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eQuestioning: Oral Questioning in Litigation in the Era of Social Distancing

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In adversarial litigation, oral questioning is an out-of-court pre-trial or pre-hearing proceeding where a party to litigation orally examines (by way of questioning) under oath another party adverse in interest, or their agents, for the purpose of adducing information that may be used as evidence. In the *Alberta Rules of Court*, Alta Reg 124/2010 (*Alberta ROC*), oral questioning can take the form of questioning for discovery (Rules 5.17 and 5.22) or questioning on application (Rules 6.7 and 6.8). Before the COVID-19 crisis and its social-distancing requirements, the default method of oral questioning in civil litigation was in person, with the parties and their lawyers present at a physical location accessible to all, such as the lawyer's office or some other location chosen by the parties. A certified court reporter must also be present, who swears the witnesses and also takes record of the 'question and answer' proceeding.

The COVID-19 pandemic has resulted in public health and judicial directives enforcing isolation and social-distancing rules. Consequentially, in-person questioning became impractical on public health grounds. Although the justice system was substantially paralysed by the pandemic, litigation must go on even in that state of paralysis. In response to the realities imposed on the justice system, in-person oral questioning gave way to virtual or remote questioning using audio- or video-conferencing technologies. This method of questioning is what I refer to in this post as eQuestioning (short for electronic questioning).

eQuestioning is no stranger to the civil justice system, although before the COVID-19 pandemic, it was the exceptional and sparsely used alternative to in-person questioning in litigation. But the COVID-19 crisis has changed the world in many ways, and in response to its travel restrictions and social-distancing measures, eQuestioning has become the default means of conducting oral questioning in litigation.

In this blog post, I will examine oral questioning in civil litigation and the rules governing eQuestioning in the *Alberta ROC*. I will also critique the recent decision on eQuestioning by the Alberta Court of Queens Bench in *Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta*, 2020 ABQB 359 (CanLII) (*Sandhu*).

Questioning for Discovery vs. Questioning on Application

Oral questioning for discovery enables a party to litigation to obtain information which is relevant and material to the litigation from parties adverse in interest, or their agents. This process is also known in some jurisdictions as oral discovery, examination for discovery, examination on discovery, oral examination or deposition. Rule 5.17 of the *Alberta ROC* allows for questioning under oath of a party adverse in interest for the purpose of obtaining "relevant

and material records and relevant and material information." The questioning can be done orally or in writing (Rule 5.22, *Alberta ROC*).

Oral questioning on application arises in two situations. First, a party adverse in interest may question the person swearing "an affidavit in support of an application or in response or reply to an application" (Rule 6.7, *Alberta ROC*). This is known as cross-examination on affidavit. Second, a witness at the hearing of an application may be questioned under oath before the hearing for the purpose of obtaining evidence admissible at the hearing of the application (Rule 6.8, *Alberta ROC*).

Some important similarities between questioning for discovery and questioning on application are:

- Both proceedings are pre-trial or pre-hearing proceedings.
- Unlike a normal court proceeding, they are not open to the public and involve only the parties, their counsel, and other authorized persons.
- Both proceedings are out-of-court and do not involve the judge; the lawyers run the process. This can sometimes lead to chaotic drama, like the American deposition seen here.

Notwithstanding the similarities, there are also important differences between the two. The transcript of proceedings in oral questioning on application is evidence before the court and can be relied on by either party. In oral questioning for discovery, the transcript is not evidence before the court. The transcript (or a portion of it) becomes evidence only when "read in", generally by the party who conducted the questioning.

The Pre-COVID-19 In-Person Default

Although the *Alberta ROC* do not explicitly provide any default method for the conduct of questioning in litigation, prior to the COVID-19 pandemic, as noted earlier, the default was in-person presence at a predetermined location by the parties and their lawyers. Thus, the party seeking to conduct questioning in litigation initiates the process by serving on the party to be questioned a notice of appointment (Form 29) specifying date, time and place for the appointment for questioning. The notice must be served along with reasonable payment for accommodation, meals, and transportation expenses (Rule 6.17, *Alberta ROC*).

The main problem associated with this in-person process is cost. That is especially the case when the parties, their lawyers, and the persons to be questioned live in different and distant locations. The expense in travel and accommodation for all persons involved adds to the cost of the litigation, and the farther their locations from the venue of the questioning, the higher the cost. Now, with the COVID-19 crisis, in-person questioning is practically impossible. This has resulted in a "new normal," where questioning using tele- or video-conferencing technology has become the default means of conducting questioning. As would be expected, not all litigants have been receptive to the change. Some would rather have the oral questioning process suspended until the world returns to a normality that would allow the continuation of the in-person process. See *Arconti v Smith*, 2020 ONSC 2782 (CanLII) (*Arconti*); *Sandhu*.

eQuestioning and the *Alberta Rules of Court*

Before the COVID-19 pandemic, Alberta courts had on some occasions authorized the use of eQuestioning in civil litigation. This was done without any reference to any applicable provision in the *Alberta ROC* as a basis for the order. The use of eQuestioning in *Geophysical Service Incorporated v Falkland Oil and Gas Limited*, 2019 ABQB 314 (CanLII), for example, seemed to have been based largely on the agreement of the parties rather than on any applicable provision in the *Alberta ROC*. However, in *Franiel v Toronto-Dominion Bank* 2020 ABQB 66 (CanLII) (*Franiel*), the court was rather hard on a party for insisting on in-person questioning when eQuestioning via video conference was an available and viable option. In that case, Master Andrew Robertson ruled that if the plaintiff insisted on in-person questioning of the defendant bank's witness who resides in Toronto, then the plaintiff must "pay for airfare, hotel (likely two nights), meals, and conduct money for that witness' attendance in Calgary" (at para 42). In the alternative, Master Robertson recommended that the plaintiff conduct the questioning using videoconferencing, which was less expensive and more efficient:

> My recommendation is that videoconference be used. It would be less expensive and likely could be arranged more quickly and easily than an attendance requiring the witness to spend, in practical terms, three days in total to travel to Calgary, testify, and then travel back to Toronto. (at para 43)

It should be noted that in recommending the use of eQuestioning via videoconference, Master Robertson made no reference to any provision in the *Alberta ROC*. Rather, he noted that "[t]he Foundational Rules direct that the Court and the parties are to find the most efficient way to find a resolution to the case" (at para 40). I will come back to these foundational rules later.

So, what rule or rules govern eQuestioning in Alberta? Unlike in Ontario, which clearly provides for the use of tele- and video-conferencing technologies in all or part of a proceeding or steps in a proceeding (Rule 1.08, *Rules of Civil Procedure*, RRO 1990, Reg 194, emphasis added), the *Alberta ROC* lack a similarly worded provision. Justice Michael Lema was faced with this difficulty in *Sandhu*. The issue in that case was whether the cross-examination on affidavits should be suspended until the COVID-19 pandemic has cleared, or whether it should be conducted sooner by videoconference.

In *Sandhu*, Justice Lema seemed to consider Rule 6.10 of the *Alberta ROC* as one of the governing rules for remote questioning. Rule 6.10 deals with "electronic hearing", which is defined as:

> an application, proceeding, summary trial or trial conducted, in whole or in part, by electronic means in which all the participants in a hearing and the Court can hear each other, whether or not all or some of the participants and the Court can see each other or are in each other's presence. (emphasis added)

Clearly, electronic hearing can only apply to any of the above listed proceedings in which the participants and the court are involved. As has been noted above, questioning for discovery and questioning on application are out-of-court pre-trial or pre-hearing proceedings that involve the

parties and their lawyers. The court is not involved, and the judge does not participate. The absence of the court's involvement takes the proceeding outside the context of Rule 6.10.

Justice Lema initially acknowledged this in his judgment (at paras 19-20), but then sought to invoke a predecessor rule and caselaw in support of the use of Rule 6.10 as a governing rule for eQuestioning – Rule 261.1 of the old *Alberta Rules of Court*, Alta Reg 390/1968. The old rule provides that "[o]n application to the Court and on showing good reason for doing so, the Court may permit evidence to be admitted by telephone, audio-visually or by other means satisfactory to the Court." Justice Lema went further, citing *De Carvalho v Watson*, 2000 CanLII 28217 (AB QB) where Justice Craig Jones broadly interpreted Rule 261.1 "to allow for the continued examination of an individual on an examination for discovery by appropriate audiovisual techniques" (at para 18).

Without disputing Justice Jones' broad interpretation of Rule 261.1, it is vital to note the important difference between Rule 261.1 (the old Rule) and Rule 6.10 (the new Rule). The difference lies in the latter's clear and obvious requirement of the court's involvement in a hearing in order for Rule 6.10 to apply. This requirement is not evident in Rule 261.1, which only requires an application be made to the court to authorize the use of electronic means for the admission of evidence. Unlike Rule 6.10, this can be broadly interpreted to apply to out-of-court proceedings in a matter before the court such as questioning for discovery or questioning on affidavit.

Clearly then, the argument I am making here is that Rule 6.10 cannot be used as a basis for virtual or eQuestioning. What rule(s) then will apply? In *Franiel*, Master Robertson alluded to the foundational rules' requirement that the court and parties seek out the most efficient means of resolution of the litigation. In *Sandhu*, Justice Lema rightly considered the foundational rules in justification of his order to permit remote cross-examination on affidavit.

The Foundational Rules

The foundational rules are found in Part 1 of the *Alberta ROC*. They provide guidance on the interpretation of the Rules, including practice and procedural orders that the court can make to achieve the purpose and intention of the Rules. The foundational rules appear to provide substantive grounds for ordering the use of eQuestioning in litigation. Rule 1.2, for example, clearly lays out the purpose and intention of the *Alberta ROC* which includes, among other things, "to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way…" and "to facilitate the quickest means of resolving a claim at the least expense*"* (emphasis added).

In a COVID-19 era where the court system has almost come to a grinding halt, eQuestioning provides a means of safely and efficiently conducting questionings in litigation, thus enhancing timely resolution of matters before the court. Even with the social-distancing rules in place, parties can still conduct this aspect of the litigation process without necessarily having to wait until the world returns to in-person normality. Also, it need not be re-emphasised that eQuestioning may prove to be the least expensive means of conducting questioning, as in-person

questioning can add significantly to the cost of litigation, especially where the parties reside in locations very far from the venue of the questioning.

In addition, Rule 1.4 provides further assistance in this regard. Rule 1.4 advances the purpose and intention outlined in Rule 1.2 by permitting the court to "make any order with respect to practice or procedure, or both, in an action, application or proceeding before the Court." Further to that, Rule 1.4 (2) provides:

> Without limiting subrule (1), and in addition to any specific authority the Court has under these rules, the Court may, unless specifically limited by these rules, do one or more of the following:
>
> …
>
> (c) give orders or directions or make a ruling with respect to an action, application or proceeding, or a related matter.

Although eQuestioning is not expressly provided for in the *Alberta ROC*, these foundational rules undoubtedly provide legal basis for its use in civil litigation, especially in the era of COVID-19. eQuestioning falls in line with the purpose and intention of the Rules in achieving a timely and cost-effective resolution of litigation.

Making a Case for eQuestioning

A starting point in making a case for eQuestioning in civil litigation is an inquiry into its necessity in our civil justice system. Currently, the strongest case for eQuestioning is clearly related to the travel restrictions, isolations and social-distancing requirements imposed by the COVID-19 pandemic. But even beyond COVID-19, there are other reasons that justify the use of this electronic process. Cost, time efficiency, and effectiveness of the process count. In-person processes often entail a longer timeframe.

eQuestioning is also a very convenient process and is often easier to schedule than its in-person alternative. Counsel and the parties are able to participate from the comfort of their homes or offices. This is especially important where any of them has limitations such as physical mobility. The convenience associated with this process also limits the likely absence or unavailability of the participants in the proceeding.

While time, cost, and efficiency are some of the major factors in support of eQuestioning, some concerns have been raised against this process and in support of the pre-COVID-19 status quo. Some of these arguments were raised by the plaintiff in the Ontario case of *Arconti*, COVID-19 era litigation where the plaintiff objected to examination for discovery by videoconference. These objections included: (i) the difficulty in assessing a witness's demeanour remotely; and (ii) that the use of technology in the questioning process will facilitate the ability of the party to cheat and abuse the process. I will address both of these concerns.

First, in conducting examination of a witness in the course of a proceeding, observation of the demeanour of the witness may be important. When the credibility of the witness is an issue in the proceeding, the observation of their demeanour is best made in an in-person proceeding. But it is

important to make a distinction between a pre-trial proceeding and the actual trial. While credibility issues often arise in hearings or trials where a judge (or jury) is present, in most pre-trial proceedings such as questioning for discovery or questioning on affidavit, credibility is rarely an important issue. Hardly (if ever) do the transcripts from these proceedings (which are or may become evidence in court) record information about the demeanours of the witnesses. Hence, the need to observe the demeanour of the witness is not a significant enough factor to warrant an in-person process in all situations. This position is further supported by the fact that the *Alberta ROC* allows for written questioning (in questioning for discovery), which provides no opportunity for observing the demeanour of the party responding to the questions (Rule 5.22(b)).

The second argument relates to the use of technology to facilitate the ability to cheat and abuse the questioning process. Concern may be raised about the ability of a remote witness to be coached or unduly influenced in the course of eQuestioning. This is a practical reality which cannot be totally eliminated, but it can be checked. First, the person being questioned may be placed in an environment where they can be subject to a 360-degree view on a video camera or cameras, and any individual (except counsel) whose presence is not relevant to the questioning may be required to leave the room. Further, our code of professional conduct as lawyers provides an ethical check on cheating or abuse of court (and out-of-court) processes in the conduct of litigation. Lawyers have an ethical obligation to prevent their clients from engaging in such conduct. Rule 5.1-5 of the Law Society of Alberta Code of Conduct prohibits counsel from misleading the tribunal or assisting a client or witness to do the same. Justice Frederick Myers rightly summed this up in *Arconti*:

> While no one is immune from cheating, regulated professionals must maintain professional ethics [or] have their licenses at risk. Their professional reputations are their lifeblood. While the court remains open to receive evidence of abuse of any examination or other process in a lawsuit, and should deal strongly with any proven abuse, I do not think an amorphous risk of abuse is a good basis to decline to use available technology. (at para 26)

In making a case for eQuestioning in litigation, I must admit that there are cases where in-person questioning may be a better alternative to eQuestioning. For example, where the questioning involves the examination of physical objects, or an expert witness examining detailed technical presentations and models, in-person presence of the participants in a physical location will be a better alternative.

Conclusion

So why must lawyers continue to push for the use of eQuestioning in civil litigation? Because, to quote Justice Myers in *Arconti* (at para 19), "It's 2020." Technology will continue to disrupt our usual ways of doing things. It will continue to provide us with better and innovative alternatives. It is important that our profession and the justice system embrace these better and innovative alternatives rather than stick to the old and often expensive and time-consuming ways of doing things.

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