

From: [Mark Rubenstein](#)
To: [Christine Long](#)
Cc: ["jay@shepherdrubenstein.com"](mailto:jay@shepherdrubenstein.com)
Subject: Virtual Hearing - Comments
Date: Tuesday, June 30, 2020 3:00:12 PM
Attachments: [image003.png](#)

Dear Ms. Long,

Thank you for the opportunity to provide comments as the OEB prepares for virtual hearings. Below are a few comments based on my own experiences, as well as some discussions I have had with other lawyers who have participated in virtual court and tribunal hearings over the last few months. In many ways the OEB is well positioned to conduct virtual hearings because of the existing electronic nature of the documentary evidence, but there are some issues the OEB should consider.

Question 1:

- ***Virtual Hearings Are Tiring.*** Sitting in front of your computer all day in a focused state is a significantly more exhausting activity than doing the same thing in-person in the hearing room. It is especially hard on witnesses and the decision-maker (the OEB hearing panel). I have had the opportunity to speak to individuals who have participated in virtual hearings in other forums and this is a consistent issue they have raised. I am not sure what the solution is exactly, but the OEB may want to think about potentially shorter hearings days, or more frequent or longer breaks. My understanding is that in a recent lengthy Federal Court virtual trial, they took short breaks every 60 to 75 minutes due to witness fatigue.
- ***Disconnection Protocol.*** The OEB will need to develop a disconnection protocol to deal with the inevitable situations where someone gets disconnected from the ZOOM platform. If one of the OEB panel members, witnesses, their counsel, or the cross-examiner are disconnected, it would seem obvious there would need to be a recess until the issue is fixed. But the OEB will need to determine in advance, what happens if another party's representative/counsel, Board Staff, or the hearing advisor get disconnected. Do you stop the hearing until they are re-connected or just continue?
- ***Witnesses.*** There are two separate issues the OEB will need to consider with respect to witnesses:
 - ***Witnesses Conferring During Cross-Examination.*** It would seem the biggest complication for virtual OEB hearing is that witnesses usually sit in a panel and they may not all be in same room (or even if they are, they are unlikely to be able to sit close enough together due to social distancing policies). Since it is not uncommon for witnesses to huddle to confer before providing an answer, how this would work in the virtual environment is not entirely clear. Will the conferring huddle take place in a breakout room? If so, there are concerns with such an approach. Witnesses under oath should not be able to go into the equivalent of a separate room to discuss an answer before they give it, out of view of the hearing panel and parties. It also would dramatically slow down the hearing. In my experience there are some witness panels that it feels like they confer amongst themselves every third question.
 - ***Witness Protocol.*** The OEB should develop a witness protocol that sets out the dos and don'ts for witnesses when they are under oath and being questioned. Witnesses should be required to confirm when being affirmed, that they have reviewed the protocol and agree to abide by it. The protocol should include, for example, a clear prohibition of witnesses communicating with others privately by way of electronic means while they are being questioned. Below is a link to a recent Federal Court decision that sets out some details regarding protocols for witnesses in a virtual trial (see paragraph 13). Not all of them are

relevant to the OEB context, but it may be helpful guide for things that should be considered. <https://www.canlii.org/en/ca/fct/doc/2020/2020fc637/2020fc637.html>

- **Breakout Room Feature.** ZOOM is a great platform, especially because it has the breakout room feature. The OEB should ensure that likeminded parties (e.g. consumer intervenors, etc.) are given on-going access to breakout rooms to replicate the opportunities that normally exist for discussing amongst parties before and after the hearing day and during breaks when hearings are held in-person. Ensuring access to breakout rooms will allow better coordination amongst intervenors, which is an important way to help ensure the efficiency of multi-party hearings. The OEB should make these breakout rooms available daily during hearing days 30 minutes before the start of a hearing a day, and during all breaks.

Question 3:

- Regarding the pre-hearing conference, it would be helpful if the OEB member who attends lets the participants know if there are any specific practices that they and their fellow panel members would find helpful.

Please do not hesitate to contact me if you require any clarifications or would like further information.

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From: Batul Rahimtoola <Batul.Rahimtoola@oeb.ca>
Sent: June 17, 2020 16:46
To: BoardSec <BoardSec@oeb.ca>
Subject: OEB Letter - Seeking Input on Virtual Hearings

To: All Registered Stakeholders

The OEB is beginning to take steps to ensure that we are ready to hold virtual oral hearings, in the event it becomes necessary to do so and is therefore seeking your input on conducting virtual hearings. Please see the attached correspondence for details.

Thank you.

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