



## BY WEB POSTING

July 17, 2020

**TO:** Stakeholders

**RE:** Virtual Hearings at the OEB

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On June 17, 2020, the OEB issued a letter to stakeholders seeking feedback on the OEB's intent to plan for conducting virtual hearings. We received helpful information from various stakeholders that we will consider as we create a virtual hearings protocol. A summary of those comments is outlined below.

### Questions posed in the consultation:

1. What issues should the OEB consider as it plans for the ability to conduct a virtual hearing?
2. Are there any technical obstacles which would prevent you from participating in a virtual hearing?
3. Are there matters you think should be specifically discussed at a pre-hearing conference in advance of a virtual hearing?

### Responses - What did we hear?

1. Issues to consider

#### Process

- There must be recognition that a virtual hearing will never be the same as an in-person hearing; parties should be willing to cooperate in good faith to achieve the most expeditious and least costly resolution of proceedings
- Virtual hearings should be limited to a narrow list of issues that cannot be addressed in writing
- The virtual platform should be configured to satisfy the needs of an oral hearing, including openness and accessibility to interested members of the public
  - Virtual proceedings will present challenges as they will tend to erode hearing time
  - Encourage parties to settle issues in order to preserve hearing time for

- material issues
  - Issue prioritization will preserve hearing time for most material issues
  - Require that all parties who intend to cross-examine be present in the virtual hearing when cross-examination begins to listen and adjust their questioning to avoid duplication
- Hearing timeline
  - Consider opening the virtual hearing room at least 30 minutes in advance of each hearing day to test mics and connectivity
  - Schedule more frequent shorter breaks
  - Consider building contingency into the hearing schedule at the outset to allot time for resolving technical issues/disruptions
- Participant preparation/training
  - Conduct a series of “mock hearings” with external participants to refine the use of technology and build familiarity among the participants
  - Conducting a virtual rehearsal session for the purpose of testing the Zoom platform and reviewing the planned sequence of the event is a welcome approach to use in advance of a virtual hearing
  - A test/prep session has been a good approach to ensure that all stakeholders can navigate Zoom and set expectations for protocols during a proceeding.
- Prepare an outline for the virtual hearing to establish a communication protocol during the hearing. Address the following;
  - How do you ask questions without interrupting the speaker?
  - How does counsel interject while a witness is testifying?
  - How do panel members interject to moderate or facilitate lines of questioning?
  - How are visual references presented effectively?
  - How do witnesses privately convene a discussion during questioning?
  - Will exhibits be displayed on screen, and how? What is the process for the operator to clarify if a reference is not heard clearly?
  - Timing on delivery of compendiums, evidence, undertakings, etc. so that it can be reviewed without distracting from the proceeding
- Participation
  - How will the hearing be made accessible for those with visual or hearing disabilities?
  - Virtual hearings are tiring. Think about potentially shorter hearings days, or more frequent or longer breaks. In a recent lengthy Federal Court virtual trial, they took short breaks every 60 to 75 minutes due to witness fatigue
  - Provide ongoing access to breakout rooms to replicate the opportunities that normally exist before and after the hearing day and during breaks when hearings are held in-person
  - Consider the relative locations of the various parties and their witnesses

- In a “partially virtual” hearing, in-person interactions could be preserved by allowing parties to participate in self-contained groups, e.g. a full witness panel along with counsel and key company representatives

#### Evidence

- Outline the ability of an applicant to bring up documents on the screen as they are being referenced
- Provide written instructions for how to display evidence
- Reference undertaking number and what is requested
- Size of text when sections of evidence are on screen needs to be considered for those who do not have 20/20 vision
- Assign case document names based on OEB-prescribed file naming convention (historically not used consistently)
- All case documents should be available electronically in an easily accessible format
- Consider digital compendium submission deadline, i.e. 6:00 pm the day before the expected cross-examination, to ensure there are no issues with receiving or loading compendium into the virtual hearing room
  - File size should be limited; some email systems have size caps
  - Deadline is critical for preparation and timeliness
  - Continued ability to rely on the full evidence – witnesses should be permitted to indicate they would like to review the full evidence and given time to do so

#### Security/Confidentiality

- Safety and security – there have been instances of Zoom security issues and breaches. Investigate other potentially more secure platforms such as Google Meet or the Microsoft platform
- Consider the use of Microsoft Teams as an alternate technological solution for virtual hearings
- Consider the potential that meetings might be recorded by parties and whether this is appropriate
- Consider prohibiting video recording, audio recording, photographing and screen capturing the proceeding – may cause privacy concerns
- The OEB could require all parties to participate by video call where they can be seen by participants
- Concerns for using Zoom for *in camera* sessions because of Zoom’s encryption model; all materials shared on Zoom should be considered public
- Determine the *in camera* process; *in camera* sessions are harder to monitor and administer in a virtual environment
  - Should have the ability to create a separate encrypted and password protected room for only those who have signed the confidentiality declaration and undertaking

- Consider requiring all participants in an *in camera* session to use video to confirm all have signed the declaration and undertaking
- Confidentiality declaration and undertaking should be revised to include provision that any audio or video is not broadcast, recorded or otherwise shared with anyone who has not signed [the confidentiality declaration and undertaking]

#### Witnesses/Cross-examination

- There should be rules around virtual examination and cross-examination
- There should be an ability for counsel representing witnesses to object in the moment
- There should be an ability for witnesses to confer – through a separate platform/virtual meeting room (e.g. Skype or text messages, or in the same room with physical distancing)
- Consideration should be given to how the witness panel will communicate among themselves, and with counsel, privately
- Develop a witness protocol that sets out the dos and don'ts for witnesses when they are under oath and being questioned
  - It is not uncommon for witnesses to huddle to confer before providing an answer. Consider how this would work in the virtual environment
  - 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
  - Consider reviewing the attached link to a recent Federal Court decision that sets out some details regarding protocols for witnesses in a virtual trial (see paragraph 13):  
<https://www.canlii.org/en/ca/fct/doc/2020/2020fc637/2020fc637.html>
- Breakout rooms for witnesses have taken more time than typical conferring during a panel. This should be used efficiently or additional hearing time may be required
- Having options for intervenors, witnesses or other groups of stakeholders to caucus (particularly during a settlement conference) is essential. This can be achieved through break-out rooms.

#### Moderator/Speakers

- Clearly identify neutral moderator: in the hearing, the Chair of the panel; in settlement conferences, an OEB-appointed facilitator or OEB staff who are not part of the hearing team
- If participants using two screens turn their head away from the microphone, the audio drops significantly
- Standardized protocols for muting and unmuting participants are required
- Limiting the speakers

- Separate dial-ins for participants (active) and the public (listening only) to control audio participation; will allow participants to mute/unmute themselves without needing a moderator
- OEB Panel and Counsel should always have the ability to speak through the proceeding, e.g. need to interject during the proceeding
- Consider retaining a moderator to control audio access and designate a speaking order
- Ensure participants understand which party is allowed/encouraged to speak at a given time – the role of facilitator/moderator assumes heightened importance in a virtual hearing
- One key to successful Zoom facilitation is the skills of the Zoom host. In our experience so far this has been positive.
- Whether there is anything participants can do to assist the court reporters

### Technology

- It is critical to develop and distribute a robust and validated training guide with a visual tutorial on how to connect to the hearing
  - Written instructions for participants to understand how to use Zoom and how the proceeding will be led, including order of questioning and speakers, how witnesses will view documents, shared settlement language
- Consider the technical capabilities of participants to ensure they are clearly heard and seen and rules/consequences around when a participant may be required to stop participating if their sound or video quality falls below a certain level
- Ensure all security updates provided by the platform provider are up to date for all participants
- Audio and video quality are paramount; consider providing guidance when participants should have their cameras on to limit draws on bandwidth
- Rehearsal prior to the start of a proceeding; sound checks at the beginning of each new session
- Setting up test sessions with participants and OEB IT staff ahead of hearings to ensure connectivity issues are identified and resolved
- Consider establishing a contingency plan if the selected technology is not available or not functioning on any particular day; additionally permit parties to dial-in by phone in the event internet stability is a concern
- Consider having dedicated technical support for participants to access in real-time during the hearing
- Screen sharing
  - Technology should allow applicant team to use more than one screen and be able to select which screen to project (assists with lining up documents to project prior to being projected)

- Limit screen sharing ability to the applicant team in order to ensure that any set up is retained throughout the hearing; most efficient as the applicant team can quickly flip to another referenced document that other parties may not have readily available to project onto the screens; OEB and intervenors can request documents to be shown (same as current hearing process)
- Guidance on how to address technical challenges and other difficulties
  - A mechanism of alerting the Panel when a participant is experiencing technical difficulties needs to be identified
  - Establish protocols – if an active speaker cannot be heard by the panel or the parties, difficulties with rejoining, if someone is unable to signal their interest in interjecting
  - Consider appointing a contact for tech support throughout the hearing
  - Ensure the OEB's IT department is the first point of contact for any connectivity issues
  - Parties should provide their phone and email details to the support contact to ensure they can be reached in case they are disconnected during cross-exam or witnessing
  - Consider setting up training sessions on how to use the hearing tools and to test the system; parties should be encouraged to attend training session from the same location they plan to be in for the hearing so any potential issues can be discovered in advance
  - Develop a disconnection protocol to deal with the inevitable situations where someone gets disconnected. Do you stop the hearing until they are re-connected or just continue?
  - In the case that stakeholders experience internet connectivity issues, there is an option to call into Zoom via phone and that option should continue to be available as a backup.

### Transcripts

- Consider as a rule that discussions on technological issues will not form part of the transcript
- The transcripts issued by the OEB should serve as the final record of the hearings
- How will the hearing be transcribed, especially if the sound quality is poor?

### Settlement Conference

It is imperative to configure and administer the virtual platform to ensure access is granted to authorized users only to safeguard confidentiality

## 2. Technical obstacles that might prevent participation

- Bandwidth may be an issue when working from a remote location
- Zoom desktop version is not allowed in some companies
- Security of online platform
- Poor sound or video quality could impair the quality of testimony
- Technical requirements
  - Minimum technical requirements, including specific microphone requirements, should be communicated to all parties
  - Use of technology may be impaired by the availability of reliable internet, especially for Northern or rural areas in Ontario (e.g. Hydro One customers and staff)
  - Incompatibility of available equipment of participants with virtual platform – should the OEB provide equipment to participants who do not have suitable devices. Could the OEB provide a separate, isolated and safe physical location for participants to use who cannot make technology work in their circumstances?
  - Firewalls could cause issue with connectivity; will need time to develop and establish firewall solutions/rules
  - Audio quality, loss of internet connection and sufficient internet bandwidth are issues to consider and mitigate – need contingency guidelines in place

## 3. Pre-hearing matters

- Rules and protocols
  - The hearing format and what issues should be argued in writing vs orally
  - Logistical matters including the order of speakers, process for motions, how motions will be considered and permissible uses of the chat feature in Zoom
  - Establish hearing schedules, order of cross-examination, procedural matters, scheduling of witnesses and experts; cross-examination of confidential matters will help set the *in camera* schedule
  - Rules around confidentiality and sensitive information
  - Issues list
- Witnesses and intervenors
  - Create a process for follow up questions (i.e. turn on video and audio, and turn off again)
  - Create breakout rooms for witness panels and intervenors and provide instruction on how to get in and out of these rooms
  - Witness panels should be allowed to use their own virtual platform for breakout rooms (not run by OEB)
  - Witnesses providing responses should be required to have video turned

- on; primarily in hearings, not necessarily in a consultation or technical conference
- Questioning sessions – OEB staff lawyers should be stricter in managing such matters to prevent intervenors from re-emphasizing items that were already raised during their allotted time
- Documents
  - The format of documents and guidelines for document exchange, i.e. last-minute responses, service of compendia with adequate review time
  - Provide other documents electronically that are not part of the applicant evidence
  - How to bring up documents quickly to the screen
- Technology services that may be required
- Presiding member should let participants know if there are any specific practices the panel would find helpful to them

#### **Additional comments**

- Virtual hearings will reduce travel time for participants
- Removal of the requirement for 2 hard copies will reduce related expenses and environmental impacts
- Support the steps the OEB is taking to facilitate virtual hearings in the face of the challenges and constraints imposed by the COVID-19 pandemic
- Virtual hearings are an appropriate approach given the circumstances.
- Recommend that the OEB remain with electronic filing only and not return to paper filing. This has been a more efficient and cost-effective approach