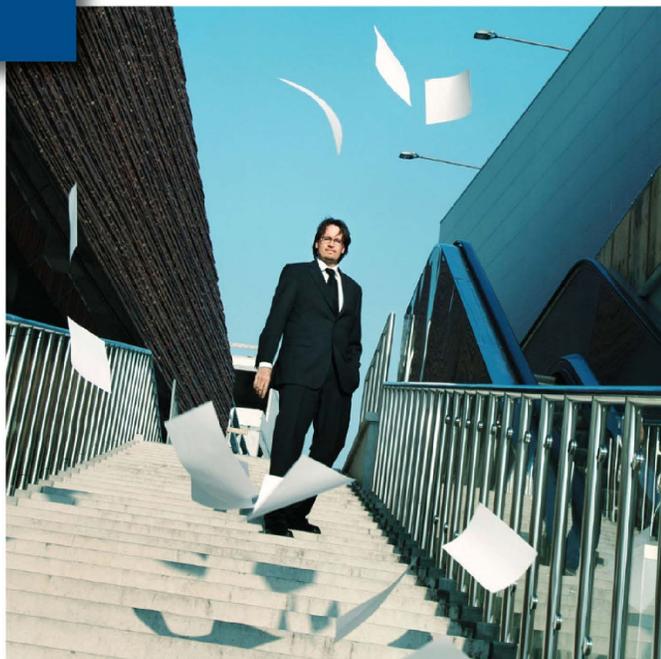


E-trials in Canada: Courts still slow to enter digital age



E-discovery and technology may have changed the way we litigate. Fully equipped e-trials, however, continue to be the exception rather than the rule in Canada.

“We do about two e-trials a year,” says William Platt, managing partner at Platinum Legal Group, a litigation support services company. “There is no business in Canada for trial support alone.”

In this respect, Canada lags far behind its southern neighbour. According to Platt, many U.S. lawyers “use every bell and whistle that they can to advocate their client’s position,” whereas Canadian courts are notoriously underfunded and under-equipped to handle e-trials.

Pressure to move the courts towards more e-trials has to come from the lawyers, says Ontario Superior Court Justice Arthur Gans. “Because many of my colleagues are reticent or do not fully appreciate the benefits of using a document management system in a trial, and because the (Ontario) Ministry of the Attorney General has yet to get behind the initiative, the notion of an e-trial has to be counsel-driven.”

That may happen soon enough, if modern legal work trends are any indication. “In the civil litigation group, we work exclusively on a paperless basis,” says Graham Underwood, a lawyer with the BC Ministry of the Attorney General. “All incoming correspondence immediately gets scanned into our file management

system. I rely exclusively on the electronic copies. I never see the paper.”

The paperless trend will only intensify as digital natives enter the profession and more lawyers get comfortable performing e-discovery. “When I started in this business it was all paper. Now it’s 40 per cent paper and 60 per cent electronic documents,” Platt says.

Meanwhile, governments are beginning to budget for e-trial equipment when courtrooms come due for renovations. And judges like Gans insist on e-documents when facing document-heavy trials.

In the past few years, the Supreme Court of Canada led the way by undertaking a major courtroom modernization initiative. It is now equipped with an electronic document and records management system as well as audiovisual and information technology. At the provincial level, British Columbia introduced electronic filing in 2004. Researchers at the *Laboratoire sur la cyberjustice* at the Université de Montréal are currently working on software that would allow litigants to negotiate online for small claims cases. The laboratory wants to usher the entire Quebec justice system into the digital age.

Ontario, however, is considered to have fallen behind in adopting electronic technologies, though a few courts are equipped and its Court of Appeal requires appeal factums to be filed electronically.

For litigants, the benefits of e-trials are clear as it boils down to a question of access to justice. Properly applied, technology should cut trial times from a quarter to a half, argue Underwood and co-author Jonathan Penner in their book *Electronic Evidence in Canada*, just by switching from print to electronic documents.

It’s an opinion shared by other practitioners. “I examined a historical geographer for three full days, followed by two more days on cross-examination,” recalls John Ritchie, a partner in the Toronto-based firm Ritchie Ketcheson Hart & Biggart LLP. “If we didn’t have electronic documents, we would have taken at least two more days.”

Other cost savings can also be achieved by bringing in witnesses who reside far away through in-court teleconferences.

Perhaps more promising for the future of e-trials is the fact that lawyers who take advantage of technology in court say it helps them make clearer arguments. BC Crown counsel and PowerPoint proponent Nils Jensen says “it’s so much easier to knit all your evidence together in a seamless presentation — your documents, your videos, your images.”

Of course, there’s no discounting the competitive nature of the profession itself. “If you can show that you can be a better advocate for your client, there’ll be greater uptake on e-trials,” Platt says.

Video conferencing

Department and delivery still count on screen.

Video conferencing is widespread in today's courtrooms. It allows people in different geographical locations to "appear" in court, to see and hear all that is happening in the courtroom and be able to answer questions posed by presiding judges and lawyers. The benefits of this convenient, cost-effective, time-saving solution are plentiful.

Besides the obvious benefits of saving in time and travel costs, video conferencing can also facilitate the testimony of children, protect the well-being of individuals involved in sensitive cases, help access to justice in remote areas and reduce the cost of security at courthouses.

And while there are still a few who resist the use of video conferencing, preferring human face-to-face interaction, most view it as a positive tool that offers efficiencies and opportunities that result in justice better served with less wait time.

Preparing your client for video conferencing

During a video conference, the client will be 'on stage' for the duration — not just during responses, but also between questions and during any delays. Non-verbal communication like eye-contact and body language will be watched and noticed, so it is important to not underestimate the time needed to prepare your client for their video-day in court. The

following are tips for getting your client ready for a video conference.

1. Appearance

It is important that your client dress appropriately, just as the client would if they were actually going to court. Avoid small busy patterns and extremely bright or 'saturated' colours, which don't work well on camera.

2. Eye contact

The client must either look directly at the questioner or into the camera. They should not get distracted by movements in the courtroom, shifting their eyes back and forth, as this can give a 'shifty-eyes' look on the screen.

3. Body language

The camera will remain fixed on the client at all times so it is important to project positive body language. Stress the importance of avoiding distracting behaviours like fidgeting, nail biting and finger tapping. A solution is to sit up straight and keep hands on the table for the duration.

4. Answers

On video, too much of a pause between question and answer can have a negative effect, suggesting that the client is hiding something. Answers should be open and to the point.

5. Attitude

It goes without saying that the attitude should be one of co-operation. Never, under any circumstances, should the client argue with the questioner.

6. Practice

Practising on camera allows you to point out the good and the bad to your client. It will help them get comfortable with being on camera and familiarize them with the questions.

— Katya Hodge



High tech on a budget

If technology isn't built into the courtroom, don't let that stop you: assemble a do-it-yourself e-trial kit.

With a modest budget you can bring a regular courtroom into the tech future.

The following is a list of simple, affordable tools needed for an e-trial.

Laptops

You will need a laptop complete with litigation and presentation software, the joint brief and any other documents needed for the trial.

Document cameras

If Court Services doesn't have any, you need a document camera that will display your docu-

ments, photos and objects. It captures the images and projects them onto a screen or monitors for all to see.

Projectors and screens, or monitors

Cabling for LCD projectors and screens is easier to manage than for individual monitors on each lawyer's desk. It is important to determine the layout of the courtroom to determine where the screen should be placed so that all participants have a clear view.

Cables & extension cords

It is worth keeping extras in your kit. There is nothing worse than not being able to reach the plug.

— Luigi Benetton

E-trial tips and traps

To make the most effective use of technology at trial, consider the following pointers.

Choose your tech moments wisely

Think about what you need to prove, then consider if technology will help you accomplish your goals. It is important not to let technology become your crutch. Even with all your technological bells and whistles, you must not lose sight of the facts and you must make a compelling argument.

Plan ahead

Discuss your technology choices with the other parties, including the judge and court staff, before the trial. It's a good idea that everyone knows ahead of time what to expect.

Tech support

Hire technical support. Technology can be a distraction during your trial, so it's a good idea to hire someone to help it run smoothly. That way you can focus on getting your points across.

PowerPoint

With PowerPoint, less is often more. Used sparingly, your presentation will be more effective. Whatever you do, do NOT read bullet points off your slides.

Back it up

Unless you want to experience unparalleled frustration, back up your litigation database to an external storage device every day.

Practice makes perfect

Don't wait until the trial begins to use your technology. Practice ahead of time so you know what to expect and can perform effectively in court. If possible, rehearse in the courtroom itself before the trial.

Don't panic. If something goes wrong with one part of your presentation, simply jump to another part while the problem gets sorted out.

— Luigi Benetton