

## LEGAL BUSINESS

## First e-discovery law boutique in Canada opens its doors

By Michael Rappaport  
Toronto

As counsel for Air Canada, Susan Wortzman saw up-close the huge burden that e-discovery – the disclosure of all relevant electronic documents during litigation – can place upon a litigant: in a corporate spying suit last year, after losing a motion before the Ontario Superior Court of Justice, the airline was ordered to check 75,000 of its electronic documents for confidential information before handing them over to WestJet.

“Air Canada would have had to manually review all the documents page by page to determine if the contents were privileged,” Wortzman gasps. A few weeks after this daunting order, Air Canada reached a settlement with its rival.

Every crisis also presents an opportunity, according to an ancient Chinese proverb. Having witnessed the onerous obligations which e-discovery obligations can inflict upon litigants, Wortzman, decided to open the first Canadian law firm devoted solely to providing e-discovery advice. She left Lerner LLP where she worked for 17 years along with her colleague Susan Nickle. Together, they launched Wortzman Nickle Professional Corporation in Toronto on October 1, 2007.

The law firm provides two key types of advice: assistance with fulfilling e-discovery obligations to litigants after a suit is filed and guidance on e-discovery preparedness to businesses in the event of a law suit.

Wortzman likens the first type of legal advice to a “SWAT team approach” to responding to e-discovery duties.

“The parties are already involved in litigation and they’re throwing their arms up in the air asking how are we possibly going to deal with all the electronic information? We have 5,000 employees who might have relevant e-mails, we’ve got 5,000 desktops. We might have to look at the server. We have BlackBerrys. We have fax machines. We have all these sources which might have electronic information. How are we going to manage it?”

Advice at this stage, revolves around preserving electronic information, collection, review for relevance and production of all non-privileged electronic documents.

The second kind of advice is proactive — it involves assisting

businesses develop and implement policies for managing and preserving electronic information so they can fulfill their e-discovery obligations in the event that litigation arises.

“You can’t put your head in the sand. It’s just not going away. You are going to have to be dealing, in every piece of litigation, with electronic records. I think that’s what a lot of lawyers haven’t grappled with yet,” Wortzman exclaims. She adds that e-discovery issues are popping up all over, not just in corporate litigation, but in family and employment law cases as well.

“Spouses are saying I want to see what’s on my partner’s computer. He walked out the door, with his laptop and it had all the financial records,” Wortzman says.

Nickle echoes Wortzman’s views: “That’s really the big e-discovery myth that it’s only commercial litigation or class actions that involve e-discovery; even the smallest employment dispute will often turn on electronic records.”

Data, data, everywhere. Businesses are literally awash in an electronic sea of information with millions of megabytes of data stored on servers, desktops, laptops and hand helds. It’s estimated that a whopping 92 per cent of all communications in the workplace are electronic: e-mails flip back and forth, documents are created and modified on a daily basis, fax machines buzz and telephones digitally recording voice messages. Worse yet — all of these data can come back to haunt a business if they’re not handled properly.

“E-discovery has transformed

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litigation, because when mishandled it’s exceedingly expensive and can give rise to a whole host of new problems that we didn’t have to deal with before,” Wortzman explains. “One example is spoliation of evidence. You knew before when your client got sued and the other side requested that you send over all relevant documents, that it would be an intentional act for your client to take bad documents and shred them. Now, potential evidence is being destroyed all the time inadvertently.”

To illustrate this point,



Susan Nickle (left) and Susan Wortzman Photo by Paul Lawrence

Wortzman provides the following hypothetical example: “A corporation gets sued. Their back-up system automatically recycles all the tapes every three weeks. If the corporation doesn’t communicate quickly enough with IT to stop the recycling of back-up tapes, the evidence will be destroyed inadvertently. It’s not intentional, but the issue which the courts are grappling with is: should legal counsel have ordered the freezing of the back-up tapes?”

Beyond the difficulty of dealing with the sheer volume of electronic information, the ease of duplication and modification also raise tricky issues.

“You could be certain that if there was only one copy of a contract before and it is destroyed, it’s gone. Whereas, bits and pieces of the contract may remain on your server if the contract is electronically generated. It may have been forwarded as e-mail. There may be multiple versions of the contract. “This has made the whole task of production much more time-consuming and expensive,” Wortzman says.

Indeed, the wide scope, enormous costs and time-consuming nature of e-discovery can be an outright deterrent to litigation, since it can cost millions to do

massive electronic production, according to Wortzman.

Electronic information also has some unique features such as meta data, which is the data behind the data, such as the creation date of the document, when it was last modified, where it was sent, who has opened it and how long they spent on it.

Wortzman calls meta data “a bit of a red herring in litigation,” but concedes that in certain cases it can be crucial, since it provides so much information about a document which wasn’t available before.

Obsolescence is another factor which presented a stumbling block in e-discovery. Litigants often run into trouble when they are required to disclose older files during e-discovery, but the older formats are no longer accessible by the newer versions of software.

E-discovery has posed so many prickly problems in litigation that two years ago a legal policy group, Sedona Canada, struck a committee composed of technical experts, top lawyers and respected judges from across the country to develop national principles tailored specially to managing e-discovery legal issues. Wortzman chaired this committee and Nickle was also a member. The guidelines are expected to be released this December.

While e-discovery can hit a litigant like a ton of bricks if they are not properly prepared, it can also offer a veritable cornucopia of sav-

ings.

E-discovery can save cash. “If you can produce all your documents electronically you can save huge photocopying costs,” Nickle says.

“It saves trees,” Wortzman pipes in, putting an environmental spin on things. She adds it also saves time: “If you’re able to isolate, preserve and produce electronically, it is so much cheaper. If you have a case with 100,000 documents and you’re searching for a particular sentence you can’t find it if it’s on paper.” In stark contrast, electronic documents can be searched using keywords.

Most importantly, e-discovery can save your case in court. According to Nickle, their objective is to demonstrate to litigants how to do e-discovery so that they can be successful in court and meet their obligations: “Often there’s just a small handful of documents which are useful...f you can put your finger on the right documents, it can help you win your case. If you can’t find them, you can’t use them.”

Does e-discovery offer any more savings?

“It saves us from having to haul boxes to court,” Wortzman quips. She elaborates that the end goal is to help litigants produce everything in an electronic format — so instead of having to turn over box loads filled with paper from hundreds of filing cabinets, litigants will only have to hand over a single DVD.