

## **ELECTRONIC DOCUMENTS AND HEARINGS**

### **DISCUSSION NOTES**

#### **1. What do we mean by “electronic hearing”?**

- A hearing in a format other than in person or exclusively by paper
- Electronic commonly refers to telephone – here focus is on videoconferencing
- Not the same thing as electronic disclosure
- Electronic reader for written documents, reports, etc.

#### **2. Electronic Disclosure:**

- Refers to documents
- ARB Rules provide that all documents must be filed electronically but there are no standards re transmission – ie. size of attachments, number of attachments per email, order of attachments, order of tabs/pages etc.
- Issues relate to transmission – server capacity, limit on size of attachments (Outlook limit of 25MB)
- Use of electronic sharing processes ie. Dropbox, OneDrive
- Consider use of litigation management software
- Not the same thing as a document reader during a hearing

#### **3. Authority that permits an electronic hearing:**

- SPPA
- Board’s Rules
- Rules of Civil Procedure

#### **4. Telephone Hearings:**

- Format
- Standards
- Issues – no ability to share documents via screen, technological issues such as echo, tedious roll call, speaker phone use, sound quality, calling back in by participants

#### **5. Videoconferencing Hearings:**

- Format
- Standards
- Technology Required – video and audio
- Requires video of all participants and electronic document reader/sharer

## 6. Videoconferencing and Appeals

Rule 61.03(2) of the Rules of Civil Procedure speaks to the material that must be filed with the Divisional Court on a motion for leave to appeal- includes

- (v) a copy of all affidavits and other material used before the court or tribunal from which leave to appeal is sought,
- (vi) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves, and
- (vii) a copy of any other material in the court file that is necessary for the hearing of the motion;

## 7. Privacy and Security Issues

Hearings are public but in person hearings, unless there is a court reporter, have no permanent record of the event.

Needs a secure system, protocols regarding streaming and electronic republication. Who “owns” the video, how long is it stored, where is it stored?

Electronic readers of confidential information, particularly that protected by s. 53 of the *Assessment Act*

## 8. Accessibility Issues

The ARB is bound by the provisions of the *Accessibility for Ontarians with Disabilities Act, 2005*

Any use of electronic devices must permit full use by persons with disabilities. For example, volume control, use of assistive devices for the hearing impaired.

See Ministry of the Attorney General 2016 Accessibility Report

<https://www.ontario.ca/page/ministry-attorney-general-2016-accessibility-report>

## 9. Implementation Issues

Who is to pay for the technology (ie. software and hardware)?

Who is to provide it, service the equipment?

Who is responsible for making the arrangements for a video conference and what type of input is permitted by other parties?

Who trains the Board members on the chosen system?

How are technological issues before and during a hearing addressed? IT staff?

## **10. What are other jurisdictions/practice areas doing?**

The Advocates' Society, the Ontario Bar Association, the Federation of Ontario Law Associations, and the Ontario Trial Lawyers' Association have established an E-Hearings Task Force to work with the Ontario Superior Court of Justice to expand virtual access to the courts.

The E-Hearings Task Force will serve as a consultative forum and liaison between the Ontario bench and bar in respect of practice directions and other regulatory changes required to implement fair and efficient e-hearings, including motions, applications, pre-trial conferences, trials and appeals, by means of teleconference and videoconference and other available electronic platforms. Its mandate also includes the development of best practices for the preparation and conduct of e-hearings, and assisting the Superior Court of Justice and the Ministry of the Attorney General with the identification and procurement of workable platforms for the continued expansion of e-hearings in Ontario – see

[https://www.advocates.ca/TAS/COVID-19/E-Hearings/E-Hearings\\_Task\\_Force.aspx?WebsiteKey=06cf22b6-e7ad-4e74-b12b-196172e60ffc](https://www.advocates.ca/TAS/COVID-19/E-Hearings/E-Hearings_Task_Force.aspx?WebsiteKey=06cf22b6-e7ad-4e74-b12b-196172e60ffc)

I am advised that the E-Hearings Task Force is in the midst of drafting best practices for virtual hearings, which may be published by mid- to late May 2020.

See notes below re:

- The Supreme Court of British Columbia 2006 Practice Direction
- Notes regarding the Saskatchewan Municipal Board
- The European Patent Office

## **11. What can be done in the ARB setting?**

- Document management – filing, sharing, use, retention
- E-hearings – telephone, video

## REFERENCES:

### 1. Legislative Authority for Electronic Hearings

#### *Statutory Powers Procedure Act*

5.2 (1) A tribunal whose rules made under section 25.1 deal with electronic hearings may hold an electronic hearing in a proceeding. 1997, c. 23, s. 13 (7).

#### **Exception**

(2) The tribunal shall not hold an electronic hearing if a party satisfies the tribunal that holding an electronic rather than an oral hearing is likely to cause the party significant prejudice.

#### **Same**

(3) Subsection (2) does not apply if the only purpose of the hearing is to deal with procedural matters.

### **Assessment Review Board Rules of Practice and Procedure**

#### **s. 1**

“electronic hearing” means a hearing event held by teleconference, videoconference or some other form of electronic technology allowing all the parties and the Board to hear, or hear and see, one another or any witnesses throughout the hearing event;

“hearing event” means a procedure held by the Board at any stage of a proceeding, and includes a hearing, settlement conference, motion, and mediation, whether these are held in the form of an in person hearing, electronic hearing or written hearing;

**Rule 35** - All hearing events in summary proceedings will be electronic hearings, unless the Board directs otherwise.

**Rule 56** - Every settlement conference will be an electronic hearing, unless the Board directs otherwise

**Rule 90** - The Board may hold a hearing event by electronic hearing for the determination of any issue in a proceeding, unless a party satisfies the Board that holding an electronic hearing is likely to cause the party significant prejudice.

**Rule 91** - A party who objects to an electronic hearing shall, no more than 10 days from the Board's issuance of the notice of the electronic hearing, file with the Board, and serve on all other parties to the proceeding, a written notice setting out the party's submissions why holding an electronic rather than an oral hearing is likely to cause the party significant prejudice.

**Rule 92** - The Board may request a written response from other parties within a specified time.

**Rule 93** - Upon receiving an objection to hold a hearing event by electronic hearing, the Board may:

- (a) convert the hearing event to a different format;
- (b) continue with the electronic hearing, with or without conditions, or
- (c) make any other order the Board considers appropriate.

**Rule 94** - The Board may consider any relevant factors in deciding to hold a hearing event as an electronic hearing, including:

- (d) the likelihood of the process being less costly, faster and more efficient;
- (e) whether it is a fair and accessible process for the parties;
- (f) whether the evidence or legal issues are suitable for an electronic hearing;
- (g) whether credibility may be an issue and the extent to which facts are in dispute;  
and
- (h) the integrity of the Board's process, including the Board's ability to efficiently resolve all appeals filed with the Board within the current four year cycle.

**Rule 95** - The Board may direct the arrangements for the electronic hearing or designate an approved location for videoconference to protect the integrity of the hearing process, including the security and confidentiality of evidence.

## **Electronic Filing**

**Rule 36** - All documents filed with the Board must be filed electronically, unless the Board directs otherwise.

## **Rules of Civil Procedure, RRO 1990, Reg. 194**

### **TELEPHONE AND VIDEO CONFERENCES**

#### ***Where Available***

**1.08** (1) If facilities for a telephone or video conference are available at the court or are provided by a party, all or part of any of the following proceedings or steps in a proceeding may be heard or conducted by telephone or video conference as permitted by subrules (2) to (5):

1. A motion (Rule 37).
2. An application (Rule 38).
3. A status hearing (Rule 48.14).
4. At trial, the oral evidence of a witness and the argument.
5. A reference (Rule 55.02).
6. An appeal or a motion for leave to appeal (Rules 61 and 62).
7. A proceeding for judicial review.
8. A pre-trial conference or case conference. O. Reg. 288/99, s. 2; O. Reg. 24/00, s. 1; O. Reg. 438/08, s. 3 (1).

#### ***Consent***

(2) If the parties consent to a telephone or video conference and if the presiding judge or officer permits it, one of the parties shall make the necessary arrangements. O. Reg. 288/99, s. 2.

#### ***Order, No Consent***

(3) If the parties do not consent, the court may, on motion or on its own initiative, make an order directing a telephone or video conference on such terms as are just. O. Reg. 288/99, s. 2; O. Reg. 438/08, s. 3 (2).

(4) The judge or officer presiding at a proceeding or step in a proceeding may set aside or vary an order made under subrule (3). O. Reg. 288/99, s. 2.

#### ***Factors to Consider***

(5) In deciding whether to permit or to direct a telephone or video conference, the court shall consider,

- (a) the general principle that evidence and argument should be presented orally in open court;
- (b) the importance of the evidence to the determination of the issues in the case;

- (c) the effect of the telephone or video conference on the court's ability to make findings, including determinations about the credibility of witnesses;
- (d) the importance in the circumstances of the case of observing the demeanour of a witness;
- (e) whether a party, witness or lawyer for a party is unable to attend because of infirmity, illness or any other reason;
- (f) the balance of convenience between the party wishing the telephone or video conference and the party or parties opposing; and
- (g) any other relevant matter. O. Reg. 288/99, s. 2; O. Reg. 575/07, s. 1.

### ***Arrangements for Conference***

(6) Where the court permits or directs a telephone or video conference, the court may direct a party to make the necessary arrangements and to give notice of those arrangements to the other parties and to the court. O. Reg. 288/99, s. 2.

## **The Sedona Canada Principles of Addressing Electronic Disclosure**

### **Ministry of Attorney General software standards**

#### **Civil Justice Reform Project – Hon. Coulter A. Osborne, QC – November 2007**

#### **Chap. 16 - *Technology in the Civil Justice System* -**

[https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/180\\_technology.php](https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/180_technology.php)

"There are three aspects to the use of technology in civil litigation: (a) between lawyers/parties; (b) by the court; and (c) by courts administration.

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#### **Recommendations (Technology)**

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- Parties and their counsel should be encouraged to explore methods of using technology to share information electronically to achieve time and cost savings. The judiciary and courts administration should make every reasonable effort to accommodate requests for the use of technology in individual cases, where possible.
- Rules 1.08 and 37 should be amended to permit a party to propose, or the court to order on its own initiative, that any matter referred to in rule 1.08 be heard by telephone or video conference.
- A committee of nine – comprised of a member of the bench, bar and courts administration from a small, medium and large court location in Ontario – be struck

to make recommendations, jointly to the Attorney General, the Chief Justice of the Superior Court of Justice and the Chief Justice of Ontario, on technological improvements that may be made at each of the three court locations.

Recommendations should be detailed, taking into consideration policy, legal, cost and operational impacts. They should also include a process to evaluate any improvements implemented.

- Additional training should be provided to judges on all aspects of the use of technology in and out of the courtroom. This is a matter that is being addressed by the Judges' Technology Advisory Committee of the Canadian Judicial Council. The National Judicial Institute and the Ministry of the Attorney General should participate, where possible, in assisting with such training.”

### **Practice Direction Re: Electronic Evidence by The Supreme Court of British Columbia, 2006**

[https://www.bccourts.ca/supreme\\_court/practice\\_and\\_procedure/practice\\_directions\\_and\\_notices/electronic\\_evidence\\_project/Electronic%20Evidence%20July%201%202006.pdf](https://www.bccourts.ca/supreme_court/practice_and_procedure/practice_directions_and_notices/electronic_evidence_project/Electronic%20Evidence%20July%201%202006.pdf)

**The Law Society of British Columbia – Video conferencing technology information -**  
<https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/law-office-administration/video-conference-technology/>

This information bulletin provides advice and warnings to lawyers regarding the use of video technology.

### **Saskatchewan Municipal Board**

The Saskatchewan Municipal Board is an administrative tribunal that deals with issues from local authorities arising from a number of Provincial acts, including *The Assessment Management Agency Act*, *The Cities Act*, *The Conservation and Development Act*. It is primarily an appellant tribunal (99% of its matters are appeals from local tribunals).

The SMB has been using video conferencing for our hearings for quite some time. It currently uses the Cisco Webex system. The Webex platform is excellent in terms of call quality, user management and is cost effective.

To successfully roll out Virtual hearings (Hearing by video conference), must have two things:

- (i) Electronic documents -

Once it receives an appeal, it contacts the lower board (Board of Revision) to get the record and the transcript (if any) of the hearings. Its administrative staff sorts the files together and puts it together using BoardEffect software and create a Record Book and share it with both

parties. The SMB shares the Record Book to ensure both parties are referring to the same documentation while making their submissions. Once it receives the submissions, they are added to the record book and staff create the Hearing Book using BoardEffect. It shares it with both the parties and the panel hearing the appeal(s); this ensures that all parties are referring to the same document at the hearing (<https://www.boardeffect.com/>);

(ii) Video conferencing system –

It schedules all its hearings using its videoconferencing (VC) system. It does a test run with parties to ensure the VC is working a couple of days before the actual hearing.

## **European Patent Office**

<https://www.epo.org/law-practice/legal-texts/html/guidelines/e/e.htm>

### **Guidelines for Examination in the European Patent Office**

#### **Part E – Guidelines on General Procedural Matters, Chapter III – Oral Proceedings and interviews held by videoconference**

##### **11. Oral proceedings and interviews held by videoconference**

11.1 Requests for videoconferencing

11.2 Preparations for the videoconference

11.3 Submissions

11.4 Technical problems

11.5 Checking the identity of the representative

11.6 Recording of the videoconference