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The Probative Value of Technological Evidence

By: Lisa Silver

Case Commented On: *R v Didechko*, 2016 ABQB 376 (CanLII)

"After a while circumstantial evidence can be overwhelming!" remarked Mister Justice Germain in the recent Alberta Queen's Bench decision, *R v Didechko,* (2016 ABQB 376, para 86). In this case, Justice Germain infers guilt on charges of failing to report an accident where death ensues pursuant to s. 252(1.3) and obstruct justice pursuant to s. 139(2) from the circumstantial technological evidence advanced by the Crown prosecutor. The use of such technological evidence, global positioning or GPS and telecommunications cell tower usage, is not unique. Rather what is singular is the evidential purpose for which it is proffered by the Crown as the only evidence available to establish the required factual connection between the accused and the crime. This case is a portent of the future as technological advancements make it possible, and necessary, to use such technological evidence for the investigation and successful prosecution of crime. *Didechko* is a persuasive example of a "smart" prosecution wherein the Crown utilizes all the evidentiary tools available to create a cohesive and, ultimately, unassailable prosecution. It is also a wake-up call for all those in the legal system to be mindful of the potential effects of technological advances in building a legally cogent case.

In order to appreciate the intelligence of this prosecution, we must review the facts as potential evidence at trial. At the core, *Didechko* is factually simple. In the early morning hours of October 14, 2012, the eighteen-year-old victim, Faith Jackson, is hit by a motor vehicle. Two firefighters, who by happenstance were nearby when the collision occurred and observed the event, provide immediate assistance but to no avail as Ms. Jackson soon succumbs to her injuries at the hospital. Later that day, the police find a damaged motor vehicle at the side of a road. Using the vehicle identification number, the police can easily establish ownership by a car dealership. Thus far, the investigation uncovers facts which, at trial, can be easily established through witnesses (i.e. the manager of the dealership) and/or documentary evidence. These facts, when tendered into evidence by the Crown, are an example of direct evidence, which, if believed, resolves an issue without any drawing of inferences by the trier of fact. Typically, direct evidence is given by eyewitnesses to an event or issue, such as in this case, the observations of the firefighters who saw the incident unfold.

However, finding a damaged vehicle does not end the matter. In order to establish Mr. Didechko's legal responsibility the Crown must prove, beyond a reasonable doubt, two vital factual connections: that the abandoned vehicle was the vehicle involved in the fatality and if so, that Mr. Didechko was in care and control of that vehicle at the relevant time. There must be a nexus between the prohibited conduct (the unreported collision) and the person accused of the crime. In terms of the first matter of proof, identity of the vehicle, Mr. Didechko's counsel, through an agreed statement of fact filed pursuant to s. 655 of the *Criminal Code*, admitted it was the involved vehicle. That leaves the crucial issue of identity of the driver as the main issue at trial.

Upon further investigation, the facts reveal that at the relevant time, the abandoned and damaged car, which was the dealership's demonstration vehicle, was signed out by Mr. Didechko. This can be proven by both direct evidence and by Mr. Didechko's own admission to the police. But this evidence is still not enough to connect Mr. Didechko to the incident as he reported the vehicle stolen during the relevant time period. In other words, According to Mr. Didechko, he was not in possession of the vehicle when Ms. Jackson was killed. According to his police statement, he was asleep at his father's home at the time of the incident. However, he gave the police a number of contradictory statements regarding when, where, and how the vehicle was taken. There is also evidence, from video recordings and witnesses, that Mr. Didechko attended a number of bars that evening and consumed alcohol. The police now have a possible motive for Mr. Didechko to mislead the investigators regarding his involvement in the hit and run. But how to prove this in court? The direct evidence at hand is not enough to attribute legal responsibility to Mr. Didechko for the fatal collision. It is suspicious but lacks probative value.

A decade ago a Crown prosecutor faced with this dilemma would determine that there was no reasonable likelihood of conviction and withdraw the charges. A decade ago, the police investigators would agree, having exhausted their investigative techniques. But the situation is different now. In *Didechko*, the police dig deeper and access information that normally lies hidden: the technological footprint of a person's daily life. As we make our daily rounds, technology follows us. Our smart phones and computers record our contacts, our thought patterns, and our location. Our cars convey us through the City with technology recording the places we go and the speed at which we do it. This information is there waiting to be mined. In the *Didechko* case, the police mined this information but it is the Crown prosecutor who turned the data into a persuasive narrative and probative evidence of identity.

The Crown thus weaves an overwhelming case by piecing together seemingly disparate evidence, much of which is circumstantial evidence, from which a trier of fact can draw reasonable inferences. The cell phone transmissions provide the location of Mr. Didechko at the relevant time and place, both at and near the scene of the incident and at and near the location where the motor vehicle was abandoned. It establishes the falsity of Mr. Didechko's statement that he was sleeping at his father's home at the time. This evidence ties Mr. Didechko to the vehicle as the vehicle's GPS traces the path of the incident. Evidence of the people he contacts during and after the incident is available through cell phone records, which also connect him to the incident and to the vehicle. For example, Justice Germain draws an inference from a timely conversation between Mr. Didechko and his brother (based on cell phone records) as the vehicle returns to the scene (based on both GPS from the vehicle and cell tower positions) where the fatally injured Faith Jackson lies. Presumably, according to Justice Germain, Mr. Didechko does so in order to assess the state of his jeopardy and the next steps he will take escape criminal liability.

To establish these technological facts, the Crown does not merely rely on the records and data but calls experts to explain GPS and the cell phone system to establish accuracy and reliability of the evidence. It should be mentioned that the defence fully canvasses the admissibility of the technological evidence in a previous application (see *R v Didechko*, 2015 ABQB 642). The Crown then builds the case further by explaining the interplay of these technologies and creating an exhibit mapping the connections between the cell towers and the use of the cell phone and as connected to the positioning of the motor vehicle. Again, weaving the circumstantial evidence into proof beyond a reasonable doubt. A final piece of evidence emanating from a text message sent by Mr. Didechko some two hours after the incident neatly sums up the case: "something bad happened sry" (at para 73). It should finally be noted that this same technology also assists the

accused in his acquittal of dangerous driving causing death pursuant to s. 249(4) as the GPS evidence could not conclusively show he was driving in a manner dangerous to the public.

The use of GPS and cell phone tower evidence at trial is not novel. For instance, GPS evidence is used in *Fisheries Act* prosecutions, such as in *R v Fraser*, 2012 NSPC 55. Such evidence is also used in criminal prosecutions to establish a conspiracy or a common purpose to commit an offence such as in *R v Crawford*, 2013 BCSC 932. It has also been used to assist in assessing the credibility of witnesses in a "he said/she said" sexual assault allegation, such as in *R v Aulakh*, 2012 BCCA 340. Rather, what is novel in the *Didecheko* case is the utilization of this technological evidence as a combined narrative on the ultimate issue of guilt or innocence. Justice Germain at para 30 of the decision suggests that "modern technology has changed the way in which police investigate crime." I would change that sentiment only slightly to suggest that modern technology has significantly changed the legal landscape and we, as members of the legal community, must be ready to embrace it.