



# The Advocates' Society

## La Société des plaideurs

May 10, 2021

VIA EMAIL: [Registry-Greffre@scc-csc.ca](mailto:Registry-Greffre@scc-csc.ca)

Mr. David Power  
Registrar  
Supreme Court of Canada  
301 Wellington Street  
Ottawa, ON K1A 0J1

Dear Registrar:

### **RE: Counsel Appearances and Acknowledgment in Appeals Heard Via Zoom**

The Advocates' Society (the "Society"), established in 1963, is a not-for-profit association of approximately 5,200 members throughout Canada. The Society's mandate includes, among other things, making submissions to governments and others on matters that affect access to justice, the administration of justice, and the practice of law by advocates. Many of the Society's members appear frequently in the Supreme Court of Canada as counsel to both parties and interveners, and the Society itself has intervened in numerous appeals to the Court.

The Society writes to express its concern regarding the unintended consequences of the Court's current direction limiting the number of counsel that may "appear" in virtual hearings held via Zoom, coupled with the policy regarding which counsel's names will be recorded in the published reasons for judgment.

The Society understands the current direction to be that only two counsel per party and one counsel per intervener will be provided the link to the virtual hearing held via Zoom. While Rule 71(1)(a) of the *Rules of the Supreme Court of Canada* directs that no more than two counsel for each Appellant or Respondent and one counsel for each Intervener shall present oral argument on an appeal, previously additional counsel could still appear (i.e., be physically present and robed in the courtroom for the hearing) despite not making any oral submissions. All counsel who appeared in this manner were listed on the Court's written judgment whether or not they made oral submissions at the hearing.

The limit on the number of counsel who may appear via Zoom negatively impacts diversity and inclusion in the Court's virtual hearings and in the legal profession and impedes effective consultation and support from co-counsel.

As a result of the current policy co-counsel, who are more likely to have fewer years at the bar and be racialized or from other equity-seeking groups, are excluded from the virtual courtroom and consequently also left off the published reasons for judgment. Very often these advocates have made significant contributions to preparation of the case – such as being authors of the written submissions. The fact that co-counsel are not permitted to appear or be recognized in the published reasons for judgment makes

their contributions invisible and means that the decisions of the Court will not reflect the true diversity of the bar that participated in the appeal.

As you can no doubt appreciate, the ability to demonstrate participation in appeals is very important to professional recognition, particularly for those belonging to historically disadvantaged groups. An unintended consequence of the Court's current policy may therefore be the exacerbation of the disadvantages that advocates from equity-seeking groups face in advancing within the legal profession.<sup>1</sup>

Moreover, while co-counsel who are not permitted to enter the virtual courtroom can follow the proceeding on the public webcast, the public webcast gives one a more limited view of the courtroom and is delayed vis-à-vis the virtual hearing. This makes it difficult for co-counsel to provide effective assistance to their colleagues appearing in the virtual courtroom. This raises access to justice concerns and may be particularly problematic in cases where co-counsel are necessary because of differing subject matter expertise.

It is not clear to the Society why it is necessary to limit the number of counsel who may appear via Zoom. If the concern is that confusion may arise regarding the number of counsel on screen, that concern can be addressed by asking counsel who will not be making submissions to remain on mute and off video once the hearing begins. Zoom settings allow for non-video participants to be hidden.

Accordingly, the Society respectfully requests that the Court: (a) henceforward increase the number of counsel who may appear in Zoom hearings to the number that were allowed to appear in the courtroom at in-person hearings held pre-pandemic, and list the names of all counsel who so appear in the judgment; and (b) permit the names of counsel who have been excluded from hearings held via Zoom to date to be listed in the published reasons for judgment of the Court (including by adding the names of counsel who were excluded to any judgments that have already been rendered during the pandemic). For past cases that were heard virtually and rendered during the pandemic or are currently under reserve, the Society urges the Court to put in place a consistent mechanism to identify the other counsel who would have been acknowledged in the published reasons for judgment under the Court's pre-pandemic practice. For example, based on the information on the Court's website about cases heard in the last year, as the names of all counsel are listed for each party (including interveners) and easily identifiable, the Court could use this information as a basis to correct past judgments. Alternatively, the Court could post a notice announcing its change in policy and ask parties and interveners whose counsel's names they wish to appear in the reasons.

In the alternative, if the Court intends to continue to limit the number of counsel who may appear via Zoom, the Society requests that the Court include the names of all counsel of record on the Court's decisions. This could be achieved on a go-forward basis by directing parties and interveners to list all counsel of record in the Notice of Appearance (distinguishing those who will be making oral argument).

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<sup>1</sup> In addition, the Society notes that the United Kingdom Supreme Court ("UKSC") has been holding appeal hearings via WebEx during the COVID-19 pandemic. Similarly to the Supreme Court of Canada, the UKSC limits the number of counsel who may make oral submissions at an appeal hearing to two per party and one per intervener. See the United Kingdom Supreme Court, [Practice Direction 6 \(The Appeal Hearing\)](#), s. 6.6.5: "No more than two counsel will be heard on behalf of a party (or a single counsel on behalf of an intervener permitted to make oral submissions)." Nevertheless, it is our understanding that the written judgments rendered by the UKSC during the pandemic acknowledge multiple counsel per party and intervener, and not only those who have made oral submissions to the Court.

The Society also respectfully requests that the Court add the names of all counsel who have been excluded from hearings held via Zoom to date to judgments that have already been rendered during the pandemic and to judgments that are currently under reserve, using the consistent mechanism suggested above.

I would welcome the opportunity to further discuss this issue with you at your convenience and assure you that the Society would be pleased to assist in any way it can to facilitate the Court in implementing the above-mentioned changes.

Yours sincerely,



Guy J. Pratte  
President

CC: Vicki White, Chief Executive Officer, The Advocates' Society