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A New Year's Resolution for Civil Practice: New Rules Amendments Nudge Civil Litigation into the Digital Age

On January 1, 2021, significant changes to the *Rules of Civil Procedure* will come into force. The COVID-19 pandemic has materially transformed the day-to-day practice of litigation, and these rule changes are a significant attempt to capture the pragmatism and efficiencies that the pandemic has pushed litigators to adopt to keep their files moving.

The changes can be found in the amending Regulation.

These amendments:

- establish a process to allow a hearing or part of a hearing, a mandatory mediation or an oral examination for discovery to proceed by teleconference or video conference (Rule 1.08);
- authorize an order for any oral examination of a person or witness at trial to proceed by videoconference (Rule 20.05(2)(j.1));
- authorize electronic issuance of any court document that requires issuance (Rule 4.05(1.1));
- require the use of CaseLines to submit filed documents for hearings, pre-trial conferences and case conferences as required by the court (Rule 4.05.3);
- authorize email service without consent or court order for documents that are not required to be served personally or by an alternative to personal service (Rule 16.05(1)(f));
- remove the option of service by fax (Rule 16.05(1)(d) will be revoked);
- align the affidavit requirements with the amendments in O.Reg. 431/20: Administering Oath or Declaration Remotely (Rule 4.06(1)(e));
- remove the requirement to file 3 copies of motion records, facta and transcripts with the Divisional Court where the documents are filed electronically (Rule 61.03);
- clarify processes relating to the preparation and delivery to the court of a draft order (Rule 59.03)

Certain of these changes consolidate the shift to digital ways of performing some steps in the litigation process, such as electronic issuance of court documents and the use of the CaseLines platform to manage document intake in court proceedings. Others sweep away anachronistic practices such as the use of fax machines.

The most notable of these changes is the provision in the new Rule 1.08 providing for steps such as hearings, parts of hearings, mandatory mediations, or oral examinations for discovery, to proceed virtually. This Rule does not apply to proceedings in the Court of Appeal, or to case conferences, which are presumed to be heard by telephone conference unless the Court orders otherwise. The Rule contemplates that a party seeking a hearing or other step in a proceeding that permits or requires the attendance of parties shall, in initiating that step, specify whether it is proposed to be taken in person, by telephone, or by videoconference. In general, it is up to the responding party to object to the method proposed.

Exactly how widely these changes will impact the day-to-day reality of litigation may depend on how the new provisions in Rule 1.08 concerning the use of videoconferencing interact with the cost consequences provided for under the new Rule 57.01(1)(h.1). This new clause contemplates cost consequences where a party unreasonably objected to proceeding by telephone conference or video conference under Rule 1.08.

It is not immediately apparent what criteria will or should be used to assess the reasonableness of an objection to proceeding virtually under Rule 1.08. The specific criteria set out in that new Rule are the only guidance in the amendments to assess what kind of objections might be considered reasonable or unreasonable. They provide at Rule 1.08(6) for the following factors to be considered in determining whether a step in a proceeding should unfold virtually:

- (a) the availability of telephone conference or video conference facilities;
- (b) the general principle that evidence and argument should be presented orally in open court;
- (c) the importance of the evidence to the determination of the issues in the case;
- (d) the effect of a telephone conference or video conference on the court's ability to make findings, including determinations about the credibility of witnesses;
- (e) the importance in the circumstances of the case of observing the demeanour of a witness;
- (f) whether a party, witness or lawyer for a party is unable to attend because of infirmity, illness or any other reason;

- (g) the balance of convenience between any party wishing the telephone conference or video conference and any party or parties opposing; and
- (h) any other relevant matter.

Significantly, with respect to examinations for discovery and mandatory mediations, the Court is to determine the appropriateness of proceeding virtually by assessing only the factors (a), (f), (g) and (h) in the above list. Notably, this excludes the emphasis on hearings of evidence and argument in open court stressed in 1.08(6)(b).

It stands to reason that the narrowing of the factors to be considered in ordering examinations for discovery and mandatory mediations to proceed virtually will make it easier for parties to establish that a party unreasonably objected to proceeding by telephone conference or videoconference in these cases.

More generally, however, it remains to be seen, once life returns to normal, how the stipulations of Rule 1.08 will transform the day-to-day practice of litigation. These new rules do not by any means create a presumption that routine steps (other than case conferences) should proceed other than in person, such that particularly with respect to hearings, the emphasis in subrule 1.08(6)(b) on "the principle" that evidence and argument should be presented orally and in open Court, may drive more motions into the courtroom where one party insists on it.

It is noteworthy as well that the cost consequences identified in the new subrule 57.01(1)(h.1) apply only to parties who unreasonably *object* to proceeding virtually. There is no explicit cost consequence to a party that initiates a routine step and insists that it proceed in person over the objections of another party.

As with all amendments to the rules, how revolutionary they will be will depend on how they are applied. The Rules have long provided that they are to be interpreted liberally "to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits," yet their application has been slow to accommodate the efficiencies that digital tools can bring to litigation. The pandemic, however, has provided an unparalleled opportunity for the Courts and for counsel to re-think established habits and to focus on what really matters. The new Rules amendments are a significant invitation to counsel and the Courts to seize that opportunity.