

BENCHMARKING TECHNOLOGY COSTS IN CIVIL LITIGATION: DON'T SPEND MORE THAN YOU NEED TO

By Sandra Potter

The use of technology to manage data and particularly electronic evidence continues to transform the way information is collected, managed and utilized in civil litigation. Some Canadian jurisdictions (such as British Columbia) have introduced practice directions on this subject. The Canadian Judicial Council has published national standards to be used by those jurisdictions that have not issued their own practice direction.¹ These initiatives cover the exchange of electronic information between the parties and the court and the conduct of electronic trials using electronic documents including, for example, documents scanned from hard-copy material and photographs. The intent is to maximize the benefits of using the technology for both the parties and the courts.

This article pertains to benchmarking in the sense of the application of a standard used to measure a process against alternative processes. "Benchmarking" as used in a business setting also involves adopting and adapting any functions or procedures shown to be more effective. We will discuss the benchmarking of technology costs involved in civil litigation in British Columbia.

In 2006 the B.C. Supreme Court issued a practice direction for the use of technology in civil litigation matters. It has now been followed by the adoption of the "Sedona" principle of proportionality in the new Supreme Court Civil Rules. The Sedona Canada Principles pertaining to e-discovery in civil litigation matters consist of guidelines designed to facilitate discovery of electronically stored information. In particular, they attempt to provide for an e-discovery process that takes into account the principle of proportionality.²

While British Columbia's electronic evidence practice direction outlines the basic type and format of the electronic information to be exchanged and supplied to the court, it does not provide a guideline as to the costs of such technology.³ That is an area where benchmarking will help to fill the gap. The only reference in the practice direction to costs relates to recovery of "reasonable" costs for the preparation of electronic evidence:

3. Costs

- 3.1. The reasonable costs incurred in complying with this Practice Direction, including the expenses of retaining or utilizing necessary external or in-house technical consultants, may be claimed as costs that were proper or reasonably necessary to conduct the proceeding within the meaning of Rule 57.
- 3.2. Where this Practice Direction applies and subject to any order of the Court, work which might reasonably have been undertaken in accordance with the Default Standard or an existing agreed Protocol or a Court ordered Protocol, but which is undertaken otherwise than in accordance with the Default Standard or an agreed or Court ordered Protocol, as the case may be, will generally not be treated as being costs that were proper or reasonably necessary to conduct the proceeding within the meaning of Rule 57

Parties that adopt and comply with the practice direction will generally have their costs protected, as such expenditure will appear to be reasonable and necessary. However, there can be a disparity between what might be deemed a reasonable cost for the collection and management of electronic data and the actual costs incurred by the parties. Therein lies the current risk: the cost a party incurs in the conduct of an electronic discovery task may later be deemed inappropriate and thus irrecoverable pursuant to an order for costs.

In some provinces, such as British Columbia under the current costs regime, firms that contract out the work of processing electronic evidence are in a good position to recover the amount that they pay as a taxable disbursement, whereas a firm performing the same functions in-house may have problems recovering the same amount. This situation has arisen in other Commonwealth jurisdictions such as Australia and England, and the introduction of cost guidelines and benchmarks in those jurisdictions has helped level the playing field.

Corporations have used benchmarking for years to render their businesses more cost-competitive. They use teams of people to review all their processes and consider how to do them better. The process is ongoing and reiterative. Comparisons are constantly made with best practices in order to drive improvement.

There is good reason why technology-related costs of civil litigation should be benchmarked in a similar manner. Such a process would:

1. provide a guide for the assessment of costs incurred in technology-assisted litigation;
2. ensure that law firms that do this type of work in-house can recover the associated costs for their client if they win the case; and
3. provide a guideline to firms and clients alike as to how the registrar in an assessment hearing will rule, and provide a predictive costing model.

It should be noted that benchmarks evolve and therefore must constantly be updated. The continuing improvement in technologies and competitive pressures generally apply a downward cost trend. For example, in 1995 the average cost of performing optical character recognition was about \$2.00 a page. Now it is under five cents.

BENCHMARKING IN BRITISH COLUMBIA

The benchmark model includes a sample table (Table 1) which outlines the tasks involved at each of the key steps. This table once written was tested in B.C. through a number of workshops with the legal profession and meetings with various members of the judiciary. A more detailed spreadsheet model was then created, with the necessary elements and calculations in place to allow the model to be refined and updated as required. The costs used in this spreadsheet were collected for British Columbia.⁴

The model provides a structure for considering the following:

1. the analysis of litigation processes using technology;
2. a determination of where costs are already covered by a tariff; and
3. a comparison with costs available from commercial service-providers.

The services in Table 1 on the following page represent a typical mix of tasks to be considered in the benchmarking process. They have been summarized and ordered in a way that reflects the typical workflow and methodology that applies to electronic disclosure and e-hearings.

BENCHMARK METHODOLOGY

Under the guidance of the B.C. Supreme Court, namely Mr. Justice Elliott Myers and Mr. Justice David Masuhara (head of the Supreme Court of British Columbia IT Committee), and a group of lawyers, litigation support specialists and paralegals got together to run the benchmarking exercise.⁵

The topic areas described in Table 1 were expanded to create a list of specific tasks generally related to electronic discovery. This expanded list was validated with a representative panel of lawyers and consultants from within a number of the larger law firms. Once these tasks had been allocated (or not) against the existing tariff, those that were not covered in the existing tariff were grouped together in related tasks. These tasks and items were then circulated to a number of leading legal technology service providers to obtain a listed average cost for each of the tasks described. This information was then used to validate the spreadsheet model.

The spreadsheet model is used to calculate a cost median by ignoring the highest and lowest costs and then determining the average of the remaining quotations. Spreadsheets were used to produce the sample scale fee table on

TABLE I

Electronic Task List (Summary)	
1	Document Preparation
2	Database Creation
3	Numbering (Electronic Bates)
4	Scanning
5	Objective Coding
6	Processing Electronic Files
7	Database Management
8	Determination of Production Set (Legal Analysis)
9	Project Management
10	Examination for Discovery
11	Common Trial Book Preparation
12	Hearing Preparation
13	Hearing
14	Appeal Preparation

the following page. This is a sample of items detailed in the task list that were used to regroup together a number of related tasks into a single and easy-to-apply scale fee.

PROPOSED COST ITEMS

The table on the following page reflects the scale items proposed for B.C.⁶

CONCLUSION

This scale has now been presented to the B.C. Supreme Court Rules Committee for further consideration and in the hope that it may adopt these as guidelines or tariffs in the future. In the meantime these proposed benchmarks are offered as an indication of typical costs for use by law firms in B.C. It is hoped that they may be of some use in planning and reviewing costs and ultimately in reducing the cost of modern litigation. They should assist in ensuring that law firms and their clients receive good value for money.

PROPOSED COST ITEMS

Item	Description	Charge
A	Management of case information, including agreement of protocols, database design and administration, project management, quality assurance and system management—per document/item	\$3
B	Preparation of hard copy documents, scanning, numbering, database creation and objective coding—per document/item	\$10
C	Gathering and collecting documents (electronic only as hardcopy is already covered in current tariff 11b or 11c), including pre-culling and analysis of electronic data. Current tariff should be applied on a per gig basis, e.g., Scale B—\$110 per gig or Scale C—\$170 per gig	\$110 or \$170
D	Processing of electronic files, including extraction, conversion, automated indexing, automated record attachment of attachments, automated numbering and de-duplication of data and any required manipulation of data to confirm with agreed protocol—per gigabyte charge based on the scale used, e.g., \$110 for Scale B, \$170 for Scale C	\$110 or \$170
E	Copy to compact disc— for the first compact disc for each copy of compact disc thereafter	\$300 \$15

ENDNOTES

1. Online: <http://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_2008_0620_en.asp>.
2. Online: <<http://www.lexum.umontreal.ca/e-discovery/documents/SedonaCanadaPrinciples01-08.pdf>>.
3. Online: <http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/practice_directions_and_notices/electronic_evidence_project/Electronic%20Evidence%20July%201%202006.pdf>.
4. These figures were collected from various bureau service businesses that provide litigation support to law firms in B.C., temporary employment agencies that organize staff to undertake paralegal work for law

firms and bureaus in B.C., real estate agents that have properties to let in downtown Vancouver, and IT businesses that hire out equipment and technical support to law firms or bureaus in B.C.

5. This Practice and Procedures Focus Group was made up of the following people:

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6. Based on gaps in current tariffs.

