

Moving Summation into the Courtroom
and onto the Judge's Dais

I wish to describe my use of Summation and suggest the potential benefits I believe you can reap by moving Summation into the courtroom to display documents and onto the judge's dais where he or she can use Summation to organize the evidence in preparation for writing his or her reasons for judgment.

In early 2002 I was recruited, by the Regional Senior Justice of the East Region, to hear the *GasTops v. MXI* trial in Ottawa, which was scheduled to last four to six months. I suspect I was asked to hear this trial as I was known as a judge who used a laptop in court to take notes and was interested in bringing digital technology into the courtroom.

Prior to arriving in Ottawa to commence this trial in October, 2002 I was told that counsel were using Summation and with the help of Cheryl Curran had scanned approximately 4,000 disclosed documents into Summation. Counsel were proposing to use Summation in the courtroom to display the documents they were seeking to have made exhibits.

For the first twelve months of the trial I took notes on my laptop in Word and each morning counsel would provide me with a CD-ROM containing the documents that had been made exhibits during the previous day's evidence. I would load the images on my laptop and view the exhibits using Internet Explorer. In addition, I was receiving a transcript of the evidence from the court reporter in a Word document approximately two weeks after the evidence was heard in court.

During the spring of 2003 it became apparent to me that this trial was not going to finish in six months' time. I was right on this score as the trial continues today and may not finish until late 2005. As of October 14, 2004 I have sat 191 days and I have admitted into evidence 2,092 exhibits, which I estimate contains 35,000-40,000 pages.

As the number of sitting days increased, without any end in sight and the number of electronic exhibits soared past 750, I became increasingly concerned about the management of the exhibits and the *vive voce* evidence, as I knew that there would come a day when I would have to write a decision.

As a result of my past experience with the Integrated Justice Initiative in Ontario, I was convinced that the use of an electronic document program was a far more efficient environment in which to store and organize evidence in preparation for writing my reasons for judgment than a hard copy environment.

During the fall of 2003, I was at a technology conference in Toronto and by chance met Nicole Swank of Summation Technologies. Within moments she had me interested in using Summation. I remember leaving the Summation booth with the feeling that Summation could be exceedingly helpful in managing the information I was receiving in the *GasTops* trial.

I am not here today to convince you of the value of Summation in organizing a trial for presentation in a courtroom. All of you are probably using Summation or a similar program. I am, however, advocating an extended use of Summation in the courtroom to

display electronic documents as opposed to the traditional hardcopy documents.

One of the many things I have learned as a judge is that if your evidence is not memorable you will not succeed. I was a civil litigator for 25 years spending most of my time in a courtroom. While preparing for a trial I spent little, if any, time considering how I could make the evidence understandable and memorable for the judge. I assumed that the judge would understand all of the evidence if he or she heard it once and would be able to determine which evidence was important. How wrong I was! Judges, like all of us, have difficulty understanding technical evidence the first time they hear it and in appreciating the importance of the evidence unless it is organized within the theory of the case. If you take anything away from my remarks today - I hope it is *that unless the evidence is organized within the theory of your case it will not be memorable*. If the evidence is not memorable you have little chance of success, which is the goal of all litigation.

In my view, Summation can be used not only to ensure a complete presentation of the evidence, but also to display electronic documents in the courtroom. If a judge uses Summation on his or her laptop, he or she will be able to organize the evidence, whether *vive voce* or documentary, and the result will be that the evidence becomes memorable. If the evidence is memorable, it will play an important role when the judge begins to craft his or her decision.

There are a number of obstacles to overcome if you wish to use Summation in the courtroom for the presentation of evidence and to have the judge use Summation to organize the evidence.

The challenges for you in achieving these goals will involve:

- The lawyers
- The courtroom
- The judge

The Lawyers

Although most law offices use computer programs for accounting and word processing, and perhaps even for document management, very few lawyers in Ontario bring their laptops into 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 their index of disclosed documents.

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

It will be up to you to convince the lawyer for whom you work that there is an advantage to using such a program, not only in organizing the evidence but also in displaying the evidence (i.e. documents and transcripts in an electronic format). There can be little doubt that the use of a document management program will:

- Eliminate lost or misplaced documents in your office and in the courtroom.
- Eliminate photocopying costs.
- Eliminate storage charges.
- Allow documents to be sorted.
- Allow for electronic disclosure.

- Allow for the text of documents to be searched using the Optical Character Reading feature.

These features, even in small cases, will reduce preparation time and thereby reduce litigation costs for the clients.

Assuming you can convince senior counsel to use Summation for pretrial disclosure and at trial to display documents in an electronic format, what do you do if opposing counsel takes the position that he or she does not use a computer and insists that all documents be disclosed in hard copy? My suggestion is that you make disclosure in an electronic format with instructions on how to print the documents and then make arrangements to meet with a judge to determine how disclosure is to be made at the pre-trial and trial stage.

One of the strongest arguments you can make before the judge is that over 93% of all documents are initially created and stored in an electronic format and over 30% of those documents are never printed, and if you are required to make disclosure in hard copy - you will simply print the documents. As a result, opposing counsel will be unable to verify when the document was created and last modified. This argument highlights to the judge that even if he or she wishes to work in a hard copy environment, it may be necessary to use the electronic copy of the documents in the courtroom if there is a dispute concerning the date of creation, date of modification or authorship of the document.

I would also suggest that you be prepared to demonstrate to the judge the increased costs to the client if hard copy documents are used. Judges tend to be sensitive to the high costs of litigation to the

clients. In the trial I am hearing, 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 catalogue the copies!

Some judges may be reluctant to order disclosure of documents in an electronic format and allow the use of such electronic documents at trial as they are not comfortable using a computer and are afraid that they will be unable to judge in an electronic environment.

Your task will be 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 Summation - notwithstanding he or she is not a touch typist.

If the pre-trial judge agrees to the use of electronic documents in disclosure or on pre-trial motions it will be difficult for the trial judge to refuse the use of such electronic documents at trial.

It is helpful to have a “champion” within the judiciary for the use of electronic technology. A “champion” within the judiciary will promote the use of electronic documents in the courtroom. In Ottawa and London I have, with the help of Nicole Swank of Summation, Cheryl Curran of Commonwealth Legal, and [other parties] - arranged for six judges in each center to receive a copy of Summation for his or her laptop along with training on the use of Summation.

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 a paperless courtroom. This was an enormous undertaking as there are 52 judicial centers in Ontario and over 750 judges of differing jurisdictions. 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, as they have in the past, to use hard copy exhibits notwithstanding the additional cost to the litigants.

As a member for five years of the Judicial Advisory Committee of the Superior Court of Ontario, which advised the Chief Justice of Ontario on the introduction of electronic technology into the judicial system, I was then and remain today a strong proponent of the use of electronic documents in the courtroom.

Prior to the commencement of the *GasTops* trial there had been a few trials in Ontario wherein counsel had agreed prior to the commencement of the trial on the documents that would be made exhibits and then had the documents saved on a CD-ROM and made available to the presiding judge.

The *GasTops* trial is different in the sense that over 4,000 documents had been disclosed but counsel had not yet agreed on which documents they would attempt to have made exhibits. It is only after I see a document on my monitor that I rule if the document can be entered into the record as an exhibit.

As a result of the budget constraints in Ontario we could not expect to receive any financial assistance from Courts Administration in setting up a courtroom that would facilitate the use of Summation to display electronic documents to counsel, the witness and the judge.

I asked counsel to attend in Courtroom 32 in Ottawa for two days prior to the commencement of the trial in order to discuss and set up different configurations for our courtroom to display the electronic documents.

It is imperative that the trial judge has 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.

Firstly, we looked at using a large screen and projection system. One counsel was convinced that this was the appropriate manner in which to show documents. After setting up this system we all realized that the sound of the projector would be distracting and in order to place the screen where it would not interfere with site lines in the courtroom, the documents would have to be 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 showing electronic documents. With the help of Cheryl Curran, an I.T. consultant who was present for our practice sessions, and with some encouragement from myself

we agreed on a configuration of our courtroom wherein a video splitter box would be used to power a separate monitor for each counsel, the witness and the Judge. When counsel is examining a witness, he or she simply 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 I rule that the document can be made an exhibit, we simply assign the electronic document, identified by its Begdoc number, a trial Exhibit number. At the same time counsel can assign the document in their copy of Summation the exhibit number.

The next morning counsel provides me with a CD-ROM with the previous day's exhibits, which I load into my copy of Summation. At the same time counsel provides the Clerk of the Court with a CD-ROM with all of the exhibit images in order that there can be a permanent electronic record of the exhibits.

This configuration (i.e. monitors, cabling and video splitter) was achieved at a cost of less than \$1,500.00 (Canadian). Judges, lawyers and Court Administration officials are amazed that we were able to set up an electronic courtroom for less than \$1,500.00. The system is portable and can be set up or taken down in less than 40 minutes.

Counsel, when examining a witness, can display an exhibit, go to a page and highlight a paragraph in less than 5 seconds. If we were working in hardcopy, each counsel, the witness, the judge and the clerk of the court would have a set of hardcopy exhibits filed in binders with tabs. If counsel wished to show a witness an exhibit, opposing counsel, the witness and I would have to locate the binder, the tab, the correct page and then the paragraph. I have no doubt

that to accomplish this would take on average 2-3 minutes. Think of the number of times a binder would be misplaced or incorrectly tabbed - or a party is unable to locate a particular paragraph - or a page in an exhibit that is not numbered; 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 your courtroom for the first time you must consider the effect monitors will have on site 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 understand the evidence of the witness?

The Judiciary

Convincing the judiciary to allow Summation to be used in the courtroom to show electronic documents may be your greatest challenge.

When I was appointed a judge in 1988, there were very few judges using computers in Ontario and only one judge using a computer in the courtroom to take notes. For many years thereafter the vast majority of judges in Ontario appeared to look on computers with disdain, clinging to ancient courtroom traditions. Over the past five or six years I have noticed a subtle changes in the attitude of the judiciary in Ontario to 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 invite counsel to use a computer in the courtroom to display documents.

As I have said earlier if you wish to use electronic documents in the courtroom it is essential that you seek the permission of the trial judge prior to the commencement of trial unless you are appearing before a “champion” of digital technology in the courtroom. The worst possible course of action 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 and if you have not prepared hardcopy exhibits - you are in big trouble!

The pre-trial conference with the judge (when you are attempting to obtain permission to use electronic documents in the courtroom) is a meeting for lead counsel to attend. Never send a junior counsel alone to this meeting. It is imperative that you be fully prepared for this meeting and, if possible, I would suggest that you attempt to conduct a demonstration in the courtroom to show the judge how the documents will be displayed. I would also recommend that you have an I.T. person, who is familiar with the technology you wish to use, in attendance to immediately answer any questions raised by the judge.

Remember - it is easy for the trial judge to say, “no we will conduct the trial as we always have in the past” which means using hardcopy documents. Before he or she makes such a statement you should explain to the judge why you are making this request and why he or she should accede to your request. Be prepared to demonstrate that electronic documents:

- Reduce costs to the litigants.

- Reduce the time needed to locate and display exhibits.
- Allow all participants in the litigation process to be directed to the same location in an electronic document at the same time.
- That the overwhelming majority of all documents are initially created in an electronic format and if questions arise concerning the authenticity of the documents it may be necessary to view the documents in an electronic environment in order to see the hidden data. In order to make this point noteworthy I would suggest you show the judge a printed Word document and then show him or her the electronic copy and demonstrate how the date or content can be modified. Demonstrate the information that can be accessed in the “properties” of an electronic document (i.e. creation date; author; date last modified and when printed).
- If evidence is taken via video conferencing, the electronic documents can be shown to a witness on a laptop in the remote location via a secure Internet connection.

Assuming that the assigned judge is prepared to allow the use of an electronic environment in his or her courtroom to display documents, you should, during your pre-trial conference, discuss with the judge and opposing counsel the following:

- How the electronic documents will be displayed (i.e. projector or monitors located on the dais, witness box and counsel table).

- The effect that monitors will have on site lines.
- Developing a protocol for making an electronic document an exhibit.

In my view, one of the most important discussions you will have with the assigned judge is to explain to him or her that from time to time computers crash or programs freeze; and if this happens, a short adjournment will be required. If you say nothing and your computer crashes during the trial, you run the risk that the judge will become frustrated and demand that you switch to hard copy. It is also imperative that you assure the judge that all electronic documents are backed up and there is no chance of the documents being lost if a computer crashes.

Getting Summation onto the Dais

I would also suggest that when you are seeking permission to use Summation in the courtroom to display documents you suggest to the judge that he or she should consider using Summation on his or her laptop to assist him or her organize the transcripts and exhibits. Most judges are receptive to any help they can get in dealing with the exhibits and evidence at the end of the trial. I am sure you could convince Summation Technologies to provide the judiciary with a copy of Summation at an attractive price. Since the fall of 2003, I have been using Summation on my laptop. If my laptop crashed I would adjourn the trial until my computer is back in working order and I am able to use Summation. That is how valuable Summation is to me.

I use Summation in the courtroom, in my chambers, in my apartment in Ottawa, in airports, on each weekend and at home. I

have become what I refer to as a “champion” of the Summation program within the judiciary. When I demonstrate my use of Summation in the *GasTops* trial to my judicial friends I wish I had the exclusive rights to sell Summation in Canada as each of them without exception wants a copy of Summation.

During the trial, I use Summation:

- To receive a real time transcript from the court reporter.
- To make notes on the real time transcripts and assign the note to the issues list I have created.
- To link the references in the transcript to the exhibit image.
- To link the past evidence of a witness to his or her present testimony.
- To make notes in the column view of the exhibits.
- To highlight the exhibit or otherwise mark the exhibit using the markup bar.

Making notes and creating links will be invaluable to me when I come to writing my reasons for judgment. Before using Summation, any attempt by me to organize the transcripts and exhibits required me to physically locate the exhibit. In order to do this at home, I had to take the exhibits home with me. Imagine carting 2,092 exhibits on the plane every weekend.

Searching

This may be the most valuable feature of Summation to the judiciary. Again, judges to whom I show the searching capabilities of Summation and the search reports, are astounded at the information

that can be obtained in such a report including the ability to drill down into the transcripts.

During the *GasTops* trial I use the search feature:

- During cross-examination or re-examination when a dispute arises between counsel concerning what a prior witness has said I search the transcripts to determine exactly what the witness stated. This can be accomplished within Summation in a few seconds and results in shorter arguments, which saves valuable court time.
- During the evidence to ascertain if a witness has given inconsistent evidence at an earlier time in the trial or in an exhibit.
- To search the text of the exhibits after I have used the Optical Character Reader program. In a trial such as the one I am hearing where there are 2,092 exhibits to-date, which comprise at least 35,000 pages, the ability to search the text of the exhibits is invaluable.

Issues

This feature is extremely valuable to a judge as it allows him or her to sort the evidence as it is being received. Even if a judge does not touch type, this feature is valuable as the judge can make notes by incorporating the transcript into the note and then assign the note to an issue.

The creation of an issue list in a short trial with well-defined issues is a simple matter. It becomes more complex in a longer trial, which may have many issues, which are difficult to identify during the

trial. The judge may have to wait until he or she hears final submissions before creating an issue list and then assigning evidence to an issue. Even if the creation of an issue list must await final arguments the creation of such a list will be an indispensable tool for the judiciary.

The Case Organizer

When I draft my reasons for judgment I create a time line and a witness list and then follow this outline:

- A narrative of the pertinent facts, which include the facts as related by the plaintiff witnesses and the defence witnesses.
- The findings of credibility. It is imperative if there are disputed facts that I make findings of fact based on credibility and I set out in detail why I believe or disbelieve disputed evidence. It is extremely helpful to use Summation to identify credibility issues and be able to put them in the case organizer.
- The Analysis of the Findings of Facts, the Issues and the Law.

The judge can use the Case Organizer as the trial progresses to start organizing the evidence and the issues for inclusion in his or her reasons for judgment.

In the trial I am presently hearing I have told counsel that instead of oral submissions at the end of the evidentiary phase of the trial they will be making written submissions, which I hope can be put into an electronic format with links to the transcripts, exhibits and law I am referred to in the submissions.

When I commence to write my reasons for judgment I will use a dual monitor configuration with Summation on one monitor while I create my reasons on another monitor. I was at a law office in London a few months ago and every lawyer was using a dual monitor configuration with Summation on one monitor and another program on the second monitor.

The Challenge

I know that all of you are comfortable using Summation and appreciate its value within a law office when used to create an electronic file for an action from the first day the client comes into the office. Summation is also valuable to ensure that all of the evidence you wish to adduce is presented in court. Summation also allows counsel to prepare for cross-examination.

But why should you care, if I, as a judge, allow Summation to be used in the courtroom to display documents and use Summation on my dais or in my chambers? Will you reap any benefit?

Counsel use Summation to organize the evidence they wish to present in court and to prepare for cross-examination. This is what I refer to as the traditional use of Summation.

If your focus is simply on the presentation of all of the evidence you have stored in Summation, you may overlook the need to ensure the evidence you adduce is organized within the theory of your case, which will make it memorable for the judge. In my view, the traditional use of Summation does not necessarily make the evidence memorable for the judge, which is essential if your client is to succeed in the litigation. Unless the evidence is memorable to the

judge, the use of Summation in litigation will not improve your chances of success.

The use of Summation in the courtroom to display electronic documents will result in substantial savings to your client by reducing preparation costs and courtroom time. In addition, the use of electronic documents in the courtroom will allow timely access to the electronic exhibits which will allow counsel to better organize and demonstrate the importance of such exhibits within the theory of their case - and as a result, the evidence will be more memorable for the judge during such presentation.

One of the great challenges that confront counsel in a courtroom is presenting the evidence in chronological order or in a manner that relates the evidence to the issues before the court. The difficulty arises when differing 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 this occurs it is imperative that you assist the judge in organizing the evidence in order to make the evidence memorable.

I would suggest that if the judge is using Summation on his or her computer - that you make a detailed issue list prior to the commencement of the trial and export the list to the judge's computer; and while the evidence is being adduced - inform the judge which issue the evidence relates to. I would find it exceedingly helpful to receive an issue list from counsel prior to the commencement of

the trial. In addition, the issue list would be available to the judge when he or she writes his or her reasons for judgment.

If the judge is using Summation on his or her computer, I would recommend that you assist the judge in organizing the evidence during your submission by providing the judge with written instructions on how he or she can search the transcripts or exhibits to find the evidence that supports the theory of your case. When you relate a submission to a particular witness or an exhibit, give the judge instructions on the search he or she should conduct to find the passage in the transcripts or the particular paragraph in the exhibit. These instructions will be exceedingly helpful to the judge when he or she commences to write his or her reasons for judgment and will make your submission memorable.

In my view, if you do not use Summation in the courtroom to display documents and convince the judge to use Summation on his or her laptop, you will not be using Summation to its full potential and more importantly you will be missing an opportunity to make the evidence more memorable for the judge and thereby enhancing your client's chances of succeeding in the action.

If you convince a judge to allow you to display documents in an electronic environment, I have no doubt that you will be able to convince the judge to use Summation on his or her laptop to review the transcripts and exhibits. I am sure that once a judge uses Summation to review the transcripts and exhibits, he or she will insist that electronic documents be used in his or her courtroom in the future. In addition, you can be rest assured that a judicial user of Summation will be a "champion" of Summation amongst the other

judges in his or her judicial district. Soon other judges will agree to and eventually insist on the use of electronic documents in their courtroom.

As a result counsel will be assured that they can start organizing litigation files in an electronic program such as Summation without having to make final preparations for trial in hardcopy. This will be a financial savings to your client and to your firm.

In my view, the Summation team - with input from the judiciary - must create a user-friendly book of instructions for the judiciary. The instructions must set out detailing the steps to be taken for each task that will assist the judiciary in organizing the evidence and issues in preparation for writing the judgment. These instructions must be simple, clear and memorable. It is important to remember that most judges - although able to use the Internet and e-mail - are usually intimidated by new software programs.

One of the difficulties I have seen in Ontario is that the judges whom we have trained to use Summation have not had an opportunity to use Summation in a trial and I am afraid they will have forgotten the valuable instructions given to them by Cheryl Curran and [others].

In closing, if you are able to convince the judiciary to use Summation on their laptops, the legal profession will follow the lead of the judiciary and Summation will become a program widely used by the judiciary and the legal profession in the courtroom.

Mr. Justice B. Thomas Granger
Superior Court of Justice – Ontario
Courthouse
80 Dundas Street, 12th Floor, Unit “K”
London, Ontario Canada

N6A 6B2
Telephone: 519-660-2291
Email: thomas.granger@jus.gov.on.ca