

# KEEPING CURRENT

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## Court grapples with fake electronic evidence and Zoom imposter witness

By James R.G. Cook

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

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As we discussed in a recent [blog](#), technological advances have resulted in a digital revolution in the justice system, but these same technologies have opened up serious concerns about the integrity of the process. Electronic evidence is subject to manipulation, as is the testimony – or even identity – of witnesses appearing remotely.

A recent decision of the Ontario Superior Court of Justice, specifically addressed the perils of having to deal with “fake news” in the form of spoofed emails and electronic documents, and the disqualification of a witness appearing via Zoom who was not whom a litigant asserted him to be: *Lenihan v. Shankar*, [2021 ONSC 330 \(CanLII\)](#).

The decision was the culmination of a bitterly litigated custody, access and mobility dispute between the parents of a toddler whose father lived in the United States, but whose mother had moved to Ontario shortly after their marriage and before their daughter's birth. The mother obtained permanent residency status in Canada and had taken steps to try and keep her daughter away from her American father.

According to the decision, every attempt that the father made personally or through the Ontario courts to have knowledge of, and to build a relationship with his daughter was met with “subterfuge, amplified allegations of abuse and wrongdoing, or silence.” What began as a request for access to information and a parenting schedule, shifted during the course of litigation to a determination of whether a young child could have any meaningful relationship with her father and her paternal grandparents while in her mother's care.

At the time of a four-week trial before the Honourable Madam Justice McGee in November, 2020, which involved tens of thousands of documents, it was abundantly clear that there was no line that the mother would not cross. By that point, the mother had asserted non-existent court orders to professionals and ignored those orders which did exist; falsified a paternity test; forged a sperm donor agreement; and created sham email exchanges with the father which caused her trial counsel to immediately withdraw from the record upon realizing their unwitting participation in presenting false evidence to the court.

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The mother then left Canada for India in the midst of the trial without saying goodbye to the daughter for whom she was seeking custody. She participated via Zoom thereafter.

The mother called a witness on Zoom who was ultimately disqualified when it became clear to Justice McGee that he was not whom he was presented to be. Notwithstanding that he was purported to be the daughter's real father, the witness had "the appearance of a student" and read answers to prepared questions. During cross-examination he looked at his phone while the mother was on her own phone or outside the view of the camera. When Justice McGee asked the mother to step into the frame of the camera, the witness froze his screen and appeared no more.

Another witness, for whom a will-say statement had been produced by the mother, confirmed that she had in fact never met or spoken with the mother or any lawyer on her behalf, and that 11 pages of a purportedly notarized statement was completely false and her signature forged thereon.

The father was successful at trial and obtained custody of his daughter. Justice McGee [awarded](#) costs to the father of \$438,188.77.

While the case is an egregious example of a litigant having utter disregard for the truth and integrity of the judicial process, the decision provides a comprehensive [discussion](#) of the requirements for admissibility and authenticity of "electronic documents" adduced as evidence pursuant to the common law and the Ontario [Evidence Act](#). The court's focus on the admissibility and proof of authenticity of electronic evidence was necessary due to the disputed versions of text messages, emails and other electronic records.

With regard to text messages, the father tendered a complete record of all text messages exchanged between the parties and testified how he had exported the messages from his phone into a printable format using an application called "GIIApps SMSShare 2". While the mother argued that an expert in forensic authentication of electronic messages was necessary to establish authenticity, McGee J. noted that the Court of Appeal had previously determined that expert evidence from a forensic examiner was not required to authenticate a text message: *R. v. C. B.*, [2019 ONCA 380](#) paras. [77-78](#). Accordingly, the husband's evidence, and the overall patterns of the evidence as a whole, was sufficient to establish that the text messages he adduced as evidence were authentic.

As evidence in support of her case, the mother tendered emails that were purportedly sent by the father from a gmail.com account which he denied having authored. Justice McGee reviewed the emails and determined them to be inauthentic, namely that they were *not* what they appeared to be. In that regard, the emails were from an account which the father testified he had never used; they were written in a style inconsistent with his other communications; and they appeared to have been printed from another account which the mother admittedly owned. Notwithstanding that they were inauthentic, McGee J. admitted the emails into evidence as being probative of the mother's efforts to damage the father's character. As set out in [R. v. C. B.](#), an inauthentic communication may be relevant if it is tendered as bogus.

Further electronic documents adduced by the mother, including "Our Family Wizard" logs and Instagram postings, were determined to have been manufactured by the mother, who created fake accounts in the father's name.

After reviewing the evidentiary issues, Justice McGee stated that while the court transitions to a fully digital platform, the trial was a “stark reminder of the potential for the manipulation and misuse of electronic evidence.”

The decision demonstrates the importance of saving all electronic communications and other documents in a reliable electronic format and being able to explain to a court how the documents have been preserved and presented as authentic evidence for trial. The possibility of fake electronic evidence and perhaps even fake witnesses appearing remotely via Zoom must be considered as potential issues in high conflict litigation.

In particular, Her Honour addressed the concept of “spoofed emails,” which is when the email address in the “from” field is not actually that of the sender. This manipulation of evidence is of particular concern as potentially any electronic medium can be spoofed: texts, emails, postings to social media, and even messaging through a reputable software program specifically designed to provide secure communications can be manipulated. The potential for “deepfake” videos and doctored voice recording raise similar concerns.

McGee J. noted that callers are now able to change how their voice sounds, to evade a blocked number or to pretend to be a person or institution with whom their target was familiar as a result of advances in mobile apps, websites, forwarding services and other technologies. In the case at hand, it was noteworthy that the mother’s “spoofing” was not done to elicit information or trick the target, but to deliberately damage the other parent’s credibility and to gain litigation advantage.

The decision’s concluding paragraphs outline the nature of the court’s concerns:

254. Fake electronic evidence has the potential to open up a whole new battleground in high conflict family law litigation, and it poses specific challenges for Courts. Generally, email and social media protocols have no internal mechanism for authentication, and the low threshold in the [Evidence Act](#) that requires only some evidence: direct and/or circumstantial that the thing “is what it appears to be;” can make determinations highly contextual.

255. In a digital landscape, spoofing is the new “catch-me-if-you-can” game of credibility.

256. I urge lawyers, family service providers and institutions to be on guard, and to be part of a better way forward. Courts cannot do this work alone, and the work must be done well. High conflict litigation not only damages kids and diminishes parents; it weakens society as a whole, for generations to come.

In the case at hand, the mother’s lawyers immediately withdrew from her representation as was appropriate once it was apparent she had created the fake electronic evidence introduced at trial. Counsel are obligated by their professional obligations to the court to not present false evidence and accordingly have a “gatekeeper” function to ensure that their own clients are not presenting fake electronic evidence. Pursuant to Ontario’s [Rules of Professional Conduct](#), a lawyer shall not knowingly attempt to deceive a court by “offering false evidence, misstating facts or law, presenting or relying upon a false or



deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct.” Self-represented litigants, or litigants who are sufficiently motivated without regard for the truth or professional conduct obligations, may not abide by such rules. One hopes that these situations are extremely rare.

### **Contact us**

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **James Cook** at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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