A paperless courtroom:

Embracing the use of electronic trials

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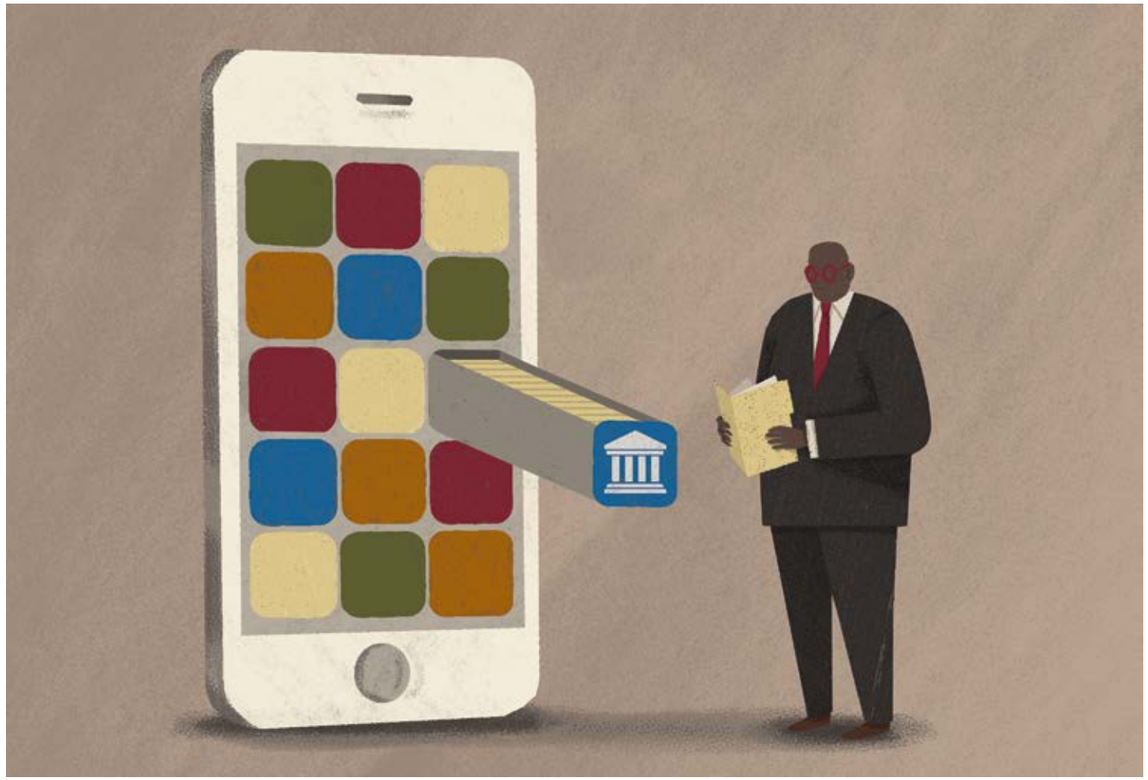

Although electronic trials (also known as "e-trials") continue to be the exception in Ontario, the tipping point is fast approaching, if not yet upon us. As technology advances, we as litigation counsel are provided with an increasing array of tools that can be used to manage the trial process efficiently and effectively. The great volume of electronic documents such as emails have become the norm in civil litigation. These tools assist the court, counsel and litigants in reducing the time and expense of litigation. Such cuts are particularly important in complex commercial cases.

In this article, we discuss a number of innovative practices that were adopted by the parties and the court in the *Husky v. Schad et al.*[1] trial heard in the Ontario Superior Court (Commercial List) in late 2015 and show how the adoption of those practices allowed the parties to effectively and efficiently bring this large and complex piece of commercial litigation to trial on an expedited schedule. Of particular note, the procedure adopted by the court and the parties included the use of iPads by both counsel and the court; the "chess clock" method of allocating each party's time at trial; evidence-in-chief by way of affidavit; cloud storage and transfer technology; and real-time transcription.

The *Husky v. Schad et al* trial – a paperless courtroom

The case of *Husky v. Schad* involved Husky Injection Molding Systems Ltd., one of the world's leading manufacturers and suppliers of injection moulding equipment to the plastics industry, as the plaintiff; and Husky's founder, Robert Schad, and his new company Athena Automation Limited, as defendants. This case involved allegations by Husky that the defendants, among other things, misused Husky's confidential information

in the process of manufacturing injection moulding machines. The trial took place over four weeks, from November 23 to December 23, 2015, before Justice Newbould.

This matter progressed on a highly accelerated timetable for a case of its size and complexity. The claim began in May 2013 in the Ontario Superior Court. Given the real time nature of the allegations raised, the amounts at issue (in the hundreds of millions of dollars) and the sophistication of the parties and experience of counsel, the defendants were granted a request to have the matter transferred to the Commercial List.

It became clear to the defendants at an early stage of the proceedings that it would be essential for the parties and the court to adopt innovative practices to bring the case to trial in an effective and efficient manner. This was particularly apparent not only from the substantive content of the documents produced by the parties in discovery (the vast majority of which related to highly technical engineering matters), but also from the volume of documents produced – more than 31,000 records.

Proceeding by way of e-trial allowed the parties to advance from the documentary discovery phase through to the completion of trial in 14 months. This process included extensive examinations for discovery, with nearly 16,000 questions asked over 24 days of discovery and more than 2,000 answers to undertakings provided. Such a complex endeavour would have been extraordinarily difficult, if not impossible, to carry out using the conventional "paper trial" method.

The parties requested and were assigned a case management judge to assist them in maintaining the aggressive trial schedule, including being available to deal with preliminary motions. That judge, who quickly became familiar with the case, was able to provide the parties with direction when there was disagreement over scheduling and to facilitate the efficient resolution of preliminary motions, such as a motion on refusals brought by Husky during the discovery process.

The parties were also fortunate to make use of Courtroom 8-1 at 330 University Avenue in Toronto, which is furnished with all the equipment necessary to conduct an e-trial, including monitors and large screens for projecting materials for the judge, the witnesses, counsel and observers.

Justice Newbould directed that no hard copy materials be used during the course of the trial.[2] Opening submissions, which were made orally, were accompanied by PowerPoint presentations. No written motion materials were filed for motions that took place during the trial, and there were no hard copy "witness binders" put to the various witnesses on cross-examination. Rather, all materials were displayed electronically on screens in the courtroom and, as explained below, accessible by the court on an iPad.

During the approximately four weeks of trial, more than 3,000 documents were put to witnesses on examination. In a traditional paper trial, at least seven printed copies of each of these documents would have been needed for distribution to the judge, the court reporter, the witnesses and each of the parties. Although e-trials offer benefits for all kinds of trials, the sheer volume of documents involved in this case made the electronic approach particularly beneficial.

The efficiency and seamlessness of the paperless courtroom were helped by a trial protocol – agreed to by all parties – that documented the processes and procedures to be used. For example, all parties agreed to (and they ultimately did) prepare, serve and file their evidence-in-chief by way of affidavit, a process that provided for considerable time savings in a trial involving evidence of a technical nature heard from 17 fact witnesses and six independent expert witnesses. The use of affidavits in this manner resulted in a substantial front-end loading of the preparation required for trial and was critical in allowing the trial to be completed in only four weeks. *Viva voce* direct examinations were still conducted for each witness, but the length of each examination was considerably reduced.

At the suggestion of counsel for Mr. Schad and Athena, and as approved by the court, the parties also used the "chess clock" method for allocating time during the trial. Under this method, a party is allocated a fixed amount of time in which to present its case.[3] This method places a premium on good advocacy, forcing parties to hone in on the issues of central importance to the case. The Canadian Competition Tribunal is one of the first adjudicative bodies in Canada to have used this method,[4] which is recommended as a best practice by the Advocates' Society.[5] Although not new, the chess clock method has rarely been used in the Ontario Superior Court.[6]

In the *Husky v. Schad* case, the total amount of time allotted for the trial was divided between the parties based on percentage allocations that were negotiated between them in advance. Following the trial protocol, time was debited from a party's total allocation for each of opening submissions, direct examinations, cross-examinations, re-examinations, closing arguments and any motions *lost* during the course of the trial. (For all motions brought during trial, the total time used for the motion was debited entirely from the time of the party that lost the motion.)

Although the plaintiff initially expressed concerns that the negotiated time allocations might be insufficient, each party concluded its case with time remaining.

This trial also prominently featured the use of tablet technology, as both the parties and the court used iPads in place of printed copies of the trial documents, examination briefs and briefs of authorities. In particular, documents were viewed in the "GoodReader" application, which provides a look and feel similar to a physical document and contains extensive annotation and editing functions (including the ability to highlight and create markups of documents).

The use of iPads, which was highly effective for dealing with such a complex case in real time, eliminated the need for parties to allow additional time for printing and assembly. It also allowed for the use of technological tools to navigate the vast evidence more efficiently, making it possible to navigate the entire case with ease. The amount of paper saved by a single iPad the size of a thin notebook could have filled several rooms.

Finally, the parties used a cloud-sharing service supplied by Davies to upload and share materials. For counsel using iPads, the tablets were set up to synchronize with the cloud-sharing site so they could be fluidly updated as new files were added. This process made the act of sharing files highly efficient because there was no need to deliver physical USB keys. (The size of many of the documents and materials made it impossible to send them by email.)

Conclusion

Although the advantages of e-trials are particularly evident in large, electronic document-intensive cases such as *Husky v. Schad*, they can make any size of trial more efficient and cost-effective. Conducting an e-trial may seem like a daunting proposition, but successful execution involves the same essential skills as a conventional trial: organization, preparation and effective communication between the parties and the court. E-trials may currently be the exception in Ontario; from the perspective of the authors, however, the efficiency and seamlessness with which technology can be incorporated into litigation means it is only a matter of time until these practices are widely adopted. Indeed, at the conclusion of the *Husky v. Schad* case, the trial record – which includes thousands of documents and thousands more pages of testimony, in the form of affidavits and transcripts – was stored on the court file on a single USB key the size of a thumb.

Notes

The authors are all lawyers in the Litigation Department at *Davies Ward Phillips & Vineberg LLP*. They acted together with Kent Thomson, the head of Davies' Litigation Department, as counsel to the defendants Robert Schad and Athena Automation Limited. The authors would like to thank the exceptional clerks, litigation support personnel and assistants involved in this matter for their tireless efforts in bringing this electronic trial to life. In particular, enormous thanks are due to Debra Bilous, Tanya Barbiero and Michelle Lee for keeping counsel organized and the trial running smoothly.

1. *Husky Injection Molding Systems Ltd v Schad*, 2016 ONSC 2297.
2. The only exception was the use by each witness of a hard copy version of his affidavit during the course of his examination.
3. See for example the decision of the Canadian Competition Tribunal in *B-Filer Inc v The Bank of Nova Scotia*, [2006] CCTD No 36 (QL).
4. *Ibid*.
5. "Best Practices for Civil Trials (Toronto: The Advocates' Society, June 2015) at 5; online: www.advocates.ca/assets/files/pdf/news/The%20Advocates%20Society%20-%20Best%20Practices%20for%20Civil%20Trials%20-%20June%202015.pdf.
6. Notably, the chess clock method was mandated by the Joint Trial Protocol in the highly publicized cross-border trial in the matter of *Nortel Networks Corporation (Re)*, 2015 ONSC 2987.