

BC Court Rules on Defendant's Application to Avoid a Zoom Discovery

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The Supreme Court of British Columbia recently rendered its first reported decision that dealt with a contested appointment to examine a party by way of videoconference since the outbreak of the pandemic.

Given that examination by videoconference will become the norm for discoveries and cross-examinations in the near term, the Court's interpretation of its Rules as they apply to virtual examinations is paramount for lawyers and their clients to understand.

The Decision

In *Jazette Enterprises Ltd. v. Gould* (2021 BCSC 216), the examinee, Mr. Chen, one of the defendants, was in India. Mr. Chen sought to set aside the appointment taken out by the plaintiffs for a discovery via Zoom. The plaintiffs' claim was described by the Court as a complex conspiracy claim involving "amounts up to around \$18 million." In support of his position to set aside the appointment, Mr. Chen advanced four arguments: (1) the appointment was invalid, (2) the times were inconvenient for him, (3) there was no urgency to the appointment, and (4) a pleadings issue had to be resolved first.

Mr. Chen relied on Rule 7-2(11) to argue that the examination must take place at a location "within 30 kilometres of the registry that is nearest to the place where the person to be examined resides." The Court dismissed this "technical argument" given that the parties had previously agreed to conduct an examination in October 2020 "by Zoom because Mr. Chen either lives or works in India."

The discovery was to take place over two days, each scheduled to proceed between 6:00pm to 10:00pm in Vancouver, which corresponded to 7:30am to 11:30am in India. Mr. Chen argued that the times were inconvenient. The plaintiffs took the position that the times could be adjusted by agreement, but Mr. Chen's counsel never made efforts to vary those times. Furthermore, the plaintiffs argued that they were entitled to sequence their discoveries as they saw fit, as they bore the burden of proof in the litigation.

The Court also dismissed Mr. Chen's argument that he was recovering from an illness and accordingly the discovery should be delayed, as Mr. Chen did not produce any evidence to support that argument. Finally, the Court dismissed Mr. Chen's argument that a pleadings issue remained to be resolved as the details of which were not contained in the application materials.

Key Takeaways

This decision demonstrates that the Court will likely have little patience for parties attempting to rely on “technical arguments” for the purpose of delaying their discovery obligations.

In this case, the most significant factor weighing against Mr. Chen’s position was his prior agreement in October 2020 to be discovered via Zoom. Moreover, the plaintiffs’ lawyer’s suggestion that they were flexible on timing, and Mr. Chen’s failure to adduce evidence to substantiate his claims of illness also weighed against his position. The decision also makes clear the Court’s reticence to delay the prosecution of a complex claim on the basis that there a pleadings issue to be resolved (even if the issue had properly been before the Court).

If a party is refusing to be discovered by Zoom, an application should be made pursuant to Rule 7-2.

(See also our previous comment regarding misconduct during a video examination.)

Our team is experienced at conducting examinations via videoconference and stays on top of all the changes the courts are making in the context of the pandemic.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.