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BRIEFING NOTE

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eDiscovery Update: case law on Predictive Coding

In June 2012 I wrote a previous Briefing Note in which I reported on a United States District Court ruling in which the use of predictive coding software was ordered as a means of determining which of 3,000,000 documents would be produced in an employment class action.[1] In that paper I analyzed how the software worked and what its proponents argued were its benefits.

In my research I have not yet located any Canadian cases in which predictive coding was ordered or even utilized by counsel. Since the *Da Silva Moore* ruling, there have however been a number of US cases in which judges have encouraged counsel to utilize it[2] or in which counsel agreed to its use.[3] The cases upon which I shall report hereafter are examples in which its use has been the subject of argument and adjudication. The courts in these cases have for the most part been favourably disposed towards the utilization of predictive coding software and have ruled in favour of counsel who adopted a more cooperative approach to discovery.

EORHB, Inc., et al v. *HOA Holdings, LLC*,[4] concerned interpretation of a release signed by the litigants in relation to a the purchase and sale of the Hooters restaurant chain. In this case the judge commented that since generally claims of this sort led to a large number of documents being disclosed, the parties could benefit from the use of new technology. He therefore ordered the use of predictive coding without any prompting by counsel. It should be noted that several months later the judge reversed the order after the parties established in a show cause hearing that the number of documents in the case did not justify the expense of utilizing predictive coding.

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[1] *Da Silva Moore* v. *Publicis Groupe SA* 11 Civ. 1279 (ALC) (AJP) (April 25, 2012)
[2] e.g. *National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency* US District Court S.D. New York 10 Civ. 3488 (SAS) (July 13, 2012), *Harris v. Subcontracting Concepts* US District Court N.D. New York N.D. Civ. No. 1:12 – MC - 82(DNH/RFT) (March 11, 2013), *Chevron Corporation* v. *Donziger, et al.* US District Court S.D. New York No. 11 Civ. 0691 (LAK), (March 15, 2013), and *FDIC* v. *Bowden* US District Court Savannah, Georgia CV413-245 (June 6, 2014)
[3] e.g. *Re Actos (Pioglitazone) Products Liability Litigation,* US District Court W.D. La. MDL 6:11-md-2299 (July 27, 2012) and *Gordon, et al.* v. *Kaleida Health, et al.,* US District Court W.D. New York No. 08-CV-378S(F) (May 21, 2013) in which its use was agreed upon but a dispute arose over protocol implementation.
[4] Delaware Chancery Court C.A. No. 7409-VCL (Oct. 15, 2012)

Global Aerospace Inc. et al. v. *Landow Aviation LP dba Dulles Jet Center, et al.*[5] was a lawsuit relating to the collapse of three hangars at the Dulles Jet Center during a snow storm in February 2010. The defendants argued that if the court were to grant the plaintiffs' demand for human review of the 2,000,000 documents in question, the process would require 20,000 man-hours of work and $2,000,000 in legal fees. As such the defendants proposed a protocol under which they would provide a complete set of training documents and a logging of withheld documents so that the plaintiffs could determine if they required modification of the coding prior to the actual iteration process. The court ordered the use of predictive coding over the objections of plaintiff's counsel, who had demanded keyword searches and manual review.

In *Kleen Products, LLC, et. al.* v. *Packaging Corporation of America, et al.*[6] the plaintiffs alleged the defendant packaging companies had engaged in price-fixing in contravention of the *Sherman Antitrust Act*. The defendants had already engaged in thousands of hours of Boolean keyword searching and manual review that had led to the disclosure of over 1,000,000 documents. The plaintiffs asked the court to order that the process be restarted using predictive coding as the method that had been used prior to that was inadequate and fundamentally flawed. The court did not rule on the effectiveness of either method and instead told both sides that they would have to compromise. Five months later, the parties agreed that predictive coding would not be used in the first phase of review but that the parties reserved the right to apply again for a determination regarding its use at the second phase.

Gabriel Technologies Corp. et al. v. *Qualcomm Inc. et al.*[7] was an unsuccessful lawsuit in which the plaintiffs alleged patent infringement, fraud, breach of contract, and eight other causes of action. Having found the plaintiffs' claims were "objectively baseless and brought in subjective bad faith," the court awarded costs sanctions to the defendants totaling $12,401,014.51 for their legal fees and disbursements. One element of that award was the amount expended for the application of predictive coding software. There had been 12,000,000 potentially relevant documents that were filtered using predictive coding software and then reviewed manually by third-party litigation consultants. The plaintiffs were awarded to pay cost for the defendants' electronic review, which totaled $2,829,349.10. The court found this figure reasonable since it minimized the time and expense incurred by the litigation consultants.[8]

In re: Biomet M2a Magnum Hip Implant Products Liability Litigation,[9] the defendant medical device manufacturer had spent $1,070,000 for e-discovery using keyword searching and manual review in order to identify 2,500,000 potentially relevant documents from a total group of 13,500,000. The defendant then employed predictive coding software in order to further clarify relevance from the remaining 2,500,000 documents. The plaintiff class

[5] Loudon County Circuit Court Virginia No. CL 61040 (April 23, 2012)
[6] US District Court N.D. Illinois No. 1:10-cv-05711 (Sept 28, 2012)
[7] US District Court S.D. California 3:08-cv-01992-AJB-MDD (Feb. 1, 2013)
[8] the bill for their 6,949.5 man-hours of work was $391,928.91
[9] United States District Court N.D. Indiana NO. 3:12-MD-2391 (Apr. 18, 2013)

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steering committee objected as it asserted the use of a keyword search had "tainted" the search and sought an order that predictive coding be used on the original 13,500,000 documents instead. The court considered the additional cost that the defendant would have to incur if the plaintiff class steering committee's order was granted on the one hand, and the potential benefit to disclosure on the other. In the end the court was not satisfied that the plaintiff class steering committee's order should be granted. Several months later,[10] a second hearing was conducted with respect to whether the defendant was obligated to provide the seed set of documents used to train the predictive coding program. The plaintiffs argued that the *Sedona Conference Cooperation Proclamation*[11] and the corresponding *7th Circuit Discovery Committee*[12] supported their position but the court noted that neither of those expanded a federal court judge's powers with respect to orders compelling discovery. While the court felt that the defendant's refusal to disclose the seed set of documents was problematic, it ruled that it lacked the discretion to make the order to disclose it.

In *Federal Housing Finance Agency* v. *HSBC North America Holdings, Inc.*[13] the plaintiff, as conservator for the Federal National Mortgage Association (more commonly known as "Fannie Mae") sued the defendant for alleged violations of the Federal *Securities Act 1933* and State "Blue Sky" laws. The court quoted a peer-reviewed study[14] that this author identified in his previous paper as support for the use of this technology and noting how it can contain discovery-related costs. The court ordered the use of predictive coding over the objections of plaintiff's counsel (and also denied a subsequent request for reconsideration). Interestingly, the court commented that perfection cannot be expected from the discovery process.

In *Progressive Casualty Insurance Company* v. *Delaney*,[15] the plaintiff insurance company sued the Federal Deposit Insurance Corporation in relation to the takeover of a failed bank. After months of negotiations, the litigants initially agreed upon a protocol under which a set of search terms could be used to identify documents that may be potentially relevant. The plaintiff was then supposed to review the documents in question to determine whether to disclose them (with or without relevant objections), assert privilege, or identify as non-relevant (which would lead to further consultation with opposing counsel). Approximately 1,800,000 documents were reviewed in this manner and 565,000 documents were identified as potentially relevant. The plaintiff asserted that there were too many documents to review and unilaterally began

[10] on August 21, 2013
[11] a PDF for which is available for download from the Sedona Conference website
[12] The Statement of Principles for which emphasize the need for proportionality and cooperation between opposing counsel.
[13] US District Court S.D. New York 2014 WL 584300 (Feb. 14, 2014)
[14] 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) note reference to it was also made in the *National Day Laborer Organizing Network* case referenced above (see footnote 2) and the *Progressive Casualty Insurance* case noted below (see footnote 13)
[15] US District Court Nevada No. 2:11-cv-00678-LRH-PAL, 2014 WL3563467 (July 18 2014)

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a second screening process using predictive coding which further reduced the number of documents to 90,575. Noting the problems with utilizing predictive coding after keyword searches and the question and the programming of the predictive software by the party's own counsel, the court rejected the plaintiff's motion. The 565,000 documents were ordered disclosed subject to an electronic privilege filter (and provision of a privilege log regarding the documents withheld).

Dynamo Holdings Limited Partnership, et al. v. *Commissioner of Internal Revenue*[16] was tax litigation under which the petitioners sought to overturn a determination by the IRS that various property transfers between related companies were "disguised gifts" to one of the company's owners. The petitioners argued the impugned transactions were loans. The respondent IRS was seeking all the documents saved on two backup tapes, each of which contained about one month's worth of data. The tapes backed up data from an exchange server, and a domain controller file server: the former had approximately 200 mailboxes that were each 500 megabytes to 1 gigabyte in size; the latter was comprised of 50 common top level file share folders, 200 user share folders, and an undetermined number of subfolders. The petitioners asserted that traditional review of the data to determine relevance, privilege, and confidentiality would take many months and cost approximately a half million dollars to complete. The petitioners asserted that use of predictive coding software could reduce that cost by more than 5/6^{ths}. The court rejected the IRS' argument that predictive coding was an "unproven technology" citing a number of the cases analyzed herein. The court also noted that its procedural rules relating to discovery are to be interpreted in a manner "construed to secure the just, speedy, and inexpensive determination of every case." The court noted that if the IRS believed that the predictive coding software had not ensured complete disclosure that it would be at liberty to file a motion to compel at that time.

In conclusion, in the overwhelming majority of cases concerning this technology decided since *Da Silva Moore* v. *Publicis Groupe SA*, US courts have approved the use of predictive coding software. This is not surprising when one considers that the judiciary is grappling with how to simultaneously address issues such as access to justice, the ever-increasing costs of litigation, and the application of principles of proportionality on the one hand, while ensuring litigants are not denied the evidence they require to prove their theories at trial on the other. While not a panacea for these conflicting requirements in the digital age, predictive coding is increasingly being accepted as a potential tool for balancing them and ensuring justice for litigants.

Alexander D.C. Kask is a partner with Guild Yule LLP and practices in the areas of professional negligence, health law, municipal law, administrative law, and insurance defence litigation. He also has experience in commercial litigation, safety standards regulation, personal injury, and human rights law. Alex has represented clients at all levels of court in British Columbia and before various administrative tribunals. He has been an instructor for the Vancouver Community College Paralegal Certificate and Diploma Program as well as a contributor and lecturer for the Continuing Legal Education Society of British Columbia.

[16] United States Tax Court Nos. 2685-11, 8393-12, 143 TC No 9 (Sept. 17, 2014)

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