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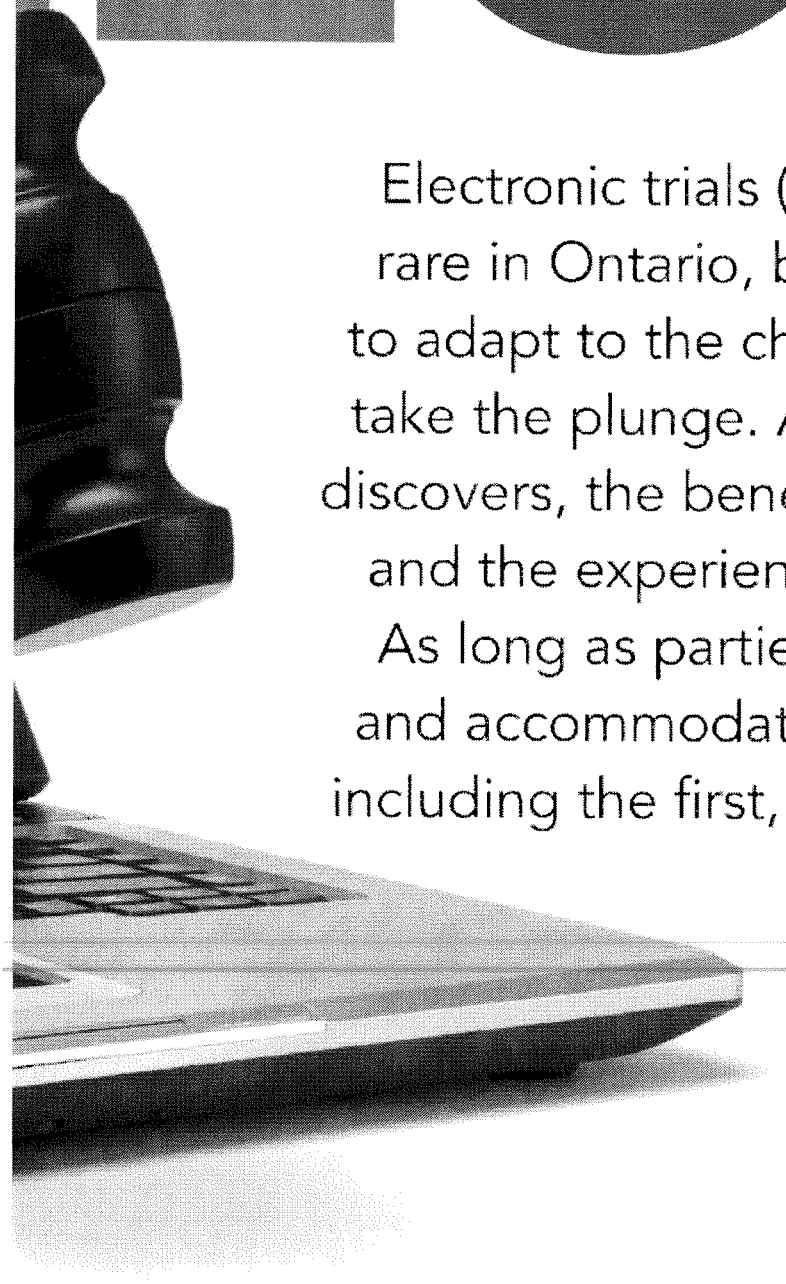
E-Trials by fire: LEON!



Electronic trials (or "E-Trials") are rare in Ontario, but counsel need to adapt to the changing times and take the plunge. As one legal team discovers, the benefits are significant, and the experience is contagious. As long as parties remain patient and accommodating, every E-Trial, including the first, can be successful.

parties, 15 lawyers, thousands of documents, 48 witnesses and 103 days of evidence – this is not unfamiliar territory for experienced trial lawyers. But throw in some real-time court reporting, 18 external monitors, at least 6 laptops and one completely "wired" courtroom, and the familiar suddenly becomes daunting. Electronic trials (also affectionately known as "E-Trials") are rare in Ontario. Aside from the fact that our courtrooms are not physically designed to facilitate E-Trials, most of the blame can be attributed to the fact that technology can be intimidating, especially to more senior lawyers or judges who aren't particularly tech savvy. However, counsel need to adapt to the times, look fear in the eye and take the plunge into the world of E-Trials. The benefits are significant, and the experience is contagious.

Last year, plaintiff legal teams from Ross, Scullion and Rochon Genova concluded an E-Trial before the Honourable Justice Arthur Gans under the landscape mentioned above. The litigation, dealing with Aboriginal and treaty rights, was commenced in 1994 and, by the time the matter was set down for trial, the document database consisted of nearly 14,000 documents. Although the parties agreed to exchange documents electronically early on, none of the lawyers had any E-Trial experience and most of them had never even used electronic trial software before. However, with enthusiastic support from Justice Gans, the parties, albeit nervously, agreed to take on the challenge of a paperless trial.

Several months before the trial was set to start, junior counsel were painstakingly tasked with reviewing the 14,000 documents in order to separate the wheat from the chaff. The result was a reduced set of just over 4,000 documents to be entered at trial as the (still monstrous) joint book of documents ("JBD"). Although a time-consuming exercise, this process enabled those assigned with the task to become familiar with, if not efficient in, using the electronic trial software. Working against the clock and under an already strained budget, the plaintiff legal teams did not have any formal training on the software. Instead, we simply learned by doing. Ultimately, the lawyers who used the software to prepare for trial became those in charge of the controls when it was show time.

The parties did jointly retain outside assistance to physically wire the courtroom and provide technical support. An IT company specializing in E-Trial management finalized the JBD, trained court staff and the trial judge on the software, updated the database and trial judge's laptop as the trial progressed, and was available for troubleshooting as and when needed.

In many ways, the physical courtroom layout for the trial was typical, with the plaintiff parties set up on the right and the defendants on the left. It was the not-so-subtle presence of electronics, particularly the monitors on tables and piles of wires on the ground, that elevated the decor into the realm of abnormal. Each counsel had their own monitor, as did the judge, the court clerk, the witness and the viewing gallery, all of which were connected to a mobile main controller switch by a video splitter that would display whatever was on the source computer. The main controller was circulated and plugged into the trial laptop of whichever party was in the "hot seat" at the time.

From the plaintiffs' perspective, one disadvantage of the E-Trial was being the guinea pig. Not only were we carrying the pressure of having to prove our case, our teams were first up at the controls as the defendants watched and learned. The disadvantage for the defendants was that, technologically-speaking, we set the bar high. In our case, openings proceeded without resorting to electronics, but navigating the controls was inevitable as soon as the plaintiffs' first witness took the stand.

The examinations were a tag-team effort. Examining counsel relied on their junior co-counsel to display documents while they led their examinations. They would identify a document by JBD number and that document would then appear on all monitors thanks to the skill of the examining lawyer's "wingman". If comfortable enough with a computer, a lawyer could control their own documents without assistance using a wireless mouse (as was bravely and successfully accomplished during our trial by one of plaintiffs' counsel although not recommended). Plaintiffs' counsel also chose to use the dual-screen function in navigating their documents, which was just like using a second monitor at the office. This setup allowed the lawyer controlling the laptop to search the database, prepare the next document, or take notes in private on their laptop screen while at the same time displaying an exhibit on the second screen and all other monitors.[1]

It is no surprise that the key to every fluid examination was preparation. The examining lawyer would identify ahead

of time the documents they intended to refer to and give that list to the lawyer responsible for the controls. That lawyer would then prepare a "briefcase" or sub-database of the documents to be used for that witness or that day, which enabled the selection of documents from a short list rather than searching the entire JBD database.

Despite the best planning and preparation, both the examining lawyer and the lawyer at the controls needed to be ready for curve balls. Often times, Justice Gans would ask that another, unanticipated document be displayed. The lawyer controlling the monitors had to know how to quickly find any document and display it on the fly. The search features inherent in our software came in handy in these high-pressure situations.[2] Without those searches, it would have been impossible to quickly find, for example, "the letter written by one of the treaty commissioners in November 1905 referencing a meeting".

Once a document was proved and marked as an exhibit, the court clerk assigned the document an exhibit number that was entered electronically into a separate column in the index of the electronic JBD. We customized our settings so that the exhibit number would be automatically displayed on the document's face as soon as it was marked, along with the JBD number. This was particularly useful when jumping back and forth between documents, as everyone could immediately identify which exhibit it was. For oversized and non-documentary exhibits, such as a DVD for example, the traditional method of marking exhibits was used, with a corresponding entry entered into the JBD identifying that it was physically marked. There were also several instances where new documents were created or produced that needed to be added to the JBD. In such instances, counsel would circulate an electronic or paper copy of the document, with it digitally added to the database the next day by our IT company.

The electronic display of documents facilitated locating and displaying documents quickly and efficiently, avoiding delays caused by counsel, the witness and the judge all frantically searching to find the same paper document within stacks of binders. Using our software, we were able to zoom in when needed, highlight sections to draw attention to them, and easily transition back and forth between documents. With a little bit of creativity, our teams also combined the use of other programs to manipulate documents more effectively. One limitation of our electronic trial software was that it could only display a single document at a time. When Justice Gans asked to see two exhibits side by side for the first time, plaintiffs' counsel instinctively converted one of the documents to PDF in order to enable two documents to be displayed together. From then on, we maintained a separate folder of PDF exhibits as and when they were entered. This allowed us to keep whatever document was already displayed while flashing up any other exhibit when required. One of our momentous achievements involved the display of three documents simultaneously. This format of viewing documents was especially helpful when viewing maps or comparing different versions of documents. Another example of a creative application of ordinary programs was using Paint to draw a shape over a map as verbalized by the witness, which was later entered as an exhibit.

For our trial, the parties used a real-time court reporter, whose feed was transmitted live, directly to each party's trial laptop. This meant that every (on the record) word was recorded and displayed as it was spoken, and the parties could highlight portions of the transcript, flag important testimony and/or add notes while the witness was speaking. As with any live transcription, there were some very entertaining misspellings caught on the screen. But these were corrected at the end of each day by our court reporter, who would email all counsel an edited version of the day's transcript every evening.

The live transcripts became an invaluable tool for counsel during preparation for cross-examinations because they provided the ability to review the word-for-word evidence of each witness during or directly after his or her testimony in chief. In addition, the real time transcripts were referenced regularly by counsel and Justice Gans to confirm statements made or positions taken by counsel or witnesses. This reduced the traditional "speculation" involved in confronting a witness with earlier testimony. The live transcripts were fully searchable even while recording, which allowed counsel to quickly check references to exhibits or statements made. The searchable transcripts were also particularly useful in preparing written closing arguments, which were hyperlinked to the relevant transcript references and/or trial exhibits.

In any E-Trial, the database is irreplaceable. It not only contains all of the documents, but also the lawyers' private notes and work product, and must be backed up to an external storage device every day. Midway through our trial, we averted a potential disaster

by abiding by this mantra that is often preached but not always followed. One of the plaintiff's trial laptops endured too much punishment from its daily travels up and down the sidewalks of University Avenue and was essentially rendered useless. Because the database was backed up on an external drive, it was easily transferred to a new laptop without any loss of data or time.

As with any computer program, sometimes our trial software would freeze or the real-time transcript would crash. The parties were all understanding during those instances and Justice Gans was very accommodating to all counsel, providing them with indulgences when technical issues arose. But the technical problems were few and far between, and the efficiencies of an E-Trial far outweighed the sporadic delays caused by minor bumps in the road. In fact, the rare technical difficulties that arose led to increased co-operation and commendable civility between adversaries, since we all faced the same challenges.

In an E-Trial, it is up to all the players to work together, help each other, and come up with innovative solutions to various hurdles that arise along the way. As long as parties remain patient and accommodating, every E-Trial, including the first, can be successful. Ontario lawyers need to jump on the bandwagon because E-Trials are here to stay and for good reason. Once you try it, a traditional paper trial will no longer seem appealing.

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NOTES

[1] A helpful tip to those at the controls: When plugged into the main controller and acting as the source computer, don't open any "compromising" emails or pictures. Accidents do (and did) happen!

[2] Our documents were not converted to OCR (Optical Character Recognition) format. This meant that the content of the documents was not searchable. We did not find this to be a handicap.