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Do courts have jurisdiction to order virtual hearings? Absolutely!

The initial reaction of most Canadian courts in the face of the COVID-19 pandemic was to shut down completely. This undoubtedly made sense from a public health perspective. However, as the Ontario Superior Court of Justice noted in its recent practice direction, courts have "constitutional responsibility to ensure access to justice remains available". Consequently, courts have been taking gradual steps towards reopening and allowing certain cases to be heard.

Given the presently estimated timeline for social distancing, it seems unlikely that courts will return to their previous model of in-person hearings for several months. Consequently, many Canadian courts are exploring whether certain hearings can be conducted by video or teleconference. In many cases, such decisions will be on consent as all parties want to move their matters forward. Yet, in some cases, one or more parties will likely oppose their matters being heard by video or teleconference, either for genuine reasons—they believe it disadvantages their clients' interests—or for purely tactical reasons—they believe they will benefit from the delay.

The inevitable question in those circumstances will be whether the courts have the jurisdiction to order parties to appear by video or teleconference. Our answer to this question is a resounding yes.

Judges should of course consider the interest of justice in whether there would be prejudice to one or both parties from the case proceeding by video or teleconference. However, where there is limited prejudice or the prejudice is outweighed by the public interest in having the case heard more expeditiously, there should be nothing to stop courts from ordering the matter to proceed by video or telephone conference. As the Superior Court of Justice has noted, courts have a constitutional responsibility to provide access to justice, and that responsibility includes ensuring that cases are heard in the best format available given the circumstances.

Section 96 Courts' Jurisdiction

The analysis of the Superior Courts' jurisdiction to conduct hearings by videoconference is straightforward. Superior Courts are established by section 96 of the *Constitution Act, 1867* and

possess inherent jurisdiction. That inherent jurisdiction includes both inherent subject matter jurisdiction as well as inherent jurisdiction to control their own processes.

The Supreme Court of Canada has characterized the Superior Courts' inherent jurisdiction in broad ranging terms in *Endean v British Columbia*:

> I mentioned earlier that the superior courts' inherent jurisdiction is a residual source of power which a superior court may draw on in order to ensure due process, prevent vexation and to do justice according to law between the parties. One aspect of these inherent powers is the power to regulate the court's process and proceedings: Jacob, at pp. 25 and 32-40. As Master Jacob put it, "it is difficult to set the limits upon the powers of the court in the exercise of its inherent jurisdiction to control and regulate its process, for these limits are coincident with the needs of the court to fulfil its judicial functions in the administration of justice": p. 33. In short, inherent jurisdiction, among other things, empowers a superior court to regulate its proceedings in a way that secures convenience, expeditiousness and efficiency in the administration of justice.

While Superior Courts' jurisdiction can be limited by statute, we are not aware of statutes that limit the means by which the Ontario Superior Court of Justice can hear cases, including in writing, by videoconference, or by teleconference. Certainly, the Ontario Superior Court's most recent Notice signals a willingness on the Court's part to embrace its jurisdiction and conduct hearings remotely.

Other Courts' Jurisdiction

While the Superior Courts have inherent jurisdiction, all other courts are creatures of statute. This includes the Supreme Court of Canada, appellate courts like the Ontario Court of Appeal, and the entire Federal Court system. For each of those courts, the analysis must be anchored, at least to some extent, in the statutory scheme that establishes each court.

At the basic level, if a court were subject to an express statutory provision that it not conduct hearings by video or teleconference, that court would clearly not be permitted to do so. However, such statutory restrictions are not generally present. In particular, none of the Supreme Court of Canada, Federal Court, or Ontario Court of Appeal are subject to such statutory restrictions in any of the *Supreme Court Act*, Ontario's *Courts of Justice Act*, or the *Federal Courts Act*. By the same token, however, provisions expressly allowing courts to conduct

hearings by video or teleconference are also rare.

Consequently, the real question is this: if a court's enabling statute does not expressly allow it to conduct a hearing by video or teleconference, but there is also no express provision prohibiting it, does a statutory court have inherent jurisdiction to do so? Most of the case law clearly says yes.

While statutory courts do not have inherent *subject matter* jurisdiction, they do have a form of inherent jurisdiction to control their own process. That is, it has been recognized that even statutory courts have an inherent ability to control their own processes within the contours of their enabling statutes. Indeed, statutory courts are starting to exercise this inherent *procedural* jurisdiction to order hearings to proceed in creative ways.

For example, sections 3 and 4 of the *Federal Courts Act* recognize the Federal Court (Appeal and Trial Divisions) as courts "of law, equity and admiralty in and for Canada, for the better administration of the laws of Canada" and as "superior court[s] of record having civil and criminal jurisdiction." Similarly, subsection 2(1) of the *Court of Justice Act* recognizes the Court of Appeal for Ontario as "a superior court of record."

In constituting these courts as superior courts of record, Parliament intended that they have all powers necessary to do justice in matters subject to their jurisdiction. As statutory courts, they may have limits on the scope of matters they are competent to adjudicate, but once that competence is established, they are not limited in the procedures they can employ simply by reason of their statutory origin.

These powers to control their own processes have been confirmed by the Supreme Court of Canada in *R v Cunningham*:

> [I]n the case of statutory courts, the authority to control the court's process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law. This Court has affirmed that courts can apply a "doctrine of jurisdiction by necessary implication" when determining the powers of a statutory tribunal:
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> - . . . the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime . . . .
> - *(ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para.

> 51)
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> Although Bastarache J. was referring to an administrative tribunal, the same rule of jurisdiction, by necessary implication, would apply to statutory courts.

At the Court of Appeal for Ontario, an example of this creativity is the recent decision of Justice Paciocco in *Carleton Condominium Corporation No 476 v Wong*. In that case, the parties had an appeal scheduled for April 9, 2020, and they could not agree on how it should be dealt with. The appellant asked that it be adjourned to an in-person hearing in September or October 2020, while the respondent asked that the appeal proceed in writing, with an opportunity for the parties to respond to panel questions either by teleconference or videoconference on April 9, 2020.

Justice Paciocco declined to order a full remote hearing, citing difficulties that appellant's counsel stated he would have in preparing. However, accepting the respondent's suggestion, he ordered that any questions the panel had could be dealt with via a teleconference on the originally scheduled appeal date. Justice Paciocco was clearly concerned with the impact that an adjournment of the case would have on the judicial system as a whole:

> Moreover, it is not in the interests of justice to overburden the court by adjourning matters that can be dealt with fairly, as scheduled. The backlog that will be created by cases that must be adjourned to protect the public and ensure fair hearings will be imposing and it should not be unnecessarily aggravated.

Since that decision, the Court of Appeal for Ontario issued a Practice Direction seemingly mandating that all matters will proceed by way of a remote hearing or in writing.

Another example of creativity and willingness to embrace new technology, is the approach that the Federal Court is taking with respect to moving hearings forward during the pandemic. On April 4, 2020, the Federal Court issued a Practice Direction recommencing case management by telephone and video conference and expanding the scope of matters which may be dealt with by telephone and video conference. Indeed, two of the authors of this blog post may well be conducting a trial remotely at the Federal Court in the next few months.

The approaches taken by both the Federal Court and the Court of Appeal for Ontario are admirably practical, and representative of what the courts should be adopting generally. It is in the

interests of the judicial system and access to justice generally that cases are not delayed. While some cases may be the special unicorns that can only be dealt with via an in-person hearing, most are not. The question that courts should be asking is not whether a hearing should be adjourned, but rather how it should go ahead. Hearings in writing, by teleconference, and by videoconference are all possible; now is the time for creative thinking by both courts and lawyers to figure out how to ensure that matters proceed both fairly and effectively.

What About the Open Court Principle?

An issue that will have to be addressed throughout this entire process is the need to ensure that the open court principle is complied with. The open court principle requires that courts generally be open to the public, and that exceptions from that openness be justified. This principle is a constitutional one, and it is also embodied in various statutes. For example, s 135(1) of Ontario's *Courts of Justice Act* provides that "[s]ubject to subsection (2) and rules of court, all court hearings shall be open to the public."

Undoubtedly, a wholesale migration to alternative forums from which the public were categorically excluded would likely offend the open court principle. Thankfully, technology provides a solution for that and in fact, allows for a greater realization of the open court principle than does the previously existing state of affairs. An open telephone line or web feed that members of the public could join would satisfy the open court principle. There is nothing in the open court principle that requires access to a physical space; rather, it is all about ensuring that the public see the judicial process through the same lens as the parties.

Indeed, for most people, it is likely to be easier to dial or log in to an ongoing court proceeding remotely than it would be to physically attend at a courthouse. The goal of the open court principle is to ensure that the courts are open and their conduct can be scrutinized. The current environment may result in that being fulfilled to a great extent than was previously possible.