

Discovery Ordered to Proceed by Videoconference or Not at All

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“It’s 2020...We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back”.

These were the comments of Justice Myers in [Arconti v. Smith](#), 2020 ONSC 2782. The plaintiffs objected to conducting an examination for discovery by videoconference. They argued that:

- they need to be with their counsel to assist with documents and facts during the examination;
- it is more difficult to assess a witness’s demeanour remotely;
- the lack of physical presence in a neutral setting deprives the occasion of solemnity and a morally persuasive environment; and
- the defendants may engage in sleight of hand and abuse the process.

Justice Myers stated that, in 2020, the use of readily available technology is part of the basic skillset required of civil litigators and courts. Efforts can and should be made to help people who remain uncomfortable to obtain any necessary training and education.

His Honour acknowledged that there are perceived, and possibly very real, shortcomings associated with proceeding remotely rather than in person. There is some loss of solemnity and personal chemistry in remote proceedings.

Further, there is the potential for abuse. For example, there could be improper prompting of a witness. However, Justice Myers stated that an amorphous risk of abuse is not a good basis to decline to use available technology.

The benefits and risks have to be weighed. Delaying a matter that has been ongoing for years is not desirable. His Honour did not accept that anything would be lost by examining

the defendant by videoconference that would not be more than offset by the proportionality of proceeding efficiently and affordably.

The plaintiffs were given the option to either examine the defendant by videoconference, or to waive their opportunity to conduct the examination.