

Second Study Commission

Civil Law and Procedure

65th Annual Reunion of the IAJ – Tel Aviv, Israel

CANADA'S RESPONSE to the Questionnaire 2022

VIRTUAL TRIALS IN CIVIL PROCEEDINGS

The Second Study Commission will focus on how our jurisdictions used, and will use, virtual trials and hearings before, during and after the Pandemic. We have limited the questionnaire to six questions, and we expect to receive short and concise answers. The questions are as follows:

1. Did your jurisdiction offer complete or partial virtual civil trials or hearings before the Pandemic? If yes, please describe what was offered and how often the offer was exercised.

Prior to the Pandemic, virtual civil trials or hearings were unheard of. Exceptionally, witnesses could testify by video conference by Court Order. Also exceptionally, in case of urgency for instance, short interim hearings could be held by telephone.

2. Did your jurisdiction offer civil virtual trials or hearings during the Pandemic? If yes, was there a change in how, what and when it was offered? Were protocols published? Also, if yes, when were the virtual trials/hearings offered and what was the uptake?

After initial closures of Canadian courthouses in March 2020, video conferencing technology was obtained to allow for virtual hearings including commercial, family, and appeals. The provincial and federal courts used various software: Cisco WebEx, Zoom, and Microsoft Teams were the most common. Civil trials were mainly adjourned initially. Eventually, some virtual civil trials were held.

Guidelines were published on various court websites. A helpful decision on virtual civil trial process was published by Justice Lafrenière of the Federal Court: *Rovi Guides v Videotron* 2020. FC 637.

The uptake of virtual hearings was slow at first – many counsel and parties preferred to appear in person except in short interim application type matters. Eventually, as the technology improved and the Pandemic dragged on, the uptake became more normalized and all matters, other than jury trials, were heard virtually. Civil jury trials were either changed to “judge alone” virtual trials by consent, were adjourned, or eventually were heard in person in large off-site plexiglass protected venues (such as theaters).

3. Presuming that civil virtual trials were offered, was there any improvements made in the technology/software that the government provided? How were documents and exhibits managed?

There were significant technological improvements made in courthouses across the country – mainly involving the acquisition of video conferencing software. As well, as most judges were sent home to work, home based computer and monitor set ups were arranged.

Document and exhibit management was challenging for most trial courts. When the Pandemic hit, most Canadian Courts were still paper based. Exceptionally, British Columbia had a fairly robust e-filing system. Other jurisdictions, such as Ontario and Quebec had some very limited e-filing capability. Most other jurisdictions were still at the review and planning stage of e-filing capability. Some Courts of Appeal, and the Supreme Court of Canada had working e-filing processes.

As the Pandemic continued, many trial courts started to allow court documents to be filed by email – but they were then printed at the Courthouse and paper filed. Ontario arranged for an evidence and document management system to be purchased (CaseLines). Some jurisdictions (such as Alberta) started allowing documents to be uploaded to digital drop boxes, such as Sharepoint for the virtual hearings, with limited success. Other jurisdictions fast tracked digital filing projects, but many are still works in process. During hearings the “share” function was used to display digital documents.

Filing digital exhibits was challenging. Some jurisdictions marked and downloaded digital exhibits on sticks (which were then filed). Others had them printed and physically marked and filed at the courthouse later in the day.

4. What does the future hold in your jurisdiction with respect to the continuation of virtual trials? What are the issues and or benefits that have arisen?

Virtual trials and hearings are here to stay, however, what should be heard virtually vs in-person is the subject of considerable debate across the country. Committees have been struck to consider the ongoing processes that will be allowed and some go forward guidelines have been published. Generally, longer and more substantive hearings and trials are reverting to in-person hearings. Shorter and administrative type hearings are continuing virtually. Some Courts allow the parties to chose.

In Ontario and British Columbia, members of the bar have started petitions attempting to force virtual hearings for shorter matters to be offered virtually considering the significant cost and time savings realised for their clients.

The benefits of virtual hearings include the efficiency, accessibility, and cost savings to the parties. The issues include the virtual document management problems with inadequate

software and e-filing systems, the perceived lack of gravitas to the virtual hearing setting, technological issues (including bandwidth and computer access), and perceived poorer assessment of witnesses.

5. Has or is research being done in your jurisdiction to help ameliorate some of the concerns that have arisen with virtual trials?

Most court jurisdictions are in the process of modernising its e-filing and virtual court capability. A number of committees across the country have been tasked with this concern including a National Task Force dedicated to the topic with members from the Ministry of Justice, the Supreme Court of Canada and some Chief Justices from across the country. The Canadian judiciary held multi-day seminars both in July 2021 and 2022 gathering experts from around the world to lecture on best practices in the virtual setting. The CyberJustice Laboratory at the University of Montreal is researching best practices with virtual hearings involving international experts.

6. How did the digitally excluded people in your jurisdictions have access to justice and specifically to virtual trials during the Pandemic?

In general, it was a rare concern that a party did not have digital access by computer, or at the least by a smart phone. If a party had difficulty with digital access, steps were taken to help with the concern as needed depending on when the virtual hearing was held. For instance, early on, when all courthouses were basically closed, emergency telephone hearings could be held and if a matter could not be held virtually, it was adjourned. Later, digital access was available at various government sites, was borrowed from others, or was done in person in exceptional circumstances.