



UPHOLDING THE OPEN COURTS PRINCIPLE DURING THE COVID-19 PANDEMIC – A CASE STUDY OF THE FEDERAL COURT

A Statement from the Action Committee

Our Committee exists to support Canada’s courts as they work to protect the health and safety of all court users in the COVID-19 context while upholding the fundamental values of our justice system. These mutually sustaining commitments guide all of our efforts.

As part of its mandate, the Committee facilitates information sharing amongst Canada’s courts – which includes highlighting useful practices emanating from individual courts, as appropriate – in recognition that such efforts can serve to promote coordination and collaboration in key areas to help restore court operations across the country.

ISSUE

Open courts are a hallmark principle of the Canadian justice system. The open courts principle promotes access to court hearings and court services for justice participants, the media, and the general public, while taking into account a number of relevant circumstances. However, essential health and safety measures put in place to respond to the COVID-19 pandemic – such as physical distancing and restrictions on maximum occupancy in court facilities – have created a unique challenge for courts in providing both safe and open access. Courts across Canada have risen to the challenge by implementing a combination of in-person and virtual access to court hearings, records, and services, complemented by practical tools and guides for court users, members of the public and the media.

On March 26th, 2021 the Action Committee heard from Chief Justice Paul Crampton of the Federal Court who shared the Court’s experience in balancing the dual priorities of upholding the open courts principle and ensuring high health and safety standards.

This case study outlines the Court’s experience as an example of how regular communication, flexibility, empathy, and change management tools can be used to promote open, safe, and accessible courts both during and beyond the pandemic. The aim is to document useful practices that could be adapted to different court contexts, taking into account local laws, regulations, public health advice and other factors relevant to individual courts.



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THE FEDERAL COURT EXPERIENCE

Overview

When the COVID-19 pandemic spread to Canada in March 2020, the Federal Court was well positioned for the digital shift that was required to maintain access to the Court by parties, the general public and the media.

The Court launched its e-filing portal in 2005 and gradually created online resources such as its electronic docket, online hearings lists for each part of the country, and links to a broad range of information on its website. With the launch of its 2014-2019 Strategic Plan, its commitment to technological modernization was reinforced. Its 2020-2025 Strategic Plan then aligned the Court behind its current transformation away from being a primarily paper-based organisation towards being a much more digitally accessible, national, bilingual and bijural court. So, when the pandemic broke out, the Court did not face internal resistance to the digital shift that was necessary to keep the Court open and functioning.

That shift had already been underway, and included a growing use of video conference hearings, the deployment of electronic courtrooms at several of its locations across the country, the allocation of significant resources to its e-filing portal, the phased roll-out of electronic scheduling, webcasting pilot projects, and significant consultation with stakeholders regarding online access to court records. However, the Bar remained reluctant to embrace electronic filing, video-conference hearings and electronic courtrooms on a widespread basis. This all changed with the onset of the pandemic. In the absence of an ability to have in-person hearings, legal counsel quickly recognized and accepted the need to shift to a much greater use of video conference hearings and electronic courtroom technology. In brief, necessity once again proved to be the “mother of invention.”

Over the period March 16, 2020 – March 31, 2021, the Court held approximately 1,300 hearings by video conference and another 1,350 hearings by teleconference (mainly case management and other short hearings). Despite implementing a broad range of health and safety measures at its facilities and offering parties the opportunity to have an in-person hearing, beginning in July 2020, just over 30 such hearings took place – likely due to ongoing concerns regarding the COVID-19 virus.

In addition, instead of having to travel to the Court’s facilities to view a hearing or obtain documents, the general public and the media have been able to access links to web-based hearings over Zoom and obtain electronic copies of documents over the Internet. In so doing, they have not had to worry about geographic limitations or being crowded out of high profile matters. For example, an injunction motion in a gun-control case attracted approximately 1,000 participants, including journalists from across the country. Other examples of cross-country participation in web-based hearings include hearings relating to climate change, national security and missing and murdered Indigenous women and girls.

As a national, itinerant, court, the Court has needed to accommodate variances in local health conditions arising from the pandemic. This has been achieved through regional practice distinctions, for example, closing court facilities in Ontario and Quebec in January 2021 due to health measures imposed in those provinces. Virtual hearings and registry services, both described below, continue to be offered. This regional approach to virtual practice has helped the Court ensure the health and safety of court users and staff, as well as upholding the open courts principle, while maintaining a national presence.



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In-person Access

The Court holds an average of 2,800 hearings across the country every year. These hearings are open to the public unless, for special reasons, the Court directs otherwise. To respond to public health advice and enable in-person hearings to occur, when feasible, comprehensive protective measures have been put in place in its courtrooms across the country. These include altered layouts in courtrooms to ensure that physical distancing is achieved, the installation of physical barriers (Plexiglas dividers), ventilation (HVAC) upgrades, frequent disinfection of surfaces, chairs and microphones, measures to ensure the safe transmission of documents, and a contact tracing protocol.

Parties have been able to request an in-person hearing since July 2020, except in areas that are in “lockdown”. The Court determines such requests after providing parties and their counsel with an opportunity to make representations, considering recommendations by local public health authorities, and confirming the availability of court staff and court officers.

Where in-person hearings take place, access to the media and the public is presumed, but may be limited, in order to respect the two-metre distance rule and any other local regulations and public safety advice. If necessary, court staff will assign seating in the gallery for members of the public and media. Overflow rooms providing videoconferencing for observers, or a remote Zoom link, can also be arranged if necessary and possible.

Virtual Proceedings

In the early days of the pandemic, the Court scheduled “virtual” hearings over Zoom only with the consent of the parties. However, after encountering strategic delay on the part of some parties, the Court abandoned the consent requirement and began scheduling a broad range of matters to be heard by video conference by “default.” This was subject to providing parties with an opportunity to make submissions in support of an in-person hearing or an adjournment.

To facilitate its videoconference hearings, the Court has prepared a detailed protocol.

Where the matter proceeds remotely, the Registry provides individual links to participants once a hearing is scheduled. For security reasons, such links can only be used by one user at a time and the Court warns against sharing them. In addition, registry officers keep participants in a virtual “waiting room” before the hearing begins and lock it once the proceeding is ready to begin. The officers also ask participants to identify themselves. Individuals who have privacy concerns are free to turn off their cameras.

Confidential information and materials are protected during virtual hearings to the maximum extent possible, with the unavailability of traditional *in camera* proceedings mechanisms. The Court works with parties in advance of hearings to identify confidential information and discuss ways to protect that information during virtual hearings, for example by referring to paragraphs and page numbers of documents where the relevant confidential information is written instead of stating it aloud. The Court



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is not aware of any breaches of confidentiality or cyber-security in any of the virtual hearings that it has held to date.

Members of the public and the media can observe virtual proceedings provided that an advance notice of two business days is given by email to Hearings-Audiences@fct-cf.ca. When they do so, their cameras and microphones will not be turned on unless they request and receive permission to address the Court. When a great number of people express interest in a hearing, the Court may hold a “Zoom webinar,” which requires registration. Once again, when participating in this manner, observers’ microphones and cameras will not be activated.

Access to and Protection of Recordings

The Court’s [Policy on Public and Media Access](#) applies to in-person and virtual proceedings. Hearings, other than pre-trial or dispute resolution conferences, are generally open and accessible to the public and media, as are documents filed in court. There are exceptions to this general policy relating to confidentiality orders and certain statutory requirements.

The Court creates a digital audio recording of both in-person and virtual hearings (other than pre-trial and dispute resolution conferences), whether the matter proceeds by videoconference or teleconference. The audio recording is part of the court record, and can be accessed by parties, media, and the public in accordance with the Federal Courts Rules and the Court’s [Policy on Public and Media Access](#), following the request process / form set out in [Pilot Project for Access to Digital Audio Recordings](#) (there is a \$15 fee under the Rules for a copy).

Members of the media holding valid credentials may record proceedings to verify their notes of what was said and done in court, but not for broadcast. Others (i.e., counsel or members of the public) must seek permission of the presiding judicial officer.

Media may record a hearing for broadcast after having provided advance notice and receiving permission from the Chief Justice, who will consult with the presiding judicial officer. A copy of the broadcast must be provided to the Court within 10 days of the proceeding. Given the very large file size of video recordings, the Court is assessing the feasibility of retaining such recordings and how to manage access by parties, members of the public or the media.

Attendees of virtual hearings are reminded at the beginning of each hearing and in the Court’s guides that proceedings are not to be recorded or broadcast (including screenshots), except under certain conditions outlined in the [Policy on Public and Media Access](#). Parties to virtual hearings must acknowledge that they have accepted the terms of the policy by clicking on the link to join a virtual hearing.

Members of the media who want to object to a publication ban during a virtual hearing can do so by communicating directly with the registry officer to have their microphone activated so that they can make submissions to the presiding judicial officer.



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Remote and Electronic Services

Certain information is readily available to the public as a matter of course. Specifically, court dockets and hearing lists are posted on the Court's [public website](#) shortly after being entered into the internal proceedings management system.

Access to assistance from the court is also available through email and phone interactions with court personnel. For example, members of the media and general public seeking access to documents on the Court record may request electronic copies of non-confidential documents by email to: FC_Reception_CF@cas-satj.gc.ca. However, due to limited staff on-site during the pandemic, only documents that have been submitted to the Court electronically by the parties, and documents that have been scanned to the record by the Registry, may be immediately available. Requests for hard copies of documents may be subject to some delay, depending on the nature of physical restrictions in place at any given time.

Since October 3rd, 2005, the Court has allowed parties to file documents directly with the Court using an e-filing application, initially via a third party e-filing portal. Since March 1st, 2013, the Court has hosted its e-filing portal on its own website. Following the outbreak of the pandemic, there has been far greater use of the Court's e-filing portal and e-mail communications with the Court. To assist parties who are not able to submit documents electronically, drop boxes have been placed at court facilities. Due to additional public health measures in certain jurisdictions, special arrangements for document drop-off can be made by contacting the Registry at the local telephone number indicated in the Court's COVID-19 Practice Direction. The reduced traffic at the Court's facilities has provided greater scope for media and the public to access hearing rooms and court services within safe occupancy limits.

In its Practice Direction (COVID-19): Update #7 (January 18, 2021), the Court encouraged parties to file large documents via Microsoft's SharePoint platform. The Courts Administration Service satisfied the accreditation process required to achieve "Protected B" status for that platform in March 2021. Among other things, this has permitted several large tribunals and organizations whose decisions are regularly subject to judicial review to transmit their certified tribunal records to the Court. The SharePoint platform also permits those records to be accessed by the parties to the proceeding.

Communications Practices

The Court has regularly issued updated [COVID-19 practice directions](#) to address changes required by the evolving nature of the pandemic, and refinements of the Court's practices and procedures. The Court has also maintained regular consultations with the bar (through its established liaison committees) and other stakeholders throughout the pandemic. Its Practice Directions reflect input received in those consultations and provide a high level of transparency regarding the Court's evolving processes.

To assist with its accelerated digital transformation over the course of the pandemic, the Court has held several webinars and posted a significant amount of information on the e-resources page of its website. This includes a detailed guide for e-filing, video guides that provide tips from the registry and demonstrate best practices, Frequently Asked Questions (FAQs), and a sample court electronic filing. In addition, on its E-hearings page, the Court has posted its [General Policy Statement re: Virtual Hearings](#), together with detailed user guides for [participants](#), as well as for the [public and media](#). The Court has



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also made available [Practice Tips for Remote Hearings](#) and a recording of its webinar entitled [Introduction to Zoom Best Practices](#). These outreach initiatives and resources are viewed as having been of central importance in assisting the court to manage the changes that were necessitated by the pandemic, with various stakeholders in the Court's "eco-system".

The Court is also active on Twitter (@FedCourt_CAN_en) and regularly posts updated information on the Court's website. For instance, new and updated Practice Directions appear as a pop-up on the Federal Courts' website.

Point of Contact for Heads of Court Administration

For more information from the Court on e-filing, virtual hearing, and record access, Heads of Court Administration are invited to contact:

Andrew Baumberg, Senior Legal Counsel
Office of the Chief Justice, Federal Court
Andrew.Baumberg@fct-cf.gc.ca

REFERENCES

[Consolidated COVID-19 Practice Direction \(June 25, 2020\)](#)

[COVID-19 Guide: In-person Hearings at the Federal Court](#)

[Electronic Filing Requirements](#) included in [Practice Direction \(COVID-19\): Update #7 \(January 18, 2021\)](#)

[Federal Court Hearings Calendar](#)

[General Policy Statement re: Virtual Hearings](#)

[Pilot Project for Access to Digital Audio Recordings](#)

[Policy on Public and Media Access](#)

[User Guide for Participants](#)

[User Guide for the Public and Media](#)

[Virtual Hearing Protocol, Rovi Guides, Inc. v. Videotron Ltd., 2020 FC 637 \(CanLII\)](#)