

History made in Ontario courts: Counsel's thoughts on virtual proceedings

Friday, May 01, 2020 @ 1:17 PM | By Barry Leon

In my first article in this series on Ontario's virtual proceedings for the *Nation Rise v. Minister of the Environment* judicial review, I talked of how I had tried to put myself in the shoes of counsel during the hearing. I spoke with a few counsel on the case, before the hearing and after. Here are some observations and lessons learned.

In advance of the hearing, some counsel were concerned about the possibility of an Internet issue and getting the lighting, camera placement and other tech issues right. Also, counsel were concerned about getting the document presentation to work well.

The counsel who was in the best position to comment was Ewa Krajewska, a BLG partner who was counsel on the prior week's *Sprague (Litigation guardian of) v. Ontario (Minister of Health) 2020 ONSC 2335* judicial review as well. Other counsel also had interesting things to say. Here are some of their observations:

- **Technical rehearsal.** The technical rehearsal that Arbitration Place Virtual conducted with each side (and presumably with the judges) was helpful and provided useful tips. As counsel and judges gain experience, the rehearsals should become shorter and easier.
- **Screen view.** There was a good view of the judges faces, particularly in *Nation Rise* in which the screen showed only the judges and counsel speaking. In *Sprague*, "gallery view" had been used (both proceedings were on the Zoom for Business platform). But the gallery view was not problematic and facial expressions were quite visible.
- **Seeing faces of judges.** One counsel observed, "I felt up close to the judges and I could see their reactions when counsel were speaking."
- **Additional collaboration pauses.** One counsel suggested that because team members were not all together in one place, nor were clients with their counsel, having additional "collaboration pauses" during the course of a day would be helpful. Something for the court to consider.
- **Break out rooms.** Counsel considered that it was very helpful to have virtual private "break out rooms" and that they worked well.
- **Communication among teams and counsel with similar interest.** While Zoom has a text chat function, the counsel with whom I spoke used separate communications platforms among their

teams. The Zoom chat function was only enabled to allow for technical support and co-ordination during the hearing. For notes among team members, one firm used Jabber on a separate device. WhatsApp is another option. One counsel observed that “electronic notes are legible, unlike Post-It notes passed back and forth in a courtroom.” Communication with counsel for parties with similar interests was more challenging than in a physical hearing, which means planning an effective system with workable technology is necessary.

- **Preparation for what ifs.** Participants had been prepared for what to expect if an Internet connection was lost, but that never happened.
- **Two screens.** Having two screens is advantageous so that the hearing can be viewed on one and documents on the other. There is little doubt that those doing hearings will acquire second screens or connect other existing devices, such as iPads.
- **Headphones/ear buds.** Using headphones or ear buds is better than not — but most participants were fine without them.
- **Screen sharing.** Participants need to become comfortable with “screen sharing” if documents are being displayed in that manner.
- **Compendium.** Having a good compendium with highlighting and legible text (appropriate font size), and having counsel’s submissions well-choreographed with the person putting up the documents on the screen is a plus. A choice for counsel is whether to manage their own document display — in which case a second team member needs to work hand in glove with counsel who is making submissions — or ask the virtual proceedings specialist to pull up the documents on the shared screen, in which case clear and specific sequenced directions need to be provided to avoid delays in finding the passage sought.
- **Facial expressions ... and hands.** Counsel and judges need to be mindful of their facial expressions as faces are more visible. Also, hand gesturing needs to be managed and limited, so that counsel’s hands do not appear too large because they are too close to the camera.
- **Clients.** Having a “public gallery” enables clients to watch their case, irrespective of whether they are in the city of the hearing or elsewhere. From that perspective, virtual hearings provide a significant advantage, if there is virtual public access. Virtual case management conferences both in court and in arbitration will enable clients to attend more frequently, which I believe will be beneficial to efficiency and pragmatic decision making by clients.
- **Effective compendium.** A virtual and paperless proceeding is new to many. The compendium is even more important than in a physical hearing. One counsel team had a particularly well-prepared and well-choreographed compendium. It appeared that the counsel speaking and the team member turning up the documents had finely tuned their timing and co-ordination. It is more challenging if counsel is pulling up documents on his/her own. The person assisting needs to be very familiar with the documents and the planned flow of counsel’s submissions. There is

room for more innovation with compendia including hyperlinks to documents, cases and other materials.

- **Effective advocacy — making it easy for the judges.** In a virtual and paperless hearing, counsel need to think through how to assist the court as much as possible to be able to take their notes effectively and in a manner that correlates with the documents. As one counsel put it, “You need to give the judges guideposts.” Paperless hearings, which are arriving on the scene current with the arrival of virtual hearings, are new to many judges. Judges often have developed methods of taking notes and marking up documents, whether with various colours of highlighters, Post-it notes, marginal notes, etc. that work for them. Now they are needing to develop new systems.

Perhaps more co-ordination, sharing of ideas and transparency between judges and counsel will assist everyone to be more on the same page sooner. After all, they have a common interest in having a judicial note-taking system that works well for the judges, as well as for counsel. One counsel suggested that judges should consider using an iPad Pro which enables annotating.

This is the second of a three-part series. Read part one: [History made in Ontario courts: Virtual proceedings on YouTube](#); part three: [History made in Ontario courts: More thoughts on virtual proceedings](#).

The Honourable [Barry Leon](#) is an independent arbitrator and mediator with [Arbitration Place, Arbitrators@33BedfordRow](#) (London) and Caribbean Arbitrators. He was presiding judge of BVI's Commercial Court (2015-2018) and chair of ICC Canada's Arbitration Committee.