

NEWS

Coming soon: multimedia court judgments

LUIGI BENETTON

When Auckland, New Zealand judge David Harvey handed down his judgment for *Department of Internal Affairs v. TV Works Ltd*, he probably knew he'd ruffle feathers.

One set of charges involved TV Works carrying advertising for Pokerstars.net, a "free" gaming website that serves as a feeder into the pay-to-play Pokerstars.com. Since it isn't a gambling site like its .com sibling, advertising the .net site on TV did not break any New Zealand laws.



Harvey

To explain his reasoning (and head off accusations that he's encouraging online gambling), Harvey embedded images of both the .net and .com sites and included links to videos of the ads in his 47-page judgment (available online as a PDF). In doing so, Harvey did something few judges do: he used "non-textual" information to clarify his judgment.

Daniel Poulin supports Harvey's tactics. "When you introduce pictures or song clips or video clips, it's as though the judge gives the reader of the judgment the ability to qualify elements of the event," says the director of LexUM laboratory at the University of Montréal Faculty of Law.

"In a traditional judgment, events are qualified by a judge who decides on them. With illustrations, readers can form their own opinions more easily."

Given the quantity and variety of non-textual information that can enter a courtroom, having it flow through to judgments seems logical. Long-accepted non-textual information, like maps and technical diagrams for property and IP disputes, can be joined by things like video clips, audio clips, web pages and digital photos.

Non-textual information is a matter of course in certain types of law, says Michelle Bardens, editorial manager for LexisNexis Canada Inc. Bardens points out that tribunal and board decisions tend to contain many more illustrations than court decisions. In court decisions illustrations are more likely to be things like large tables or charts. Municipal, Energy and Utility, and Trademark boards also make extensive use of illustrations in their decisions through the inclusion of things like maps, town layouts, blueprints, large charts or trademark logos, Bardens explains.

Certain judiciaries, like Québec's workplace safety board, expect more. "You need to produce videos of your work environment to prove your problems are

work-related," Poulin says. "Judges now assume that they will see video of a situation that creates health problems."

Several modern trends in legal work make including non-textual information in judgments more feasible. E-discovery and e-filing dovetail with the increasing number of lawyers working towards (and in) paperless offices, who find they can store, access and share audio, video and images just as easily as written words.

"In the Pokerstars case, I was provided with a DVD containing all of the advertisements and non-textual material to which counsel wished to refer," Harvey recalls.

Thanks partly to high-profile events like Vancouver's Air India case, legal professionals know they can bring more than documents into a courtroom. "There are many structural drawings to a Boeing 747," says Julian Borkowski, court technology coordinator for the Court Services Branch of

the Ministry of the Attorney General of British Columbia. "You can't comprehend this with text. You need graphics."

"We put a document camera in the witness box and gave the engineer coloured felts," he recalls. "When the drawing was finished, it was scanned in and became part of the evidence."

When looking for reasons why judges don't yet travel the non-textual route in their judgments, Borkowski looks in the mirror. "We

tend to overtech things," he says of technical support professionals. "To gain acceptance of technology in the courtroom, we need to make it easier to use."

Uncertainty also pervades this trend. For instance, is the Internet a safe place to store things, like video clips, that judges do not embed in their judgments? "A simple reference to the current URL of a clip is probably not enough to ensure its permanent availability,"

See **Non-textual** Page 6

Quicklaw®

Research Solutions

To know is essential.
To **Know More** is powerful.

LexisNexis® Quicklaw®
Criminal Essentials

Get *Halsbury's® Laws of Canada*, *Butterworths® Texts and Treatises*, *Forms & Precedents*, *The Canada Digest* and other exclusive online content.

FOR A FREE TRIAL call 1-800-255-5174 or visit www.lexisnexis.ca/freetrial

TOTAL PRACTICE SOLUTIONS
Client Development Research Solutions Practice Management Litigation Services

LexisNexis®

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under licence. Butterworths and Halsbury's are registered trademarks of Reed Elsevier (U.K.) Limited and its affiliated companies. Quicklaw is a registered trademark of LexisNexis Canada Inc. © 2010 LexisNexis Canada Inc. All rights reserved.

NEWS

Lawyers are not Luddites, they are just 'process-oriented'

Non-textual

Continued From Page 3

Poulin argues.

Harvey bet otherwise. "In the Pokerstars case, I placed material on YouTube. Readers of the decision who have in front of them a hard copy of the judgment could call up the particular advertisement on YouTube."

Tom Bruce dismisses any notion of Luddism, preferring to label lawyers "process-oriented" instead. "Lawyers believe in the primacy of text, even though they would rather look at pictures," says the director of the Cornell Law School Legal Information Institute. "They trust processes that they know to be authoritative, though they are open to new things."

Belief in the "primacy of text" may be bolstered by skills lawyers have long relied upon and the attitudes that belief in those skills

engenders. In Harvey's words: "The use of pictures or video may be frowned upon, suggesting that the judge is wanting in the necessary linguistic skills to properly articulate what it is that he or she wishes to say."

Key technological questions also await answers. Bruce notes the path that visual or audio data has to travel, from filing to the judgment and beyond, might be bumpy. "The publishing systems the courts use might not handle this data appropriately," he says. "Standards are needed for that kind of information."

"With more than 200 video formats in the world today," Borkowski adds, "getting people to agree on what they'll use is a massive step forward."

Bruce figures a judiciary would need something like the Harvard Law School Library's digital object repository "to guarantee that some-

“**Readers of the decision who have in front of them a hard copy of the judgment could call up the particular advertisement on YouTube.**”

body 75 years hence watching the beating in the Rodney King case will see the same thing the judge saw," he says.

Fair-use entitlement would likely overrule copyright-based objections to using certain information, but privacy concerns might not be as easy to handle. "There may be cases where evidence is of

such a sensitive nature in terms of privacy that it may be unwise to make it available in non-textual form," Harvey muses, adding, "I do not believe that an overall blanket of privacy should prohibit the use of non-textual information."

There's also a theoretical concern. "The judge would like to rule on the basis of principles that are slightly removed from the facts of the case, to make a general ruling," says Bruce. "They are developing tomorrow's case law. To be sufficiently flexible, it has to be slightly abstract. Objects specific to the case go against this preference."

Judges might worry about another can of worms. "The use of illustrative material involves both subjective and objective elements," Harvey explains. "If a judge places too much subjective weight upon the interpretation of an image there could be a debate about such subjective interpretation which

could undermine the authority of the decision if that interpretation was critical to the outcome."

Perhaps surprisingly, years after technology made illustrated judgments possible, best practices in their creation have yet to emerge.

Harvey advises judges to look at what others have done. "I do not claim to have the final answer to the incorporation of non-textual information in judgments," he admits. "The steps that I have taken and that have been taken elsewhere are small and tentative."

"Lawyers and judges need to start thinking about alternative non-textual ways of articulating reasons for decisions so that the rationale for an outcome of a particular case is clear, transparent and unambiguous."

"Most of the time we manage to do this in text. I do not suggest that judgments should become comic strips or multimedia exercises." ■

EXPERT WITNESS DIRECTORY

ACCESSIBLE INVESTIGATIVE & FORENSIC ACCOUNTING & BUSINESS VALUATIONS

We Make The Difference



KROFCHICK VALUATIONS

Personal Injury
Investigative Accounting
Family Law
Business Valuations
Forensic Economics
Actuarial Services



Gordon Krofchick CA*CBV
info@kval.ca
1-877-250-6682
www.kval.ca

ACCOUNTANTS— FINANCIAL ADVISORY

WITH OVER 95 OFFICES ACROSS CANADA

— from our rural centres to our largest markets — BDO has experts at your doorstep.

- Expert Witness
- Litigation Support
- Valuations
- Insurance Loss Accounting
- Damage Quantification
- Forensic Accounting

ASSURANCE
ACCOUNTING
TAXATION
ADVISORY SERVICES

BDO. More than you think.

To find a team member near you, visit:
www.bdo.ca/advisoryteam



BUSINESS VALUATION & LITIGATION CONSULTING

Stern Cohen Valuations Inc.

Business Valuations
Litigation Accounting



Guidance at every turn.

- Business and intellectual property valuation
- Damage quantification
- Forensic accounting
- Transfer pricing

Peter Weinstein MBA, CA-IFA, CBV
416.967.5100
pweinstein@sterncohen.com



FORENSIC ACCOUNTING

Your forensic accounting specialists.

Matson, Driscoll & Damico is an international forensic accounting firm, specializing in insurance loss accounting and litigation support services. We have the experienced professionals and necessary technology to serve all of your litigation accounting needs — and a track record to prove it.

Call Mark Gain CA*IFA, CBV
416-366-4968.



THE EXPERTS IN AFTER MATH.

Vancouver • Calgary • London • Toronto • Kingston • Montreal
www.mddcda.com

Toll Free: 1-866-MDD-2631

Experts in Litigation Support

NURSING AND MEDICAL EXPERTS

Call CanLNC for Nursing and Medical Experts

- Medical Malpractice
- Personal Injury
- Occupational Health & Safety
- Forensics
- Sexual Assault Nurse Examiner
- Medical Death Investigation
- Long Term Care, Nursing Home
- Case Management
- Corrections, Military
- Large Volume Medical Record Summaries for Class Actions

Plaintiff or Defence

canlnc

403-278-9273
www.CanLNCExperts.ca
Experts@CanLNCExperts.ca