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Court of Appeal Affirms Jurisdiction to Hear Appeals in Writing

The old saying that "to a hammer, every problem looks like a nail" is disquietingly relevant to traditional approaches to the dispensation of justice. For a long time, commentators have observed that the legal profession and the Courts lag behind much of the rest of society in leveraging digital resources to improve the quality, speed, and efficiency of litigation.

As we observed in our recent blog post, the COVID-19 crisis has forced courts across the country to quickly adapt to avoid the justice system grinding to a complete halt. Just as someone who wields a hammer can benefit from seeing herself as in the "building things" business as opposed to the "hammering nails" business, courts are in this crisis discovering pragmatism and agility that decades of conservative assumptions prevented them from realizing they had. COVID-19 has allowed courts more fully to see themselves as in the "resolving disputes justly" business as opposed to being in the "staging live hearings" business.

A recent decision by the Court of Appeal may be taken by some as illustrating this trend, but some may question how far it should go. In 4352238 Canada Inc v SNC-Lavalin Group Inc, the Court of Appeal affirmed that it has jurisdiction—even over one party's objection—to order that an appeal proceed in writing.

The Court stressed that it is "well settled that this court's implicit or ancillary jurisdiction to manage its own process is broad" and that the powers necessary for the Court to accomplish its mandate "arise by necessary implication even in the absence of express statutory or common law authority." Noting that nothing in the *Courts of Justice Act* requires oral hearings, the Court further refused to interpret language of the Rules of Civil Procedure that contemplates oral hearings as necessarily requiring them. Noting that "the COVID-19 pandemic has created extraordinary circumstances to which we must all adapt as best we can," the Court referenced a mounting backlog of adjourned appeals and found that it can, and in appropriate cases will, proceed in writing, even if a party objects.

It remains to be seen what factors will influence courts in future

cases in ordering appeals to be heard in writing. Moreover, it may be open to question whether in all cases ordering an appeal to be heard in writing will actually free up Court resources, as opposed to shifting them around. A fully written "hearing" shifts much of the burden of organizing and processing a case onto the judges hearing it, a burden that sometimes can be alleviated where a judge can simply ask counsel for clarification in real time.

Moreover, in some—but perhaps not all—civil cases, part of the justification for oral hearings is to give parties a real sense that they have been truly heard. The common law tradition is an oral tradition, and it is important not to lose sight of those core values. It has often been said that while many cases are decided on the basis of the written record, oral hearings do make a difference in a material number of cases. This can particularly be true in complex cases where on occasion oral argument crystallizes the essence of the issue before the Court.

These considerations, however, relate to the question whether a written hearing "should" be ordered. The Court of Appeal's decision addresses only whether it “can.”