

Adapting to a New Normal: Our Experience at the Divisional Court's First Virtual Hearing

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On April 9, 2020, the Ontario Divisional Court held the first virtual hearing in its history. With Justices Penny, Backhouse and Lederer presiding, the Court seamlessly navigated an urgent full-day judicial review hearing relating to the COVID-19 pandemic. We had the privilege of appearing as counsel for one of the respondents, alongside Anna Marrison and Barbara Walker-Renshaw.

The proceeding commenced with a Notice of Application for Judicial Review on March 25. While courts across Ontario were minimizing their operations to respond to the pandemic, the Divisional Court swiftly identified this case a priority. By March 27, the Court had hosted a case conference and confirmed it would hear the matter virtually, due to its urgency as well as its potential for broader relevance beyond this specific applicant. The applicant's materials were filed by March 30 and the respondents' by April 6.

Preparation of our responding materials proceeded as usual, with some modifications. For example, we were all in the early stages of adapting to our newly established home offices and were becoming familiar with modified protocols, such as the Law Society of Ontario's new guidelines for virtual commissioning of affidavits. Per the case management judge, the Court accepted e-mail filing of all documents and opted for hyperlinks to CanLii cases in our factum rather than a Book of Authorities.

A few days before the hearing, we received notice that the Court was partnering with Arbitration Place to facilitate the hearing via Zoom for Business. This meant that the hearing would be coordinated and moderated by one of Arbitration Place's "Virtual Proceeding Specialists". Our assigned Specialist was Sarah Mohamed, who is an experienced disputes lawyer trained in the use of technology.

The day before the hearing, Ms. Mohamed hosted a one-hour virtual training session for each set of counsel individually. In this "dress rehearsal", Ms. Mohamed tested our systems, gave us tips on our sound and video quality (including how to optimize our lighting) and introduced us to the various features of Zoom, such as breakout rooms and screen sharing.

On the morning of the hearing, while many of the usual stresses were absent (such as making it on time or forgetting a key document), other new stresses emerged including concerns that the technology and Internet may fail. Half an hour prior to the start of the hearing, a virtual "waiting room" was opened for counsel, where counsel could test their individual systems without having to communicate with or see opposing counsel.

At 10:00 a.m. sharp, we were welcomed by Ms. Mohamed into the hearing room. This was when the difference between a virtual hearing and a normal hearing was most apparent. The judges and counsel all appeared by video in a grid at the same time. Everyone was sitting. There was no special entrance by the judges with the customary bow between the judges and counsel. No one was gowned (though all were in business attire). The majority of those on the screen, including the judges, had their "home offices" visible in the background. Those counsel not making oral submissions kept their video off and showed up on screen as a blank box in the grid identified by their name only; they could still see everyone else.

Justice Penny gave opening remarks, thanking everyone for accommodating the new hearing format and acknowledging that this was the first virtual hearing that the Divisional Court had ever heard. He had all counsel introduce themselves to test their connection and then jumped right into the hearing.

Once you got past the initial differences, the hearing process was remarkably unremarkable. It proceeded with the same formalities, expectations and rules as it would in an in-person hearing. The judges interrupted to ask questions, the Court took breaks throughout the day and all parties were given their opportunity to make submissions.

Throughout the hearing, there were three particularly useful technologies that assisted:

- **Breakout Rooms** – at every recess, counsel had the option to confer privately to discuss strategy in their own Zoom breakout room to which they had exclusive access;
- **Screen Sharing** – rather than having everyone fumble for an exhibit, counsel had the option to pull up (or have Ms. Mohamed pull up) a document and share their screen with the judges and counsel;
- **Independent Chat Room** – while not through Zoom, counsel at BLG set up an independent chat room to correspond during the hearing, which was far superior to the typical illegible notes that are passed between counsel during a hearing.

The hearing ran smoothly and concluded at about 5pm with only a few brief interruptions. For example, about an hour into the hearing, one of the judges lost their internet connection and was inadvertently "ejected" from the hearing. Ms. Mohamed immediately interrupted the hearing and the Court recessed for 15 minutes sending counsel to their breakout rooms while a connection was re-established. Later in the hearing, another brief interruption occurred when one counsel's child snuck into the room just as they were about to commence their submissions. The Court was very understanding that unexpected interruptions may arise and gave counsel an indulgence to regroup.

From start to finish, it was impressive how quickly and patiently the Court and counsel adapted to this new environment in the context of an urgent application to ensure all parties were properly heard and the matter was adjudicated fairly. While there were some minor procedural variations between a virtual and an in-person hearing, at the end of the day, the substance and the advocacy were the same.

Tips

While the Court is currently only hearing matters of an urgent nature, we expect it will not be long before virtual hearings are opened to a larger class of matters. To help you steer through this, we have, with the input and assistance of Sarah Mohamed of Arbitration Place, developed the following 8 tips that you can use to successfully navigate your first virtual hearing:

1. **Be Prepared for your Internet to Fail** – plan for alternative solutions, such as using your phone's hot spot, a mobile internet stick or a friendly neighbour, and be aware of call-in options in the event you cannot get an internet source to work;

2. **Two Screens are Key** – while not strictly necessary, using two screens provides you with easier access to the hearing, private chats and relevant documents at the same time (and helps guard against inadvertent display of information during screen sharing);
3. **Use Headphones with a Microphone** – those speaking with headphones came across clearer and louder than those simply speaking into their computer;
4. **Rely on a Compendium** – it can be difficult to get participants to locate the right document efficiently, so a compendium with paginated documents you anticipate relying on is key to facilitating screen sharing of documents and using your time for submissions efficiently;
5. **Become Comfortable with Screen Sharing** – this takes practice to do so quickly and without inadvertently sharing the wrong information, but is the most effective way to get a document before the court;
6. **Set-up an Independent Chat with your Team** – the chat function was integral to support counsel making submissions, by providing relevant references, reminding them of important evidence to rely on and giving suggested responses to judicial questioning;
7. **Be Mindful of Facial Expressions** – your camera provides a much closer and direct view of your face than the judges and other counsel would otherwise have, so try to keep a poker face;
8. **Enlist Support and Advice** – consider engaging a Specialist or Technician who can provide technical advice and support before and during a hearing, as it ensures that you can focus on the substance of the hearing rather than the technical aspects.

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