ARTICLE:

Case commentary on *Laushway v Messervey*, 2014 NSCA 7: 'Old evidence law dogs, new technology tricks'

By **Patricia Mitchell and Jennifer Taylor**

Introduction

It is often said that 'all relevant evidence is admissible.'[1] But as technology develops, this evidence may look very different from the oral testimony of a witness on the stand, or the paper documents that the witness has produced. How can the law keep up?

The answer is simple: By applying basic principles to new technology. The decision of the Nova Scotia Court of Appeal in *Laushway v Messervey* demonstrates this point.[2]

Laushway was novel because it was the first time the production of metadata that was addressed by a court in Canada. The metadata issue arrived at the Court of Appeal after the defendants successfully moved for a production order in the Supreme Court of Nova Scotia. The Court of Appeal relied on traditional principles of evidence law – including relevance – to conclude that the defendant was entitled to production of certain metadata from the plaintiff's computer, after balancing the defendant's right to disclosure against protection of the plaintiff's privacy.

Background facts and procedural history

Laushway was a personal injury case – not surprising, as personal injury cases are often a flashpoint in the clash between law, technology, and privacy. The plaintiff was injured in a motor vehicle accident. As a result of his injuries, the plaintiff said, he could no longer spend sufficient time at his computer to run his online health product business. He claimed damages for loss of income and loss of earning capacity. Pre-accident, the plaintiff said he spent about 12-15 hours each day on his computer, working. Post-accident, the plaintiff testified that he was down to about 2-3 hours online a day, including personal internet use, which dramatically affected his business.

The defendants took issue with this part of the claim. They brought a production motion, seeking the metadata from the plaintiff's computer hard drive. The defendants had retained an expert who would perform a forensic analysis, essentially checking to see if the plaintiff's claims about changes in his internet use were borne out by the metadata. Justice Robertson of the Supreme Court of Nova Scotia (the superior trial court in the province) granted the order, but attached detailed conditions. The plaintiff appealed, which led to the decision currently under discussion.

Review of Court of Appeal decision

Three preliminary points must be made, to place the metadata issue in context.

First, to quote Justice Saunders, 'A logical place to begin the inquiry is to ask oneself "what is metadata?"'According to the defendants' expert, it should be defined 'as data providing dates, data authorship, and placement of data and sometimes purpose of the data.'

Second, there is a presumption of full disclosure in Nova Scotia – including the full disclosure of relevant 'electronic information.' The court noted that Nova Scotia's rules of court were 'written with the intention that they will keep pace with the rapid advances of technology and every day commerce.'

Third, the metadata at issue in this case met the definition of 'electronic information' in the rules. Nova Scotia Civil Procedure Rule 14.02 defines 'electronic information':

> 'electronic information' means a digital record that is perceived with the assistance of a computer as a text, spreadsheet, image, sound, or other intelligible thing and it includes metadata associated with the record and a record produced by a computer processing data, and all of the following are examples of electronic information:

[1] See e.g. *R v Abbey*, [1982] 2 SCR 24 at 40.
[2] *Laushway v Messervey*, 2014 NSCA 7.

> (i) an e-mail, including an attachment and the metadata in the header fields showing such information as the message's history and information about a blind copy,
>
> (ii) a word processing file, including the metadata such as metadata showing creation date, modification date, access date, printing information, and the pre-edit data from earlier drafts,
>
> (iii) a sound file including the metadata, such as the date of recording,
>
> (iv) new information to be produced by a database capable of processing its data so as to produce the information;

Justice Saunders rejected the plaintiff's argument that metadata was only producible if it was associated with another electronic record, accepting that metadata itself could be considered 'electronic information.' It was, in this case.

The issue then became what principles to apply to the admissibility of metadata. Recall the general rule that all relevant evidence is admissible. According to Justice Saunders, the 'overarching question' was whether the metadata were relevant – meaning, whether the information that could be revealed by the metadata was sufficiently linked to the issues in the litigation. 'Relevance' in Nova Scotia is defined using a 'trial relevance' standard, the idea being that the judge hearing a production motion must 'imagine herself in the shoes of the trial judge' in order to decide whether the material sought is sufficiently related to the issues in the case.

The test is one of common sense:

> [61] It is axiomatic that deciding whether something is 'relevant' involves an inquiry into the connection or link between people, events or things. Relevance cannot be determined as if it were contained in some kind of pristine, sealed vacuum. One is always expected to ask 'relevant to whom? Or to what?'

The metadata met the test, on the facts of the case:

> [57] The plaintiff has put his computer use squarely in issue. That is how he earns his income and he blames the defendants for causing that significant financial loss. Based on the circumstances in this case there is a clear, direct link between the hours Mr. Laushway says he spent at his computer, and his income as a salesman selling health products on line. That is what makes this information relevant. The respondents should be entitled to access that evidence in order to test the extent and reliability of the appellant's claim.

This common sense connection between the evidence at issue (the metadata from the plaintiff's computer) and the issues in the case (the plaintiff's loss of income claim, when his business was run from his computer) is not based on any new principles of law. It is based on the same conception of relevance that the common law has applied for decades. Although Nova Scotia's rules of court have been tweaked as technology has evolved, the fundamentals have stayed the same.

This is evident in the court's list of 10 guiding principles for courts, at [86], 'considering whether or not to grant production orders in cases like this one,' reproduced here:

> 1. Connection: What is the nature of the claim and how do the issues and circumstances relate to the information sought to be produced?
>
> 2. Proximity: How close is the connection between the sought-after information, and the matters that are in dispute? Demonstrating that there is a close connection would weigh in favour of its compelled disclosure; whereas a distant connection would weigh against its forced production;
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> 3. Discoverability: What are the prospects that the sought-after information will be discoverable in the ordered search? A reasonable prospect or chance that it can be discovered will weigh in favour of its compelled disclosure.
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> 4. Reliability: What are the prospects that if the sought-after information is discovered, the data will be reliable (for example, has not

been adulterated by other unidentified non-party users)?

5. Proportionality: Will the anticipated time and expense required to discover the sought-after information be reasonable having regard to the importance of the sought-after information to the issues in dispute?

6. Alternative Measures: Are there other, less intrusive means available to the applicant, to obtain the sought-after information?

7. Privacy: What safeguards have been put in place to ensure that the legitimate privacy interests of anyone affected by the sought-after order will be protected?

8. Balancing: What is the result when one weighs the privacy interests of the individual; the public interest in the search for truth; fairness to the litigants who have engaged the court's process; and the court's responsibility to ensure effective management of time and resources?

9. Objectivity: Will the proposed analysis of the information be conducted by an independent and duly qualified third party expert?

10. Limits: What terms and conditions ought to be contained in the production order to achieve the object of the Rules which is to ensure the just, speedy and inexpensive determination of every proceeding?

None of these are new ideas. Instead, they demonstrate the continued application of old principles – and common sense analysis – to new technologies and types of electronic information.

Life after Laushway

Laushway has sparked commentary and lots of interest from the legal community, but thus far has not been cited in any cases outside of Nova Scotia. This is curious. While it may be because the rules of court can vary greatly from province to province, one would have thought the principled framework more widely applicable.

The beauty of the framework is that it can be transposed to any new technology or communication method; it does not have to change with the technology. Otherwise, if the legal test for the admissibility and relevance of evidence was particularized to the technology or social medium at issue, the test itself would quickly become irrelevant and obsolete.

Perhaps the next frontier for the application of these principles will be wearable technology, items that track and store data about users' daily habits, from exercising to sleeping. Lawyers, especially in personal injury cases, are starting to take notice of the possible admissibility of this kind of data. Although the bigger issue here may well be reliability rather than relevance, the Laushway principles could still guide the discussion.

As long as the governing principles remain at a high level, they can be adapted to different facts in the future. However, even though the same general principles (e.g. reliability, proportionality, etc.) should guide the analysis, the court can craft case-specific terms and conditions that are more attuned to the idiosyncrasies of the technology. For example, in Laushway itself, the court order specified exactly how the defendants' experts were to pull and analyze the metadata from the hard drive, and set up appropriate limits to ensure there were no unwarranted incursions into irrelevant data – e.g. the metadata would have to summarize 'internet usage history by website, with each non-business related website identified by a pseudonym.'

Such limits are important, because as technology evolves, so do concerns about how to protect the technology user's privacy. The court in Laushway certainly recognized the need for balance. However, once again, it is not a new kind of balancing to weigh a request for information against privacy-based resistance, but instead a recurring theme in the law of evidence (the Court of Appeal cited the Supreme Court of Canada's 1997 decision in *M (A) v Ryan*, [1997] 1 SCR 157, which dealt with a defendant's request for production of the plaintiff's communications with her psychiatrist).

Even the idea that the law of evidence is adaptable is not new. Consider Justice Linden's eloquent explanation in a 1978 decision on applying the Canada Evidence Act to a computer print-out:

> I hold that a computer print-out is a copy of a record kept by a financial institution. The types of records that have been kept have varied through the ages. Human beings have used stone tablets, papyrus, quill pen entries

> in dusty old books, typewritten material on paper, primitive mechanical devices and now sophisticated electronic computer systems.
>
> ...
>
> ...
>
> Though the technology changes, the underlying principles are the same.[3]

Tablets that used to be made of stone now come in the form of mini-computers. But the law of evidence is just as adaptable, if not as fast-moving, as technology. Laushway is further proof that the old legal principles can be applied to technology's new tricks.

Patricia Mitchell is a partner in the advocacy group at Stewart McKelvey in Halifax, NS. She received her LLB from Dalhousie Law School in 1996. Her practice focuses mainly on the defence personal injury and disability claims and products liability class actions.

Jennifer Taylor is a research lawyer at Stewart McKelvey in Halifax, NS. She received her legal education at Dalhousie University (LLB, 2008) and the University of Cambridge, Trinity Hall (LLM, 2011). Before joining Stewart McKelvey, she spent two years as a Law Clerk at the Nova Scotia Court of Appeal.

[3] *R v McMullen*, 1978 CarswellOnt 58 (SC) at [6] – [7].