

LITIGATION IN A VIRTUAL WORLD

SPIAO Roundtable Spring 2021

Christine Carter



RECENT CASE LAW

- ▶ In my view, the simplest answer to this issue is, “It’s 2020”. We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back.
- ▶ That is not to say that there are not legitimate issues that deserve consideration. Technology is a tool, not an answer. In this case, the parties cannot attend in the same location due to health concerns and governmental orders. So, the question is whether the tool of videoconference ought to be required to keep this matter moving or if the mini-trial ought to be delayed further due to the plaintiffs’ desire to conduct an examination for discovery in person.
- ▶ *Arconti v. Smith* 2020 OSC 2782,



- ▶ Initially, an order for the use of remote proceedings required the consent of all parties or, in the absence of consent, that a party bring a motion. In 2008, Rule 1.08(3) was amended to enable the court to require remote proceedings at the court's own initiative. This reflects an evolution of the acceptance of the use and perceived value of remote communication technology whereby it can be ordered even where neither side asks for it or wants it.

Arconti v. Smith



- ▶ First, as a matter of general practice, the consent of the parties is not required for the court to schedule the hearing by video conference. This is clear from the terms of the Practice Direction effective April 6, 2020. The court is faced with an unprecedented challenge maintaining the institutions essential for the continuation of the Rule of Law in the face of the COVID-19 crisis, and recourse to electronic hearings is a key aspect of the court's response. Scheduling and conduct of court proceedings is not subject to the consent of the parties.

Association of Professional Engineers v. Rew, 2020 ONSC 2589

- ▶ Third, Mr Schwisberg argued that the dynamics of a live hearing may be lost in a video conference. He cited an article published in 2007, co-authored by Professor Sossin (as he then was), and recounted an anecdote respecting appellate advocacy in which the late Justice Catzman of the Court of Appeal counseled appellate counsel to “watch the judges’ pens” during an appeal. The policy arguments for and against video conferenced hearings are not matters on which this court should opine. The Directions to the Profession are sets of policies and procedures directed with Province-wide effect in response to the COVID-19 crisis, and concerns about the means chosen to respond to the crisis are matters to be taken up with the Office of the Chief Justice, not individual judges across the Province. Of course, every judge retains the inherent jurisdiction to ensure that cases proceed fairly. However, the materials and arguments presented by Mr Schwisberg do no more than suggest that something may be lost in a video conferenced hearing. Something will be lost if court business does not continue, as best as can be managed, during the COVID-19 crisis, and I am not persuaded that any of the concerns raised by Mr Schwisberg justify departing from the processes established under the Directions to the Profession for the continuation of court operations



Association of Professional Engineers v. Rew, 2020 ONSC 2589

- ▶ I respectfully do not find the presence of any “due process concerns” inherent in the format of a video hearing. All parties have the same opportunity to participate and to be heard. All parties have the same ability to put all of the relevant evidence before the court and to challenge the evidence adduced by the other side. The only possible “unfairness” is a lack of comfort by one counsel that he or she will be at their best in presenting evidence and making arguments using technology.
- ▶ In my view, in 2020, use of readily available technology is part of the basic skillset required of civil litigators and courts. This is not new and, unlike the pandemic, did not arise on the sudden.

Arconti v. Smith

- ▶ Two points are of note. First, the great fears expressed in case law by those who have never actually used the technology may not be as significant as feared. I agree with this view. However, I also agree with Perram J. and Mr. Bastien, that currently, it does appear that there is some loss of solemnity and personal chemistry in remote proceedings. What is not yet known however, is whether, over time, as familiarity with new processes grows, we will develop solutions to these perceived shortcomings.
- ▶ [40] As things stand at present, I do not doubt that there are perceived, and possibly very real shortcomings associated with proceeding remotely rather than in person. However, in this case at least, the benefits outweigh the risks. The most obvious benefit is that litigation will not be stopped in its tracks.

Arconti v. Smith



- ▶ It is clear that the use of virtual examinations will continue by this Court and will become the norm for the foreseeable future. Even when the pandemic is behind us, the comfort level we have all gained with this form of technology is such that it is likely to continue to be a strong option for parties, particularly where a witness is out of country, out of province or has mobility or health issues.
- ▶ [56] Given the inevitable future of virtual examinations in the legal system, it is up to the judiciary, as its gatekeepers, to ensure that this tool is not abused nor seen to undermine our globally admired legal system.

▶]

▶ I have found that the Respondent was untruthful in his affidavit when he deposed that his wife and son were not present during his cross-examination. This also means that Mr. Makori must have been untruthful when he stated on the record that the Respondent's wife and son were not present.

▶ [71] The Applicant's motion to strike the evidence of the Respondent did not seek any sanctions against Mr. Makori. Had the relief sought on the motion included a request to have Mr. Makori removed as counsel for the Respondent, I would have given it very serious consideration. In any event, I believe that it would be inappropriate for Mr. Makori to continue as counsel in this matter, but make no order in that regard.

▶ **ORDERS AND COSTS**

▶ [72] Given all of the above, I make the following Orders:

- ▶ a. The Applicant's motion is granted. The affidavit of the Respondent sworn October 26, 2020 and any other evidence from the Respondent by way of response to the Application is hereby struck.
- ▶ b. The parties shall provide written submissions on costs starting with the Applicant on a 7-day turnaround, commencing 7 days from the date of release of these reasons. If no costs submissions are received within 35 days of the date of release of these reasons, costs will be deemed to be settled.
- ▶ c. A Case Conference is to be arranged following the release of this decision to discuss scheduling of the hearing of the Application.

▶ *Kaushal v. Vasudeva et al.*, 2021 ONSC 440 (CanLII)

- ▶ Neither counsel nor the court will gown for the hearing. Instead, business attire is required for anyone with a speaking role in the hearing. All parties must ensure that they participate in the video conference from appropriate surroundings and that they (and the Court) will not be interrupted or disturbed during the hearing.



Association of Professional Engineers v. Rew, 2020 ONSC 2589

EXAMINATIONS FOR DISCOVERY

- Setting
- Documents
- Preparation of witnesses
- Examining witnesses
- Other best practices



MEDIATION

- Preparation
- Communication
- Other best practices



PRETRIAL CONFERENCES

- Preparation
- Communication
- Best practices



TRIAL

- Virtual courtroom
- Documents
- Witnesses
- Experts
- Interpreters
- Best practices



▶ <https://www.youtube.com/watch?v=lGOofzZOyl8>





**Thank
You for
Listening**

[Christine Carter: carter@phmlaw.com](mailto:carter@phmlaw.com)