

CNJ

WAXMAN VS. WAXMAN: APPEALING EXPERIENCE

After a 200-day trial, the parties in *Waxman vs. Waxman* appealed and cross appealed. Counsel for five legal firms agreed to file the more than 26,000 pages of documents in both paper and electronic form with the Ontario Court of Appeal.

They retained Commonwealth Legal Inc. to do the conversion to Adobe Acrobat, met to determine the document structure and form of presentation, and held a conference with Mr. Justice Stephen Goudge on their plans.

In the courtroom, two of the three judges and all but one counsel used the electronic record. They were able to click and call up any page on screen and create hyperlinks as if on the Web. When counsel referred to a case in the factum, the judge would click on the reference and the case would appear on his screen. When counsel referred to a page number, the judge would go to the page by typing in the number and pressing Enter. No need to go to volumes or tabs. No shuffling of pages.

Reflecting on the experience, Justice Goudge said the benefits started with his preparation for the case.

"Information that takes up stacks of space in my office was on my laptop. Instead of renting a truck to take material home for the weekend I would sling my laptop over my shoulder. Everything was there, and linked." In the courtroom "it was much easier to use the electronic version than paper. The program allowed easy movement from one document to another."

Mr. Justice John Laskin said he is not the most computer literate judge on the court but he found the system easy to use. "It's sensational, and definitely the way of the future, especially for a case of this magnitude."

Robert Harrison, counsel for Fasken Martineau, said operating from CD-ROM "cuts your 'slog' time by some kind of multiple. The accelerated access to references or cross-references is extraordinary. Transcripts of the trial were fully searchable. We were dealing with an enormous number of exhibits, case author-

ities, facts, arguments and a 600-page judgment. Everyone could spend time listening instead of scrambling."

Lorne Silver, counsel for Cassels Brock and Blackwell, said he found the experience extremely rewarding, and especially appropriate in such a document-intensive, transcript-intensive case.

Justice Goudge concludes that Courts of Appeal would require some standardized formatting if electronic appeals are to come into generalized use. "In this case we learned about formatting with experience. Prep time was significant. Standard formatting would shorten prep

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times.” (The Judges Technology Advisory Committee is developing standards in this area.)

Waxman vs. Waxman proceeded with a mix of paper and electronic formats. In future, if parties and the courts are able to go electronic-only, major dollar savings are possible, says Dr. Martin Felsky, president and general counsel of Common-

wealth Legal Inc. For example, the court and the lawyers for the various parties in a case of the dimensions of Waxman vs. Waxman might require 20 sets of documents. Starting at 25 cents per page, 20 paper sets of 26,000 pages would cost (.25 x 20 x 26,000 =) \$130,000. Depending on the length of the factum, 20 copies of the same appeal in electronic form would cost in

the order of 50 cents to \$1 per page (.50 x 26,000 or \$1 x 26,000 =) between \$13,000 and \$26,000.

Like Justice Goudge, Lorne Silver emphasized the benefits outside the courtroom: “It’s far easier at night and at weekends to work with the computer record.”

PUBLIC AND FAMILY MEMBERS SERVED BY AIR INDIA TRIAL SITES

Two innovative Web sites concerning the Air India Trial were developed in British Columbia. One helps the public understand the trial. The other assists family members throughout the trial.

■ FOR THE PUBLIC

“On Trial — Air India Trial” «www.airindiatrial.ca» offers trial updates alongside information about how the justice system works. The Law Courts Education Society of B.C. «www.lawcourtsed.ca» launched the educational site, the first of its kind in Canada, in the week leading up to the trial. “As people around the world follow this complex trial, they will have questions about the justice system here in Canada. What are the steps in a criminal trial? What are the rights of the accused? How is a judgment delivered? ‘On Trial’ is where you will find answers,” said Rick Craig, Executive Director of the Law Courts Education Society.

Visitors are introduced to three main areas:

- “On this Case” provides information on the Air India Trial.
- “Follow a Trial” helps the public learn about how trials are conducted.
- “Our Justice System” helps the public understand the general structure and operation of the Canadian Justice System.

Each educational section is linked to “Did You Know,” “Test Your Knowledge,” and “Classroom Learning,” which provide additional information, pose questions, test understanding and offer classroom activities.

The information officer for the Supreme Court of B.C. provided valuable feedback to the society during the development phase. The trial judge was made aware of the Web site in advance so that he could be reassured it would not interfere with the trial in any way. As the trial unfolds, the site will continue to evolve.



■ FOR FAMILY MEMBERS

The Criminal Justice Branch of the Ministry of Attorney General worked with the society to develop a secure Web site for family members of the victims of the Air India tragedy. The password-protected site is designed to assist family members as they follow the trial and plan their visits to Vancouver to attend the trial. With funding from the federal government, the Criminal Justice Branch is responsible for the site's content while the society manages all technical aspects.

The development of both sites was inspired to some extent by the work the universities of Glasgow and Syracuse did during the Lockerbie

Trial. However, the design and approach taken in Canada involves a much broader educational focus and many unique features.

Reaction to the On Trial site has been extremely encouraging. When it was launched, local media picked up the story.

From there, the story spread to organizations around the world such as the BBC. In its first week, the Web site had over 3,000 visits. The Air India trial is important to people around the world, and as a result the Web site has had visitors from over 20 different countries. Meanwhile, the society continues to work on getting the word out to teachers, students and members of the public.

ESSAYS ON JUDGMENT WRITING:

For many judges, the computer is indispensable

A bound collection of 58 essays on judgment writing has been sent to all judges in Canada as a joint project of the National Judicial Institute (NJI) and the Canadian Judicial Council.

The NJI's experience with a 2002 workshop led the institute to call for submissions on the subject from judges, now brought together in *The Most Important Thing is to Begin: The Art and Craft of Timely Judgment Writing*.

More than one third of the essays specifically discuss the computer as a tool in the judgment-writing process.

■ TAKING NOTES

Justice Marion J. Allan of the Supreme Court of British Columbia takes all her bench notes at trial on computer.

I find that I can type faster than I can write and I can spend more time observing

the witness. There is usually enough time to go back to the previous sentence or paragraph and underline, bold, or italicize a word, phrase or sentence that captures the essence of that portion of the evidence.

The difference between taking detailed handwritten notes and electronic note taking was like night and day for Justice Robert J. Spence of the Ontario Court of Justice.

I found I could record my notes with greater speed and with far less physical trauma to my writing hand. Most significantly, at the conclusion of trial I simply printed out my notes and, of course, avoided entirely the problem of trying to decipher what I had written. For me, typing beats handwriting in every respect.

For Judge Jeremy A. Nightingale of the Provincial Court of Saskatchewan, the key is good notes, well-organized.

I try to take extensive notes during trial. In complex cases I cross-index my bench book as I go. By the time I have heard the submissions of counsel I have usually resolved the facts.

Justice David F. Tysoe of the Supreme Court of British Columbia has been using a laptop computer to take notes in the courtroom for 10 years. He cites three advantages:

- the search feature permits him to find the evidence he wants to review when writing the Reasons;
- it saves time in court because counsel usually do not wait for him to finish writing his note before asking the next question or making the next submission;

- he has more opportunity to observe the demeanour of witnesses if he is able to type without looking at the laptop.

■ **WRITING THE JUDGMENT ON COMPUTER**

The first draft on computer is equivalent to a third draft by hand or dictation, finds Justice Laurie P. Allen of the Manitoba Court of Queen’s Bench.

Drafting on computer also permits thoughts on the next point or issue to be preserved when you have them. The tangents, brilliant thoughts, etc., can be set down — and left at the end of your document until you are ready to deal with that point or issue.

Better to draft on computer than dictate, advises Judge Cheryl L. Daniel of the Provincial Court of Alberta. “. . . seeing the judgment emerge on your computer before your eyes is very encouraging and your progress is obvious. Your judgment is under your control and is not subject to delays caused by your secretary.”

For Judge Anne E. Crawford of the Provincial Court of Nova Scotia, it’s straightforward.

Basically, I just start writing. I use WordPerfect and split my screen horizontally. On top I have my notes from the trial and beneath the judgment form (I use the computer format approved by CJC). I review the issues raised by counsel in summation, review my notes as they relate to those issues and start by stating

the issues. I write the facts first and then do any research that is necessary before dealing with each issue raised by counsel.

Judge Nightingale goes to his laptop the same evening in a one-day case, and as soon as possible in longer ones, to sketch out his factual findings and any tentative legal conclusions. Then he defines the issues and decides the order in which they must be considered.

As I organize my thoughts around the issues I create a series of files on my computer, from which I can later extract and edit passages for inclusion in my judgment. How many of such files I create and their nature varies widely with each case. They fall generally into two categories: issues and law.

■ **COMPUTER SKILLS**

Judges report that they have learned about computers on the job.

“When I was appointed in 1994, I had no typing or computer skills,” writes Justice Margaret P. Eberhard of the Ontario Superior Court of Justice. “I learned all that while I was also learning how to be a judge. I am still not very skilled but the computer helps enormously. I absolutely do not know how people can produce a jury charge without cutting and pasting the precedents provided by CRIMJI, Watt J., colleagues and your own previous cases.”

“I taught myself most of what I need to know on the computer, and in a larger judicial centre,

one always can seek the assistance of a more computer literate colleague,” writes Judge Robert B. Hyslop of the Provincial Court of Newfoundland and Labrador. “Most people who are particularly skilled in this area tend to enjoy helping others.”

■ **TOOLS AND TECHNIQUES**

Judges have discovered many ways to work faster and create a better product by computer.

Justice George W. Baynton of the Saskatchewan Court of Queen’s Bench says a laptop or desktop computer, at the desk or on circuit, provides a judge with access to laws and cases anywhere in the world, law library resources, case manuals, comprehensive checklists, forms, precedents, calculators and spreadsheets, on-line access to other judges and a ready access to the judge’s personal calendar and schedule.

Judge Catherine Bruce of the Provincial Court of British Columbia keeps an updated precedent file on the C drive or on disk under various categories — impaired driving, Charter defences, etc.

Each time you write a judgment in a new area of the law or receive the latest and governing cases, briefly summarize them in your database. You can also take quotes from the judgments and place them in the database for future decisions. Then just cut and paste them into your current judgment to save having to retype them.

Justice Russell G. Juriansz of the Ontario Superior Court of Justice uses Word, DragonDictate Version 6, Summation Version 2.0, and Quicklaw. DragonDictate enables him to quickly produce formal judgments, endorsements, jury charges, correspondence and even e-mail.

Working with a microphone leaves both of my hands free to hold books or other written material as I dictate. I can produce notes that are adequate for the delivery of oral reasons at almost the speed at which I speak.

Justice Juriansz describes Summation as probably America's leading litigation software.

When I have the luxury of a real-time reporter, Summation enables me to accept a live feed of the rough transcript and to immediately annotate it in the courtroom. (Otherwise) . . . I take my own notes using Word, which I then input into Summation. I use Summation to organize and analyze the evidence, whether in transcript or note form. Summation is able to prepare a number of different types of analyses and reports, and can search across different transcript files at one time.

Using DragonDictate and Summation efficiently requires "a fairly good facility with computers," writes Justice Juriansz.

Especially in a long trial, Madam Justice Julie Dutil of the Quebec Superior Court suggests one way for a judge to receive and organize evidence.

[TRANSLATION]

It can be useful, using the Excel software, to list the items in chronological order. This makes it easier to summarize the facts. Moreover, after each day's hearing, it is essential to summarize the evidence heard. Afterwards, it will be possible to group the testimonies together by topic and to prepare an index.

Her colleague Justice Richard G. Mongeau asks the parties, when possible, to submit diskettes or CD-ROMs of their exhibits, proceedings and other relevant documents.

[TRANSLATION]

When the transcripts of the testimony are available, I work mainly with these transcripts (on paper or computerized). This makes the search for a particular testimony much easier using the index.

Justice Nancy Bateman of the Nova Scotia Court of Appeal seeks the appeal factum or pre-trial memorandum in electronic form, compatible with her word processor.

I often copy the statement of facts out of the factum then massage it into a form that I like. . . . This avoids retyping dates, names and such and generally, assuming an accurate statement of facts, gives chronology. You will decide what parts are necessary to your judgment.

Like many other judges, Justice Bateman uses shortcuts for long phrases or frequently used words. For the advanced computer user, Justice Denise Bellamy of the Ontario Superior Court of Justice provides detailed tips on the use of keyboard shortcuts, macros and autocorrect features.

Judge Thomas C. Smith of the Provincial Court of British Columbia, has prepared a step-by-step paper on taking notes, analyzing evidence and law and writing judgments. Copies are available by phoning the NJI at (613) 237-1118 ext. 239.

E-COURT CONFERENCE 2002

Jennifer Jordan
Registrar
British Columbia Court of Appeal

Canadian courts were well-represented at an E-Court Conference in Las Vegas in December 2002.

The conference featured a discussion of privacy and access issues in the context of the *Public Access to Court Records Guidelines for Policy Development by State Courts* which had just been issued on behalf of the Conference of Chief Justices and the Conference of State Administrators.

We were disappointed that at least half of the sessions were devoted to private companies discussing their products. In addition, the privacy and access discussion consisted largely of presentations by companies which routinely sell court-record information to large databases containing information on individual citizens.

While there is a market in Canada for some off-the-shelf electronic solutions for courts, most jurisdictions are pursuing individual systems developed for their specific requirements and environments. In this respect, some of the sessions at the December conference were quite useful.

A session on electronic signatures provided a practical look at the requirements for authentication of documents and the various levels of authentication currently supported by technology. The discussion examined the expense and practicality of the solution proposed, as well as associated opportunities to streamline court processes.

Another session dealt with the development of detailed functional, technical and policy standards for electronic filing in the courts. Functional standards are the minimum requirements necessary for such things as document integrity, authentication of files, payment of fees and service, and notice. Technical standards encompass the

compatibility of hardware and software. Policy standards ensure that courts use the same definition for court records and the same means to authenticate persons sending and receiving documents. Draft standards were available on the National Center for State Courts Web site in May 2002, «www.ncsconline.org» but the final document has not yet appeared on the Web site.

A useful example of the effect automation can have on a court was demonstrated by the Miami-Dade County Traffic Division, one of the first electronic courts in the United States. The entire process — from scanning tickets and calendaring witnesses electronically to judges using electronic files on the bench — has resulted in enormous savings for the Court.

The new system has reduced staff by over 40 people, with remaining staff now handling 32 percent more citations. The error rate has been reduced from 15 percent to less than one percent. Scheduled cases have increased by 167 percent.

The closing day of the conference was devoted to privacy and access issues that arise in the electronic court environment. A guideline document suggests policies, with useful commentaries and alternative approaches, which could be adopted by individual courts to reflect limits imposed by rules or other court practices. The document, which can be found at «www.courtaccess.org/modelpolicy», may be seen as a companion to *Open Courts, Electronic Access to Court Records and Privacy*, soon to be posted on the Canadian Judicial Council's Web site.

I sincerely hope we in Canada can develop guidelines that preserve the integrity of the court record and protect the privacy of personal information, while at the same time promoting open access to court information.

FJA AND NJI DOCUMENT LIBRARY

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As of June 2003, the Library conference on JUDICOM houses over 1,800 documents covering a variety of subjects. The NJI/JUDICOM search engine, located on the National Judicial Institute's (NJI) Web site, indexes approximately 1,000 of these documents. Of this thousand, just over 300 are papers from the NJI's own document library.

Arranged in various folders under the heading NJI Papers - Docs INM, conference materials from this year and previous years are available to all judges for reference. In many cases the JUDICOM data team has processed these papers to turn the names of the cases cited into hyperlinks so you can click on them and immediately be transported to the text of the judgment as recorded on eCarswell's servers.

The hard part is zeroing in on the right paper in the collection. FirstClass, the software on which JUDICOM is currently built, has limited search functionality. FirstClass is primarily a collaborative work environment and excels in areas such as group forums, e-mail and chat. It falls short in the document management department.

It allows you to search through a single text or series of texts sequentially looking for one or more words, but beyond that its capabilities are quite limited, not only compared with the powerful search engines used by commercial legal databases such as Quicklaw and SOQUIJ but also compared with commercially available text search software, such as FolioViews (used on the Consolidated Statutes and Regulations CD circulated by Justice Canada) and to various search engines commonly found on the World Wide Web.

You have no doubt experienced Web-based search engines at sites like Google and AltaVista. If the NJI papers were placed in a similar database,

they too could be accessed through a Web-like interface. Since all judges already have a Web browser available on their desktops, it would be an easy and convenient process to search for these papers in a browser-based system.

The disadvantage of the World Wide Web is that it lacks the security safeguards that FirstClass has; these have to be added deliberately. Implementing this security is not rocket science, but it does take careful planning and monitoring.

The best solution is to find a way to combine the security and easy access of the NJI papers on JUDICOM with the advanced search capabilities of a server-based engine.

That is exactly what the Computer Education Partnership of NJI and the Office of the Commissioner for Federal Judicial Affairs (FJA) is planning to do. Over the next few months, an integrated search engine and database will be constructed to house the NJI Library. As much as possible, moving between JUDICOM and the Library will be a smooth, intuitive process.

At the same time, the new system will help manage the life cycle of documents in the Library. The system ideally should intake documents in their original submitted form, control them first through the translation and publication processes, then through keywording and indexing, and finally, when they become outdated, through retirement.

The system will eventually grow to thousands — if not tens of thousands — of documents. First in line are the 500-odd NJI seminar papers produced in the past year that haven't yet been put into JUDICOM because of its limitations.

Obviously, a large undertaking like this takes time to develop and test. There will be some teething pains, but in the end will produce a more functional Library, where you will be able to find what you need quickly and easily.

YOU WERE ASKING...ABOUT FIREWALLS

Q: In simple terms, what is a firewall?

A: Judges familiar with home construction or automobile design know that a firewall is a reinforced barrier that prevents the rapid spread of fire in a building or a car. The same term has been applied to computers, where a firewall is a programmable barrier placed between a private computer network and another network. The firewall restricts unauthorized access to the private network. Typically, a firewall is a piece of software that runs on a server or on another type of network device (such as a router) to control incoming Internet traffic.

The Internet is a large publicly accessible network. When a judge connects to the Internet, either from inside a court's network, through JUDICOM, or from home, other users on the Internet can possibly gain access to that judge's computer. Unfortunately, there seem to be many individuals out there whose hobby it is to test the security on all computers connected to the Internet at any given time, and to exploit any lapses by invading poorly protected private resources.

A firewall is one of the key lines of defence in the battle for privacy. Most firewalls work by inspecting all incoming Internet traffic, looking for the source and destination of each transmission. It then compares this information against the rules that the network administrator has programmed into the firewall. If the transmission (or "packet") fails to meet the firewall's safety conditions, it is rejected and does not pass through. A firewall can also mask or hide the identity of computers on a court's network, making it more difficult to hack into them.

Even the best enterprise firewall is not a complete guarantee of safety, since hackers have ways of defeating firewalls if they really work at it. Some estimates are that 30 percent of large corporate networks with firewalls have been hacked. The main security concern for judges exists in two situations. First, where a firewall is installed in the court but not effectively configured or maintained, and second, home "always on" Internet access where judges may not have or use a firewall.

In practical terms, judges who have high speed Internet access at home should implement "personal" firewall protection. This can be as simple as a piece of software installed on the home computer. In fact, some versions of Windows have a built-in firewall. You can also buy free shareware or inexpensive commercial firewall software. One of the most popular programs is BlackICE Defender, which is not a true packet-filtering firewall but an intrusion detection system. Also available commercially is the Norton Personal Firewall. In some situations, you may need a router. For proper protection make sure you follow the manufacturer's instructions or get help from a trusted advisor.

Martin Felsky and Lewis Eisen

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