

**Using Litigation Support Software in the Courtroom -
Better Lawyer, Better Judge, Better Justice -
The Need For Judicial Leadership¹**

Justice B. T. Granger²

In early 2002 I was designated the trial judge for a non-jury action between *GasTOPS v. MxI*³ which was scheduled to commence in the Ontario Superior Court of Justice in Ottawa, Ontario on October 22, 2002. Prior to 2002, counsel⁴ with the assistance of Cheryl Curran⁵ an IT specialist had scanned approximately 4000 disclosed documents into Summation iBlaze⁶ (“Summation”) and were proposing to use Summation to display in the courtroom the documents they were seeking to have made exhibits. As of June 23, 2005 I have heard evidence on 260 days and admitted into the record 2,646 electronic exhibits, which I estimate comprise 40,000-50,000 pages.

For the first two months of the trial I made notes of the evidence on my laptop in a Word document and each morning counsel would provide me with a CD-ROM containing images of the electronic documents that had been made exhibits during the previous day’s evidence. After loading the images on my laptop I was able to view the exhibits using Internet Explorer. I was also receiving a daily transcript of the evidence from the court reporter in a Word document, approximately two weeks after the evidence was received in court.

During November 2002 it became apparent that the trial would not be completed within the initial estimate of six months. As the number of sitting days and electronic exhibits increased, I became concerned about the

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³ *GasTOPS Ltd. v. Forsyth, Brouse, Cass, Vandenburg and MxI Technologies Ltd.* Court File No. 98-CV-5929

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⁶ A litigation support software program, Summation Legal Technologies Inc. 550 California Street, Suite 800, San Francisco, CA 94104, www.summation.com

management of the exhibits and the *viva voce* evidence, as I knew that there would come a day when I would be required to organize the evidence in preparation for writing my reasons for judgment.

As a result of my past experience with the Integrated Justice Initiative in Ontario, I felt that the use of an electronic litigation support program would assist me in storing and organizing the transcripts and exhibits. During the fall of 2002 I started to use Summation iBlaze on my laptop on the courtroom dais.

I Making the Evidence Memorable with Summation

Many counsel in Ontario are using a litigation support program such as Summation in their office to organize the evidence, transcripts and documents they intend to use at trial but very few, if any, use their litigation support program in the courtroom to present their evidence, preferring to employ a traditional approach, which is based on the use of hard copy documents. I advocate that counsel extend the use of their electronic litigation support program by using it to display electronic documents in the courtroom and to assist the trier of fact in organizing the evidence.

One of the many things I have learned as a trial judge is that if your evidence is not memorable you will not succeed. As a civil litigator for 25 years I spent very little, if any, time considering how I could make the evidence understandable and therefore memorable for the judge. I wrongly assumed that the judge, without any assistance from me, would understand the evidence and its significance if he or she heard it once. The reality is that judges, like all of us, have difficulty in appreciating the importance of the evidence unless it is organized within the theory of the case. Counsel should remember that unless the evidence is organized within the theory of their case it may not be memorable and if the evidence is not memorable there is a diminished chance of success, which is of course the ultimate objective of all litigation.

Summation can be used not only to ensure a complete presentation of the evidence, but also to display electronic documents in the courtroom in a more timely and organized manner than hard copy exhibits.

If the judge can be convinced to use Summation on his or her laptop, he or she will be able to store and organize the evidence, whether *viva voce*

or documentary, in a manner which will ensure the evidence is memorable and as such will play an important role when the judge begins to craft his or her decision.

II Using Summation in the Courtroom and on the Judge's Dais

There are a number of challenges to overcome before Summation can be used in the courtroom to display documents and used by the judge on his or her laptop to organize the transcripts and exhibits:

- counsel;
- judicial approval;
- the courtroom.

(a) Counsel

Although most law offices use computer programs for accounting and word processing, and perhaps even for document management, very few lawyers in Ontario as of this date use their laptops in the courtroom for the presentation of evidence. If they do bring their laptops into the courtroom, it is for note-taking purposes or to access the information they have stored in their litigation support program.

I am left with the impression that most trial counsel are more comfortable using hard copy exhibits in the courtroom. I see no indication in Ontario courts that younger counsel, who are generally more adapt at using computers are promoting an extended use of computers in the courtroom.

In most cases it will fall on junior counsel or legal clerks to convince senior counsel of the advantages of using a litigation support program, not only in organizing documents and transcripts but also in displaying the documentary evidence in an electronic format. The use of an electronic litigation support program in the law office and courtroom will:

- eliminate lost documents, photocopying charges and storage charges;
- allow the documents to be electronically sorted and searched;
- allow electronic disclosure;

These features, even in smaller cases, will reduce preparation time and thereby reduce the cost of the litigation for the client.

If opposing counsel, objects to the use of electronic documents on the grounds that he or she does not use a computer and wants all documents disclosed in hard copy I would suggest that you make disclosure in an electronic format with simple instructions on how to print the documents and then make arrangements to meet with a judge to determine if electronic documents can be used when making disclosure, at discoveries and at trial.

(b) Judicial Approval for the use of Electronic Documents

Convincing the judiciary to allow an electronic litigation support program to be used in the courtroom to display electronic documents and to create an electronic record as opposed to using hardcopy documents may be counsel's greatest challenge.

When I was appointed to the bench in 1988, there were very few judges in Ontario using computers. For many years thereafter many judges in Ontario appeared to look on computers with disdain, clinging to ancient courtroom traditions. Over the past five or six years there has been a subtle change in the attitude of the judiciary in Ontario regarding digital technology. Today most judges in Ontario recognize the benefits that digital technology can bring to the judicial system but are, as a result of their inability to touch type, reluctant to encourage counsel to use computers in the courtroom to display documents.

At the present time, if you wish to use electronic documents in the courtroom and create an electronic record, it is essential that you seek the permission of the trial judge prior to the commencement of trial. The worst possible scenario would be to announce to the trial judge, at the opening of trial, that you wish to use an electronic environment to display your documents in his or her courtroom. If the judge has never judged in an electronic environment he or she may simply say that you cannot use electronic documents. If you have not prepared hardcopy documents your presentation of the evidence may be greatly compromised. When seeking judicial approval to use electronic documents in the courtroom the initial meeting with the trial judge is extremely important and senior trial counsel should attend such a meeting. It is imperative that counsel be fully prepared for this meeting and, if possible, conduct a demonstration in the courtroom

to show the judge how the electronic documents will be displayed. Counsel should have their IT advisor in attendance to immediately answer any questions raised by the judge. Counsel should be prepared to demonstrate that the use of electronic documents in the courtroom as opposed to hardcopy documents will reduce the court time required to hear the action.

In addition, counsel should demonstrate to the judge on a computer the information that can be retrieved from an electronic document as opposed to a hard copy document. Many judges will be surprised at the information in the “Properties” of an electronic document, i.e. date document was created; when it was last modified; author and when printed. Over 93% of all documents are initially created and stored in an electronic format and over 30% of those documents are never printed. If counsel are only required to disclose hard copy documents, many relevant documents that have never been printed will not be disclosed and even if such documents are produced in hard copy the recipient will be unable to access the electronic data that forms part of the electronic document. As a result, disclosure in hard copy is less than full disclosure if the document was initially created in an electronic format. There are numerous cases and articles on electronic disclosure and discovery which could be helpful in convincing the judge that he or she should allow discovery of electronic documents in order that litigants have full discovery of all of the relevant documents.⁷ If electronic discovery is ordered, it will be difficult for opposing counsel or the trial judge to oppose the use of electronic documents in the courtroom.

The judge before whom you are seeking approval to use electronic documents should be made aware that even if he or she is uncomfortable using electronic documents it may be necessary to use electronic documents if there is a dispute regarding the authenticity of the document.

If the trial judge is prepared to allow electronic documents to be displayed in his or her courtroom you should discuss with the judge and opposing counsel, prior to the commencement of trial, if hard copy exhibits will be required to create a hard copy record or if an electronic record will suffice. If the judge is prepared to allow the creation of an electronic record

⁷ *Zubulake v. UBS Warburg LLC*, 2003 U.S. Dist. LEXIS 7939 (S.D.N.Y. May 8, 2002)
Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. May 13, 2003)
Zubulake v. UBS Warburg LLC, 2003 U.S. Dist. LEXIS 12643 (S.D.N.Y. July 24, 2003)
Zubulake v. UBS Warburg LLC, 2004 U.S. Dist. LEXIS 13574 (S.D.N.Y. July 20, 2004)

a protocol for the admission into the electronic record of the electronic exhibits should be established before the trial commences.

I would recommend that you be prepared to demonstrate to the judge with visual aids the increased costs to your client if hard copy documents are required for disclosure and the trial. If your client is capable of disclosing all of the relevant documents in an electronic format it is difficult to justify the cost of printing and photocopying numerous copies of each document when disclosure could be made by electronically transferring the documents onto a CD-ROM. Most judges are receptive to arguments that will result in cost savings to the litigants. In *GasTOPS v. MxI*, counsel have told me that if they had been required to make five copies of each document, the additional cost to the clients would have exceeded \$50,000.00 in photocopying charges, without taking into account the cost of having a legal clerk make and collate the copies.

Some judges may be reluctant to order disclosure of documents in an electronic format and to allow electronic documents to be displayed at trial if they are not familiar with the software program you propose to use in court. They are concerned that they will be unable to judge in an electronic environment. It is the task of counsel to convince the judge that prior to the commencement of the interlocutory motions or trial, you will assist him or her in learning how to be a trier of fact in an electronic environment using an electronic litigation support program such as Summation notwithstanding he or she has never used Summation and has limited typing skills.

It is essential to explain to the assigned trial judge that from time to time computers crash or programs freeze and if this occurs a short adjournment may be required. If counsel does not alert the judge that this can occur he or she runs the risk that the judge will become frustrated and demand that counsel return to a traditional hard copy trial. At the same time the trial judge must be assured that all of the electronic exhibits and the electronic record are backed up and there is no chance of the exhibits being lost if a computer crashes or a disk is damaged.

(c) The Courtroom

In Ontario, as in most jurisdictions, there is a funding crisis within the justice system. In 1998, the Ontario government, in partnership with the private sector, launched an initiative to modernize the justice system by creating, storing and moving all information across the system in an electronic format. The goal was to have a paperless justice system including paperless courtrooms. Unfortunately, the initiative collapsed in 2003 as a result of the failure to create a functioning web-based case management system. As a result of the collapse of the Integrated Justice Initiative, the conversion of Ontario courtrooms into electronic courtrooms came to an end. Today, Ontario courtrooms continue the long-standing tradition of using hard copy exhibits notwithstanding the inefficiencies of such a system.

Prior to the *GasTOPS v. MxI* trial there had been a few trials in Ontario wherein counsel prior to the commencement of the trial had agreed on the documents that would be tendered as exhibits and then had such documents saved on a CD-ROM and made available to the presiding judge. In these trials the electronic documents were used simply as a visual aid for the judge and counsel as the official court record consisted of hard copy documents.

In *GasTOPS v. MxI* over 4,000 documents had been disclosed electronically, but counsel had not agreed on the documents they would attempt to have made exhibits. It is only after I see a document displayed on my monitor that I rule if the electronic document can be entered into the electronic record as an exhibit. If I rule that the document can be made an exhibit, the Clerk assigns the electronic document, identified by its Begdoc⁸ number, a trial Exhibit number. At the same time counsel enters the Exhibit number in their copy of Summation. The next morning counsel provides me with a CD-ROM continuing the previous day's documents that had been made exhibits, which I import into my copy of Summation. In addition, each morning counsel provides the Clerk of the Court with a CD-ROM containing all of the exhibit images in order that there can be a permanent electronic record of the exhibits.

Prior to the commencement of the *GasTOPS v. MxI* trial I asked counsel, the court reporter and the court staff to attend at Courtroom 32⁹ in

⁸ The identification number assigned to the document within Summation

⁹ Courthouse 161 Elgin St. Ottawa Ontario

order to discuss and test different configurations for the display of electronic documents in the assigned trial courtroom.

It is imperative that the assigned trial judge, have input into the configuration of the courtroom in order that he or she will not be surprised when walking into the courtroom on the first day of trial.

Initially, we considered using a large screen and projection system. After testing this system we quickly realized that the sound of the projector would be distracting. In addition, to avoid the screen interfering with sight lines in the courtroom, the screen had to be placed where it was difficult to read the documents unless they were enlarged to a point where a single page of the document would not fit on the screen. As a result we discarded this method of displaying the electronic documents. With the help of Cheryl Curran who was present for all of our pre-trial sessions, we agreed on a configuration of the courtroom wherein a video splitter box would be used to power separate monitors for each counsel, the witness and the judge. When counsel is examining a witness, he or she plugs his or her laptop into the video splitter and can then display on all monitors any document in his or her copy of Summation.

If you are concerned about your privileged trial preparation in Summation being displayed on all of the courtroom monitors as a result of forgetting to shut down the external monitors when changing documents you wish to display, you might consider using an electronic presentation programs such as Sanction¹⁰ or TrialDirector¹¹ to display the electronic documents in Summation. These programs interface with Summation and, in addition to ensuring the confidentiality of your trial preparation, allows more flexibility in the presentation of the electronic documents. Both Summation and TrialDirector allow multiple documents or transcripts to be displayed at the same time for comparison.

The configuration of the *GasTOPS v. MxI* courtroom (i.e. monitors, cabling and video splitter) was achieved at a capital cost to the law firms of less than \$1,500.00. Judges, lawyers and court administration officials are astounded when told we were able to set up a functional electronic courtroom for less that \$1,500.00. The system is portable and can be set up

¹⁰ Verdict Systems Inc., www.verdictsystems.com

¹¹ inData Corporation, www.indatacorp.com

or taken down in less than 40 minutes. When the trial is completed counsel will retain the monitors, video splitter box and cabling for future electronic trials.

In Courtroom 32, counsel, when examining a witness, can highlight and display a sentence within an exhibit in less than five seconds. If we were working in hardcopy, each counsel, the witness, the judge and the clerk of the court would have a set of numbered binders with tabs containing the hard copy exhibits. If counsel wished to show a witness an exhibit, opposing counsel, the witness and I would have to locate the binder in which the exhibit was filed, the tab, the correct page and then the paragraph or sentence. I have no doubt that to accomplish this would take on average two minutes. Think of the number of times a binder would be misplaced or incorrectly tabbed or a party would be unable to locate a particular paragraph or sentence. In a large documents case, this alone should be a sufficient incentive to make all parties including the judge, insist that electronic documents be used in the courtroom.

When configuring a courtroom to display electronic documents you must consider the effect the monitors will have on sight lines. Will the monitor in the witness box interfere with counsel's or the judge's view of the witness? Will the monitors interfere with the court reporter's view of the witness, which may impair his or her ability to comprehend the evidence of the witness?

In my view, the judiciary must demand that courtrooms have monitors for the judge, counsel and the witness along with a video splitter in order that counsel can use their electronic litigation programs in the courtroom to display documents and create an electronic record. This will improve the efficiency of the court process and thereby reduce the cost of litigation.

III Persuading the Judge to use Summation

When seeking permission to use an electronic litigation support program in the courtroom to display documents and create an electronic record, counsel should urge the judge to consider using a compatible electronic litigation support program on his or her laptop to organize the transcripts and exhibits.

Since the fall of 2002, I have been using Summation on my laptop and have found it extremely helpful in managing the vast amount of evidence I

have received in the *GasTOPS v. MxI* trial. Today I would not go into court without my laptop computer and Summation.

I use Summation to access the transcripts and exhibits I have imported into my laptop, in the courtroom, in my chambers, in airports and at home. When I demonstrate my use of Summation in the *GasTOPS v. MxI* trial to my judicial colleagues each of them, without exception sees the value to the judiciary of using an electronic litigation support program.

During the *GasTOPS v. MxI* trial, I use Summation in the courtroom to:

- receive a Realtime transcript from the court reporter;¹²
- make notes on the Realtime transcripts and assign the note to the issues list I have created within Summation;
- link the references to exhibits in the transcripts to the exhibit images;
- link the past evidence of a witness to his or her present testimony;
- make notes in the column view of the exhibits;
- highlight or otherwise markup that part of the exhibit which I feel is important or to which the witness was referred.

Linking the references to exhibits in the transcripts to the exhibit image will be of great assistance when I review the evidence in preparation for writing my reasons for judgment. Before I commenced to use Summation any attempt to organize the transcripts and exhibits required me to physically locate the exhibit each time I wanted to review the exhibit. In order to review the evidence and exhibits outside the courthouse I had to physically take the exhibits with me. Using Summation, I have an image of all the exhibits stored on my laptop.

IV Summation Elements

(a) Realtime Transcript

In the traditional courtroom in Ontario, the judge and counsel attempt to make written notes of the testimony, which leaves little, if any, time to

¹² David Nash, 48 Wychwood Promenade, Gatineau

record impressions of the testimony or to assign the evidence to one of many issues in the action. The Summation Realtime feature provides counsel and/or the judge with the ability to record his or her comments of the testimony in a note, which is attached to the Realtime transcript being received from the court reporter.

As trials become longer and more complex it is imperative that the trial judge have immediate access to a text transcript in order to organize the evidence as it is received. It is unfair and inefficient to require a trial judge to take notes in the courtroom and then spend a considerable amount of time summarizing his or her notes outside courtroom time. Numerous studies have shown that at least 80% of what we learn, we learn by sight as opposed to hearing. Accordingly, it is imperative that trial judges have a transcript that they can review in order to accurately appreciate the facts upon which their judgment will be rendered. Judges should insist on receiving a Realtime transcript, which will be more accurate and complete than their written notes of the evidence.

Appellate courts require a transcript of the trial evidence in order to review the trial judge's findings or application of the law. It is doubtful that the Court of Appeal would be satisfied with a copy of the judge's handwritten notes. If appellate judges require a transcript of the evidence, trial judges should also be entitled to a Realtime transcript of the evidence. If a Realtime transcript cannot be provided, judges should request an overnight transcript, which can then be imported into Summation.

Litigants are entitled to expect that the trial judge will have an accurate record of their evidence and this can only be achieved by having a written transcript of the evidence.

(b) Searching

Summation allows searches of single words or combination of words. The search can be limited to particular evidence or across all of the evidence. The text of scanned exhibits can be searched if the "Optical Character Recognition" program in Summation has read the exhibits. After completing the search Summation prepares a report of the search results. The report shows the question and answer in which the search term was located. The search report allows the user to drill down into the transcript containing the search term.

During the *GasTOPS v. MxI* trial I use the search feature:

- when a dispute arises in court between counsel concerning prior evidence, to locate and determine the exact words of the witness. This can be accomplished within a few seconds in court and results in shorter arguments, which conserves valuable court time;
- to search the text of the exhibits after I have used the “Optical Character Recognition” program. In a trial such as the one I am hearing where there are 2,646 exhibits to-date, which comprise approximately 42,000-50,000 pages, the ability to search the scanned text of the exhibits is invaluable.

(c) Issues List

This feature is extremely helpful as the judge can create a note, which incorporates a selection of the transcript and assign the note to a pre-determined issue. When organizing the evidence in preparation for writing his or her reasons for judgment the judge can search each issue and be directed to the transcript or transcripts where the issue has been identified.

The creation of an issue list in a short trial with well-defined issues is a simple matter and can usually be created at an early stage of the trial. In longer trials where there are many issues, it may be difficult to identify all of the issues during the trial. The judge may have to wait until he or she hears final submissions before creating a complete issue list and then assigning evidence to the issues.

Counsel should consider exporting their Summation issue list to the judge’s copy of Summation in order that counsel’s issue list will be available to the judge as the evidence is adduced and when the judge prepares his or her reasons for judgment.

(d) The Case Organizer

Most judges follow a pattern when drafting their reasons for judgment. I create a timeline and a witness list and then follow this outline when drafting my reasons:

- a narrative of the pertinent facts, which include the facts as related by the plaintiff witnesses and the defence witnesses;
- the findings of credibility which result in finding of facts upon which the reasons for judgment are based;
- an analysis of the findings of fact, the issues and the law.

The “Case Organizer” within Summation contains a number of tools, which can assist the judge in organizing the evidence in preparation for writing his or her reasons for judgment. “Timelines”, “Chronology of Events” and “People Tables” can be used by the judge to organize the evidence and also by counsel to assist the judge in having a better command of the evidence.

Counsel should consider before the commencement of the trial exporting from their copy of Summation, to the judge’s copy of Summation a “Timeline”, “Chronology of Events” and “People Tables”. The “People Tables” should list the witnesses to be called, and the issues each will address. These tools can provide the judge with an outline of counsel’s case before the evidence is adduced. It is important that the “Timeline”, “Chronology of Events” and the “People Tables” exported to the judge are confined to facts which counsel believes he or she will be able to prove at trial. At the conclusion of the evidentiary phase of the trial and before making submissions, counsel may wish to export to the judge an updated “Timeline”, “Chronology of Events” and “People Tables” which could contain references to all of the evidence.

One of the great challenges that confront counsel in a courtroom is presenting the evidence in chronological order, or presenting all of the evidence relating to a single issue, before moving on to another issue. The difficulty arises when witnesses attest to different segments of the facts of the case, and as a result, it becomes difficult to relate the evidence to an issue or to a timeline. The problem can be further exacerbated by witness availability. Notwithstanding the best efforts of counsel, the evidence when adduced may appear disjointed and as a result the judge may find the evidence difficult to follow.

If counsel provides the judge with an “Issue List”, a “Timeline”, a “Chronology of Events” and “People Tables” before commencing to adduce evidence, such aids will assist the trial judge in appreciating the significance of the evidence as it is presented.

V Submissions

In *GasTOPS v. MxI* counsel have agreed to make their final submissions in an electronic format which will link the references to the evidence in their submissions to the transcripts and the case law references to the complete reported decisions. This will be done in Adobe Acrobat¹³ as opposed to Summation. Counsel might consider suggesting to the judge that he or she use a dual monitor configuration when reviewing the data in Summation and the electronic submissions of counsel.

VI Conclusion

Counsel use an electronic litigation support program in order to have a better command of the evidence they wish to adduce at trial. The use of an electronic litigation support program such as Summation in the courtroom to display documents will make the courtroom more efficient which will reduce litigation costs. If the judge uses a similar electronic litigation support program, it will provide him or her with a greater command of the evidence. In addition, the tools in a program such as Summation will assist counsel in making their evidence more memorable for the judge when the evidence is adduced and when the judge crafts his or her decision.

VII The Need for Judicial Leadership

The use of litigation support programs such as Summation in the courtroom to display exhibits and create an electronic record can reduce the time required to hear the evidence in an action and thereby reduce the costs of the litigation. As the judiciary controls the courtroom process, it is unfair to expect the legal profession to prepare their presentations in an electronic format until the judiciary makes it clear that electronic documents can be displayed in the courtroom and an electronic record maintained. If counsel who wish to use electronic documents are required to also provide hardcopy

¹³ Adobe Systems Incorporated, 345 Park Avenue, San Jose, CA, 95110-2704 USA. www.adobe.com

documents for the judge and/or opposing counsel, it will add to the already high cost of litigation.

Accordingly, the judiciary as a whole must step forward and demand digital technology employed by programs such as Summation be brought into the courtroom to make the litigation process more efficient and affordable for the public.

No longer should judges and lawyers who refuse to take the time to learn how to use digital technology be allowed to control the process and thereby thwart the introduction of cost effective digital technology into the courtrooms.

The justice system must become more efficient if it is to meet the needs of the public. In order to become efficient the judiciary must embrace digital technology, which is employed in almost every other facet of commercial and public life. The judiciary must take the lead in making courtrooms more efficient. If the judiciary refuses to embrace the use of digital technology in the courtroom and courts administration fails to provide the necessary tools to create an electronic environment in the courtroom both the judiciary and courts administration will have failed the public.

August 5, 2005.