BRIEFING NOTE

Moore v. *Publicis Groupe SA*: Relevance for documentary disclosure determined by computer?

E-discovery is the topic of much discussion as of late. The sources and types of data subject to discovery are dizzying in their ever-increasing variety. The application of the traditional rules relating to disclosure can be both onerous in terms of the workload required and the back-breaking costs involved. Some attempts have been made to develop rational standards for discovery in the digital age such as the Sedona Conference Canada.[1] Suggested approaches to this problem have included the outsourcing of the services to counsel in less-costly jurisdictions or potentially minimizing the scope of disclosure depending on the features of each case. The use of information technology to remedy a problem created in part by increased use of digital data and media is attractive for the elegance of its logic but it raises many fundamental questions about whether the human contribution to the process is necessary and to what degree it may be desirable.

While Canadian courts have tended to be conservative regarding the adoption of new technologies, there a recent interlocutory ruling by Judge Andrew Peck of the United States District Court in the Southern District of New York that may give us some insight into what the future may present. In *Moore* v. *Publicis Groupe SA*[2] Judge Peck ordered the use of Recommind Inc.'s Axcelerate predictive coding software to decide what documents would be produced in that case. The question arose with respect to 3 million documents that were potentially disclosable in an employment law class action.

Generally speaking, predictive coding involves use of software by a lawyer who manually classifies a sample of representative documents using keywords. Thereafter the software generates search results on other documents that are reviewed and corrected by counsel. This process allows the software to learn what may be relevant and what is not. The validity of the coding is then reviewed by the opposing counsel. If there is a disagreement then the court can rule on the methodology to be used. Thereafter the coding is inputted into the software which governs the process of determining what documents are therefore relevant and a database of documents that meet the coding criteria is generated. Counsel would thereafter be limited to utilizing those documents when preparing their cases.

The accuracy of predictive coding has been analyzed papers by the RAND Corporation[3] and KPMG[4], both of which endorsed it as a cost-effective means of

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[1] e.g., see http://www.lexum.ca/e-discovery/documents/SedonaCanadaCostContainment.pdf & http://www.lexum.ca/e-discovery/documents/Handout-WG7Proportionality.pdf

[2] available at http://www.nylj.com/nylawyer/adgifs/decisions/022912peck.pdf.

[3] Nicholas M. Pace and Laura Zakaras *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* (Rand Institute for Civil Justice April 11, 2012) available at http://www.rand.org/news/press/2012/04/11.html.

addressing the challenges of disclosure in the digital age. More significantly testing reported in the *Richmond Journal of Law and Technology* has concluded that predictive coding was superior to intensive manual review by counsel[5].

The *Moore* litigation is still at an early stage and therefore the question of whether this interlocutory decision is prudent remains to be seen. For now this case is the first decision in which a court has opted to allow software to determine to some degree the relevancy of documents to be disclosed.

Like the *U.S. Federal Rules of Civil Procedure*, Rule 1-3(2) of *British Columbia Civil Rules* requires judges to use proportionality as a means of gauging the scope of disclosure on a case-by-case basis. The concept involves a varying degree of disclosure depending on the monetary value, complexity, and social significance of the case being litigated. This has led to some commentators to question if this approach may create a lower grade of justice for cases that are on the lower end of these criteria. If so, is it fair for litigants in those cases to have a different sort of justice from those that meet the criteria? Should a party be denied the ability to access data that may assist its case simply because the case is not involving a large financial exposure or complex legal issues?

If we accept Judge Peck's reasoning in the *Moore* case, then technology may allow for some mitigation of the deleterious effects attributed to proportionality. Software may allow litigants some access to the large volumes of data needed to advance their cases without incurring the same expense that would be required if that data were to be manually reviewed by counsel.[6] This would however require us to question the human role in the process of determining what data may be made available to the litigants and whether we can entrust technology to make this determination.

The *Moore* case is being closely observed by many commentators around the world. Whether this reasoning may find traction in Canada remains to be seen. It does allow for a new solution to what has become a vexing problem for counsel and litigants – one that may allow for an equitable balancing of interests in the litigation process. That being said however it will be incumbent on the courts considering this approach not to limit analysis to this method but to also consider other on-going advances in artificial intelligence and availability of alternative comparable methodologies to reduce the risk of software error and subsequent non-disclosure of relevant evidence.

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[4] *The Case for Statistical Sampling in e-Discovery* (KPMG: January 2012) available at http://www.kpmg.com/us/en/IssuesAndInsights/ArticlesPublications/Documents/case-for-statistical-sampling-e-discovery.pdf.

[5] M.R. Grossman and G.V. Cormack, *Technology-Assisted Review in e-Discovery can be More Effective and More Efficient than Exhaustive Manual Review* XVII Rich. J.L. & Tech 11 (2011) available at http://jolt.richmond.edu/v17i3/article11.pdf

[6] Grossman and Cormack concluded that a sample of as little as 1.9% of total documentation may be sufficient to satisfactorily educate the software (*Ibid*. p. 43). The RAND study determined that 73% of discovery-related expenses are related to counsel review (note 2 page xiv [PDF page 16]).

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