one day have to produce in court.

Jaar, one of a handful of Canadian experts in the rapidly emerging field of e-discovery, says organizations often address this issue too late. "When a corporation gets sued and they have to disclose electronic information, that's when they tend to realize, 'Oh, gosh, we don't have a good document management system or record management system.'"

While e-discovery is well established as a major concern for in-house counsel, it's also clear that the issue is only becoming more complex—and potentially fraught with unknown pitfalls. With the technology and the case law continually evolving, in-house counsel need to be way out in front of the issues, not just reacting to them, notes Frank Walwyn, a partner at WeirFoulds LLP and part of a team that defended WestJet Airlines Ltd. in the recent corporate espionage suit brought by Air Canada; that case (*Air Canada v. WestJet Airlines Ltd.*) was settled soon after a landmark decision ordering Air Canada to conduct a manual review of 75,000 electronic documents to ensure they did not contain privileged information before producing them in discovery.

"Frankly, the in-house counsel who do not already have this issue, and a plan to address it, up on their radar screen might as well have a stack of signed blank cheques ready to hand out to plaintiffs' counsel in any litigation their company faces," says Walwyn.

He says in-house counsel must ensure that their companies know exactly where their electronic information is stored and have a sound policy for managing it, "so that, if and when they do face litigation, or if and when they do face a regulatory question, they are able to respond to it without having to essentially put the company in jeopardy because of the money it would cost to respond to the issue."

Walwyn emphasizes that this "isn't just fear mongering" and he isn't exaggerating about e-discovery potentially putting

your company in jeopardy. And it doesn't only apply to large corporations, many of which have already been exposed to litigation and understand very well what is involved in gathering up and analyzing the massive number of documents that they may be compelled to produce. "The concern we have is for the smaller companies that never had to extract e-mail from backup tapes; have never had the cost of forensically analyzing data sources or data media; and have never had to search for all available media from every custodian who has information material to the matters in the litigation," says Walwyn. "The sticker shock of that process on these smaller companies will be immense."

In fact, Walwyn adds, there is just one conclusion that clients tend to reach when he sits down with them and explains how they will have to identify every person who had potentially relevant documents and how they will then have to look for the data in their desktops, laptops, home computers, additional hard drives and other sources, including old obsolete computers and storage media. "When I explain all that and tell them they may have to hire a specialist to do the extraction, the next thing that comes out of their mouths is 'what will it cost to settle?'"

"I've been practising for 12 years or so and I can think of no other development in recent history that has as much potential to bring about non-merit-based results in litigation as this proliferation of electronic documents and the use of e-discovery," Walwyn says.

The role that e-discovery issues played in leading Air Canada to settle with WestJet can only be a matter for speculation. WestJet admitted that it had covertly accessed Air Canada's password-protected employee website to download commercially sensitive information and that this "unethical and unacceptable" practice "was undertaken with the knowledge and direction of the highest management levels." Nevertheless, the amount of money that WestJet paid out—$5.5 million in costs to Air Canada and $10 million donated to charity—was relatively low, given that Air Canada evidently had an overwhelmingly strong case and had originally sued for $200 million.

While that seems a favourable result for Air Canada, the company may well have pushed for more if not for e-discovery issues. In what was the first major Canadian court decision on e-discovery, Justice Ian Nordheimer of the Ontario Superior Court of Justice ruled that Air Canada would not be allowed to take a short cut that would have saved the huge expense of manually reviewing 75,000 documents. If that seems enormous, Walwyn notes that the number of documents at issue was "a very narrow subset" of "the universe of documents" that Air Canada would

Tip Sheet

So what do you do when a big case comes in and you know you may have to produce thousands of electronic documents?

- Susan Wortzman, a partner at Lerners LLP, says the secret is for in-house counsel to work with information technology people and external counsel to ensure that there is a good plan in place. She breaks the task down into four categories:
- Preservation—you have to make sure that everything potentially relevant is preserved immediately, so you have to figure out right away what to preserve and where it may be, then impose a litigation hold to ensure that no one destroys or alters this material.
- Collection—you need to get a technology service provider or your IT department to make images of hard drives and servers, collect back-ups and restore them, if necessary.
- Review—you have to decide what is relevant and what isn't, designing search criteria, such as key words and date parameters, preferably reaching an agreement with opposing counsel about what search terms to use. You also have to identify privileged documents, perhaps starting with a key word search for lawyers' names or words like "legal," "lawyer" or "privilege." Then comes the onerous work of having lawyers review all the documents that you have identified in these electronic searches.
- Production—finally, you have to figure out how you can best present the material. This involves making numerous technical and tactical decisions concerning the format and medium in which you present the material, how it is coded, indexed or cross-referenced.
- Where possible, you should cooperate with opposing counsel to come up with an agreed-upon discovery plan, Wortzman suggests. "If both sides agree, there will be far fewer motions down the road and far less cost."

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Dominic Jaar, in-house counsel at Bell Canada

have had to review in preparing its case. He says the ruling is significant in that it sets out clearly for litigants the obligations they face when they are producing massive amounts of documents. "It is a process which is enormously expensive and extremely time consuming," Walwyn adds.

Susan Wortzman, a Toronto-based partner with Lerners LLP, a member of the team that represented Air Canada, says the volume of electronic documents in major cases involving large companies is "staggering." She says that "counsel are starting to recognize these are new problems that we've never had to deal with before."

Wortzman is a participant in a working group set up to establish e-discovery best practice guidelines under the auspices of The Sedona Conference, a US law and policy research and educational institute. She notes that lawyers in the United States have been aware of these issues for longer. US guidelines were established in 2005 and a Canadian working group is currently seeking consultation on a made-in-Canada version.

Wortzman observes that in some respects the Canadian legal system is even more onerous in its e-discovery requirements than the US system. Whereas in the US parties are obliged to respond to requests from the other side, Canadian lawyers and their clients have a positive obligation to produce all relevant material that is in their power, possession and control. She says this means "you have to search through all your business to find anything that is potentially relevant to the litigation." And the potentially huge costs of this search will ultimately be paid—though not necessarily in US litigation—by the party that loses the case.

All this underlines the need for best practice guidelines that will encourage "a balanced view of e-discovery" whereby counsel will try to reach agreements about how to conduct the search for relevant electronic documents and how to narrow the scope of this search to reflect the context of the litigation, says Wortzman.

While the difficulty of vetting electronic documents for privilege proved to be a stumbling block in Air Canada's suit against WestJet, Wortzman says, "I've been involved in other cases where parties on both sides agreed that if anything is inadvertently produced it won't constitute a waiver. That's a reasonable solution."

But lawyers involved with e-discovery generally agree that this is a field where prevention is far better than a cure. They emphasize that the ideal is to strive to do what Jaar is trying to do at Bell Canada—to organize and manage the corporation's universe of electronic documents so as to make it easier to find whatever you might need in the event of a lawsuit.

The demands of privacy law and for compliance with corporate governance and financial regulations are also driving this need for more efficient management of electronic documents, according to Vivian Bercovici, who was vice-president, general counsel and corporate secretary at The Dominion of Canada General Insurance Company, before becoming a partner at Goodman and Carr LLP.

If your electronic documents aren't well managed, she says, "You go to litigation and you're fumbling around. You can't

recreate the documentary evidence. It takes you too long. It's cumbersome. You overproduce. That's embarrassing. That's going to cause reputational harm to your organization."

Yet the task of getting your organization's electronic documents in order is, she says, "a huge task because it involves not only resources, but also modifying behaviour in the workplace."

And it is a task that requires in-house counsel to take on a role that they are not usually expected to play—they must become promoters and champions of an initiative that will involve a huge allocation of technical and human resources to something that hardly anyone else sees as part of the core business of the organization. "The challenge is convincing your colleagues that resources should go here, rather than to a fabulous new sales system," Bercovici says.

Jaar says his advice to other in-house counsel is "never bring it in as a litigation issue, because you're going to get the easy answer, 'We're not in the business of getting sued. We're in the business of selling services and making money.'"

So what Jaar did at Bell Canada was convince senior management "by showing the increase in efficiency and productivity—and creativity, to a certain extent—of having a uniform information management system, where people could share the information readily and easily access it whenever they need, instead of having to spend precious time looking."

Jaar says he also bolstered his case by showing that it would save the company money if the new information management system cut down on the amount of redundant data being stored and backed up in numerous additional servers taking up valuable space in office buildings.

While securing the buy-in of senior management, in-house lawyers also need to work closely with information technology departments, Jaar suggests. One of the reasons that companies run into huge problems with e-discovery, he says, is that information technology departments "tend to think that they are doing a really good job if everything is kept. So they have a really good back-up system where they back up everything and keep the back-up tapes for years."

From a legal point of view, however, a good document management system is one that destroys electronic records that are no longer required, including documents containing personal information that organizations are required by law to destroy once it is no longer being used. Particularly important, in this regard, according to Bercovici, is making decisions about when to make legacy systems redundant, since keeping information stored in outdated computer systems can result in companies having to spend a lot of money to have forensic experts extract it in the event of a lawsuit.

As Jaar explains, putting such a policy in place involves careful planning and cooperation throughout the organization.

To begin with, you have to send surveys to your different groups to know how they do business, how they manage their information and what type of information they have. You can then use this information to draw a data map, identifying all the locations where information is stored, the technologies used to store it, who created the information, who has access to it, who can modify it and who manages it.

You also need to launch a major education campaign within your organization to get everyone to understand the importance of managing information carefully, says Jaar. People need to understand, for example, that forwarding a word processing document inappropriately could have legal implications because of the metadata buried in the file—information such as who wrote and reviewed the document and when.

In some organizations, different departments or subsidiaries have different ways of managing information and storing it, while individual users all have their own way of classifying and saving their files, Jaar observes.

For example, some people will have their e-mails stored in numerous clearly defined folders and subfolders, while others will keep every message they receive in their in-box.

People also have different ways of handling attachments—the various files that have been inserted into incoming e-mails—with some individuals saving these files in relevant document folders and others simply leaving them attached to the e-mails that sit in their inbox. All this makes it hard to retrieve the information in a uniform way for e-discovery purposes.

The solution that Jaar is helping implement at Bell Canada involves a major change in the way everyone in the organization uses computers. Under this policy, users are not allowed to store any files on their desktop computer hard drives, which are used only for storing software. All documents and information is stored on the corporate network and managed centrally. This makes it possible to apply and enforce rules as to what needs to be stored, where and for how long, eliminating duplication and the necessity for costly searches of individual computer hard drives, back-up storage devices and other media.

"We're working on the implementation of such a system as we speak," says Jaar. "We started in the legal department and we're pushing in further into other divisions."

In a large organization such as Bell Canada, implementing a document management system to meet the demands of e-discovery is not something you can do in a day. "It's a work in progress," says Jaar.

Kevin Marron is a freelance business and legal affairs writer.