

Drainage Referees' Remarks for Practitioner's Conference on October 23, 2020

Presenters: Andrew Wright and Rob Waters

We have been asked to comment about how the Court of the Drainage Referee is managing during the current COVID 19 pandemic.

When, in March 2020, it became apparent that courtrooms would not be available for months, if not years, we made the decision to continue as best we could using video conferencing. The Province does not have available for our use any facility for video conferencing, so we decided to use the Zoom platform. While there is a modest cost to the host to use it, those accessing the conference can do so via internet video without cost and can call in by telephone if reliable internet connectivity is not available to them.

Using video conferencing we are attempting to emulate as much as possible what would otherwise occur in a courtroom.

The following comments touch upon some of the issues we have had dealing with video conferencing.

Security and Access to Video Conferences

In a courtroom, there is a public gallery where interested members of the public, including media, can attend to observe. The difficulty translating this to a video conference environment is the risk of disruptive "zoom-bombing". In a courtroom setting, a person behaving badly can be removed by an OPP officer. On a video conference steps need to be taken to keep such disruptive elements out or to remove them if they get in.

To that end, when setting up video conference hearings, there is a unique conference identifier and a unique passcode required to log into the video conference procedural pre-hearing conference or hearing. This is coupled with a virtual "waiting room" through which entrance to the proceeding is screened by the presiding Referee.

To understand how those login credentials are made available, a word should be said about the notice that is given for the procedural pre-hearing conference. The notice for the procedural pre-hearing conference is sent by mail a month or so in advance. It is sent to all the owners of land assessed for the drain or who received allowances under the most recent report as well as to others who are clearly interested, such as the engineer and other municipalities affected by the drain.

The notice invites those who wish to be parties to enter an appearance by serving on all parties an appearance document (in the form provided with the notice) and to file it with the court registrar.

The notice also advises of the opportunity to observe – with microphone muted. This is the equivalent of a public gallery in a courtroom where interested persons, including

media, can observe the proceedings without participating or being involved as a party. Those who wish to be observers need to provide their names and e-mail addresses to the parties and to the presiding Drainage Referee a week or so in advance of the pre-hearing conference or hearing on the merits.

The widely circulated notice of the procedural pre-hearing conference does not provide the login credentials but rather tells interested persons how they can access the login credentials. The presiding Referee, who hosts the video conference, then has a list of those to whom to send the login particulars and of those who are to be allowed access to the conference.

To reduce the risk of the login credentials being more broadly circulated, the login credentials are sent out only a day or two before the video conference. The login credentials are sent by e-mail by the presiding Drainage Referee to the lawyers for the parties and to the persons identified by the lawyers to assist them (a client representative(s) and witnesses) and to those seeking party status and to those who have asked to observe.

Often the e-mail covering the login particulars includes a message along the lines as follows:

The video conference platform is Zoom. If you do not already have the Zoom software, when you log into the video conference you will be asked to download the free software. Once installed you will be able to complete your login to the video conference. There were changes made by Zoom at the end of May 2020 and, if your software version pre-dates June 2020 you will need to update it. You can determine this by clicking on your photo at the top right corner of the Zoom home screen. There will be a drop-down menu and about 2/3rds of the way down you will see "Check for Updates". Click on that and you will see your software version and can update if needed. You'll need version 5.0 or higher.

If you need to install the Zoom software, I suggest you allow ten minutes in advance of the meeting to do so. As an alternative to trying to sign up with Zoom on the day of the conference call, you might consider signing up for and/or updating the free Zoom service a day or so in advance.

To log in, simply click on the http link provided in this e-mail and add the password if asked – the password is impeded in the http link. Once you have logged in, you will be asked to open Zoom (if it is not already open on your computer) and then you will find yourself in a holding or waiting room area. This is an additional security measure (in addition to a unique video conference identification number and unique password) so I can screen and allow into the video conference only those who are supposed to be there.

If you are telephone calling in – cellphone or ground line - for the prehearing conference by audio only, the same conference ID and password will be required and access to the meeting will be through the screening room.

To avoid the risk of disruptive intrusions by persons without any legitimate interest

in this matter, I ask that you not share with others the video conference ID or password. If there are others who you would like to have with you for the pre-hearing conference, please provide to me their name, e-mail address and reason for including them; I will then send them this e-mail so they will have it directly.

Let me add a comment about internet connectivity. In your offices you may have greater internet bandwidth than I do at home but, when I am using Zoom here at home, I make sure that no one else here is streaming movies or music or playing games. Sending and receiving e-mail doesn't seem to compromise the internet connection but data streaming, in addition to a Zoom connection, can make the internet connection unstable for video conferencing.

If you lose your connection while we are on-line together, please log back in using the same credentials. You will come back into the waiting room and I'll have to let you back into the hearing.

In these days of physical separation, we are attempting to replicate electronically, as much as possible, what would be achieved if we were all attending in a courtroom. If all does not go as smoothly as is ideal, please bear with us as we do our best to continue Drainage Referee work through the continuing COVID 19 pandemic.

After the list is established of those who are to receive login credentials for the procedural pre-hearing conference, the same list is used for ensuing pre-hearings and the hearing on the merits. The covering e-mail message is usually shortened for subsequent video conferences on the same case because those who are involved in the first video conference event will know the drill for those that follow. The list can be augmented as the matter proceeds; for example, a lawyer may not need or want to have all of their witnesses for the procedural pre-hearing conference but will want to add the witness(es) names to the list for the subsequent hearing.

Exhibits

During hearings there is reliance on documentation which are marked as Exhibits and retained by the court registrar in the courthouse. It is therefore important to have an orderly system for keeping track of and identifying documentation and exhibits when conducting hearings by video conference. If the proceedings were conducted in a courtroom, exhibits would be filed with the court registrar and marked with an exhibit number and thereafter be maintained in the court file. When proceeding via video conference there is no physical ability to hand an exhibit to a court official. It is nonetheless essential that there be a formal court record of exhibits properly identified by number for future reference.

We have developed a protocol for the entering of exhibits and the following is a summary:

1. A document, including a plan or photograph, to be relied upon at a hearing must be identified as an exhibit.
2. To be identified as an exhibit, the document must be provided to the presiding Referee and to all other parties at least 2 days in advance of the video conference

hearing at which it is to be presented as an exhibit; the presiding Referee may abridge this time.

3. The presiding Referee will decide whether to enter the document as an exhibit and, if it is allowed, the presiding Referee will assign an exhibit an alpha/numeric identifier.
4. Once the document has been entered as an exhibit, the party that introduced the exhibit shall, within 3 business days following the conclusion of the video conference hearing, send hard copy or an electronic copy of the exhibit to the court at:

(name and address and e-mail address)

5. and when doing so shall identify the court file no.: Court File No. ##### and the exhibit identifier assigned by the presiding Referee; a copy of the letter or e-mail of transmittal shall be provided to the presiding Referee.
6. Court Orders, the application, notices of motion, factums, case law, legislation and compendiums of authorities will not be marked as exhibits though Court Orders, the application, notices of motion and factums should be filed with the court and item 4 applies *mutatis mutandis*.

A list of the exhibits is maintained and is usually entrenched in the procedural orders. The orders are filed with the court registrar who will thereby have an authoritative list of the exhibits and their numbers against which to check the contents of the official court file.

The documents that have exhibit numbers retain their exhibit numbers through pre-hearing conferences and then the hearing(s) on the merits of the case. New exhibits will be identified by the next ensuing exhibit number and be added to the list as the hearing(s) progresses.

The listing of Exhibits is intended to reflect those things which would normally be filed in court or which would be used in the course of the hearing. It does not include but does not intend to dispense with routine items such as appearances, affidavits of service required by the court staff for filings such as the application, appearances, any motions and routine affidavits of service for supporting affidavits.

Finally, a comment about exhibits, and filing with the court registrar in the courthouse where the proceeding was initiated. The court system in Ontario is in the process of establishing an electronic document filing system for Exhibits, applications, notices of motion, affidavits, etc.

This system is not generally available yet. In the meantime, most court offices will accept e- mailed documentation for filing. The Referees' experience currently is that sending documentation to the court registrar or trial coordinator by both mail and e-mail works. Each court office may be different and specific inquiries should be made.

A postscript about court office procedures and filings is warranted. In most court offices there is no problem but, in a few places in the Province, court offices are unfamiliar with the Court of the Drainage Referee and have initially declined to open a court file to receive a notice of application, supporting documentation and responding documentation. Where that has occurred, the Referee has sorted it out with the court staff. Should you or

legal counsel representing your client encounter that situation, please call one of the Referees for assistance.

Video Hearings

At the opening of a video conference hearing, the presiding Referee must admit participants who are being held in a virtual “waiting room”. After everyone is in the hearing and after introductions, there are a few housekeeping preliminaries that are covered. Needless to say, the Referee will not admit anyone who is not on the list of those who were provided with login credentials. If someone becomes disruptive of the proceedings, the presiding Referee can remove them from the video conference by putting that person back in the “waiting room”.

There is a “chat” facility in Zoom which permits participants to communicate privately. The principal point is that any “chat” communication that is addressed to the presiding Referee needs to be sent to all.

Aside from the chat feature, participants can have their private communication exchanges using your cell phones via e-mail or texting. If proceedings were in a courtroom, it would be expected that such devices would be silenced and not be used. In the circumstances of a video conference, they can be used so long as there are no voice calls while the hearing is under way and so long as the sound volume of rings, e-mail and/or text messages is turned down – setting for vibrate only would be ideal.

Finally, it is important to make it clear that the session is being recorded and that an electronic copy of the recording will be sent to each of the parties or their legal counsel.

As nearly as is possible the hearing is then conducted much as would occur in a courtroom, without the excitement of surprise, walk-on witnesses or the tendering of exhibits during cross- examination which no one has seen before.

A word should be said about witnesses on video conference hearings. If a witness is to be sworn before giving evidence, the witness needs to have a bible with them to be sworn in. In the normal course in a courtroom there is a bible. This is not an issue for those who prefer to affirm on their conscience.

The other thing about witnesses is the concern about “coaching” via electronic devices, including the Zoom “chat” facility. Legal counsel know better but other, lay persons might not appreciate that their helpful texting of suggested answers to a witness in fact compromises the integrity of the process. The practise, after swearing in a witness, is to caution the witness about giving their own evidence and to ask that they put away their cell phone or other similar device.