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## Class Actions “Zooming” Forward during the COVID Pandemic?

Courts across Canada were quick to respond to the COVID-19 pandemic. Courts have faced the unenviable challenge of maintaining the rule of law and fair process throughout a global crisis.

Many courts initially restricted hearings to urgent matters and limited in-person attendances. For many civil litigants, proceedings have been delayed as the parties and courts recognize fairness and practical concerns in advancing the litigation during this crisis. As Canadians have begun to adjust to the “new norm” of working at home and social distancing, courts have also adapted. Courts are starting to encourage virtual hearings and have moved into a new phase, which includes some non-urgent hearings. Recent decisions, practice directions and guidance from the courts demonstrate that courts are encouraging case progress where practicable. One area that has seen ongoing activity is class actions.

Many common features of pre-certification class proceedings, including a more prominent role of counsel and active judicial case management, led to increased reliance on teleconference hearings even in the pre-COVID-19 era. A number of recent coronavirus-related practice directions and decisions support consideration of whether written, videoconference and “virtual” hearings can fairly and appropriately advance class proceedings during the pandemic.

The Ontario Superior Court (Toronto Region) is conducting hearings in writing, by audio or by video for case management conferences

and select motions in class actions.<sup>1</sup> The Ontario Superior Court (East Region) will now conduct case conferences in appropriate cases, including cases under case management and class proceedings.<sup>2</sup> The Ontario Superior Court (West Region) is also scheduling case conferences in class actions at the discretion of the case management judge.<sup>3</sup> The Federal Court has recommenced case management hearings for matters with an assigned case management judge, including class actions.<sup>4</sup> Video-conferences are generally being held on the Zoom platform.

The *Rules of Civil Procedure* permit the court to order that a proceeding be conducted by video-conference absent the consent of the parties.<sup>5</sup> There are three recent Ontario Superior Court decisions regarding compelling video-conference examinations and hearings during the pandemic, where the parties are in disagreement.

The first decision, *Miller v. FSD Pharma, Inc.*, was released on April 14, 2020.<sup>6</sup> The Court decided to adjourn a certification motion in a proposed class action. The plaintiffs' counsel was reluctant to proceed with the motion by video-conference, primarily because of the difficulty in managing documents and conferring with a counsel team during a complex and lengthy motion. The Court was concerned about proceeding with a hearing that "in its very format raises due process questions". The Court found it was not appropriate to compel the moving party to proceed by video-conference where they had concerns about the effectiveness of the approach.

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<sup>1</sup> [G. Class Action Matters](#)

<sup>2</sup> [Notice to the Profession – Court Operations in the East Region during the COVID-19 Health Emergency \(May 12, 2020\)](#)

<sup>3</sup> [Notice to the Profession – Second Expansion of Matters to be Heard in the Ontario Superior Court – Southwest Region \(May 12, 2020\)](#)

<sup>4</sup> [Updated Practice Direction and Order \(COVID-19\); Practice Direction and Order \(COVID-19\): Update #2 \(April 29, 2020\)](#)

<sup>5</sup> RRO 1990, Reg. 194, Rule 1.08.

<sup>6</sup> *Miller v. FSD Pharma, Inc.*, 2020 ONSC 2253.

Subsequently, two Ontario decisions compelled video-conferences despite a party opposing the format.

On April 24, 2020, the Divisional Court denied a request to adjourn an application for judicial review until it could be heard in-person.<sup>7</sup> The Court noted that the hearing would be on a written record and did not require oral testimony. The Court found that a delay in court business outweighed concerns that “something may be lost in a video conferenced hearing”. The Court also took into consideration the historical delays in the matter.

On May 4, 2020, the Court denied a request to delay an examination for discovery until an in-person examination could proceed.<sup>8</sup> If the plaintiffs decided to conduct an examination, they were required to proceed by video-conference. The Court disagreed with the finding in the Miller decision that the use of remote technology can raise “due process concerns”. The plaintiffs’ main objections were the need to confer with counsel to assist with documents and facts during the examination, the difficulty in assessing a witness’s demeanor remotely, the lack of physical presence in a neutral setting, and risk of “slight of hand to abuse the process”. While the Court acknowledged that there was some validity to some of concerns raised by the plaintiffs, on balance, the concern to move the case forward prevailed. The Court found:

In my view, in 2020, use of readily available technology is part of the basic skillset required of civil litigators and courts. This is not new and, unlike the pandemic, did not arise on the sudden. However, the need for the court to operate during the pandemic has brought to the fore the availability of alternative processes and the imperative of technological competency. Efforts can and should be made to help people who remain uncomfortable to obtain any necessary training and education. Parties and counsel may require some delay to let one or both sides prepare to deal with unfamiliar surroundings. [...]

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<sup>7</sup> Association of Professional Engineers v. Rew, 2020 ONSC 2589 (Div. Ct.).

<sup>8</sup> Acronti v. Smith, 2020 ONSC 2782.

We expect that there will continue to be a backlog of court attendances until social distancing restrictions are lifted. In these circumstances, it is understandable that Courts will be reluctant to adjourn proceedings indefinitely until an in-person hearing can proceed.

The appropriate procedure will differ on a case-to-case basis and there may be an appropriate basis for pandemic-related adjournments in some circumstances. The Miller decision, denying the request to compel a video-conference certification motion, is an early decision in the class action context. There may be circumstances that arise even in class actions, including party-specific factors and the length and complexity of the hearings, which favour minor delays for the benefit of in-person attendances. On the other hand, given that class actions are more likely to be actively case managed, they might be expected to progress more than other civil litigation matters during this time.

The COVID-19 crisis has in many ways significantly accelerated the adoption and use of technology as an integral part of the litigation process. COVID-19 may be increasingly shaping the digital transformation of litigation, resulting in changes that are likely to outlast the current pandemic-related restrictions. It is too early to predict the full impact and outcome of these changes, but class actions are an area likely to be closely watched for guidance on the benefit, risks and practical considerations when shifting from reliance on in-person litigation practice.

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#### [a cautionary note](#)

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