THE RISE OF VIDEOCONFERENCE WITNESS EXAMINATIONS

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CCLA 32nd Civil Litigation Updated Conference,
November 2012
(Mont Tremblant, Quebec)

*The authors wish to thank **Kaitlin Johnston**, student-at-law at Soloway, Wright, for her legal research and editing, and for her assistance with the drafting of the portion of this paper regarding witness examinations at trial.

I. WHY IS THIS PROCEDURAL DEVELOPMENT SO TOPICAL FOR ONTARIO LAWYERS IN 2012?

The past decade has been characterized by a steady increase in the practice of conducting witness examinations and cross-examinations by way of videoconference. This new procedural phenomena results from a combination of factors: an increase in the number of cases involving one or more extra-provincial, or foreign, parties; the resulting rise in the incidence of witnesses whose place of residence is situated *outside of Ontario*; and, above all the dramatic decrease in the cost of conducting videoconferences, thanks to the rapid proliferation of Skype, and similar services, throughout the world over the past few years.

By way of example, thanks to Skype it is now possible to examine, cross-examine or discover any non-Ontario resident at a fraction of the significant costs charged by established, commercial videoconferencing companies in the past, and without incurring the prohibitive airfare, accommodation costs and reimbursement for travel time of yesteryear. The resulting reduction in costs has been so pronounced that, as Ottawa Master Pierre Roger observed earlier this year, in *Code Inc. v Independent High Electoral Commission*, the courts can, in 2012, "*take judicial notice that required technology for video conferences is now simpler and more easily available than in past years*". [1]

The recent rise of videoconference witness examinations poses a number of challenges to civil litigators: (i) when, if ever, should a foreign, or extra-provincial, witness or party still be *forced* to get on a plane and testify *viva voce* before opposing counsel; and (ii) which party should bear the witness' travel costs or, if he or she is permitted to be videoconferenced from his place of residence, the costs of setting up the videoconference arrangements.

There are no clear answers to these questions. In Ontario, and in other Canadian provinces, the law has not kept pace with technological development in this area. To date, the law respecting who can be examined by videoconference, when and at what cost, remains in its infancy and is regulated by a small body of jurisprudence comprising fewer than two dozen judicial decisions.

In Ontario, the Superior Court of Justice has formally recognized that examinations by videoconferencing are now an accepted norm in pretrial litigation before the Ontario Superior Court,

[1] *Code Inc. v Independent High Electoral Commission*, 2012 CanLII 2208 at para 21 [*Code Inc.*].

especially in cases involving one or more foreign parties or witnesses. As stated by Newbould J. in *Midland Resources Holding Limited v Shtaif*:

> "Examinations of witnesses by video conferencing are a normal process in modern international litigation or arbitration. The reason, of course, is that often the time and expense involved in traveling to far-distant places is not warranted if there is an alternative. In my view, given the high costs of modern litigation, it should be encouraged rather than discouraged, so long as the discretion of the judicial officer in deciding whether to order videoconferencing is exercised judicially. I see no purpose in starting from the position that it should be ordered rarely and only in exceptional circumstances."[2]

That said, within Ontario, the rise of videoconference examinations has not yet reached, and indeed perhaps never will reach, the level where either party enjoys the right to force the other to conduct a videoconferenced discovery or cross-examination of its own foreign-based witnesses or client *in all cases*. As stated by Rutherford J. in *Pack All Manufacturing Inc. v Triad Plastics Inc.*, *"[w]hile there is much to be said for using the modern technology available and taking evidence by videoconference, it is not a manner of taking evidence available to parties* ***as a matter of right***."[3] Accordingly, he (or she) who wants a witness examined by videoconference, over the objections of opposing counsel, must first obtain a court Order to that effect, pursuant to subrules 34.07(1) and 1.08(5) of the *Rules of Civil Procedure*.

Under these subrules, an Ontario Judge or Master may issue a court Order relieving the witness of the obligation to attend on his or her examination, and permitting him or her to be examined by videoconference from his or her place of residence, whenever it is "*just or convenient*" to do so. In this, as in so many other areas of our law, the issue of when it will be "*just or convenient*" to do so, is fraught with uncertainty and swathed with mystery.

Based on recent caselaw – much of it Ottawa generated – it would appear that the general willingness of the Ontario Superior Court to grant an Order permitting a witness or party to be examined by way of videoconference, pursuant to subrules 34.07(1) and 1.08(5), will depend to some extent on whether the request concerns a *pretrial examination* or an *examination at trial.* Over the past decade, Ontario Courts have been far more enthusiastic about granting Orders permitting pretrial examinations (examinations for discovery and cross-examinations on affidavits) to occur by

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[2] *Midland Resources Holding Limited v Shtaif*, 2009 CanLII 67669 at para 22 [*Midland Resources Holding*].
[3] *Pack All Manufacturing Inc. v Triad Plastics Inc.*, 2001 CanLII 7655 at para 9 [*Pack All Manufacturing*][emphasis added].

videoconference than about permitting trial witnesses to avoid physically appearing in the courtroom for the trial itself. As stated by Newbould J. in *Midland Resources Holding*:

> "There is a difference, in my view as to the consideration to be given to whether a witness **at a trial** should attend in person **for the benefit of the trier of fact** and the consideration of whether videoconferencing should be used **at a discovery**. While recognizing that counsel may gain some advantage in observing the demeanor of a witness on discovery, demeanor of a witness is ultimately of most importance to the trier of fact. A videotape from a videoconference is of more assistance to the trier of fact than the cold pages of a transcript."[4]

In light of the distinction which our Courts are now drawing between pretrial and trial videoconferencing, this paper focusses on two key questions:

(i) When can you insist on your *affiants being cross-examined, or your party being examined for discovery,* remotely by videoconference, instead of having to travel to the examination room to be examined *viva voce?*

(ii) When can you insist on your *trial witnesses* staying home and being examined, and cross-examined, by remotely videoconference, instead of having to travel to give evidence directly *in the courtroom*? And

(iii) Which party should pay the costs associated with conducting the videoconference?

II. VIDEOCONFERENCING PRETRIAL EXAMINATIONS AND CROSS-EXAMINATIONS - When can you insist on your affiants or clients staying home and being cross-examined or discovered by videoconference rather than being forced to appear in the examination room to testify in person?

In Ontario, litigants enjoy no presumptive entitlement to cross-examine an affiant, or discover an adverse, non-resident party *viva voce,* as opposed to doing so remotely by videoconference. The *Rules of Civil Procedure* create no presumptive entitlement forcing an adverse, and foreign-based, party or witness to travel to Ontario to be discovered in this province. The modern position of the Ontario Superior Court is reflected in the following statement by Newbould J., in *Midland Resources Holding*:

> "I have some difficulty with the statement …. that discovery by video conference should be ordered rarely and only in exceptional circumstances. …. I see no purpose

[4] *Supra* note 2 at para 27 [emphasis added].

> in starting from the position that it should be ordered rarely and only in exceptional circumstances. There is no basis, in my view, for any such presumption. Each case should be decided on its own facts with a view to determining what is the most just and convenient result in the particular case."[5]

On the other hand, there is also no reverse presumptive entitlement, enjoyed by that out-of-province party or witness, to avoid travel to Ontario and to insist on being cross-examined or discovered in his jurisdiction of residence. As stated by Nolan J., in *1272086 Ontario Limited v. 1210632 Ontario Inc.*:

> "Unlike when a person resides in Ontario, there is no prima facie right of someone who resides outside of Ontario to be examined where he or she lives. The test for determining the location of examinations is what is just and convenient for both parties, based solely on the circumstances in each particular case. There is no prima facie right with respect to the place of examination."[6]

To what extent will videoconferencing be ordered when issues of credibility are at stake?

Videoconferencing may be ordered even where the pretrial cross-examination or examination for discovery will focus on key issues of credibility on crucial issues in the case. The mere fact that credibility will likely be at issue on the cross-examination, or that the discovery will involve an extensive examination of issues on which the parties have opposing and irreconcilable versions of what happened, does not militate in favour of *viva voce* examinations. Contrary to the situation where the witness is testifying at trial, there is no special entitlement to discover the witness or conduct cross-examinations *viva voce* simply because there will be canvassing of issues on which credibility is key. As stated by Newbould J. in *Midland Resources Holding*:

> "With respect to the credibility of witnesses….experience indicates that the video conferencing facilities available today provide clarity, and if requested, close up clarity, of the person being examined. Moreover, if the credibility of the witness becomes of importance at trial, the fact that a videotape of the examination is available for the trier of fact, and not just a written transcript of the evidence, should assist the trier of fact in assessing the credibility of the evidence given by the witness on his examination for discovery. That of course is not available if a videotape of the discovery has not been taken."[7]

Currently, the weight of judicial opinion is that where credibility issues are at stake, there should be no presumption, that *viva voce* discovery or cross-examination is the rule and videoconferenced

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[5] *Ibid* at para 22.
[6] *1272086 Ontario Limited v 1210632 Ontario Inc.*, 2007 CanLII 52782 at para 6.
[7] *Supra* note 2 at para 25.

discovery or cross-examination should be exception. As stated by Newbould J., in *Midland Resources Holding*:

> "The reason, of course, is that often the time and expense involved in traveling to far distant places is not warranted if there is an alternative. In my view, given the high costs of modern litigation, it should be encouraged rather than discouraged, so long as the discretion of the judicial officer in deciding whether to order videoconferencing is exercised judicially."[8]

In fact, some Ontario Judges have stated that where there are credibility issues at stake, the parties should be *encouraged* to conduct their pre-trial cross-examinations by videoconference rather than *viva voce,* on the grounds that video conferencing has a positive, rather than negative effect on a court's ability to subsequently make determinations about the credibility of witnesses, by actually enhancing the court's ability to determine credibility. As stated in *Midland Resources Holding*:

> "...[E]xperience indicates that the video conferencing facilities available today provide clarity, and if requested, close up clarity, of the person being examined. Moreover, if the credibility of the witness becomes of importance at the trial, the fact that a videotape of the examination is available for the trier of fact and not just a written transcript of the evidence, should assist the trier of fact in assessing the credibility of the evidence given by the witness on his or her examination for discovery. That of course is not available if a videotape of the discovery has not been taken."[9]

When will videoconferencing be ordered?

Ultimately, it is up to the discretion of the Court (Master or Judge) as to whether a witness can remain at home and be cross-examined by videoconference pursuant to subrule 34.07(1)(f). As stated by Rutherford J. in *Pack All Manufacturing*, "[u]nless consented to by the opposite party, the court must balance the relevant factors and determine whether the advantages of using video-conferencing outweigh the possible prejudice that might arise."[10]

The test of whether a litigant can insist on his or her affiant being cross-examined, or his or her client being examined for discovery, by way of videoconference rather than *viva voce* is generally set out in subrule 1.08(5) of the *Rules of Civil Procedure*:

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[8] *Ibid* at para 22.
[9] *Ibid* at para 25.
[10] *Supra* note 3 at para 9.

(5) In deciding whether to permit or to direct a telephone or video conference, the court shall consider:

(a) the general principle that evidence and argument should be presented orally in open court;

(b) the importance of the evidence to the determination of the issues in the case;

(c) the effect of the telephone or video conference on the court's ability to make findings, including determinations about the credibility of witnesses;

(d) the importance in the circumstances of the case of observing the demeanor of a witness;

(e) whether a party, witness or lawyer for a party is unable to attend because of infirmity, illness, or any other reason;

(f) the balance of convenience between the party wishing the telephone or video conference and the party or parties opposing; and

(g) any other relevant matter.

Although the above Rule does not specifically refer to cross-examinations and examinations for discovery, the Rule appears to be broad enough to encompass such examinations (see subrule 1.08(1)).

In what types of situations will videoconferencing be ordered?

When will the Ontario Superior Court apply these factors to excuse a witness from testifying in person and permit him or her to provide his or her evidence by way of videoconference?

A review of recent Ontario caselaw suggests that an Order will be granted, permitting pretrial examination of the witness to occur by videoconference in the following situations:

(i) Where there is evidence of financial hardship, or strong inconvenience, to the witness in having to personally attend the cross-examination, or discovery;

(ii) Where the cost of travel to the cross-examination or discovery is out of proportion to the value of the claim; and

(iii) Even where, in the absence of such disproportionality, one of the parties would nevertheless be able to realize significant cost-savings by having the examinations proceed by videoconference.

(i) *Cases where there is evidence of financial hardship, or strong inconvenience, to the witness in having to personally attend the cross-examination, or discovery*

In order to persuade the Court to order the examination to take place by videoconference, on the grounds of inconvenience or financial hardship, a litigant needs to provide evidence that the inconvenience or hardship of having to attend the examination in person would be significant, rather than simply the normal inconvenience which witnesses routinely suffer in having to undergo examination. In *Seder v. Douglas*, a BC decision, the Court refused to permit a witness to be deposed by videoconference on the grounds that "there is little evidence…of the inconvenience to the witness" of having to be examined in person.[11] In reaching its decision the Court observed that

> "It is always inconvenient for a disinterested witness to take time out of their lives to testify at trial. Something more is required than the general inconvenience of all witnesses to meet this ground, otherwise the floodgates would truly open and all disinterested witnesses would be seeking to be examined prior to trial.
> …
> In the case before me, the witness has been cooperative, but has indicated a reluctance to travel. It is not very strong evidence of inconvenience, and does not satisfy this ground as being something more than the inconvenience which occurs in any trial."[12]

The degree of inconvenience or hardship which a party must show was recently addressed by the Ontario Superior Court in *Midland Resources Holding*. In that case, the Court issued an Order permitting a Ukrainian plaintiff, who resided in Moscow, to be discovered remotely by videoconference from Toronto, on the basis of a medical condition which made it painful for him to "engage in long-range travel exceeding four hours".[13] The Court granted the Order, excusing him from having to travel to Toronto, despite medical evidence that he was capable of such travel, simply on the grounds that such travel would be "painful" for him:

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[11] *Seder v. Douglas*, 2011 BCSC 823 (available on WL Can) at para 17.
[12] *Ibid* at paras 17 – 19.
[13] *Supra* note 2 at para 4.

> "The conclusion that I draw from the medical certificates from Mr. Shyfrin's Moscow physician, from the opinion of Dr. Lloyd and the affidavit evidence of Mr. Shyfrin is that he would likely be able to travel from Moscow to London, rest in London for one or two days as necessary and then travel to Toronto by airplane lying on some kind of bed, either in a private jet, or on British Airways. I also conclude, however, that it would be painful for Mr. Shyfrin to do so. I have no reason not to accept his evidence that after his last experience in traveling to the Maldives, he realized that he should not take such a long trip again."[14]

In *Paiva v. Corpening*, the Ontario Superior Court issued an Order permitting two married affiants residing in Denmark to be cross-examined remotely by videoconference from Toronto, on the basis that their purchase of airfare to Toronto would cause them financial hardship. The level of financial hardship did not appear to be very great given that that their combined income was $72,000.00 and that their combined airfare costs were only $2,000.00. In issuing the videoconferencing Order, the Court concluded as follows:

> "…I observe that the Applicant and her spouse are already heavily in debt and are solely responsible for the support of [their children] Jaidyn and Mackenzie as well as Olivia. If I require them to travel to Toronto to be cross-examined, that decision will place further financial pressure on their household by requiring that they borrow $2,000 to finance the trip. This decision will affect the household in which the children reside."[15]

(ii) *Cases where the cost of travel to the cross-examination or discovery is out of proportion to the value of the claim*

An order that examinations proceed by videoconference, rather than *viva voce,* will also issue where the cost of travel to the cross-examination appears to be significant when compared either to the overall value of the claim, or to what is at stake in the examinations themselves.

By way of illustration, in *Guarantee Co. of North America v. Nuytten*, the Ontario Superior Court ordered that a British Columbia defendant be cross-examined by videoconference where there were only a few questions which the plaintiff wanted put to him.[16]

Similarly, in *Golamco v. Royal Trust Co. of Canada*, the Ontario Superior Court, in ordering that a witness give evidence by teleconference, cited the fact that this option of obtaining evidence was "vastly less expensive than travel" as one of its reasons for making the order.[17] The Court had regard

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[14] *Ibid* at para 14.
[15] *Paiva v Corpening*, 2012 ONCJ 88 (available on WL Can) at para 35.
[16] *Guarantee Co. of North America v Nuytten*, 1997 CarswellOnt 2521 (available on WL Can).
[17] *Golamco v Royal Trust Co. of Canada*, [1999] OJ No 2383 (available on WL Can) at para 18 [*Golamco*].

to proportionality, noting the amount of the claim and observing, "[w]hile that is not an inconsiderable amount, neither is it so much that the expense of pursuing it can be ignored."[18]

(iii) *Cases where, in the absence of such disproportionality, one of the parties would nevertheless be able to realize significant cost-savings by having the examinations proceed by videoconference*

Even where the travel and accommodation costs associated with *viva voce* examinations are not wildly disproportionate to the amount of the claim, the Courts will nonetheless order that they take place by videoconference where those costs, or inconvenience, arising from travel to the place of examination are objectively significant. The decision of the Ontario Superior Court in *Code Inc.* provides an example of this. In that case, Master Roger issued an Order permitting Iraqi affiants to remain in Baghdad and to be cross-examined by videoconference from Ottawa, based on the significant travel costs and inconvenience which they would incur if forced to travel to Ottawa, despite the fact that those travel costs were dwarfed by the million dollar value of the claim.

The Court's decision was driven purely by utilitarian considerations of financial convenience, namely that conducting the examinations by videoconference would prove less costly than having to fly the affiants half way around the world to Ottawa. The Court ultimately issued the Order ordering that the examinations take place by videoconference, even though the significant travel and accommodation costs associated with a *viva voce* examination (collectively estimated at $30,000.00) would cause no personal hardship to the affiants themselves, because they would be borne by their large institutional employer, and even though there was "[no] evidence … of ...[any]crushing work load [for them] in Iraq and how that would negatively be impacted by their travelling to Ottawa."[19]

In what types of situations will videoconferencing be refused?

When will the Ontario Superior Court deny a request for videoconferencing and insist that a witness testify in person?

A review of recent Ontario caselaw suggests that an Order permitting pretrial examination of the witness to occur by videoconference will be *refused* in the following situations:

[18] *Ibid* at para 12.
[19] *Supra* note 1 at para 11.

(a) Where the cross-examinations involve complex and voluminous written materials or exhibits;

(b) Where the organization of the videoconference would involve complicated logistical issues, including translation or time zone differences;

(c) Where the inconvenience, or cost, of bringing the witness to the examination is minimal as compared to the amount of money involved in the claim;

(d) Where the request for videoconferencing is to achieve a collateral purpose, such as avoiding enforcement of a prior Ontario judgment against them; or

(e) Where there is some potential for the intimidation of witnesses who would be in the room with them, but off-camera.

As regards this last factor, one of the issues which sometimes arises is the extent to which the witness might be improperly prompted, directed or influenced during his videoconferenced examination by someone else in the room who was off-camera. However, this concern can usually be addressed by providing a solicitor's undertaking to send an agent to attend in the conference room. As stated by Newbould J., in *Midland Resources Holding*, in response to the defendants' concern that certain counsel would influence the witness:

> "The answer to this, it seems to me, is twofold. First, it could be ordered that the video feed show both [the witness] and his counsel, which one would expect would be the case in any event. Second, Mr. Prehogan stated that Mr. Vinogradof would not be in the room during the examination of [the witness]. In these circumstances, even if the concern of these defendants had any legitimacy, which does not appear to me to be the case, they are answered by the undertaking of Mr. Prehogan that Mr. Vinogradof would not be in attendance."[20]

This Court has repeatedly held that it cannot require foreign parties to attend examinations in Ontario based on the basis of similarly speculative and vague fears for which there is little or no strong evidentiary basis. As Master Hawkins ruled in *Man Ferrostaal Ltd. v. Cameron*:

> "Mr. Cameron says that since this action was commenced six years ago, he and Mrs. Cameron have received threats to their personal safety. They attribute those threats to 'those allied with the Plaintiff'…Mr. Cameron does not disclose why they attribute

[20] *Supra* note 2 at para 29.

> these threats to 'those affiliated with the Plaintiff'. That phrase could mean any number of things. Mr. Cameron does not offer any physical evidence of these threats such as a taped phone call, a letter or an email…The evidence of threats is weak, vague and only recently disclosed. That being so, this evidence is not a basis for ordering that the Camerons be examined in Dubai."[21]

III. VIDEOCONFERENCING THE EXAMINATIONS OF TRIAL WITNESSES - When can you insist on your trial witnesses staying home and giving evidence by videoconference rather than having to appear in person in the courtroom*?*

In the case of *trial witnesses,* the onus for persuading a Court to permit evidence to be provided by videoconference is much more onerous than it is for the cross-examination of witnesses and the examination for discovery of parties, *prior to the trial.*

Over the past decade, Ontario Courts have continued to follow the presumption that having the witness testify in person is preferable to having them testify by videoconference. As stated by Rutherford J. in *Pack All Manufacturing,* "…the conventional rule [is] that evidence be given by a witness in person, in court".[22] This view was echoed by Newbould J., in *Midland Resources Holding*:

> "I can understand that if the issue is whether at a trial a witness should be heard in the presence of the trier of fact or by videoconferencing, it may be preferable to have the witness give his or her evidence in person before the trier of fact rather than videoconferencing."[23]

This conventional rule is presumptive only, and can be rebutted by showing that permitting a trial witness to testify by videoconference would advance the interests of justice.

Despite the conventional rule, a Court may still be persuaded to order that the witness be permitted to testify at trial by videoconference in a number of exceptional situations.

One such situation is where his or her evidence is critical and where he or she is simply *refusing* to attend.

In *Archambault v. Kalandi Anstalt and Robert Campeau*, Master Beaudoin (as he then was) was confronted with a situation where a wealthy non-party witness, Ilse Campeau, the estranged wife of Ottawa real estate tycoon Robert Campeau, was refusing to leave her native Austria to attend examinations in Ottawa. Her refusal to attend was due to an outstanding Ontario judgment, taken

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[21] *Man Ferrostaal Ltd. v Cameron*, 2008 CanLII 57722 at paras 9 – 11 [*Man Ferrostaal*].
[22] *Supra* note 3 at para 9.
[23] *Supra* note 2 at para 25.

out against her by her estranged billionaire husband, in the amount of nine million dollars. The judgment creditor husband, being anxious to have her attend in person, opposed issuance of the requested videoconferencing order.

Faced with Ilse Campeau's refusal to testify in person, Master Beaudoin issued an Order permitting her to remain in Austria and to be examined remotely by videoconference on the grounds that one of the defendants would be prejudiced by her failure to testify, and that her testimony would never be forthcoming unless given by way of videoconference.

That Order was subsequently upheld on appeal by Manton J., who ruled:

> "In the case at bar, there is no question that the respondent will be prejudiced without Ilse's evidence. Further, there is no dispute that she is not compellable. There is, on the other hand, no evidence of prejudice to anyone if she is permitted to testify in this fashion. While it may make cross-examinations more difficult, these difficulties are far outweighed by the potential prejudice to [the defendant] Kalandi in not having any testimony from her. Master Beaudoin was correct to rely on this determination of whether the advantages of using videoconference outweigh the possible prejudice that might arise."[24]

Where a witness is simply unwilling to testify in person (for personal reasons other than being a judgment debtor), and it is outside of the Court's jurisdiction to compel that witness to attend, the Court will generally allow testimony by videoconference. In *R v Dix*, the witness, who had a history of being difficult to locate, resided in New York City and was planning to move overseas in a matter of days. She was unwilling to travel to Alberta to give evidence, but indicated that she was willing to testify via videoconference prior to her departure from the U.S. As observed by Costigan, J., "[t]he reality of this case is that there is now only a small window of opportunity to obtain the witness's evidence and that window of opportunity is the videoconference procedure. Therefore there is necessity in the unusual circumstances of this case."[25]

The Court will also be inclined to allow videoconferencing where it is a necessary and practical solution to the unique challenges posed by a non-compellable witness who refuses to travel to testify in person. The justification for this was set out by Costigan, J. in *R v Dix*:

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[24] *Archambault v Kalandi Anstalt and Robert Campeau*, 2007 CanLII 1337 at para 30.
[25] *R v Dix*, 1998 ABQB 370 (available on CanLII) at para 23.

> "In my view, the witness's reasons for not attending in person should not, in themselves, preclude the Court from hearing evidence that is potentially relevant. This Court has an inherent jurisdiction to control its procedures and must decide when and how to obtain evidence. That function cannot be held hostage by a witness's personal reasons."[26]

Where the witness who is refusing to attend the examination, for fear of the consequences of having to face an Ontario judgment, is one of the parties to the litigation, the Court will generally not excuse him from having to appear in person. In *133719 Ontario Inc. v Whiteley* for example, the Court rejected the American defendants' request to be discovered by videoconference where it concluded that this "would be tantamount to granting these defendants immunity from the Ontario justice system and enabling them to flout the laws of Ontario."[27]

The fact that a witness resides outside of Canada and is therefore not compellable by summons may be, on its own, enough to persuade a Court to permit the witness to testify via videoconference. In *Wright v. Wasilewski*, Master Albert held the following:

> "I find that the reason why the witnesses cannot be examined here is primarily because they are not compellable by summons, and secondarily, if the witnesses are prepared to attend without summons, [the plaintiff] has insufficient financial means to bring them to Toronto for trial. I find that these are good reasons why the U.S. witnesses cannot be examined in Toronto. I also find that requiring these witnesses to attend in Toronto for trial would be inconvenient to them and expensive for the plaintiff."[28]

Here, although inconvenience to the witnesses and costs to the plaintiff were considered as ancillary factors, it seems that the Court's principal reason for allowing videoconference testimony was that the witnesses could not be compelled to travel to Canada. The Court further noted:

> "In my view the prejudice to [the plaintiff] if these witnesses are excluded by prohibiting their attendance by videoconference outweighs the possible prejudice to the defendant of requiring the cross-examination of these witnesses to be conducted by video-conference."[29]

The importance of adhering to the objectives of case management is another factor which may tip the scales in favour of allowing videoconference evidence at trial. As Master Albert in *Wright* noted:

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[26] *Ibid* at para 14.
[27] *1337194 Ontario Inc. v Whiteley*, 2004 CarswellOnt 2312 (WL Can) at para 2.
[28] *Wright v Wasilewski*, 2001 CanLII 28026 at para 14 [*Wright*].
[29] *Ibid* at para 16.

> "Consideration must also be given to the purpose of case management, as expressed in rule 77.02, which includes the reduction of unnecessary cost and delay. This rule must be read together with…rule 1.04, which requires that the rules be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
> …
> Allowing the U.S. witnesses to testify by videoconferencing would reduce unnecessary expense and potential delay, and would provide the evidence necessary for the judge and jury to reach a just determination of the claim on its merits."[30]

The Court's inclination to order videoconference testimony will be greater where the witnesses and the anticipated nature of their evidence exhibit certain key characteristics. In the Supreme Court of British Columbia case of *Slaughter v. Sluys*, Beames J. observed:

> "Proper and full cross examination can take place even when witnesses are appearing via videoconferencing. In my view, this is particularly so where the witnesses are experts and where credibility per se is not an issue and it is also the case where the evidence a witness may give is not overly contentious."[31]

Where a witness' credibility is not expected to be an issue or where his or her evidence is unlikely to be disputed, the Court will also be more inclined to find that videoconference testimony is appropriate. The fact that the witness is an expert witness may be an additional factor that convinces the Court to permit videoconferencing.

When will witnesses be required to testify in person?

A review of recent caselaw suggests that the conventional rule of requiring trial witnesses to testify in person rather than by videoconference will be enforced in the following situations:

(i) Where *"the cost of bringing her is not all that great in relation to the amount of money at issue in the trial"*;[32]

(ii) Where *"none of [the witnesses] have provided the court with any indication that they will be personally inconvenienced or suffer hardship as a result of testifying in person"*;[33] and

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[30] *Ibid* at para 19.
[31] *Slaughter v Sluys*, 2010 CanLII BCSC 1576 at para 10 [*Slaughter*].
[32] *Pack All Manufacturing*, *supra* note 3 at paras 2 and 9.
[33] *Slaughter, supra* note 31 at para 12.

(iii) Where "*the testimony of the witness is expected to be at odds with that of an important witness for [the other side] and … an assessment of the credibility of the witness will be very important".*[34]

Cases where the cost of having the witness testify in person is proportionate to the amount of the claim

In determining whether videoconferencing is appropriate, the Court will compare the expense of bringing the witness to testify in person compared to the amount claimed in the action. In *Pack All Manufacturing*, the Court, in ordering that a witness attend in person, noted that, "[h]er evidence is important and the cost of bringing her is not all that great in relation to the amount of money at issue in the trial".[35] In this case, the witness' travel costs would be approximately $2,000, while the amount at issue in trial was between $80,000 and $105,000.[36]

The Court in *R v Ross* also held that reducing costs was not a paramount consideration in determining whether videoconferencing is appropriate, noting: "A cost saving to the state, while commendable, in and of itself does not justify the issuance of an order for a videoconference. In this case, that appears to be the primary, though not necessarily the only, stated reason for the Crown's application."[37] If the cost associated with requiring the witness to attend in person is proportionate to the amount claimed, then the Court will adhere to the conventional rule that evidence should be given in person rather than by videoconference.

Cases where there is a lack of evidence demonstrating that testifying in person would cause significant inconvenience or hardship to the witness

The Court will generally not permit videoconference testimony where the witness is compellable and there is no evidence to establish that ordering the witness to attend the trial in person would cause that witness significant inconvenience or hardship.

The fact that a witness has a scheduling conflict will not usually be sufficient to convince a Court that videoconferencing should be allowed. In the case of *Feeney v. Labatt*, the defendant sought leave to adduce evidence by videoconference from one witness, as that witness was scheduled to be on a family holiday in France during the first week of the trial and in board meetings throughout the

[34] *Pack All Manufacturing, supra* note 3 at paras 2 and 9.
[35] *Ibid* at para 9.
[36] *Ibid*
[37] *R v Ross*, 2007 CanLII BCPC 244 at para 21.

second week of the trial. In ruling that the general principle requiring testimony in person should be followed, Master Brott noted:

> "I find that although family time is important for all of society's well-being, Mr. Brito's holiday plans could have and perhaps should have been built in around the trial date which has been known since May 2006. Even so, there is no evidence that Mr. Brito cannot accommodate both the vacation and the trial if his evidence is required in week one of the trial. If it occurs during the second week, then certainly the employees and shareholders and The Board of Directors should be able to understand the necessity of the CEO to have to be away for a maximum on 36 hours on issues of company business, of which the trial of this action is certainly one."[38]

Ordinarily, it would appear that the Ontario Superior Court will not order that evidence at trial be given by videoconferencing simply because testifying in person would require that the witness travel a considerable distance or for a considerable length of time. Noting that traveling to the trial venue would take the witness three hours by car or one hour by air, Giardini J. in *R v Ross* found that this "did not establish any significant inconvenience or logistical difficulty."[39]

Cases involving key credibility issues

Credibility of the witness is a matter of utmost importance in a trial. It is imperative that the trier of fact is able to scrutinize the demeanour of the witness and that counsel has the opportunity to examine the witness unhindered by any of the concerns that are often associated with videoconferencing. While it has been suggested in *Pack All Manufacturing*, that observing witnesses on a video screen "is arguably as good or better than seeing the same witness obliquely from one side as is the case in our traditional courtrooms here in the Ottawa Court House", the courts have ultimately held that when credibility is a key issue at trial, videoconferencing is not a satisfactory substitute for in-person testimony at the trial itself.[40]

In *Pack All Manufacturing*, Rutherford J. found that:

> "I am not persuaded by the plaintiff's application that there is enough to be gained to overcome the conventional rule that evidence be given by a witness, in person, in court, and the contention by counsel for the defendant that cross-examination of this

[38] *Feeney v Labatt*, 2007 CanLII 1862 at para 4.
[39] *Supra* note 37 at para 22.
[40] *Supra* note 3 at para 6.

> important witness whose credibility is important to the trial may be rendered less effective."[41]

Similarly, in *R v Ross*, the Court observed that the witness was a material witness whose evidence would be "central to the issue to be decided at trial".[42] The Court held

> "…there is a reasonable likelihood that issues of credibility may arise. In such circumstances, I am reluctant to deprive the trial judge of the ability to see the witness physically present in the courtroom while giving evidence."[43]

IV. WHO SHALL BEAR THE COSTS OF VIDEOCONFERENCE EXAMINATIONS?

The customary rule appears to be that the costs of the examination itself shall be borne by the examining party, but any additional cost (e.g. videoconference hook-up) shall be borne by the party seeking to have the examination conducted by videoconference. This general principle is illustrated by Master Roger's decision in *Code Inc.*, where the party that successfully sought to turn that *viva voce* cross-examination into a remote videoconference examination was ordered to pay the costs of the videoconference hook-up in the place where the witnesses would be testifying, with the opposing party being required to pay for the cost of the videoconference hook-up at the other end:

> "The set up for video conferencing in Iraq is to be by and initially at the cost of the Defendants [who had sought the videoconference hook-up] with the details to be worked out by the parties and these arrangements for video conferencing are to be confirmed with the Plaintiff. The set up in Ottawa, including that of any required stenographer and interpreter, is to be by and initially at the cost of the Plaintiff [the examined party]."[44]

In some other cases, the Court has simply refrained from making any order regarding the costs of videoconferencing. In *Man Ferrostaal*, Master Hawkins noted that, "[c]ounsel have advised me that once I have ruled on [the terms for examination for discovery] they can work out the rest of the details. If not, either counsel can request a case conference."[45] This type of ruling offers flexibility, allowing the parties to decide whether to abide by the general rule or depart from it and create their own costs arrangement.

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[41] *Ibid* at para 9.
[42] *Supra* note 37 at para 18.
[43] *Ibid* at para 19.
[44] *Supra* note 3 at para 14.
[45] *Supra* note 21 at para 13.

CONCLUSION

The basis for the "*conventional rule*", that trial witnesses ordinarily testify in person rather than by videoconference, is being steadily undermined, year by year, by the inexorable advance of modern technology. As the quality of videoconferencing increases, so too do the public policy reasons for bending this conventional rule to allow witnesses to testify remotely by way of videoconference, *even where credibility is in issue*.

Assuming that there are no technical problems with the videoconference hook-up, that there is no need for simultaneous translation, that exhibits can be rapidly conveyed to the witness by email or fax, and that there is no surreptitious intimidation of the witness from someone who is in the room with him/her (but off-camera), the arguments against permitting trial witnesses to testify remotely appear to be growing weaker. As observed by Rutherford J. in *Pack All Manufacturing*, when videoconferencing is properly carried out, in the proper circumstances it can actually *enhance* the Court's ability to assess witness' credibility:

> "Seeing the witness, full face in colour and live in a conference facility is arguably as good as or better than seeing the same witness obliquely from one side as is the case in our traditional courtrooms here in the Ottawa Court House. The demeanor of the witness can be observed, although perhaps not the full body, but the sitting in a witness box is not significantly better in this regard.
> …
> I am not at all certain that much weight can or should be placed on the advantage a trier of fact will derive from having a witness live and in person in the witness box as opposed to on a good quality, decent sized, color monitor in a videoconference. While perhaps a presumption of some benefit goes to the live, in person appearance, it is arguable that some witnesses may perform more capably and feel under less pressure in a local video-conference with fewer strangers present and no journeying to be done."[46]

For these reasons, it is possible that the era of the truly "*virtual*" courtroom and trial, replete with "*virtual*" videotaped witnesses, may be approaching faster than many might have imagined.

[46] *Supra* note 3 at para 6.