THE LAWYER'S DAILY

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Phone: (800) 668-6481 | Fax: (905) 479-3758 | John.Carson@lexisnexis.ca

Legal Innovation

Technology and the courts: Now or never | Neil Wilson

By **Neil Wilson**

Neil Wilson

(April 20, 2020, 9:01 AM EDT) -- The COVID-19 pandemic has ground justice to a halt together with the rest of society. The only way to keep going will be to finally embrace what the justice system has resisted for so long: the use of technology. As the saying goes "necessity is the mother of invention" — or, in our case, necessity may be the mother of finally applying long-available inventions to the trade of lawyering.

For the first time in its history Ontario's Superior Court of Justice, together with other courts across the country, suspended operations. The initial shock of hearings being shut down has now shifted to an attempt to adapt, streamline and modernize in ways that were unimaginable a few short weeks ago. All indications are that what the justice system is going through is nothing short of a transformation.

Over the first months of this crisis three things have become clear. First, in-person court attendances should be reserved for important contested matters. Second, the court system's reliance on paper must end. Third, to accomplish these two "new normals" lawyers, courts and judges must quickly accept technology as a basic component of the litigation process.

In the short-term, hearings by videoconference or teleconference will be the norm, especially in cases that do not involve live witnesses. In Ontario the first week of the court shutdown saw an order for a hearing by teleconference in a civil case, with videoconferencing as available in the case of *Ali v. Tariq* 2020 ONSC 1695, as well as a bail review hearing conducted by teleconference in *R. v. J.S.* 2020 ONSC 1710. The Divisional Court has directed hearings by Zoom in at least two cases. Examinations for discovery and mediations are beginning to proceed remotely using videoconferencing.

Courts outside of Canada are moving in the same direction. In England, the country's first trial conducted entirely by Skype recently took place. Several appellate courts in the U.S. have conducted hearings by Zoom and established YouTube channels to stream the proceedings.

Here at home, the next natural step in the gradual reopening of court operations is allowing for the hearing of contested motions in writing. Many motions can and should be dealt with in writing. For procedural motions, the default should shift from booking a motion date for an oral hearing to filing materials to be considered in chambers, with an oral hearing available if requested.

In civil cases most discovery-related and procedural motions can be dealt with effectively in writing. Costs submissions, frequently over very large sums of money, are already typically done in writing. Even some appeals are now being heard in writing: in *Carleton Condominium Corp. No. 476 v. Wong* 2020 ONCA 244, Justice David Paciocco recently ordered that an entire appeal proceed in writing, with questions from the Court of Appeal being answered by teleconference. While oral advocacy is and will remain a central part of every litigator's practice, written advocacy in the form of a factum will take on additional importance.

When the scheduling of other proceedings resumes, all forms of scheduling court should end once and for all. These attendances have long been recognized as being a poor use of time. They involve a huge amount of waiting around for what is frequently consent date-setting. The courts have the benefit of experienced trial and motion coordinators with special expertise in scheduling. These

professionals should be empowered to handle all scheduling matters by e-mail with only intractable scheduling disputes going before a judge, by teleconference.

The profession must also break off its unhealthy relationship with paper. Key steps towards this goal have been taken in recent weeks. The Superior Court is now permitting service of documents by e-mail, and the Law Society of Ontario has issued guidelines endorsing the practice of commissioning affidavits virtually (i.e. where the signature is witnessed over video link). Some judges have allowed for electronic filing and dispensed with the need for books of authorities. An early example is *Ali v. Tariq* where Justice Frederick Myers requested that the parties hyperlink to cases online in lieu of providing books of authorities. These are all easy fixes that should be made permanent.

As can be seen from all of these recent developments, the pandemic has in a matter of weeks triggered reforms that many justice system participants had long been calling for. It has precipitated changes that would have otherwise taken years and likely been bogged down in endless consultations, costing and risk assessments. And it has created a testing ground for figuring out what works and what doesn't.

Rather than a rigid institutional response, the unusual circumstances we are in have given judges and parties a wide discretion to experiment with different processes and software. Rather than using a single software, judges have a range of options: Zoom, Skype, Microsoft Teams or whatever other programs are available. Judges are crafting litigation orders tailored to the needs of a specific case with orders for file sharing by drop box, virtual public audiences and the use of "factum compendiums" with key excerpts from cases (see for example the Divisional Court's recent endorsement in *A.G. Ontario v. Ontario (Information and Privacy Commissioner)* 2020 ONSC 2175). This will be a process of trial and error with a healthy dose of tinkering and experimentation by everyone involved.

By the end of this crisis there will be no turning back. Judges and lawyers will become more accustomed to new ways of doing things. The initial inconveniences that go along with any transition will be over. Steps towards modernization will have been taken without the justice system imploding. The question will not be whether we will revert to how things were before, but rather how many of the changes we will keep. The changes ahead are also likely to renew discussions about broader developments in the justice system — for example, the perennial debate about cameras in courtrooms: if virtual courtrooms are open to the public remotely, how can we justify not allowing the same thing once things return to normal?

The coming weeks will require everyone involved with the justice system to learn to be open to using new technology. This will include all of the programs that go along with things like videoconferencing, issuing claims online and executing documents electronically. These are all things that are widely available and which now must become widely used. This will be easier for some than others. But in the end it is no longer an option — we must use technology in order to keep the justice system moving. When presented with an opportunity to try something new, we need to just say "yes."

Neil Wilson is a lawyer with Stevenson Whelton LLP *in Toronto practicing in the areas of civil and commercial litigation.*

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