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Remote Hearings – Some Practical Considerations

In recent weeks, the Ontario Superior Court has begun scheduling certain civil hearings to proceed remotely. The Notice to the Profession released on April 2, 2020 and Regional Practice Directions specifically identify pre-trial conferences as being capable of being heard remotely, particularly when settlement is a real possibility. Divisional Court hearings, case conferences and even some contested motions for class actions and matters on the Commercial List and Estates List may also be held.

Different courts and judges have made different determinations as to whether the consent of all parties is required to proceed by way of remote hearing. The Divisional Court (e.g. *Krizan v Skurdelis*) and Commercial List appear to be inclined to push ahead with previously scheduled hearings, particularly where all materials have already been filed with the court. By contrast, even where permitted under the Notice or applicable Practice Directions, judges may be more inclined to allow adjournments in class actions proceedings or hearings requiring the participation of multiple parties. For example, in *Miller v FSD Pharma Inc*, Justice Morgan rescheduled an early May hearing for a securities class action to be heard over two days in-court in late June, stating “I do not think it appropriate to compel the moving party to proceed under conditions where Plaintiffs’ counsel perceive that they may not be able to present the case as effectively as they would in person.”

Notwithstanding the reluctance by some Courts, the reality is that there will likely be a significant increase in the number of remote hearings proceeding by video and tele-conference. This blog post sets out some tips to make sure they proceed smoothly.

Video and Tele-Conferences

The judge hearing the matter may elect to proceed by providing all parties with a dial-in code for a conference call or a link to a video-conference. However, some Regions will require counsel to make the arrangements and provide the video or tele-conference information to the court.

For hearings proceeding over telephone, parties should be aware that the conference codes provided by the Court may be available to parties in other matters, who could pop in without

warning if there is any overlap in the scheduling of the matters to be heard. Parties also must be prepared to identify themselves by name before speaking to avoid any confusion. Timing and logistics can be difficult if the judge wishes to convene break-out sessions.

Some judges have also received training on Zoom, or may be open to using other video-conferencing platforms. The benefit of proceeding over video-conference is, of course, the ability to see the speaker and watch for any reactions from the decision-maker. Some video-conference platforms also have the ability to quickly and easily convene break-out rooms, which could conceivably allow the judge to caucus independently with each party, with counsel alone, or with everyone all together in order to facilitate settlement discussions.

For video conferences, counsel should be careful to appear in business attire. Some judges (although not in Ontario) have complained about casual dress extending to pajamas and bathing suits. Most platforms allow participants to blur or replace their backgrounds in order to avoid visual distractions. Participants should also be sure to use the “mute” button when they are not speaking.

Some platforms also let participants record the video-conference, either as a video or in transcript format. Counsel who are able to do so should consider offering to provide the court and other parties with these recordings as a courtesy. Be aware that the Courts may also be recording the hearings (see for example, the Endorsements of Justice Myers in *Oppong v Desoro Holdings Inc* and *Ali v Tariq*).

Increasing concerns are being raised about privacy and security concerns with respect to Zoom. Counsel may wish to canvass with the judge and other parties whether they would be willing to use alternative video-conferencing platforms, such as Microsoft Teams or Webex. This may mean sacrificing some of the features of Zoom (like break-out rooms), but straight-forward case conferences and contested hearings will not generally require more than basic audio/visual capabilities.

Filing of Documents for the Hearing

Whether the pre-trial proceeds by video or tele-conference, counsel should provide copies of pre-trial briefs and any other relevant documents in electronic format. The Divisional Court and Commercial Court may not require Books of Authority for case law, provided the cases are on the frequently relied upon case lists (Divisional Court; Commercial List). Even if the authorities are provided in PDF, factums should include hyperlinks to CanLII sources.

In recent case management endorsements (e.g. *Society of United Professionals v New Horizon System Solutions*; *Krizan v Skurdelis*; *Nation Rise Wind Farm v Minister of the Environment*), the Divisional Court has introduced some additional measures to assist with document management in advance of video-conference hearings:

- Parties are permitted to (but are not required to) submit two compendia in advance of hearings: a “factum compendium” containing excerpts from evidence and authorities referenced in the factum; and an “oral argument compendium” containing excerpts of evidence and authorities to which counsel intends to refer in oral argument.
- Counsel may be required to submit all documents through a shared secure file sharing Dropbox in advance of the hearing so that all the materials can be accessed together in one place.

It is imperative that counsel ensure all their documents are clearly titled, with bookmarked indices, consistent page numbers, character recognition (“OCR”), and hyperlinked cross-references.

Orders

In recent endorsements, some judges have specified that orders resulting from remote hearings should include a provision in the endorsement or in the order itself declaring that the order is enforceable on the day it is made, and need not be formally entered or issued by the court (e.g. *Oppong v Desoro Holdings Inc*; *Morris v Onca*; *Ali v Tariq*; and *Karahalios v Conservative Party of Canada*).

Public Access

In a Case Management Endorsement in *Ontario v Ontario Association of Midwives*, Justice Corbett ordered that a three-day hearing proceed by way of video-conference over Zoom. This endorsement contemplates that up to 500 members of the public will be able to view the hearing over a webinar format. Interested persons can contact the Divisional Court at scj-csj.divcourtmail@ontario.ca

for the link to a live broadcast of the hearing.

Hopefully, this is a feature that will be made more widely available as the courts increase their ability to hold video-conference hearings over the next weeks and months. Webinar formats have the potential to vastly increase public access to the Ontario courts in the same way as has long been available for Supreme Court hearings. As Amy Salyzn points out in *Slaw*, “[v]irtual hearings have the potential to mitigate or eliminate many of the non-legal barriers to open courts”. Particularly in a public interest case like *Ontario Association of Midwives*, public access to the hearings is a crucial way to demonstrate that justice is both being done and is seen to be done in the province during the current public health emergency.

Looking Ahead

While we are still in the early days of transitioning towards remote hearings, the Ontario Superior Court has dramatically increased the availability of case conferences and even certain contested hearings in a short period of time. We may be a ways off from *viva voce* evidence over Zoom, but every motion that can be heard, every pre-trial that can be settled, and every appeal that can be decided reduces the inevitable backlog that will result when the courts reopen for in-person hearings. The important steps that have been taken by the Ontario courts thus far demonstrate that access to justice is still possible (and may even be improved in some ways) when courts must operate remotely.

We can expect and hope that more will be done to get up to speed with remote video-conferencing capabilities and begin getting more matters heard, particularly outside of the specialized courts in Toronto. Masters motions, matters that are unopposed, and short contested motions will likely be the next types of hearings to be added to the list of those suitable for remote hearings. Counsel must be prepared to embrace the new normal and proceed with hearings by way of video and tele-conference whenever possible to assist the courts and their clients. This time should not be wasted. Justice must roll on.