

May 20, 2020

Litigating During COVID-19: Still Possible

The COVID-19 outbreak has changed the day-to-day practice of litigation in Canada. While Canadian courts continue to adapt to the temporary reality of the pandemic, most provinces have issued guidelines to allow for remote proceedings. As the Canadian legal system continues to demonstrate a willingness to conduct in-person proceedings remotely, parties should navigate the e-practices that may shape the future of litigating. A summary of the key ways to advance or continue litigation during the pandemic are set out below.

Virtual Dispute Resolution

Parties may consider alternative forms of dispute resolution to move forward their litigation. Mediation and arbitration provide parties with the flexibility to resolve all or part of their disputes through the use of virtual hearing technology and document sharing platforms. While these e-platforms are not new to the practice, parties may have to adapt to a much more extensive use of technology as an alternative to in-person examinations, or else face delays that could reach into 2021 and beyond.

Ontario

A number of mediators and arbitrators are offering their services remotely. For example, ADR Chambers and Arbitration Place are hosting mediations and arbitrations via videoconference using Zoom or conference calls. Zoom allows for breakout rooms amongst participants. Some mediators have anecdotally reported easier, more time-efficient and cost-efficient mediations using this platform – and are considering sending lunch via delivery services to fully replicate the mediation experience.

Some court reporting services in the Greater Toronto Area, including Victory Verbatim, Network Reporting & Mediation and Reportex Agencies are already offering remote services for discoveries and mediations through programs such as Skype and Zoom. These companies provide easy access to a virtual set-up, service for scheduling, set-up for each session, trouble shooting and full customer service during the proceeding. Other providers are likely to follow and offer these remote services. When using these technological services, parties and counsel must be mindful of the implications and trade-offs that such services bring, including cybersecurity issues and unwarranted interventions by opposing counsel, as well as the necessity for paperless document review.

Mediations by telephone were already reasonably common in proceedings before certain administrative tribunals, such as the Ontario Labour Relations Board and Human Rights Tribunal of Ontario. For obvious reasons, parties will be making greater use of teleconferencing for mediations and simple procedural hearings in the coming weeks and months.

Alberta

On March 31, 2020, the Court of Queen's Bench of Alberta encouraged counsel and the public to access alternative dispute resolution mechanisms to reduce delays in resolving civil and commercial disputes in light of the of the backlog that will result once the courts open to all hearings again.¹

Effective March 30, 2020, the Court of Queen's Bench will process all Consent Orders resolving any matter over which the Court has jurisdiction, including non-urgent matters and Consent Orders to enforce Mediation or Arbitration Awards, by email or fax in accordance with the Court's Announcement [here](#).

The Court of Appeal of Alberta has suspended appellate judicial dispute resolution until July 2, 2020. Parties wishing to use this service may book dates beginning at that time.

¹ [Alternative Dispute Resolution, Consent Orders and Applications to Enforce Arbitration Awards](#)

British Columbia

The British Columbia Commercial Arbitration Centre remains open for normal operations and is accepting new cases for arbitration. Most civil matters that are currently before the courts can be submitted to arbitration for an award that can be enforced in court.

British Columbia's Civil Resolution Tribunal continues to administer online resolution for small claims and condominium disputes. The parties upload evidence, as well as submissions, and the case is assigned to tribunal member. If an oral hearing is required, it is done via Skype. Notably, while most limitation periods in British Columbia are suspended, limitation periods and other mandatory time periods continue to apply to CRT proceedings.

Quebec

Quebec's online PARLe mediation services for low-intensity disputes continues to operate. Individual Quebec Superior Court districts have issued their own [restrictions](#). For example, the Montreal *Chambre Commerciale* requires that parties deliver their urgent applications by email directly to judges only and conduct their hearings by telephone.

Best practices require parties to consider equipment needs, including large screens, headphones to increase audio quality, proper bandwidth support and webcams. It is useful for parties to prepare witnesses to use available technology properly and attempt test sessions. Parties should also include contingency plans (including alternative telephone conferencing), advanced log-ins and a common access point to view documents electronically.

Virtual Courtroom Proceedings

Ontario

On March 15, 2020, the Ontario Superior Court of Justice announced suspension of all but urgent and time-sensitive civil motions effective March 17, 2020. In *Wang v. 2426483 Ontario Inc.*, the Court stressed that the urgency of a matter is not a legal determination; parties should not send submissions regarding the urgency of

scheduled matters unless otherwise invited.² Since that decision, effective April 6, 2020, the Court expanded remote hearings to select pre-trial conferences, applications for approval of settlement and consent motions in writing. On a May 13, 2020 notice, the Court noted that in-person hearings of court matters will not resume until July 6, 2020 at the earliest. Jury selection for civil trials will also not resume until September, 2020 at the earliest.

The Court has issued further guidance of the kinds of urgent matters the Court shall hear. First, it will hear matters related to public health and safety (including matters related to COVID-19), such as applications under the Health Protection and Promotion Act. Second, it will hear family and child protection matters. Third, it will hear time-sensitive motions and applications in civil and commercial list matters, where immediate and significant financial repercussions may result if there is not judicial hearing, and outstanding warrants issued in relation to a Small Claims Court or Superior Court civil proceeding. The Court will also hear any other matter that it deems necessary and appropriate to hear on an urgent basis.

For matters that can be heard remotely, parties can send all evidence, motion records and factums by email to the other parties and the Motions Coordinator in searchable PDF. Emailed filings cannot exceed 35MB. The Court is not accepting books of authorities or statutory materials; all references to case law or statutory materials in the parties' factums or lists of authorities should be hyperlinked to CanLII. Where counsel and parties deliver materials by email, they undertake to file the same materials in paper format, and pay the requisite filing fee, at the court counter when regular court operations resume. Service is effective on the date the email is sent or, if sent after 4:00 p.m., on the next day.

The Court determines the manner of the hearing once it receives the written material from the parties. Most urgent matters are being dealt by telephone conference, although the presiding judge has the discretion to direct a videoconference hearing using technology such as Skype, Microsoft Teams, or otherwise. While remote hearings are

² *Wang v 2426483 Ontario Inc.*, 2020 ONSC 2040 at para 14, 2020 CarswellOnt 4540.

formal court proceedings that replace an in-person attendance, the Court has replaced gowning requirements with business wear. The Advocates' Society, the Ontario Bar Association, the Federation of Ontario Law Associations, and the Ontario Trial Lawyers Association have published detailed [Best Practices](#) to guide parties on the preparation and conduct of a remote hearing.

An Order has been made suspending limitation periods and procedural deadlines in Ontario proceedings. The terms of the Order apply retroactively to March 16, 2020. This means that any limitation period or procedural period of time stopped running on March 16, 2020. The suspension will last for the duration of the state of emergency, which was declared under the Act on March 17, 2020 and is ongoing. Parties are also temporarily relieved from complying with procedural deadlines, unless ordered otherwise.

Alberta

The Alberta Court of Queen's Bench has also suspended all non-urgent hearings pursuant to Master Order #3 pronounced on April 21, 2020. Applicants must first make a request to bring the urgent or emergency hearing at the Court of Queen's Bench by completing an online form.

On March 30, the Minister of Justice and Solicitor General suspended limitation periods and periods of time within which any step must be taken in any proceeding or intended proceeding, from March 17 to June 1, 2020. The limitation period or period of time resumes running on June 1, 2020 and the temporary suspension period will not be counted. Please see the order to determine whether it is applicable.³

As of March 30, 2020, counsel in Alberta may submit signed Master and Justice consent orders for processing via email. All COVID-19-related operational announcements from the Alberta Court of Queen's Bench can be found [here](#).

³ Ministerial Order 27/2020 [Justice and Solicitor General]

All Provincial Court of Alberta (small claims) civil matters that are scheduled to be heard prior to May 22, 2020 are adjourned indefinitely. All COVID-19-related operational announcements from the Provincial Court of Alberta can be found [here](#).

The Alberta Court of Appeal continues to hear appeals, applications, and motions but by videoconference or audioconference. All COVID-19-related operational announcements from the Alberta Court of Appeal can be found [here](#). Further, the Alberta Court of Queen's Bench may ask for an email with unfiled materials in determining the urgency of a hearing. Emailed materials cannot exceed 10 MB for the Court and all references to case law or statutory materials should be hyperlinked.

British Columbia

The Supreme Court of British Columbia continues to hear essential and urgent matters during the pandemic. If a litigant would like to have their essential or urgent matter heard, then they must apply to the Court using a paper or online request form. The Court has requested that parties use the online process where possible.

Once the Court receives a request for an essential and urgent matter, it will send an email response to the applicant for further materials. The applicant is then required to send (i) an unfiled draft application which identifies what orders the party is seeking, and (ii) an unfiled draft affidavit which sets out the key facts and describes the urgency. The respondent does not send any materials at this time. A judge will review the request form, unfiled application, and draft affidavit and determine if an urgent hearing is required. If the judge determines that a hearing is required, the Court will direct the applicant and respondent to provide filed materials for the hearing. The Court will also schedule a date for the hearing. Where possible, the parties will appear by telephone or video-conference.

On April 16, the Supreme Court of British Columbia announced further procedures to allow Telephone Conference Hearings for matters that are not urgent or essential. During a TCH, parties may address one disputed issue or bring forward issues on which they have consent. The issue(s) must be suitable for determination by telephone and on the basis of one affidavit per party. Affidavits must

be no longer than 10 pages each, inclusive of exhibits. The TCH process is currently available only to parties who had matters scheduled to proceed between March 19, 2020 and May 29, 2020.

In addition, a variety of civil desk order applications continue to be processed by way of e-filing while regular court operations are suspended. The Court also expanded the scope of applications that can proceed by way of written submissions. While the state of emergency is ongoing, the requirement in Rule 8-6 of the *Supreme Court Civil Rules* that an order must be made at a case planning conference before parties can make an application by written submissions does not apply to applications that may be made by written submissions and that are scheduled pursuant to the Court's remote processes.

Beginning May 4, 2020, the British Columbia Court of Appeal will begin hearing all appeals – including those that are not urgent – by videoconferencing using the Zoom platform, unless otherwise directed. Parties will not be permitted to adjourn appeals on the sole basis that they would prefer not to proceed by videoconference. Litigants in appeals must complete the Court Proceedings by Video Conference [Form](#) 14 days in advance of their hearing. The Court has issued a step-by-step [guide](#) to the Video Conference Appeal Hearings process, including directives about appropriate etiquette and decorum. Appeals may also proceed in writing by approval of the Court on consent request addressed to the Registrar.

The British Columbia Court of Appeal will also begin hearing all chambers applications and Registrar's appointments – including those that are not urgent – by teleconference or in writing. For new chambers applications or appointments, litigants must file and serve materials required under the *Court of Appeal Act*, *Court of Appeal Rules*, *Criminal Code*, the *Court of Appeal Criminal Rules* and the court's *Civil and Criminal Practice Directives*.

While time limits continue to run for most matters relating to the *Builders Lien Act*, mandatory limitation periods and any other mandatory time periods that are statutorily established are suspended from March 26, 2020 until the declared state of emergency has been lifted, cancelled, or expires in British Columbia. We think there are some questions around whether a Minister has

powers to make such an order suspending the effect of a statute without specific legislative authority, including under British Columbia's *Emergency Program Act* (i.e. it is unclear whether this is the type of statute that requires the legislature to pass legislation, or whether the executive may make an order without consulting the legislature). We recommend that clients continue to file within statutory limitation periods. If there are problems with legality, we expect the government to retroactively fix the problem, as it is legislatively competent to do so.

Quebec

The Quebec Court of Appeal allows parties to hearings before a single judge to request a hearing by videoconference. Their notice to this effect can be found [here](#).

The Superior Court's approach varies depending on the individual courthouse. The Montreal Division has published its own list of urgent proceedings, which can be found [here](#). This list is up to date as of April 17, 2020, and is subject to change. Other proceedings are not being heard at this time. The Quebec City Division, is permitting certain contested proceedings, as long as the parties agree that the hearing of said proceedings does not require witness examination, and can instead be done via exchange of affidavits. The hearing time cannot exceed 2 hours. This procedure is further limited to certain types of proceedings, a full list of which can be found in the [latest notice](#) from the Superior Court, Quebec City Division, dated April 24, 2020.

The Court of Quebec has also scaled down its regular services. The Civil Division has suspended all proceedings in its Regular Division and its Small Claims Division, including trials. The Civil Division is, however, maintaining certain judicial activities if they are considered urgent or if they can take place by conference call. The Court of Quebec's list of urgent matters as of March 31, 2020, which is subject to change, can be found [here](#).

A procedure has been put in place for each judicial district within the province to allow a judge or special clerk to review an application to decide if it qualifies as urgent in the circumstances. The exact

procedure differs for each judicial district throughout Quebec and may be obtained by contacting the appropriate court office.

On March 26, 2020, Quebec held its first virtual trial. All the parties, the witnesses and the judge communicated via computers or tablets. Large-scale adoption of this practice is yet to follow.

Electronic Court Filing

Ontario

The Ontario Superior Court of Justice permits electronic filing of documents through the Civil Claims Online Portal. On March 23, 2020, the *Rules of Civil Procedure* were amended to permit the filing of a broader scope of documents. The amendments now allow parties to file jury notices, a third, fourth or subsequent party claim or a certificate of action under section 36 of the *Construction Act*. The Civil Claims Online Portal can be accessed [here](#). Counsel and self-represented person can communicate with court staff and trial coordinators by email according to the procedures set out in each by each Court region.

The Small Claims Court remains open for filings. However, Ontario plaintiffs can continue to file their claims of \$35,000 or less electronically. Online claims can be made [here](#).

Although the Ontario Court of Appeal does not have an e-filing system, new filings can be sent by mail. Factums can continue to be filed electronically in accordance to the Guidelines for Filing Electronic Documents, which can be found [here](#). The Federal Court has long encouraged electronic filing of documents and is developing an e-Filing Toolkit to assist parties shift from paper-based litigation processes to electronic processes. The E-Filing portal can be found [here](#).

In addition, many tribunals, such as the Competition Tribunal have long required electronic filing. The Human Rights Tribunal of Ontario (HRTO) has long encouraged electronic filing and provided parties with electronic [Forms](#) for completion. The Ontario Securities Commission also permits electronic filing pursuant to its *Rules of Procedure and Forms and Practice Guideline*.

Where tribunals have not required electronic filing, they appear to be adjusting to the circumstances. Effective March 25, 2020, the Ontario Labour Relations Board (OLRB) is [requiring all filings to be made electronically](#) through its e-filing process.

Alberta

The Master Order of April 21, 2020⁴ states that all filing deadlines under the *Alberta Rules of Court* are suspended until May 31, 2020, with the important exception of those Rules applicable to the commencement of proceedings including originating applications. Details of the emailing filing process at the Alberta Court of Queen's Bench can be found [here](#).

The Provincial Court of Alberta is only filing urgent/time sensitive documents.

For the Alberta Court of Appeal, effective March 25, 2020, unless otherwise directed by a case management officer or judge, where an appeal has not yet been set for hearing, and the deadline for the preparation and filing of appeal material falls on or prior to May 4, 2020, the deadline is extended by two months. Otherwise, all deadlines remain in effect and must be respected.

All documents at the Alberta Court of Appeal may be filed by fax or email (in PDF format) as follows:

- Calgary matters: Fax: 403-297-5294 or Calgary.Registry@albertacourts.ca;
- Edmonton matters: Fax: 780-422-4127 or Edmonton.Registry@albertacourts.ca

Note that the Alberta Court of Appeal is unable to accept documents by email that exceed 100MB in a single transmission.

British Columbia

The Supreme Court of British Columbia has developed an online filing process; the Court will only permit the paper process where the

⁴ Amended Master Order #3 - Relating to Court's Response to the COVID-19 Virus

online process is not possible. If the judge determines that a hearing is required, the Court will schedule a date for the hearing.

Courthouse registries are no longer providing in-person services during the suspension of the Court's regular operations. However, all courthouses will continue to receive documents for civil matters. Requests for an urgent hearing should be made using the online process where possible.

Urgent and non-urgent materials should be filed via BC's Court Services Online, or mailed to any Supreme Court Registry or Fax Filing at a registry designated as a fax filing registry by *Supreme Court Civil Rule 23-2* or *Supreme Court Family Rule 22-3*. Parties may also use a new secure drop box available at Supreme Court registries. The drop box will be accessible to the public from Monday to Friday, between 9 a.m. and 4 p.m. and will be emptied at the end of the day and processed every 24 hours. The drop box will be monitored to ensure its contents are secure during the day. Parties who submit materials for filing using the drop box must include a telephone number or email address where they can be reached. Registry staff will contact parties only if their materials are not accepted for filing.

Beginning May 4, 2020, the British Columbia Court of Appeal mandates electronic filing through BC's Court Services Online for the vast majority of civil documents, with few exceptions: motion books, reply books, appeal records, appeal books, and forms of order submitted for entry cannot be electronically filed. The Court will not accept filings by fax, mail or courier in civil appeals, unless the document is one of the excepted documents that cannot be electronically filed or submitted by email.

Note that BC's Court Services Online and email platforms have a size limit of 10MB for documents. This may require documents to be sent in stages.

Quebec

The Court of Appeal of Quebec has launched a pilot e-filing project. This project only applies to appeals as of right (as opposed to appeals with leave) in civil matters. There are a number of requirements for e-filing, including submitting paper versions of all

appeal documents in addition to the electronic versions. Paper versions must be received by the Court of Appeal clerk within five days of e-filing. A full list of conditions and further information about the program can be found [here](#).

As for the other courts, since most court offices are closed to the public, filing of court materials is currently permitted by mail. Entry to the Montreal courthouse is permitted to bailiffs filing urgent proceedings. Further, on April 1, 2020, the Ministry of Justice released an order allowing parties to file materials in a different judicial district if their usual district is not able to accept their proceeding. More information about this process can be found [here](#).

Virtual Commissioning of Affidavits

Ontario

According to the Law Society of Ontario, oaths and declarations required to be taken “in the presence of” the commissioner no longer require physical presence. We can now use tools such as Skype, FaceTime or remote online notarizations software to commission affidavits. Note, however, that while this practice complies with a commissioner’s ethical obligations, the Law Society of Ontario does not have jurisdiction to amend a statutory law. It remains unclear whether legislators will amend the *Commissioners for Taking Affidavits Act* to help clarify the resulting ambiguity in the legislation.

Alberta

According to a Notice to the Profession and Public by the Court of Queen’s Bench of Alberta, affidavits may be sworn over video as long as the affidavit includes a paragraph describing that the deponent was not physically present before the commissioner, but was linked with the commissioner utilizing video technology and that the process described [here](#) for remote commissioning of affidavits was utilized. Note that a commissioner is required to sign a certificate stating that the commissioner was satisfied that the process was necessary because it was impossible or unsafe, for medical reasons, for the deponent and the commissioner to be physically present together.

British Columbia

The British Columbia Provincial Court, Supreme Court and Court of Appeal have all issued guidance for commissioning affidavits. Affidavits may be sworn over video as long as the affidavit includes a paragraph describing that the deponent was not physically present before the commissioner, but was linked with the commissioner utilizing video technology. Like Alberta, all levels of court also require a certificate stating that the commissioner was satisfied that the process was necessary because it was impossible or unsafe, for medical reasons, for the deponent and the commissioner to be physically present together.

Quebec

The Quebec Bar has published new guidelines for [long-distance swearing of affidavits](#). Affidavits no longer have to be commissioned in person. Any method is acceptable as long as:

1. the signature is identifiable,
2. the signatory and commissioner can see and hear each other,
3. both signatory and commissioner can see the same document, and
4. confidentiality/privilege is preserved.

The preferred method for commissioning affidavits is over videoconference. The affiant should sign the affidavit on video so the commissioner sees it. The affiant should then scan and send the signed document to the commissioner, who will stamp or otherwise attest it.

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[a cautionary note](#)

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