

BC Court Rules on Hearing Witnesses via Video at Trial

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What happens when time-zone differences, travel restrictions and trial scheduling collide?

On March 25, 2021, the British Columbia Supreme Court rendered an important decision relating to the scheduling of witnesses at trial during the pandemic. In this case, the parties jointly sought to have seven of the nine witnesses testify via video conference from China. In the circumstances, the Court declined to grant the order.

While this decision was no doubt frustrating for the parties who wanted the trial to proceed, this case provides guidance as to when the Court will consider it appropriate to permit witnesses to testify remotely.

Background

The plaintiff sought damages of approximately \$7.1 million on the basis of judgments obtained in China. In their defence, the defendants argued that there was a breach of natural justice and a fraud perpetrated on the court in the Chinese legal proceedings.

The plaintiff sought an order that all four of its witnesses testify via video link. The defence sought an order that three of its witnesses testify via video link, two of them testifying in-person. The Court noted that “most if not all” of the witnesses required a translator.

In an earlier decision dismissing the plaintiff’s summary trial application, and setting the case down for trial, the Court had commented on the complexity and “highly contested” nature of the facts surrounding both defences, including the fact that an assessment of credibility would be required.

The Court’s Decision

The judge noted COVID-19 Notice 35 which “provides that a trial may be heard by remote video conference if ordered by a trial or case management judge.” The Court noted that that notice does help identify some concerns in matters involving “translators and witness testimony.” In its reasons, the Court focused on two issues.

First, the Court was concerned that technical issues might arise which could lead to “fundamental

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concerns” since the “majority of the evidence” was sought to be brought via videolink. While the Court did not spell this out, this appears to relate to concerns about the integrity of the process.

Second, building on an earlier decision in 2020, the judge noted that there was no detailed plan submitted regarding the logistics of how the testimony would be given. On this point, the Court concluded:

[u]ltimately the number of out of country witnesses and the need for translators, along with credibility issues fundamentally underpinning this case, do not support the use of remote video conferencing for this trial. It is one thing to have one witness testify by video, it is quite another to have numerous witnesses do so, particularly in the circumstances of this case.

After finding that the case was not an appropriate one “for such an extensive use of remote video conferencing,” the Court suggested that counsel reconsider the trial estimate of fourteen days which “appear[ed] optimistic.”

Although the Court did not address it in the reasons, the proposed timing of the testimony (5 to 10 PM PDT) is relevant. The Court does not typically sit in the evenings, and it can be expected that this accommodation alone would cause a logistical problem.

Three Key Takeaways

This case highlights three crucial points for lawyers and their clients trying to press ahead with trials during the pandemic:

1. The Court specifically stated in this case that if a party seeks accommodation regarding a witness, they should make an application at least thirty days (and preferably sixty days) before trial;
2. A significant concern the case conference judge had was that there was no plan submitted. The plan needs to assure the Court that the fairness of the proceeding will not be affected by having witnesses give evidence via video link; and
3. Consider the circumstances of your case. Video will be appropriate in many cases where the facts are largely agreed and credibility does not play a central role.

The Cassels team has assisted a number of clients with remote hearings during the pandemic. We have also previously written on misconduct during video examinations as well as the scheduling of examinations for discovery by video.