

# **ONTARIO JUDICIAL COUNCIL**

**IN THE MATTER OF A HEARING UNDER SECTION 51.6 of the  
*COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C. 43, as amended**

**Concerning a Complaint about the Conduct of  
the Honourable Justice Donald McLeod**

**Before:** Justice Janet Simmons, Chair  
Court of Appeal for Ontario

Justice Michael J. Epstein  
Ontario Court of Justice

Mr. Malcolm M. Mercer  
Lawyer Member

Mr. Victor Royce  
Community Member

**Hearing Panel of the Ontario Judicial Council**

## **PROCEDURAL ORDER**

### **Counsel:**

Mr. Guy J. Pratte, Ms. Nadia Effendi, Ms. Christine Muir  
Presenting Counsel

Mr. Frank Addario, Ms. Sheila Block, Mr. Faisal Mirza, and Mr. Anthony Morgan  
Counsel for Justice McLeod

## **ORDER**

**ON NOTING** the Direction of the Hearing Panel, dated July 16, 2020, that the hearing in this matter will take place December 8-11, 14-18, and 22-23, 2020 (the “Hearing”);

**AND ON NOTING** the Direction of the Hearing Panel, dated October 27, 2020, that the Hearing shall be hosted by Arbitration Place and shall proceed electronically for members of the public and electronically or in person for Participants (as defined below) at their discretion and as circumstances surrounding the Covid-19 pandemic allow;

**AND ON NOTING** the consent of Presenting Counsel and counsel for the Honourable Justice McLeod to the terms set out below,

**IT IS HEREBY ORDERED** that:

### **A. Videoconferencing Platform and Technical Requirements**

1. Members of the Hearing Panel, Presenting Counsel, The Honourable Justice Donald McLeod (“**Justice McLeod**”), counsel to Justice McLeod, and witnesses summonsed to give *viva voce* evidence at the Hearing (collectively, the “**Participants**”), shall attend the Hearing using the Zoom platform provided by Arbitration Place.
2. Members of the Hearing Panel, Presenting Counsel, The Honourable Justice Donald McLeod, and counsel to Justice McLeod shall participate at the Hearing using a laptop computer or tablet, and shall also have a second monitor or device, such as a tablet, to create additional screen space.
3. All Participants must have a video-enabled device at their disposal, unless the Hearing Panel grants them permission to join by way of audio only.

### **B. Public Access to the Hearing**

4. The Hearing shall be open to members of the public by way of a live broadcast on YouTube, which Arbitration Place shall facilitate (the “**YouTube Broadcast**”), and

which shall be removed from YouTube at the end of each hearing day. The links to the YouTube Broadcast shall be posted to the Ontario Judicial Council's website in advance of the start of the Hearing.

5. Arbitration Place shall be responsible for administering the YouTube Broadcast. In the event that any issues arise in respect of the Broadcast, Arbitration Place (being the Virtual Case Manager), shall immediately inform the members of the Hearing Panel. The members of the Hearing Panel may then make any such order(s) they see fit, including an adjournment.
6. Arbitration Place is not obliged to assist members of the public who wish to access the YouTube Broadcast.
7. Access to the Hearing shall be subject to the terms of the within order and to further orders of the Hearing Panel, at its discretion.

#### **C. Technical Rehearsals and other pre-Hearing Requirements**

8. Arbitration Place will work with the Hearing Panel and with Presenting Counsel and counsel for Justice McLeod to advise on best practices and how to best leverage the equipment available.
9. Participants must ensure their technical setup aligns with the "Technical Specifications for a Successful AP Virtual Experience" document distributed by Arbitration Place (a copy of which is appended to this Procedural Order as "**Appendix A**"). Compatibility of Participants' technical setup will be tested during the technical rehearsals.
10. Arbitration Place shall discuss technology testing for witnesses with Presenting Counsel and counsel for Justice McLeod (together, "**Counsel**"), and organize such testing according to their instructions. Based on these discussions, the technical rehearsal(s) for witnesses may be held separately from technical rehearsal(s) involving the other Participants.

11. Participants are to communicate the technical setup that they wish to have with Arbitration Place in advance of the technical rehearsals. Arrangements for delivery of equipment and other materials required for the Hearing shall be confirmed with all Participants in advance.
12. Arbitration Place shall provide, upon request, “tech suites” in Ottawa and Toronto to accommodate any Participant who might not have the appropriate bandwidth at home and/or if their equipment is not compatible to participate effectively in the Hearing. The availability of “tech suites” shall be subject to public health guidance and regulations, as well as any orders the Hearing Panel deems necessary.
13. Arbitration place shall also provide, upon request, technical equipment to Participants who do not have access to suitable equipment for the Hearing, pursuant to its terms.

#### **D. Proceeding Logistics**

14. The Hearing schedule, including the order of counsel presenting and the order of witnesses, as well as documents to be used by Counsel, will be provided to Arbitration Place by Counsel as soon as they are available and, to the extent possible, in advance of the commencement of the Hearing. The names of counsel responsible for questioning each witness, and the names of counsel making submissions shall also be provided to Arbitration Place by Counsel at their earliest convenience, and in any event no later than two days prior to the start of the Hearing.
15. Counsel shall provide a full list of the Participants, along with their contact information (email and phone number) (the “**List of Attendees**”). The List of Attendees shall be provided to Arbitration Place as soon as possible, and in any event at least two days before the Hearing. Counsel shall notify Arbitration Place immediately of any changes to the List of Attendees.

#### **E. Technological Failure Protocol**

16. In the event of a technological failure that causes a Participant and/or the court reporter to lose a reliable connection with, or disconnect from, the Hearing (a **“Technological Failure”**), the Virtual Case Manager assigned by Arbitration Place will unmute and start their video to audibly and visibly alert the Hearing Panel.
17. If a Technological Failure arises and cannot immediately be resolved through reasonable efforts to provide or restore access, the Hearing Panel may, at its discretion, adjourn the Hearing for such a period it deems appropriate.
18. The guiding principle is that the Hearing shall not proceed unless the members of the Hearing Panel, Counsel, Justice McLeod, and any relevant witness are in attendance.

#### **F. Back-Up Equipment**

19. All Participants must have a back-up device available near them and ready to use at the Hearing in the event the primary device fails. This can be any mobile device, laptop, or tablet.
20. Participants shall also have a set of headphones (with a microphone) available and ready to use, in the event of audio quality issues. In the alternative, a mobile phone must be available.

#### **G. Hearing Login information and Court Reporting**

21. Login information for the Hearing, including the password, will be circulated the day before the first day of Hearing, being December 8, 2020, in accordance with Arbitration Place’s security practice and procedures. This information will only be provided to individuals listed on the List of Attendees. For clarity, and with respect to witnesses, hearing log-in information will be circulated to witnesses the day before their anticipated testimony.

22. Hearing login information shall not be forwarded by anyone other than the Virtual Case Manager or another Arbitration Place representative.

23. Arbitration Place shall provide court reporting services. The Registrar of the Ontario Judicial Council and Counsel may communicate with Arbitration Place concerning such services, including with respect to what services they require and the applicable charges.

#### **H. Day-Of Protocol – Entering Platform and Breaks**

24. The Participants shall enter their respectively assigned “waiting rooms” before being allowed access to the Hearing.

25. The Hearing Panel will be admitted to the Hearing first, about 15-30 minutes before the start of the Hearing, and their setup will be confirmed. The Hearing Panel will then be moved to a breakout room.

26. Once the Hearing Panel is in their breakout room, Counsel and Justice McLeod will be admitted to the main hearing room, and their technical set up will be tested and proper naming will be confirmed.

27. Witnesses will be admitted into the main hearing room at the time deemed appropriate by the Hearing Panel. The Virtual Case Manager shall make an announcement when a witness is admitted to the main hearing room.

28. Breakout rooms will be organized in advance and available to each of, (i) the Hearing Panel, (ii) Presenting Counsel, and (iii) counsel for Justice McLeod and Justice McLeod, prior to the start of the Hearing and during breaks.

29. At each break, the Hearing Panel shall move to its respective breakout room first, and then Counsel and Justice McLeod may accept the invitation to enter their respective breakout rooms.

## **I. Breakout Rooms**

30. As set out above, the Hearing Panel, Presenting Counsel, counsel for Justice McLeod and Justice McLeod shall each have a designated breakout room, where they can meet during breaks and before the start of the Hearing. Access to these breakout rooms will only be available to individuals whose names have been communicated in writing by Counsel to the Virtual Case Manager.

31. Breakout rooms will be left open throughout the Hearing in the event that the Hearing Panel, Counsel and/or Justice McLeod desire to use them. The chat function and “share screen” functions will be available in the breakout rooms and shall remain private to those individuals present in the breakout room. For clarity, the audio, visual and chat functions taking place in a breakout room are not available to individuals present in other rooms, for example in another breakout room or the main hearing room.

32. Witnesses shall remain in the main hearing room during breaks, subject to the direction of the Hearing Panel. A witness in the process of testifying shall not disable their audio and video for the duration of a break, subject to the direction of the Hearing Panel.

## **J. Etiquette and Video Layout**

33. All of the usual decorum and deference required at an in-person proceeding shall apply at the Hearing. These provisions on etiquette may be adjusted or supplemented by the Hearing Panel in consultation with Counsel prior to or during the hearing.

34. Generally, the Hearing Panel shall enable their video and audio function throughout the Hearing, unless it is necessary to mute their audio or disable their video.

35. Participants other than members of the Hearing Panel shall be muted and shall disable their video, unless speaking or acting as lead counsel.

36. When testifying, witnesses shall enable their video and audio, unless otherwise directed by the Hearing Panel.
37. Participants other than members of the Hearing Panel, when speaking, including when acting as lead counsel, shall always be in view of the camera. If two or more Participants other than members of the Hearing Panel are attending the Hearing together in a room, the active speaker may use his or her own camera focused on his or her face, provided that there is a second camera that shall be placed to provide a view of a reasonable part of, if not the entire, room.
38. To optimize video layout, Participants are encouraged to enable the “Hide Non-Video Participants” function in “Gallery View”. This ensures that the only individuals visible are Participants and members of the Hearing Panel with their video on. Alternatively, “Speaker View” or “Pin Video” may be utilized to highlight on screen the person who is speaking. The Virtual Case Manager shall be available to remind Participants about the specifications (through the platform’s chat function, by email or by way of oral directions). Video layout optimization is covered during the technical rehearsals conducted with the Participants.
39. The chat function will be enabled for the purpose of communicating directly with the Virtual Case Manager, in the main hearing room throughout the Hearing. The chat feature should be used to communicate technical issues, technical questions, or to seek or provide directions regarding document display.
40. In the event that the Hearing Panel or Counsel wish to set up an online chat for the Hearing, Arbitration Place can provide instructions on how to set up a chat on an external platform (for example, WhatsAppWeb). Otherwise, the Hearing Panel or Counsel are encouraged to leverage in-firm or enterprise-based chat models for this purpose.



#### **K. Naming Protocol**

- 41. Participants shall display their full name when logging in to the Hearing in order to ensure they are admitted by the Virtual Case manager.
- 42. Counsel shall display their full name and name of their law firm along with the designation Presenting Counsel or Counsel for Justice McLeod.
- 43. Witnesses shall display their first and last name and indicate they are a witness (for example, John Doe, Witness).

#### **L. Objection Protocol**

- 44. Objections shall be made by Counsel with an active speaking role, to the extent possible, to limit potential interruptions.
- 45. When making an objection, Counsel shall unmute themselves and audibly object.
- 46. In the event that internet connection problems preclude Counsel from objecting to a question being asked of a witness prior to the witness answering such question, counsel shall be permitted to raise the objection after the witness has already answered the question, provided that counsel objects as soon as reasonably possible. In such circumstance, the Hearing Panel shall consider and rule with respect to the objection at issue.
- 47. Should arguments about relevance or admissibility of evidence need to be made that ought not to be heard by a witness, the Hearing Panel may direct the use of Zoom break-out rooms to isolate the witness during any such argument. Such step may be taken on request of Counsel and/or at the discretion of the Hearing Panel.

#### **M. Witness Protocol**

- 48. Witnesses (not including Justice McLeod) shall be excluded from the Hearing until called to give evidence. For clarity:

- i. Until a witness has completed their evidence, there shall be no communication to such witness in respect of any prior evidence given at the Hearing; and
- ii. After the start of the Hearing, and prior to a witness giving evidence, such witness shall not, through any means, including the Broadcast, watch or listen to the Hearing, or attempt, in any way, to inform themselves of evidence given at the Hearing.

49. Upon request by the Hearing Panel, witnesses shall provide a 360-degree view of their surroundings prior to testifying.

50. To the extent there is anyone in a room other than a testifying witness, whose presence is deemed by the testifying witness to be essential to the Hearing process and whose presence the Hearing Panel has ruled is essential, each such additional person must announce themselves and must confirm their understanding to the Hearing Panel that they shall not communicate with the witness while the witness is testifying.

51. Witnesses may not use a "Virtual Background." Instead, the room in which they are located must be visible.

52. While a witness is giving evidence, the witness shall not review any documents or access any electronic resources (internet or otherwise), other than:

- i. Those documents put to them during their examinations or testimony; and
- ii. Such documents as they may be asked or permitted to review.

53. While a witness is giving evidence, the witness shall not refer to or rely on a script or any notes, and the witness shall not communicate with any other persons about the substance of their examinations or testimony.

54. Vulnerable witnesses, as specified by the Hearing Panel, will be accommodated with special considerations at the direction of the Hearing Panel.

55. After a witness has finished giving evidence and has been dismissed by the Hearing Panel, that witness shall log out of the Zoom platform, and shall not log back into it. The Virtual Case Manager shall ensure that a witness who has been dismissed by the Hearing Panel exits the Hearing immediately and shall disable such witness' log-in credentials as soon as is practicable.

#### **N. Document Display and Management Protocol**

56. Counsel shall advise Arbitration Place whether they intend to manage their own document display and document management system, or whether they wish to have Arbitration Place do so. If the latter, Arbitration Place must be advised of this requirement before the technical rehearsals.

57. If Counsel wish to manage their own document display, they shall follow best practices for screen sharing, which includes disabling any notifications on-screen, hiding any confidential material on the computer desktop, and stopping or pausing sharing when switching to another document for display on screen.

58. If Counsel wish to use a trial presentation software or other software tool besides a basic document sharing cloud repository for document management, this shall be confirmed with Arbitration Place as soon as possible.

59. Counsel shall inform Arbitration Place whether they intend to deliver their materials to the Hearing Panel by USB (which should also be able to plug into a tablet device), email, or a secure cloud repository (such as CaseLines, Dropbox for Business, SharePoint, etc.), before technical rehearsals take place. If Counsel wish to send paper or physical copy of materials to the Hearing Panel, they will advise Arbitration Place. Physical material should be organized in the same manner as electronic documents as set out below. [documents in advance]

60. In the event the Hearing Panel cannot be provided with the required technical equipment (namely, a second screen), for the Hearing, the Hearing Panel may order the delivery of physical copies of the documents to one or all of the members of the Hearing Panel.

61. In the event a witness does not have a second screen for the Hearing, the Hearing Panel may order the delivery of physical copies of the documents to a witness, as necessary.

62. Counsel shall provide electronic “hearing bundles” to the Hearing Panel and Arbitration Place, organized as follows:

- i. A list of the exhibits or other documents that counsel intends to refer to at the Hearing;
- ii. Copies of exhibits or documents, with file names that align with how counsel will refer to the documents and exhibits orally, and organized in appropriately named folders (i.e. folders may be organized by hearing day, by topic, by witness, etc.);
- iii. Copies of the Notice of Hearing, procedural orders, memorials/pleadings, or other key documents delivered to the Hearing Panel in this matter; and
- iv. The schedule of witnesses and length of argument for each day of Hearing.

63. Arbitration Place will compile electronic versions of all of the Hearing exhibits, and will send them to the Hearing Panel within seven (7) days of the conclusion of the Hearing.

64. Notwithstanding the use of electronic bundles and electronic versions of Hearing exhibits, Counsel shall provide hard copies of exhibits to the Registrar of the Ontario Judicial Council within fourteen (14) days of the conclusion of the Hearing.

## **O. Confidentiality Protocol**

65. In the event that the Hearing Panel hears evidence or submissions that are covered by a Confidentiality Order in the proceeding, or relating to documents that are otherwise designated in the proceeding as confidential, Counsel will advise the

Hearing Panel before they start discussing a confidential document or portion thereof, so that the Hearing Panel may utilize break out rooms, as appropriate, to exclude anyone not entitled to receive or otherwise gain knowledge of that confidential information (the “**Confidentiality Protocol**”). Once discussion of the confidential document or portion is complete, the Hearing Panel will invite those individuals back into the Hearing as appropriate.

66. If the Confidentiality Protocol is not practicable for any reason, the Hearing Panel shall, at its discretion, select another means to enforce any Confidentiality Order or other confidential designation.

#### **P. Exhibit Management**

67. The entering of exhibits will be managed by the Arbitration Place court reporter, subject to direction from the Hearing Panel.

#### **Q. Exit Protocol – End of Hearing Day**

68. When a hearing day concludes, Participants shall use the “Leave Meeting” button at the bottom right-hand corner of the screen to leave the Hearing or move to their assigned breakout room.

69. The Virtual Case Manager will terminate the Hearing day after all Participants have logged off the platform. The proceedings of that day shall then be removed from the internet.

#### **R. Recordings**

70. No person, other than a representative of Arbitration Place including the court reporter, shall make any audio, video, photographic, or other recording of any part of the Hearing, including a screenshot, whether they are viewing the Hearing through the Zoom Platform, the Broadcast, or other medium. This provision is subject to the further direction of the Hearing Panel, and any Order or Direction from the Hearing Panel in this respect shall be posted to the website for the Ontario Judicial Council.

71. Arbitration Place shall provide, upon direction of the Hearing Panel, solutions to block the use of recording applications on a witness' own computer or similar devices during testimony.

**S. Data Storage**

72. Arbitration Place shall permanently delete and dispose of all documents relating to this matter seven (7) days after the final day of Hearing. This includes the dismantling and deleting any shared data site managed by Arbitration Place for the purpose of the Hearing. This period shall be extended at the request of any Party. Forty-eight-hour (48) notice will be provided to Counsel prior to the disposal of documents.

Released: this 2<sup>nd</sup> day of December, 2020.

"Justice Janet Simmons", Chair

"Justice Michael J. Epstein"

"Mr. Malcolm M. Mercer"

"Mr. Victor Royce"

## **Appendix “A” - Technical Specifications for a Successful AP Virtual Experience**

### **Hardware Suggestions**

- Large Screen / Multiple Screens
- Strong and Secure Wi-Fi or Ethernet Cable
- Laptops - Docking station
- Microphone
- Camera
- Headphones (optional but recommended)

Most laptops and other devices have good microphones and cameras. Note that external cameras are now in short supply.

### **Protocol**

To avoid feedback or echo please keep yourself on mute when not speaking. Please also be aware that it is very difficult to hear anything when two or more people are talking.

### **Anticipatory Troubleshooting**

- Your device should be plugged in.
- If you are not going to plug in your device, ensure your battery is charged beforehand.
- Make sure that you have performed any critical software (especially Windows) updates so that you do not need to re-boot.
- Consider having a backup device (or two).
- You can connect/re-connect using a phone or tablet with Zoom’s mobile app.
- You can also call in on a regular phone.
- If you drop and are having difficulties, you can reach me (Liz Roberts) on my cell phone at (647) 668-9536.

### **Internet Connections**

- Secure Wi-Fi or ethernet connections are important.
- Even if you are using a home Wi-Fi network you should make sure that it is password-protected.
- Ethernet is preferable since it is less likely to have connection problems than Wi-Fi. Furthermore, ethernet is not as vulnerable to hacking as Wi-Fi.
- VPN and firewalls can reduce the speed of your Internet connections.
- You may also experience reduced speeds if other members of your household are streaming content (especially HD video) at the same time.

**Background & Setting**

- Avoid rooms with echoes—e.g., high ceilings, hard floors, glass—because they can disrupt a call with feedback.
- If you must use a room with an echo, please mute yourself.
- A blank wall is a useful/preferable background.
- Please use a quiet, private room away from young children, pets and distractions (if possible).
- Avoid backlighting.

**PDF Documents**

- PDFs will take the place of paper documents.
- Ensure that the table of contents hyperlinks to each document.
- Text should be OCR'd so that it can be searched.