

Court of Appeal Confirms its Jurisdiction to Hear Appeals in Writing Over the Objection of a Party

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By Ken Prehogan and Commercial Litigation Insights Blog

In *4352238 Canada Inc. v SNC Lavalin Group Inc.*,^[1] the Ontario Court of Appeal gave notice that it is determined to proceed with appeals, where possible to do so, during the COVID-19 pandemic emergency, but that it will be flexible in its approach.

The matter is described in the Court's reasons as arising out of the dismissal of an application for narrow declaratory relief concerning the interpretation of one clause in a contract within the context of a relatively straightforward factual matrix. The appeal was scheduled to be heard on April 20, 2020, but was adjourned *sine die* due to COVID-19 emergency.

At a case management conference held to determine how the matter was to proceed, the respondent suggested that the appeal proceed in writing, but the appellant objected. The appellant submitted that the Court of Appeal has limited supervisory jurisdiction over its own process, such jurisdiction is restricted to governing administrative details, and the Court cannot order that an appeal be heard in writing over the objection of one of the parties. Indeed, the *Rules of Civil Procedure* mandate an oral hearing unless the parties consent to an appeal in writing.

Roberts, J.A., sitting as a case management judge, held that the Court's implicit or ancillary jurisdiction to manage its own process is broad, and that the Court has the jurisdiction to make any procedural order to prevent an abuse of process or to ensure the just and efficient administration of justice. She held that these implicit powers include those that are reasonably necessary to accomplish the Court's mandate and perform its intended functions, and that they arise by necessary implication even in the absence of express statutory or common law authority.

After noting that the *Rules* contemplate an oral hearing, Roberts, J.A. stated that they do not explicitly direct that an oral hearing is required. She referred to Rule 1.04(1) which expresses the governing principle that the *Rules* "shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."

Roberts, J.A. also stated the following:

[6] It is also beyond controversy that the COVID-19 pandemic has created extraordinary circumstances to which we must all adapt as best we can. Since March 17, 2020, there have been no in person appeals heard at the Court of Appeal. More than 100 scheduled appeals had to be adjourned. Through a series of Practice Directions, this court has endeavoured to address the tremendous disruption caused by the pandemic. As a result, appeals are being heard in writing or remotely until in person appeals can resume. Case management conferences are being held to manage and schedule them.

[7] Accordingly, it is well within this Court's jurisdiction to order that a civil appeal be heard in writing when the due administration of justice requires it. During these extraordinary times, judicial resources are strained. The ability to hear appeals remotely is not unlimited. Where appropriate, some appeals must be heard in writing in order to ensure that appeals continue to be heard in a timely

and an orderly fashion.

In ordering that the appeal proceed in writing, Justice Roberts permitted the parties to file supplementary facts of no more than 10 pages. She stated that further submissions were not foreclosed: the panel has the option to seek further oral and written submissions. She gave further directions pertaining to service and filing electronically of all material previously filed, including hyperlinks in the facts and supplementary facts to key documents and case references.

The appellant has brought a motion to have the Order of Roberts, J.A. set aside by a full panel of the Court of Appeal pursuant to section 7(5) of the *Courts of Justice Act*. It will be interesting to follow this case and see whether there will be more detailed analysis of the issues in the panel's decision.

[\[1\]](#) 2020 ONCA 303

The information and comments herein are for the general information and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, please contact any of our lawyers for further guidance.

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