

**SUPREME COURT OF NOVA SCOTIA**  
**FAMILY DIVISION**

**Citation:** *Armoyan v. Armoyan*, 2015 NSSC 176

**Date:** 2015-06-19

**Docket:** *Halifax* No. 1201-65036; 73536  
And SFH CIV 70342

**Registry:** Halifax

**Between:**

Vrege Sami Armoyan

Applicant

v.

Lisa Armoyan

Respondent

Judge: The Honourable Justice Theresa Forgeron

Heard: February 26, 2015, in Halifax, Nova Scotia

Written Release: June 19, 2015

Counsel: Gordon Kelly and Stacey O'Neill, for the Applicant  
Harold Niman and Leigh Davis, for the Respondent

**By the Court:**

**Introduction**

[1] Vrege Armoyan seeks an order permitting commission evidence from a lawyer and banker who reside in Lebanon. He asks that either Skype or Google Hangouts be employed to receive the commission evidence during the contested *Matrimonial Property Act* hearing scheduled for November 2015. Lisa Armoyan strenuously objects.

**Issue**

[2] Should an order for commission evidence be granted?

**Analysis**

***Position of Mr. Armoyan***

[3] Mr. Armoyan seeks an order for commission evidence for a number of reasons, including the following:

- The evidence of a former branch manager of the Bank of Byblos in Batroun, Lebanon, Francois Arsanios El Hokayem, is relevant because Mr. Hokayem has personal knowledge of bank transactions involving Mr. Armoyan in Lebanon. Mr. Armoyan initially said that Mr. Hokayem was unsure if he could take time off work to travel to Canada to testify. By supplemental affidavit, Mr. Armoyan said that Mr. Hokayem told him that he was not prepared to travel to testify because of inconvenience and logistics; Mr. Hokayem was prepared to testify via video conference.
- The evidence of a lawyer, Chouki Bustany, of Bustany & Associates, is relevant because Mr. Bustany was involved in drafting various agreements for several of the business ventures which Mr. Armoyan states he undertook in the Middle East. Mr. Armoyan said that Mr. Bustany runs a busy law firm and that it would be inconvenient to Mr. Bustany to leave his work commitments and travel to Halifax to testify. By supplemental affidavit, Mr. Armoyan said that Mr. Bustany's assistant told him that Mr. Bustany was not prepared to travel to Halifax to testify because of inconvenience and logistics; Mr. Bustany was prepared to testify via video conferencing.

- There are significant costs associated with arranging travel for the two witnesses to attend Nova Scotia, which Mr. Armoyan calculated at about \$23,000.
- Mr. Hokayem and Mr. Bustany would each have to obtain a Visa, which Mr. Armoyan understood to involve a significant time commitment, based upon his conversations with an individual who Mr. Armoyan had encountered at the Canadian embassy in Beirut in the past.

[4] Mr. Armoyan proposed using either Skype or Google Hangouts to receive the commission evidence. He said that both programs would permit the real time transmission of evidence from Mr. Hokayem and Mr. Bustany, while allowing those present in the court in Nova Scotia to view the facial expressions and gestures of the witnesses, and to hear changes in oral expression. All that was required to facilitate the transmission of evidence in this fashion was a computer or TV to connect to the internet, a microphone and a web camera. Mr. Armoyan was prepared to obtain the technology for the court's use.

[5] Mr. Armoyan proposed using another lawyer working at Bustany & Associates to be appointed commissioner for the transmission of evidence via video conference. The unnamed lawyer would administer the oath or affirmation and receive the instructions to commissioner as issued by the court.

[6] Mr. Armoyan stated that there would be no disruption in the ability of Ms. Armoyan to cross-examine. Further, the court's ability to assess credibility would not be impaired because demeanor is not a good indicator of credibility in any event: **Baker-Warren v. Denault**, 2009 NSSC 59, paras. 18-21.

### *Position of Ms. Armoyan*

[7] Ms. Armoyan maintains that an order for commission evidence should not be granted for a number of reasons, including the following:

- Google Hangouts and Skype are not appropriate for court use. Ms. Armoyan questioned the quality of the transmission that would be available through the use of either system.
- The proposed witnesses would be testifying about crucial matters. Cross-examination would be impeded if the witnesses were not personally present.

Further, the court's ability to assess demeanor and credibility would be hindered if the witnesses were not personally present.

- Mr. Armoian did not prove that either Mr. Bustany or Mr. Hokayem would not be available to testify in Nova Scotia. The only information that suggests that the witnesses will not attend is inadmissible hearsay evidence.
- The estimated cost of \$23,000 to have both witnesses testify in Nova Scotia is minimal in the context of this case and where Mr. Armoian has access to millions of dollars.

### *Law*

[8] In Nova Scotia, commission evidence is governed by *Rule 56*. Commissions may be issued by presiding judges for the purpose of having evidence taken off-site and providing a transcript to the court, or by permitting the evidence to be introduced by video conference while court is in session: *Rule 56.01(2)*.

[9] Although *Rule 56* treats video testimony under the heading of commission evidence, Mewett and Sankoff in *Witnesses* emphasize the differences between traditional commission evidence and video conference procedures which they forecast will “rapidly begin to supplant the commission procedure.”<sup>1</sup> As to the technical side of the process, the authors write:

The basic procedure for video testimony is simple enough. The technology allows a witness to testify in the virtual presence of the court where the court determines it is not possible or feasible for the witness to appear before the court in person. Visual and oral communications between the court and witness are simultaneous which allows the parties and the court to hear, see and examine the witness as appropriate. An oath is administered to the witness by an appropriate person on-site where the witness will appear by video...<sup>2</sup>

[10] There is no common standard for the authorization of video conference testimony in Canada. At one extreme, s. 73 of the British Columbia *Evidence Act* creates a reverse onus upon the party opposing the use of such technology<sup>3</sup>, while the New Brunswick rules are silent on the subject. Most jurisdictions have established guidelines, which Mewett and Sankoff state “essentially mirror what

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<sup>1</sup> Alan W Mewett and Peter J Sankoff, *Witnesses*, vol 2 (Carswell, looseleaf) at §19.3.

<sup>2</sup> Mewett and Sankoff at §19.3(a).

<sup>3</sup> *Nybo v Kralj*, 2010 BCSC 674, at para 11.

has developed in the case law” and which “focus primarily upon the risks that might arise”, “rather than simply repeating the historical preference for oral testimony and physical presence in court.”<sup>4</sup>

[11] The considerations to be taken into account by a presiding judge in deciding whether to grant an order for commission evidence are set out at *Rule 56.03(3)*, which provides as follows

(3) A judge who decides whether to grant an order for commission evidence must consider each of the following:

- (a) the convenience of the person to be examined;
- (b) the chances that the person will not be available to testify in the courtroom;
- (c) the chances that the person will be beyond the ability of the court to compel attendance and will not attend voluntarily;
- (d) the expense of bringing the person to the trial or hearing, or the expense, if the person is in Nova Scotia, of bringing the trial or hearing to the person;
- (e) the apparent importance of having the person’s testimony;
- (f) the difficulty of assessing credibility of transcribed or recorded testimony;
- (g) the quality of proposed sound or visual transmission and the opportunity the transmission will afford for assessing the testimony;
- (h) the possibility of convening court where the witness is located, if that place is in Nova Scotia;
- (i) the possibility of appointing the judge to take evidence under commission, if the witness is outside Nova Scotia and there is no jury.

[12] Instructions for commissioners overseeing the transmission of video-conference evidence are found in *Rule 56.06*. *Rule 56.06(1)(g)* incorporates by reference *Rule 56.05(2)*, which provides specific instructions to commissioners taking evidence outside Nova Scotia.

[13] Nova Scotia courts have permitted commission evidence by video conference as noted in **Armoyan v Armoyan**, 2011 NSSC 448, D. Campbell, J.

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<sup>4</sup> Mewett and Sankoff at §19.3(a).

[14] In **Pack All Manufacturing Inc. v. Triad Plastics Inc.**, [2001] OJ No 5882 (Ont Sup Ct J), Rutherford, J. refused to allow evidence to be transmitted by video conference. In so ruling, the court made a number of comments relevant to this court's determination, and which are noted as follows:

- Commission evidence is not to be granted as a matter of right. The Court must balance the relevant factors and determine whether the advantages of using video conferencing outweigh the possible prejudice that might arise. Principles of efficiency, and savings of time and cost may weigh in favor of such an order: para 9.
- Before an order can be granted, there must be evidence that the witness is unable or unwilling for any reason to attend court and testify of her/his own volition, assuming all travel expenses are paid: para 9.
- The transmission of evidence via video conference, provided the quality is good, would not adversely impair the court's ability to assess credibility: para 6.
- Cross examination may be negatively obstructed if evidence was transmitted by video conference at para 7.
- Costs can be assessed against the party objecting to commission evidence at the conclusion of the hearing if the trial judge is of the view that the evidence could have been presented equally as well by video conference: para 10.

[15] In **Aly v. Halal Meat Inc. at al**, 2012 ONSC 2585, Ricchetti, J. permitted one of two witnesses to testify via Skype. The witness who would be providing brief evidence not central to the issues to be tried was permitted to testify by video conference. The second witness was required to testify in person because his evidence related to a matter central to the case and travel expenses were not extraordinary. In reaching its decision, the court noted the following relevant points:

- On a motion for approval of video conference testimony, the court is engaged in the balancing of competing interests – the right to have a live witness personally present to cross-examine versus the inconvenience and cost of attendance: para 37 to 39.

- The more important the evidence is to the central issue, the more likely prejudice may be occasioned if a witness is not personally present: para 40. In contrast, where the evidence relates to a peripheral matter or where costs and inconvenience are high, an order for video conference testimony may be appropriate: para 41.
- If the technology that facilitates the video conference operates effectively, then the court will be able to observe the witness and make judgements about credibility. Credibility is not necessarily impaired in such circumstances: paras. 26 to 32.

[16] In **Maggio Holding Inc. v. Carrier Canada Ltd**, [2003] OJ No 1810 (Ont Sup Ct J), the court affirmed an order permitting a witness to testify via video conference because the witness, located in Texas, had made it clear that he would not voluntarily attend.

[17] Other cases under the Ontario Rule have held, for instance, that the evidence of a CEO of the employer's parent company, who was a resident of Belgium, should not be received by video conference "simply because [he] has a busy schedule and wants to spend time with his family": **Feeney v. Labatt**, [2007] OJ No 264 (Ont Sup Ct J) at para. 12. The opposite result was reached in **Archambault v. Kalandi**, [2007] OJ No 258 (Ont Sup Ct J).

### ***Decision***

[18] I must now balance the factors outlined in *Rule 56* to determine whether the advantages of using video conferencing outweigh the possible prejudices that may arise.

[19] *Convenience of the person to be examined*: Ms. Armoyan acknowledges Mr. Armoyan's submission that it would be inconvenient for the witnesses to testify in Nova Scotia. I agree.

[20] *Chances that the person will not be available to testify in the courtroom*: I have no direct evidence that either Mr. Hokayem or Mr. Bustany will not be available to testify in Nova Scotia. I only have the hearsay evidence of Mr. Armoyan. This is insufficient.

[21] *Chances that the person will be beyond the ability of the court to compel attendance and will not attend voluntarily*: Neither Mr. Hokayem, nor Mr. Bustany

are compellable to testify in Nova Scotia. I do not have direct evidence that either witness will not voluntarily attend.

[22] *Expense of bringing the person to the trial or hearing:* The estimated cost of \$23,000 is not significant where the litigation involves millions of dollars.

[23] *The apparent importance of having the person's testimony:* Both parties agree that the proposed evidence is important to the ultimate resolution of the issues.

[24] *The difficulty of assessing credibility:* Provided there are no issues surrounding the quality of the transmission, this court does not foresee difficulties in assessing credibility if evidence is transmitted via video conference. In any event, demeanour is not a good indicator of credibility.

[25] *The quality of proposed sound or visual transmission:* I have no evidence to suggest that either Skype or Google Hangouts would not produce a quality transmission.

[26] I have reviewed the evidence and submissions of the parties and have applied the law. After balancing the competing interests and factors outlined in *Rule 56*, I deny Mr. Armoyan's motion to grant an order permitting the evidence of Mr. Hokayem and Mr. Bustany to be transmitted by video conference. I cannot grant such an order where I have no direct evidence that either witness will not voluntarily attend court in Nova Scotia; I will not draw such an inference. Further, the cost of travel is not a significant feature in the circumstances of this case. The factor weighing heavily in favor of the granting of the motion relates to convenience. Convenience, however, standing alone, is a weak basis upon which to excuse a witness from attending in person.

[27] Finally, I must also address Mr. Armoyan's proposal to have a lawyer from Bustany & Associates appointed as a commissioner for transmitting evidence by video conference. Such an appointment cannot be granted because of conflict principles. Mr. Armoyan states that Mr. Chouki Bustany runs the law firm of Bustany & Associates. It is not appropriate for an employee of Mr. Bustany to act as an impartial commissioner to transmit the evidence of his boss.

## **Conclusion**



[28] Mr. Armoyan's motion for an order to appoint a commissioner to transmit the evidence of two witnesses from Lebanon during the hearing to determine the *MPA* application is denied.

[29] Mr. Niman is directed to draft the order. Costs submissions should be provided in writing within 30 days.

Forgeron, J.