



Action Committee on Court Operations in Response to COVID-19

VIRTUAL HEARINGS:

CHECKLIST OF CONSIDERATIONS TO DETERMINE THE MODE OF HEARING

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.

CONTEXT

The Action Committee on Court Operations in Response to COVID-19 has developed [Orienting Principles](#) and an overview of [Operational Considerations](#) to support courts in determining the mode of hearing for different types of matters and situations. To further support those efforts, the following checklist outlines general considerations courts may wish to examine when developing policy or guidelines on the use of virtual hearings, or deciding on the mode of hearing for a given proceeding. These considerations may also prove useful to counsel and self-represented litigants to determine whether they want to request an in-person, hybrid (where some participants are physically present in the same location, such as a courtroom, and one or more participants attends through telephone or videoconferencing platforms) or virtual hearing. These considerations apply to all types of matters, and general terms used throughout, such as "participant", should be interpreted according to context.

Where litigants are represented, their legal counsel has a role to play in determining whether they, and any witnesses they wish to call, would be able to participate effectively in a virtual hearing. The courts – both judiciary and court staff – may need to play a more active role in ensuring that a virtual hearing will not prejudice a self-represented litigant or other participants involved in their case.

OVERARCHING CONSIDERATIONS

✓ Participants Involved

- Identify the essential participants that need to be present either in-person or virtually – this may include lawyers, legally represented and self-represented parties, witnesses, interpreters, support persons, and others
- Identify any legal requirements or restrictions that may apply to the mode of appearance for all or certain participants (e.g. accused persons in certain criminal matters)
- Assess any particular needs of individual participants to be able to participate effectively, including any accommodation requests made

✓ Request of the Parties

- Consider whether the parties are seeking an in-person, virtual, or hybrid hearing, and why



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- If all parties agree upon a mode of proceeding, determine whether there is a compelling reason to proceed otherwise (e.g. public interest, procedural fairness, serious operational or technological impediment, security issue, power imbalance between the parties)
 - In the case of self-represented litigants, ensure any consent provided is voluntary and informed by a proper understanding of the available options and their potential impacts
- Determine if, and how, parties may request a change in the mode of proceeding if needed

ACCESS TO THE COURTS

✓ Access to the Court Facility

- Determine whether any participant may have difficulty attending court in person, for example, due to
 - Geographical distance (i.e. long or costly travel required)
 - In-custody status
 - Work or family/caregiver obligations
 - Transportation issues
 - Mobility, health or anxiety issues
 - Security issues
 - Adverse weather forecasts
- Assess whether it would be disproportionately onerous (e.g. costly, time consuming) for any participant to attend in person. Consider
 - The type of proceeding (e.g. administrative vs. substantive appearance)
 - The anticipated duration of the proceeding and of the participant's involvement
 - In a substantive hearing, the participant's relative importance to the outcome

✓ Access to Technology

- Determine whether all participants, and particularly any self-represented individuals, have access to a safe space, a dedicated device, and sufficient internet connectivity
 - If any participants are using a smartphone, or a cellphone (audio only), assess the limitations of this device in the context of the proceeding
- Develop a standard list of questions to assess each participant's level of familiarity with/ability to use the relevant technology (device and virtual platform)
 - If participants have different levels of technological comfort, consider whether this might create a power imbalance and, if so, whether available mitigation options (e.g. support for the use of technology) can adequately eliminate this imbalance



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- Consider whether there is dedicated court staff to assist with virtual hearings, including to offer technical support to parties who are appearing outside of the courthouse
- In the case of in-custody criminal matters, consider whether:
 - There is adequate staff and infrastructure to assist with virtual hearings if the accused or offender is appearing from a police or correctional facility, paying particular attention to the needs of self-represented individuals
 - The accused or offender has adequate means to communicate privately with their legal counsel in the course of the hearing
 - The accused or offender has access to a private location where they can access technology for the purpose of the hearing
- Before setting a hearing, ask standard questions, either orally or in writing, to determine whether any participants have specific needs (e.g. disability, interpretation needs) that require access to additional or adapted technology to participate in the hearing on an equal footing with others, and whether that technology is available to them

PUBLIC ACCESS AND PRIVACY, SECURITY AND CONFIDENTIALITY

✓ **Public Access**

- Determine how the public will gain virtual access, if granted (i.e. through advance registration by contacting the court, or through a publically available link)
 - Consider the type of proceeding, the overall volume of cases, and relevant privacy, security, and confidentiality considerations arising in a given case or type of proceeding
 - Establish and communicate rules of access for observers, to address matters such as online identification, publication bans and prohibitions around recording and broadcasting proceedings
- Determine what virtual access permissions should be in place, and how to enforce them. For example, if the platform allows, consider whether the chat function or observers' microphones and cameras should be disabled.
- Determine whether the proceeding is of public importance or likely to attract significant observer interest and, if so
 - Consider how public access should be granted (i.e. in person, virtually, or both)
 - If providing virtual access, assess required safeguards to uphold the integrity of the court process and the privacy and security of any hearing participants

✓ **Privacy, Security and Confidentiality**

- Determine whether any measures are needed to protect the privacy or security of a hearing participant or the confidentiality of sensitive information during a hearing, for example, by way of



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- A publication ban
- A non-disclosure order
- A sealing order
- An in-camera hearing
- Encryption of, or special filing protocols for, documentary evidence
- Assess whether the available technology and its conditions of use offer sufficient safeguards to mitigate any risks of privacy, security or confidentiality breaches, for example, whether is it possible to
 - Clearly notify participants and observers of any applicable protection order
 - Designate a hearing coordinator to control access and permissions, and to verify the identity, of participants and observers
 - Enable encryption of information as needed
 - Require an undertaking from the parties, their counsel or observers to refrain from recording proceedings or otherwise breaching privacy, security, or confidentiality
- Consider the level of risk and the adequacy of available mitigation strategies to prevent lay witnesses who would be testifying virtually from being influenced, intimidated or put at physical risk by others off-screen, for example, by
 - Designating a neutral support person to accompany the witness
 - Requiring the witness to do a virtual sweep of their room and to use their own, un-blurred background
 - Establishing a protocol for witnesses to safely and confidentially inform the court immediately if their safety becomes compromised during a hearing
- Develop a standard process for validating the identity of hearing participants who are appearing virtually

For further guidance on addressing privacy, security and confidentiality concerns in virtual settings, see the Action Committee's tip sheets on Virtual Access: [Privacy, Security Considerations](#), [Options and Implementation Scenarios](#), and [Challenges and Solutions in Trial Courts](#).

EFFECTS OF THE MODE OF HEARING ON PARTICIPANTS

✓ Complexity of the Proceeding

- Consider the complexity of the proceeding, including
 - The nature of the hearing (e.g. procedural vs. substantive)
 - The expected outcomes of the hearing, including their importance and finality
 - The number and location of parties and other essential participants
 - The type(s) and quantity of evidence, if applicable – including exhibits, documents and witnesses – and the related advantages and limitations of available technology



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- The relative need for the parties to guide the court through the evidence, and whether that need is best met through an in-person or virtual appearance

✓ **Duration of the Proceeding**

- Consider the length of the proceeding overall and of each individual's testimony, including associated wait times, with either virtual or in-person attendance. For example, consider whether
 - A substantive hearing may take longer virtually than in person due to technical requirements or difficulties or the need for more frequent breaks to prevent fatigue
 - A virtual appearance might reduce wait times for counsel, litigants and witnesses
 - Virtual waiting rooms are available for witnesses waiting to testify
- Assess available options to minimize wait times for essential participants attending in person or virtually
- If all or some participants are attending virtually in a substantive hearing, consider
 - Whether frequent breaks can be taken to prevent screen fatigue (e.g. every 90 minutes)
 - How breaks should be scheduled to optimize the flow of the proceeding and minimize disruptions
 - How participants can request a break during the proceeding

INTEGRITY OF THE COURT PROCESS

✓ **Decorum and Etiquette**

- Consider the relative importance of decorum and etiquette on the hearing, based on
 - The nature of the proceeding (e.g. administrative vs. substantive hearing)
 - The type of matter, and whether it involves public or mainly private interests
 - The type(s) of participants involved, and whether formality would be beneficial or detrimental to their participation
 - The seriousness of the outcome on the parties, the public and other persons affected
 - The relative impact of the solemnity of proceedings versus a less formal setting in securing a just outcome and upholding the public interest, if applicable
- Consider whether the options available virtually are sufficient to achieve an appropriate level of decorum and enforce proper etiquette, for example
 - Gowning for judicial officers and counsel
 - Opening virtual court in the same way as the court would be opened in person



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- Ensuring that the court and counsel are addressed in the same way as in person
- Ensuring that rules around matters such as punctuality, eating, or interrupting the process are communicated beforehand and enforced in the virtual context
- Providing advance guidance to participants on matters such as dress, the use of virtual backgrounds, and eliminating distractions like notifications on electronic devices

✓ **Evidentiary Issues**

Assess whether the litigants, represented or otherwise, can argue their legal position efficiently and effectively in the virtual space, using the following considerations:

Witness Evidence

- Determine whether the proceeding involves witness testimony and, if so, consider
 - Its nature, including whether credibility is at stake or hostility is anticipated
 - Its relative importance to the issues at stake and to the outcome of the hearing
 - Whether the legal framework places any restrictions on virtual testimony
 - The relative impact of proceeding either in-person or virtually on the witness's ability and willingness to participate effectively, particularly for vulnerable witnesses
 - The relative ability of the parties to cross-examine the witness effectively either in-person or virtually, and the relative importance of that cross-examination
 - Any power imbalances technology may create, exacerbate or, on the other hand, reduce, for example due to
 - Different levels of technological access or literacy
 - Pre-existing power imbalances, such as parties in an abusive relationship or a self-represented litigant against counsel
 - Different parties or witnesses appearing by different modes in a hybrid hearing

Documentary Evidence

- Determine whether the proceeding features documentary evidence and, if so, assess how effectively it can be presented either virtually or in-person, taking into account
 - The quantity of evidence and how it is organized
 - Whether authentication is required and how it can be achieved
 - The level of familiarity of the parties with the technology used to present evidence virtually
 - The availability of adequate and compatible technology for all parties and the court to visualize the evidence concurrently, with particular attention to the situation of litigants who are self-represented or in custody
 - Whether the legal framework allows for, or restricts, virtual filing of original documents as exhibits



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- If documents are filed electronically, consider whether the courtroom is set up to facilitate ease of access to, and visibility of, documents during in-person hearings. This may include whether the judges' bench and counsel tables are equipped with
 - Wireless internet connections
 - Monitors and connection cables
 - Electrical plugs for power cords

Physical Evidence

- Determine whether there will be physical evidence (non-documentary exhibits) and, if so
 - Whether it can be effectively and fairly presented virtually
 - Whether visual authentication is required and how it can be achieved

✓ **Recording of Proceedings**

- Assess whether available technology for virtual hearings
 - Can capture an adequate record of court proceedings and, if so, what retention periods and data protection measures are involved
 - Is compatible with in-house recording devices or software, if applicable
 - Might affect the work of clerks and stenographers responsible for producing accurate minutes and records of proceedings

✓ **Interpretation of Proceedings**

- Determine whether interpretation services are needed, and if so assess
 - Whether interpreters are readily available locally and/or remotely
 - The impact of available technology on the quality of interpretation
 - Whether available technology enables simultaneous and/or consecutive interpretation, and the impact of the mode of interpretation on the participants and the process
 - The relative impact on interpretation of seeing the speaker either in person or onscreen (e.g. to ability to assess non-verbal communication)
 - Whether available technology can capture an adequate record of proceedings