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Technology and Family Law Hearings


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Technology and Family Law Hearings

Abstract

Technological innovations are changing the practice of law. Lawyers need to be aware of both the advantages of new technologies and the novel concerns that arise in the digital age. This article discusses eight issues that lawyers should be aware of with respect to technological advances within the legal field: (1) cloud technology, (2) the privacy implications that arise from new technology, (3) data storage technology, (4) electronic trials and hearings, (5) demonstrative evidence, (6) digital exhibit books, (7) internet searches and witnesses, and (8) video conference testimony.

Keywords

cloud, technology, paperless, Calgary, family law, fosters, electronic trial, video conferencing, litigation, etrial, e-trial, evidence, privacy, Tsigé, Jones, Skype, Sharpe, Perceptive Search, Summation, Lexmark

TECHNOLOGY AND FAMILY LAW HEARINGS

RONALD S. FOSTER, Q.C. AND LIANNE M. CIHLAR*

INTRODUCTION

The days of attempting to locate an elusive document on the eve of a hearing or during arguments are gone; computer document storage makes retrieval instantaneous. The voluminous accumulation of information makes it imperative that legal files be organized from the outset. An efficient lawyer needs to consider cloud technology or similar document management aids in order to keep track of the outgoing and incoming information at every stage of litigation. This article will discuss eight novel considerations that lawyers should be aware of with respect to technical advances within the legal field: (1) an overview of cloud technology and its benefits; (2) privacy implications arising from new technology; (3) the importance of data storage; (4) the increasing use of electronic trials and hearings; (5) demonstrative evidence and its value in providing visual aids when evidence is presented before the court; (6) the use of digital technology in the production of exhibit books; (7) Internet searches and witnesses; (8) video conferencing in lieu of in-person testimony. Technological innovations are changing the practice of law; lawyers need to be aware of the tools available to them to best serve their clients.

I. CLOUD TECHNOLOGY AND YOUR PRACTICE

Cloud technology is a web-based application that permits the remote storage of data files that can be accessed through the Internet from different computers or access points. Clients and lawyers can simply log in to the cloud using a password and access all of the information pertinent to a client's file. An important advantage of cloud technology is that it enables clients to access a confidential data room to review their

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files at their convenience without having to come to the lawyer's office. Once a client is in possession of the password, he or she has full access to the file. Features such as digital locks or "view only" settings are possible privacy controls. In the event that the client is required or wishes to review drafts, the files can also be unlocked for editing, and clients can access the files independently. Documents from both counsel can be saved in the cloud, and clients can edit, review, or append "sticky notes" to drafts of files such as affidavits, claims, and agreements. Further, cloud technology allows clients to review their files without help from a legal assistant or lawyer. Importantly, storing file information using cloud technology can also reduce file retention and storage costs.

II. TECHNOLOGY AND THE TORT OF PRIVACY

In family litigation, accusations of invasion of privacy arise frequently. While several privacy issues have been addressed through provincial and federal legislation, the courts have been reluctant to recognize a tort of "invasion of privacy." This trend may change following the recent Ontario Court of Appeal decision *Jones v Tsige*.¹

In *Jones v Tsige*, the appellant, Jones, discovered that Tsige, the respondent, had been surreptitiously viewing Jones' bank records. The parties worked for the same bank, and Tsige was in a common-law relationship with Jones' former husband. The two, however, did not know each other personally. Tsige used her employee access privileges to view Jones's bank records on 174 separate occasions over four years. Tsige admitted that she was in a financial dispute with Jones's former husband and accessed the account to confirm whether he was paying child support to Jones. Jones brought a claim for damages against Tsige in the amount of \$70,000 for invasion of privacy and breach of fiduciary duty, and an additional \$20,000 for punitive and exemplary damages. The claim was dismissed by a motions judge on the basis that Ontario did not recognize a tort of invasion of privacy.

Writing for the Ontario Court of Appeal, Sharpe JA cited William L. Prosser's classification of the four distinct torts relating to the right to privacy.² The first of these is called "intrusion upon the plaintiff's seclusion or solitude, or into his private affairs." Sharpe JA noted that this could include "non-physical" forms of investigation, such as opening private mail or examining a private bank account. Sharpe JA's examination of the case law found that in Ontario, the jurisprudence "remains open" to the tort of intrusion upon seclusion.

In his analysis of case law in other jurisdictions, Sharpe JA noted the result in the Alberta decision *Motherwell v Motherwell*.³ In *Motherwell*, the Court of Appeal held that the "interests of our developing jurisprudence would be better served by

¹ *Jones v. Tsige*, 2012 ONCA 32.

² William L. Prosser, "Privacy" (1960) 48:3 Cal L Rev at 383.

³ *Motherwell v Motherwell* (1976), 73 DLR (3d) 62 (Alta SC App Div) [*Motherwell*].

approaching invasion of privacy by abuse of the telephone system as a new category.” Sharpe JA also stated that *Charter* jurisprudence has interpreted Section 8 protection against unreasonable search and seizure as protecting an underlying right to privacy. Further, both federal and provincial statutes had been enacted to protect the right to privacy, including the *Personal Information Protection and Electronic Documents Act*.⁴ In Alberta, privacy legislation includes the *Freedom of Information and Protection of Privacy Act*,⁵ (*FOIP Act*), the *Health Information Act*,⁶ and the *Personal Information Protection Act*.⁷

After reviewing the above, Sharpe JA affirmed the existence of a common law tort of intrusion upon seclusion, citing that “technological change” poses a novel risk to the protection of private information. The Court of Appeal held that the elements of the tort were to be those cited in the *Restatement (Second) of Torts* (2010):

One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.⁸

It was clear in the decision that certain limitations were imposed on this tort. Actionable invasions of personal privacy must be “deliberate and significant,” and they must constitute intrusions into a person’s “financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive.” As for damages, Sharpe JA held that for cases where the plaintiff has suffered no pecuniary loss, damages should be fixed at a maximum of \$20,000. The court awarded Jones \$10,000 in damages.

Sharpe JA was careful to restrict application of this tort, presumably to discourage excessive litigation. Nevertheless, it is easy to envision the potential for breaches of privacy in family litigation. Often, computer hard drives from the home are copied and delivered by a spouse to his or her lawyer. Parties may read each other’s emails or personal mail. The emails that are often accessed contain private solicitor-client information regarding the file or pending litigation. A party may also install spyware on another party’s computer, wiretap telephone lines or install video cameras in the home. Accusations of covert surveillance, including physical surveillance through investigators and electronic surveillance, are also frequent. These types of privacy

⁴ *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5.

⁵ *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25.

⁶ *Health Information Act*, RSA 2000, c H-5.

⁷ *Personal Information Protection Act*, SA 2003, c P-6.5.

⁸ *Restatement (Second) of Torts* (2010), at 652B.

breaches may even extend to third parties. For instance, one can easily imagine a situation where one party opens the other's mail or email and reads information about the other party's new spouse, partner, relative, or friend.

The ethical dilemmas for lawyers in receipt of such information are obvious.⁹ It is true that sensitive information is normally relevant and producible during the course of family litigation, including financial information of the type that Tsige surreptitiously accessed. While it is also true that Tsige's conduct, which was held to give rise to an actionable tort, was exceptionally egregious (174 breaches over four years), it would be prudent to caution clients embroiled in family litigation to avoid accessing sensitive personal information. Accordingly, it is important to advise clients to pursue appropriate and producible information through counsel, such as through affidavits of records and questioning processes, rather than attempting to find information independently. The potential for breaching privacy is exceptionally high where couples have separated but continue to live in the same residence or share access to common electronic devices. Preventive measures should be offered to protect clients from becoming victims of privacy breaches. At the outset of a new retainer, clients should be instructed to have a secure email address and to password-protect their electronic devices, including any computers, smartphones, and tablets.

III. EMAIL ANALYSIS, ELECTRONIC DOCUMENT MANAGEMENT, AND ELECTRONIC DOCUMENT PRODUCTION

It is increasingly important to be aware of the tools available to conduct an efficient search of emails, since emails are frequently used as evidence in family litigation. Family litigation can involve hundreds of emails over a period of months or even years. Therefore, it is essential to be aware of the tools available to assist counsel in organizing and sorting through this data.

One such program is [Perceptive Search](#), formerly ISYS.¹⁰ Perceptive Search provides software with specialized filters that permit instant analysis and display of large amounts of unstructured information within a company's computer records, including files, emails, presentations, and other types of data. Impressively, Perceptive Search software searches both the text and metadata of nearly 500 different document formats. Metadata is data that describes data; it's a second way of categorizing digital language through less obvious mathematical means than prose. The software can index records and information by client name and quickly retrieve relevant emails and other

⁹ See e.g. rule 6.02(12) *Law Society of Alberta Code of Conduct* which applies to situations where a lawyer comes into possession of a privileged communication of an opposing party.

¹⁰ See Lexmark Perceptive Software, online: Lexmark <www.perceptivesoftware.com/products/perceptive-search>.

documents for discovery purposes. The software exports its findings in a report for rapid analysis and efficient document management.

Emails provide crucial evidence in family litigation. It is essential to make use of tools like Perceptive Search to be able to search and analyze emails quickly. It is also important to analyze data across a variety of formats. Sophisticated search software that can analyze large volumes of data in various formats will save clients and firms money; this contrasts with older methods of poring through thousands of paper documents to find pertinent case information.

More generally, electronic document management software has become essential to litigation and litigation support. Numerous litigation support options assist lawyers with managing large volumes of electronic information, including emails, electronic Microsoft Word files, Microsoft Excel spreadsheets, and Adobe PDF documents. [Summation](#) is one prominent brand of litigation support software. It is specifically designed to allow multiple users to access the software from different computers and perform simultaneous searches of the same database. Summation also organizes and analyzes large volumes of documents. All case materials—pleadings, transcripts, and other documents—may be searched and categorized.

Similar types of litigation support platforms—including [CaseLogistix](#), [Concordance](#), [IPRO eReview](#), [Lexbe](#), and [MasterFile](#)¹¹—are available to perform similar functions. Each of the above programs shares the ability to group together different types of documents for fast searching, categorizing, and cross-referencing. In this way, large volumes of documents become more manageable, and it becomes easier for lawyers to locate key materials. This is particularly important, for example, where one witness has been questioned and cross-examined on numerous affidavits covering the same subject. The ability to search transcripts and cross-reference them makes the task of comparing potentially inconsistent statements considerably easier.

From a financial standpoint, Summation and similar document management technologies may not be affordable for many family law practitioners. The costs are significant and may outweigh their potential benefits. Nevertheless, organizing a large volume of electronic documents represents a challenge for family lawyers. For example, it is common for damaging emails, diary entries and text messages from a former spouse or partner to be appended to affidavits as exhibits, and this trend is expected to continue. As electronic documents feature more prominently in family litigation, it will be necessary for savvy family lawyers to turn their minds to new ways of managing this data.

A limited means of introducing electronic document management into a family law practice is by using electronic affidavits of records. The Alberta Court of Queen's

¹¹ See American Bar Association, "Litigation Software Comparison Chart", online: American Bar Association: <americanbar.org>.

Bench Civil Practice Note No. 4 sets out guidelines for the use of technology in civil litigation. Parties may consent to have the Practice Note apply and sign a Protocol to that effect, or the Court may direct that the Practice Note applies. Under Practice Note No. 4, parties are encouraged to adopt the Practice Note where one or more of the following requirements are satisfied:

- 2.3.1. a substantial portion of the Potentially Discoverable Records consists of Electronic Material;
- 2.3.2. the total number of Potentially Discoverable Records exceeds 1,000 Records, or is more than 3,000 pages;
- 2.3.3. there are more than three parties to the proceeding;
- 2.3.4. if the matter is likely to be more than a 10 day trial as specified in the E-Appeals Practice Note (*Court of Appeal Practice Note (June 17, 2004) Part K, Electronic Appeals*); or
- 2.3.5. the proceedings are multi-jurisdictional or cross-border.¹²

Practice Note No. 4 illustrates some of the ways in which technology can increase the efficiency of litigation. One of the methods is “providing copies of Records to another party.”¹³ Where any or all of the elements set out in the aforementioned Practice Note are present in a family law matter (multi-jurisdictional proceedings, for example), electronic production of records can be helpful in moving litigation forward. Even where these elements are absent, it may be beneficial to adopt the electronic production of records to facilitate the litigation process.

Under the Alberta Rules of Court, affidavits of records must be served on the opposing party according to the specified guidelines.¹⁴ Affidavits of records need not be filed unless they are required for an application or trial. Rule 5.6(1) specifies that an affidavit of records must be in the prescribed form and must disclose all material records in the action. While the Alberta Rules of Court provide no specific direction as to the use of an electronic affidavit of records, the Information Note to Rule 5.6 states:

The Court may give directions to facilitate disclosure and examination of documents that may be costly or lengthy. See rule 5.1(2) [Purpose of this Part] and rule 1.4 [Procedural orders].¹⁵

¹² Alberta, *Court of Queen's Bench Civil Practice Note No. 4: Guidelines for the Use of Technology in any Civil Litigation Matter*, para 2.3 [Practice Note No. 4].

¹³ *Ibid*, para 2.5.

¹⁴ *Alberta Rules of Court*, r 5.5.

¹⁵ *Ibid*, r 5.6.

It therefore appears that while electronic exchange of documents is not specifically contemplated under the Alberta Rules of Court, the court is empowered to permit affidavits of records to be exchanged in electronic form.

Preparing an electronic affidavit of records typically involves scanning or converting documents to an electronic format, followed by indexing and coding all of the documents comprising the affidavit of records. Another document (in Microsoft Excel, for example) is drafted as an index for all of these documents. Within that index, all indexed references to the coded documents in the affidavit of records are then hyperlinked to the documents themselves. This is all done within one electronic folder, so that the index and electronic documents (which may number in the hundreds) are all stored in one place. That folder is then copied onto a USB flash drive, which is submitted as the affidavit of records alongside Form 26. While it would be possible for legal assistants to perform this task, there are specialized companies, such as Triage Data Solutions or Commonwealth Legal, that offer this service at great savings to the client.

What are some of the advantages to using an electronic affidavit of records? The clearest benefit is a large reduction in paper costs: once the initial scanning and indexing is done, there is no need for subsequent reproduction. There are also savings in courier costs because there is no need to courier large volumes of paper to another law office. An index is also searchable by keyword, making it much easier to locate documents. The keyword can be used to reveal the document needed, which is then made available through a link in the index.

What are some of the disadvantages? The chief disadvantage is that there are security concerns associated with the use of USB flash drives. Unlike large, heavy binders of materials, USB flash drives are easily lost or misplaced. Absent some form of encryption, it is easy to access sensitive information contained on a USB flash drive. Encryption using password protection is highly recommended if a USB flash drive is used to store any kind of sensitive information. Another disadvantage is the loss of metadata—data associated with an electronic document (date of creation, for example). When an electronic document (an email, for example) is transformed into an index, the metadata is lost: it is similar to the difference between a document and a photograph of the document. A final concern is that while costs such as photocopying and couriers are saved through this procedure, there is a considerable investment of time required for the initial scanning and indexing of documents. However, if performed early on in the litigation process, this investment can pay significant dividends once proceedings commence.

IV. ELECTRONIC TRIALS

The newly built Calgary Courthouse was recently equipped with millions of dollars' worth of screens, electric outlets, computers, and Internet facilities designed to facilitate electronic hearings. The technological upgrades in the new courthouse have made it one of the most technologically advanced courts in North America.

Practice Note No. 4 governs the use of technology in civil matters and relates to electronic trials. An "Electronic Trial" is distinguished from an "Electronic Hearing." The latter is described under the *Alberta Rules of Court*. An "Electronic Trial" is defined as "a hearing where evidence is managed, presented and stored electronically by the Court in an eCourt."¹⁶ Further, paragraph 2.7 states that in a proceeding to which the Practice Note applies, a court may, on application, order that there be an Electronic Trial of the proceeding. An important caveat is that it must be determined that the proceeding is in fact a proceeding to which the Practice Note applies. Practice Note No. 4 states that the Practice Note does not apply to "Standard Cases" under Part 4 of the Alberta Rules of Court unless the parties consent. Alberta Courts have considerable flexibility with respect to making orders regarding Electronic Trials under the Practice Note.

Paragraph 2.8 of the Practice Note further states that an order for the Electronic Trial of a proceeding can include any of the following orders:

- 2.8.1. that Court Documents and other Records be delivered to other parties in electronic form;
- 2.8.2. that Court Documents be delivered in electronic form for the Trial Record;
- 2.8.3. that there be an electronic Agreed Exhibit Book;
- 2.8.4. that there be a restriction upon the use of Hard Copy Records at trial; and
- 2.8.5. any other Order that the Court considers appropriate.

It is unlikely that the Court will make such an order unless at least one of the Practice Note requirements has been met.

An Electronic Trial procedure was used in the case of *1159465 Alberta Ltd v Adwood Manufacturing Ltd*, in which the majority of the documentary exhibits were filed before the court using a DVD, CD, or flash drive and were not on paper.¹⁷ Summation software was used to retrieve and display the exhibits. This was the first Electronic Trial conducted in Edmonton. However, as noted by Germain J, other justices had previously presided over trials where most exhibits were provided

¹⁶ Practice Note No. 4, *supra* note 12 at 25.

¹⁷ *1159465 Alberta Ltd v Adwood Manufacturing Ltd* (2010), 25 Alta LR (5th) 237 (QB) (available on CanLII) [*1159465 Alberta Ltd*].

electronically. For example, Kenny J did so in *Johnston v Hader*.¹⁸ Germain J made several notes regarding the procedure of Electronic Trials in Schedule 1 to his decision. For example, Germain J noted that the plaintiff's engineering expert required a Microsoft Excel spreadsheet to explain his evidence which, if printed, "would have spread across the entire judicial dais,"¹⁹ and which was cross-linked to over 20 other spreadsheets.

At the conclusion of the trial, Germain J noted counsel's opinion that the Electronic Trial evidence format had saved approximately two weeks' trial time—a 40 per cent savings.²⁰ Germain J also noted that the software enabled him to attach electronic "sticky notes" to the key points illustrated by the exhibit. These notes were automatically time stamped. Additionally, Germain J mentioned that a hyperlinked Summation software index enabled him to refer directly to the exhibit: "This worked exceedingly well and was much faster than fumbling through one of 18 binders."²¹ Germain J also observed that the electronic process was helpful because all the information in the memory of the laptop eliminated the need to "lug boxes of exhibit copies around."²² Germain J concluded as follows:

As the cost of this technology goes down and as judges and lawyers become more comfortable with it, we will have many more trials conducted in this format. E-trials will not be restricted solely to the mega-page commercial case. Even a case with 200 pages of documents generates 400 pages of photocopying to file with the court plus another 200 for each counsel. The technology needed to run an electronic trial is now as simple as the courts making available computer monitors into which counsel can plug their laptop computer in the court. Counsel will, of course, also require an ability to scan in hard copy documents to provide the electronic versions filed. I concluded the evidentiary portion of this case with a view that I had seen a glimpse of the future.²³

Opening statements have been described as the "single most important phase of a trial."²⁴ The importance of opening statements cannot be overemphasized. In preparing opening statements, counsel must identify the facts to be proved and the required supporting evidence. The opening statement requires counsel to create a factual basis for all claims made, including evidence to support and address the issues in

¹⁸ 2009 ABQB 424

¹⁹ *1159465 Alberta Ltd*, *supra* note 17 at para 1.8 of Schedule 1.

²⁰ *Ibid* at para 1.9 of Schedule 1.

²¹ *Ibid* at 1.12 of Schedule 1.

²² *Ibid* at 1.13 of Schedule 1.

²³ *Ibid* at 1.17 of Schedule 1.

²⁴ John A Olah, *The Art and Science of Advocacy*, loose-leaf (consulted on April 4, 2014), vol 1 (Toronto: Thomson Canada Limited, 1990), ch 8 at 2.

dispute. The opening statement must also include counsel's position on disputed issues. Counsel is expected to have all of the appropriate authorities available and highlighted for the Court to consider quickly and efficiently. A legal brief with all relevant authorities should be presented to the Court at the opening of the case.

Technology can assist counsel with opening and closing statements. Written submissions can now go to the trier of fact in electronic form (on a USB flash drive) and with a hyperlinked Microsoft Word index of authorities that refers the reader directly from the index to the document itself.

V. DEMONSTRATIVE EVIDENCE

Demonstrative evidence can be a highly effective tool in family litigation. Demonstrative evidence has been usefully defined as follows:

Demonstrative evidence is used to illustrate, clarify or explain other testimony or real evidence. When such an exhibit is sufficiently accurate or probative, it may be admitted into evidence [...] A closely related type of exhibit is the "illustrative aid," which may be used to assist a witness in explaining testimony.²⁵

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A discussion of the relevant considerations governing the admissibility of demonstrative evidence is beyond the scope of this paper. For a detailed review of this issue, the authors would refer the reader to Barbara Legate's paper on the subject.²⁷

The utility of technology with respect to demonstrative evidence is clear. User-friendly software programs such as Microsoft PowerPoint, Excel and Word charts and graphs allow for easy representation of data. Complicated projections regarding income or property can be easily reduced to simple, cogent visual representations. If admitted, these can be immensely useful in assisting triers of fact to understand different proposed

²⁵ Steven Lubet, Sheila Block & Cynthia Tape, *Modern Trial Advocacy: Canada*, 2d ed, (Notre Dame, Ind: National Institution for Trial Advocacy, 1995).

²⁶ Steven Lubet, Sheila Block & Cynthia Tape, *Modern Trial Advocacy: Canada*, 2d ed, (Notre Dame, Ind: National Institution for Trial Advocacy, 1995).

²⁷ Barbara L Legate, "The Admissibility of Demonstrative Evidence in Jury Trials: Applying the Principled Approach to the Law of Evidence" (2004).

arrangements regarding property division or spousal support, for example. Charts and graphs can also be very helpful in providing visual representations of data trends or patterns. In family litigation, where so much often turns on the minutiae of expenditures or changes in value over extended periods of time, reducing large volumes of data to simple charts or graphs is beneficial. Even if these charts and graphs are never put before the Court as evidence, they can be very helpful for lawyers to understand the data at hand, and to formulate arguments and possible options for the trier of fact.

VI. DIGITAL EXHIBIT BOOKS

If a court orders an Electronic Trial pursuant to paragraph 2.8.3 of the *Alberta Rules of Court*, a court is empowered to direct that there be an electronic Agreed Exhibit Book under Practice Note No. 4. Further, pursuant to paragraph 2.5 of Practice Note No. 4, parties are encouraged to consider the application of technology to facilitate the conduct of litigation where a traditional non-electronic trial is held, including preparing an electronic Agreed Exhibit Book.

The benefits and potential concerns associated with electronic exhibit books are similar to those associated with electronic production of records. In practice, an electronic exhibit book is prepared in a similar fashion to an electronic affidavit of records. First, all exhibits must be converted into electronic form, typically by scanning documents and saving them in PDF format. It hardly needs to be said that this is far less onerous in preparing a book of exhibits than in preparing a comprehensive affidavit of records, but it can still be a time-consuming task. Second, an index must be prepared in a Microsoft Word document by listing all of the exhibits. Third, each listed exhibit must be hyperlinked to the electronic document itself. All the documents for the exhibit should be saved to one electronic folder. Last, the folder containing the index and exhibits should be copied onto a USB flash drive. If new exhibits are admitted during the hearing, they can be scanned and the flash drive updated for counsel and the judge.

VII. INTERNET SEARCHES AND WITNESSES

The Internet and associated search tools can also serve a role in vetting witnesses and their testimony. If a witness makes a representation in oral evidence or in an affidavit, it may be possible to easily contradict or disprove that evidence using an Internet search. Such a search can locate news items, corporate or personal web pages, and general corporate financial information. Business web pages, and dating websites in particular, provide a wealth of information about representations of financial means, expertise, or lifestyle that can offer an abundance of information for cross-examinations. For example, on several dating websites, an individual may list his or her income. This could provide useful information if income is at issue.

VIII. ELECTRONIC HEARINGS AND SKYPE EVIDENCE

Another emerging area of potential change with respect to evidence is the use of video technology. Free Internet-based real-time video conferencing has been made possible through free programs such as Skype and Google Hangouts, among others.

The use of video conferencing technology is widespread in Canadian criminal proceedings. Under section 714.1 of the Criminal Code,²⁸ a court has discretion to allow such evidence if it is appropriate in the circumstances. This would include consideration of the location and personal circumstances of the witness, the costs that would be incurred if the witness had to be physically present, and the nature of the witness's anticipated evidence. In criminal cases, special concerns may arise regarding an accused's right to make full answer and defence, which may be impeded by cross-examinations conducted by video conferencing technology. The issue of receiving evidence by video conference in criminal proceedings came before the Alberta courts prior to the enactment of section 714.1 in *R v Dix*.²⁹ With respect to a witness who would be departing shortly for Great Britain, Costigan J held as follows:

In my view, if appropriate safeguards for reliability, public access and security are in place, there is no reason in principle not to allow potentially admissible and relevant evidence to be given by video conference where there is necessity.

In this case, evidence of the same quality as video conference testimony is not available...

In this case, reliability is safeguarded by the technological sophistication of the video conference facility which allows the witness to be seen and questioned in a live broadcast and by the use of an oath recognized and enforceable in the jurisdiction in which the witness will be situated when she gives her evidence as well as by the use of the oath recognized by this Court...

In my view, the fact that such difficulties might arise is not a principled reason to refuse this application in the circumstances of this case. If difficulties do arise, they can be met during the course of the evidence.³⁰

²⁸ Criminal Code, RSC 1985, c. C-46 s. 714.1.

²⁹ *R v Dix*, 1998 ABQA 370. [R v Dix].

³⁰ *Ibid* at paras 21-26.

Costigan J repeatedly stressed the unusual circumstances of the facts in *R v Dix*, in which video conferencing was required for examination. Nevertheless, the case shows the analysis that might be brought to bear in determining whether video conference evidence is admissible.

Video conference evidence has also been used in contexts other than criminal law. In an Ontario personal injury case, *Wright v Wasilewski*,³¹ Master Albert observed the following:

Video conferencing is an interactive technology. It is conducted in real time. The [witness] ... [is] able to see and hear what is going on in the courtroom. Those in the courtroom in Toronto are able to see and hear the witness 'live.' Questions can be asked and answered. Examinations in chief, cross-examinations and redirect examination could be conducted live, though not in person. ... evidence presented by video conferencing ... given the [trier of fact] an opportunity to observe the demeanour of the witness and hear the inflections of voice and other visual and verbal cues that are part of oral testimony ... video conferencing evidence can provide the evidence necessary for the judge and jury to reach a just determination of the claim on its merits...³²

In *Wright v Wasilewski*, Master Albert permitted twenty witnesses to give evidence by video conference, affirming the convenience and utility of video conferencing technologies.

Skype is also used as a means of permitting parties or witnesses who reside outside the jurisdiction to provide evidence. The Ontario Court of Justice addressed the use of Skype in providing evidence in the *Paiva v Corpening* decision. In this case, the father sought access to his children.³³ The mother had moved to Denmark with the children and was living there with her new partner. The mother's lawyer requested that cross-examination of the mother and her new partner take place via Skype. It was claimed that the mother and her new partner were unable to travel to Toronto for the trial and that either the mother or her new partner would have to stay in Denmark to care for the children. The father argued that he would be prejudiced if the mother and her partner were cross-examined by Skype. His counsel argued that the "ebb and flow of cross-examination" would likely be hampered, and "that it will be impossible for a judge to assess the Applicant's demeanour, a crucial task as her credibility is in issue in

³¹ *Wright v Wasilewski*, 2001 OJ 248.

³² *Ibid* at paras 6, 20-21.

³³ *Paiva v. Corpening*, 2012 ONCJ 88. [*Pavia*].

this case.”³⁴ Counsel for the mother cited the ease and low costs of using Skype technology.

While the Ontario *Family Law Rules*³⁵ do not currently permit participating in a trial by video conference, parties may participate in a motion for interim relief by video conference under Rule 14(8). However, Rule 1.08 of the Ontario *Rules of Civil Procedure* permits participation by video conference at any stage of legal proceedings. Under Rule 1.08(5), the factors for the court to consider in determining whether to direct a conference by telephone or video are as follows:

- (a) The general principle that evidence and argument should be presented orally in open court;
- (b) The importance of the evidence to the determination of the issues in the case;
- (c) The effect of the telephone or video conference on the court’s ability to make findings, including determinations about the credibility of witnesses;
- (d) The importance in the circumstances of the case of observing the demeanour of a witness;
- (e) Whether a party, witness or lawyer for a party is unable to attend because of infirmity, illness or any other reason;
- (f) The balance of convenience between the party wishing the telephone or video conference and the party or parties opposing; and
- (g) Any other relevant matter.³⁶

In determining whether the mother and her partner could be cross-examined via Skype, Murray J noted that the primary objective of the *Family Law Rules* was to enable the court to deal with cases justly. Using that analytical lens, Murray J reviewed the factors. Murray J cited approvingly the decision and reasoning of Master Albert in *Wright v Wasilewski*. Murray J also accepted the evidence of the mother regarding her debt and financial circumstances, and he noted that this would affect the children as well. Murray J also found that the balance of convenience favoured the applicant mother. Ultimately, Murray J ordered that cross-examination of the mother and her new partner be conducted by Skype, with the mother bearing any costs incidental to the video conference.

After the decision, Toronto family lawyer Christine Ann Marchetti reported on some of the potential concerns that may arise with the use of Skype evidence.³⁷ Ms.

³⁴ *Ibid* at para. 16.

³⁵ *Family Law Rules*, O Reg 114/99, r. 14 (8).

³⁶ Rules of Civil Procedure, RRO 1990, Reg 194, r. 1.08 (5).

³⁷ “Skype: Promising in Custody Cases, Problematic in Court”, online: Ontario's Legal News <<http://www.advocatedaily.com>>.

Marchetti noted that oral evidence can go beyond what a witness is saying: a witness on cross-examination in the courtroom might look to someone in the courtroom for reassurance or confirmation, and such a gesture could be “very telling” of the witness’s credibility or confidence. Ms. Marchetti also stressed that if no clear restrictions on testimony are imposed, it would be difficult to ensure that witnesses are not using aids or being fed answers. She suggested that a uniform process be implemented to prevent abuses of the technology.

While the Alberta Court of Queen’s Bench does not currently have rules specifically allowing the use of Skype or other video conferencing technology, Rule 6.10 of the *Alberta Rules of Court* sets out the procedure for an “electronic hearing.” An electronic hearing is defined as an “application, proceeding, summary trial or trial conducted in whole or in part by electronic means in which all participants and the Court can hear each other, whether or not all or some of the participants and the Court can see each other or are in each other’s presence.” Under the *Alberta Rules of Court*, electronic hearings appear to encompass the use of telephones as well as other technologies (e.g. video conferencing technology).

An electronic hearing may be ordered if the parties agree and the court permits such a hearing to be held. Alternatively, one party may make an application for the court to order an electronic hearing. The court has the authority under Rule 6.10(3)(b) to direct that an application, summary trial, or a trial be held by electronic hearing. Rule 8.18 further reiterates that a Court may permit on application that a trial be conducted by an electronic hearing.

In *De Carvalho v Watson*,³⁸ Jones J stated the following with respect to video conferencing technology:

[Video conferencing] has even improved to the point that in given circumstances, arrangements can be made so that a person being examined or cross-examined by video conference can even be presented with documents which can be dealt with appropriately. It would require one to have ‘one’s head in the sand,’ as it were, to not recognize that there are circumstances where the use of such technology can properly be made use of.

It is not the suggestion of this Court that because video conferencing is an available form of technology suitable for examination and cross-examination of witnesses or potential witnesses that such use of technology should be used generally as a substitute for personal appearances [...] But it seems to me that where there are circumstances such as the present where an individual is a long way away from the jurisdiction where the examination would normally take

³⁸ *De Carvalho v Watson* (2000), 83 Alta LR (3d) 354.

place, where the costs for the personal attendance of that individual would be extremely substantial, where the examination can be carried out with a minimum of difficulty by the use of such video conferencing technology, and where there has already been a (sic) opportunity for counsel to engage in personal cross-examination of an extensive nature of the particular witness or potential witness, that this is an appropriate type of case for a Court to look positively upon a request made on behalf of such witness that the witness be allowed in a civil action such as this to provide continued evidence on examination for discovery by way of video conference. This would be inappropriate only where there is some other circumstance which would cause a meaningful risk of causing prejudice to the party seeking to require the witness to appear in person.³⁹

Jones J also dismissed the arguments of the defendant opposing an examination by video conference:

The only submission of substance alleged on behalf of the Defendants is that it would be easier to assess credibility of the witness if the witness appeared in person [...] [T]he state of technology is now such that when video conferencing is properly carried out, in my opinion, a good view can be had of the witness for the purposes of assisting in assessing credibility through that medium.⁴⁰

In a recent family law arbitration in which one of the authors of this paper participated, several of the expert witnesses testified via Skype. The witnesses were located in different countries and in different time zones. Despite this, the use of Skype facilitated a mutually convenient schedule for the witnesses and counsel. The witnesses had access to the agreed exhibits, took the oath over video, and were cross-examined. The corollary is that there is less opportunity to observe if witnesses are testifying under any form of impairment, if they are being coached off-screen, or if they are reading from notes that are not part of the record. There was some concern about the delay of a witness's facial expression when a damaging document or picture was unveiled mid-testimony. However, the advantages to video conferencing technologies and the costs saved outweighed the disadvantages of a face-to-face cross-examination.

In *Edmonton (City) v Lovat Tunnel Equipment Inc*,⁴¹ Lee J set out guidelines for applications for electronic hearings under Rule 6.10 (former Rule 261.1):

³⁹ *Ibid* at paras 15-16.

⁴⁰ *Ibid* at para 17.

⁴¹ *Edmonton(City) v Lovat Tunnel Equipment Inc* (2000), 260 AR 259 (QB).

Having reviewed the cases discussed above, I would suggest that in any application which the parties may wish to bring pursuant to rule 261.1 they clearly set out in their submissions:

1. the relevance of the evidence which it is anticipated that the witness will give and why that evidence is necessary to their case;
2. the reasons why they suggest that video conferencing should be employed, bearing in mind that rule 216.1 requires that there be a "good reason" for the court to allow the admission of such evidence. If the applicant intends to argue that cost and inconvenience are factors which should be taken into consideration, I would expect that some evidence would be presented as to the anticipated time and costs associated with video conferencing as opposed to alternate means of procuring the evidence;
3. the logistical and technical arrangements that they have made both here and in the place from which they propose that the witness give their evidence. Counsel must ensure that the public has some access to both facilities. While the oath should be administered to the witness via video conference, I would suggest that arrangements also be made for an enforceable oath to be given to the witness at the witness's locale as in *R v Dix* [(1998), 224 A.R. 50 (Q.B.)]. Counsel must ensure that the witness will have access at the appropriate time to a clear copy of any exhibit to which their attention may be directed during the course of their testimony which presumably can be done via a fax machine at both ends of the video conference. I also would expect that some efforts would be made by the person administering the oath to ensure that there is no scripting of the evidence. Also, a tape of the video conference should be made.⁴²

CONCLUSION

Technology has changed the fundamental aspects of how our society communicates, and communication is a central component of the practice of law. Accordingly, the twenty-first century lawyer must be up to date on new developments and procedures, especially when technological tools can create opportunities to save clients' time and money. Cloud technology, digital storage programs, and video conferencing are only some of technical tools available to lawyers. As new advances appear, the client demand for technological processes will increase. Lawyers must embrace new technologies and begin incorporating such developments into their legal practices.

⁴² *Ibid* at 263-264