



Action Committee on Modernizing Court Operations

VIRTUAL AND HYBRID HEARINGS IN FAMILY MATTERS: PROMOTING THE BEST INTERESTS OF THE CHILD

A Statement from the Action Committee

Our Committee supports Canada's courts in their modernization efforts. It provides guidance for addressing challenges, and highlights opportunities and innovative practices to modernize court operations and improve access to justice for court users.

1. CONTEXT AND BACKGROUND

In August 2022, the Action Committee published a series of forward-looking guidance documents on the use of virtual hearings. These include both a set of broad [Orienting Principles](#) to support courts in establishing policies or practise related to mode of hearing, and an outline of [Operational Considerations](#) to support individual decisions concerning whether a matter will be heard in person, virtually, or in hybrid mode (when some participants are remote and others are in person).

The following guidance builds on that work in the family law context by examining virtual participation in hearings through the lens of the best interests of the child. It is based on discussions with judges and practitioners from various regions across Canada about their experience with virtual and hybrid hearings, as well as a review of domestic and international studies on this matter. The individuals who took the time to contribute to this work were on the front line of the introduction of virtual hearings in family courts. Their experiences with, and opinions of, this mode of proceeding vary greatly: while all agree that virtual and hybrid hearings can be a useful tool for appropriate matters, opinions differ concerning what constitutes an appropriate matter.

This guidance attempts to capture the nuance that came out of these consultations, while distilling considerations and tips that will be of use in deciding whether a family law matter should be heard virtually and maximizing the process when a virtual or hybrid mode of hearing has been chosen. While much of this guidance will be relevant to child protection matters, it is written from the perspective of family law (divorce and separation) proceedings.

This guidance used the term “hearing” broadly, to encompass all appearances before a judge and uses the term “virtual” to refer to both hearings that are both fully virtual (when all participants are appearing remotely) or hybrid (when some participants are appearing remotely while others are in person). While some points specifically reference participation by telephone, this guidance is generally intended for contexts in which virtual participants will be appearing via videoconferencing technology.

2. PUTTING CHILDREN'S INTERESTS FIRST

When families with children experience breakdown, federal, provincial and territorial family laws require decisions about parenting arrangements to be based on the best interests of the child. In addition to guiding substantive decisions about parenting responsibilities, the best interests of the child are relevant to procedural decisions throughout a family law process, including whether, and how, virtual hearings will be used.

The best interests of the child are served when a court process ensures that a matter is resolved in a timely manner, that the court has access to all relevant facts, and that children's exposure to conflict is minimized. Early resolution of family law matters reduces the stress on children, and solving problems before they have the opportunity to escalate can increase child safety. Having access to all relevant facts puts a judge in the best position to consider the best interests of any children affected by a separation or divorce: an optimal fact-finding environment considers the needs of participants and provides the necessary supports for their participation, including when they are providing testimony to the court. It is



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essential that the court and parties have access to, and can understand, all relevant documentary evidence and that children's exposure to parental conflict is minimized by reducing or eliminating their exposure to court hearings and their access to court documents. Ensuring such measures are in place supports the fact-finding function of the court and serves the needs of participants and the administration of justice.

As noted by the Action Committee in its [Orienting Principles](#) on virtual hearings, there is no one-size-fits-all rule to identify the best mode of hearing. The preferred approach may vary depending on the stage of the case; the technology that is available to both the participants and the court; the type of participant (e.g., party, witness, counsel); and the many unique factors that make up each family, such as their geographic location, their cultural background, and whether they have legal representation. Finding the best mode of hearing for any matter will involve weighing and balancing all of these factors, and considering opportunities to mitigate any identified challenges, within the specific context of each situation.

Family courts and practitioners across Canada are still learning how to make the best use of virtual tools, but many lessons have emerged since their widespread adoption in the spring of 2020. These lessons highlight some of the limitations of virtual hearings, as well as ways in which they can increase access to justice for family litigants and promote their children's best interests. They also reveal that there is a need for continued innovation to ensure that the adoption of technology in the courts is consistent with the needs of children in families experiencing breakdown.

3. CONSIDERATIONS FOR DETERMINING THE MODE OF HEARING

A number of factors can contribute to whether a specific mode of hearing (virtual, hybrid, or in-person) will maximize the chance of reaching a timely and appropriate outcome, provide the decision-maker with access to all relevant facts, and minimize a child's exposure to conflict. Weighing the following considerations may assist in deciding what mode of hearing is most appropriate to achieve these goals. The benefits and challenges associated with some of these considerations were addressed in the Action Committee's general [Operational Considerations](#) on virtual hearings but they are worth highlighting again, as they are particularly relevant to family law proceedings that involve children. Some of the potential challenges with virtual hearings may be mitigated by employing the tips for successful virtual hearings highlighted in section 4 below.

- *Geographic location of the participants.* There appears to be widespread agreement that one of the main benefits of virtual hearings is that they can provide people who live far from court centres, or in communities in which the court only sits on certain days, with quicker, as well as more cost effective and convenient, access to the court. Early access is especially valuable for resolving emerging or urgent matters before they become more serious.

When considering cost and convenience, the distance participants would have to travel to attend a hearing should be balanced against both how important in-person testimony is to understanding what is in a child's best interests and whether the participant has adequate access to the tools required to participate effectively. If a party or witness is not located near the court and would have to incur significant costs to travel, and adequate conditions can be assured for virtual participation, the benefits of hearing from them in person may not outweigh the burden of travelling to do so. This factor will be particularly relevant for individuals living in northern communities, or in a different location than where the proceeding is taking place.

- *Level and nature of conflict between the litigants.* Sometimes, in-person presence may facilitate judicial management of high-conflict litigants and therefore support quicker resolution. In other situations, though, maintaining physical distance may make the parties more willing to cooperate or set them at ease and allow them to testify more effectively. In situations of family violence, in particular, the ability to participate in a hearing without being in the same space as their abuser



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can both promote victim safety and facilitate their ability to tell their story. In many cases, appearing remotely may be the best way to facilitate this separation, though courts should be aware that in some instances the controlled environment of the court might provide better protection for victims of domestic violence than remaining at home will.

- *Access to the conditions required to participate effectively.* Some participants will not have access to essential conditions for effective virtual participation, such as technological tools and bandwidth. Others may need additional supports to be able to participate effectively. These conditions can affect both the judge's access to all of the facts and the creation of an environment that is conducive to early settlement.
- *Technological Tools:* As outlined in the Action Committee's previous guidance on [virtual hearings](#) and on [the needs of self-represented litigants \(SRLs\) during the pandemic](#), the ability of a litigant or witness to tell their story effectively will be affected by whether they have access to appropriate technology, including reliable internet access. Particular attention should be paid to whether either party will be disadvantaged as a result of the technology available to them: if one party is participating by telephone while the other is either present in the court or appearing by video, for example, it may be more difficult for the party appearing by telephone to effectively tell their story. Participating by telephone can also limit a party's ability to communicate privately with their legal counsel, if they are not in the same location.
 - *An appropriate place to attend virtual court:* Being at home can create distractions that minimize the effectiveness of the hearing, such as the presence of a child or other family member, phone or computer notifications, or the pull of chores that are waiting to be done. An individual who shares a small space with many people, such as extended family members, may find it particularly difficult to participate effectively from home. Pre-hearing guidance and discussions may be of some assistance in addressing these challenges, but many actors in the justice system have noted that challenges with recreating the atmosphere of in-person court often persist, regardless of such attempts.
 - *Legal Professionals:* The in-person presence of counsel, either in the courtroom or at the lawyer's office, can help set a represented litigant at ease and facilitate their ability to tell their story fully and clearly. Duty counsel provides an essential on-site service for the large number of SRLs in the family law system, who may not have access to the same level of support if their hearing is virtual. However, for litigants who speak a minority language or who would like counsel of their own cultural background to represent them, the ability to have counsel from another city appear virtually can provide access to a greater pool of lawyers who can help them to best share their story.
 - *Other Support Persons:* Beyond legal counsel, other professional and community support persons can both facilitate a litigant or witness' ability to participate in a hearing effectively and help to minimize any trauma associated with participating in the legal system. It may be easier for band representatives, extended family members who play a key role in the child's life, or community members to attend hearings to support First Nations litigants, particularly from remote communities, if they are able to appear online, for example. The same may be true of social workers or counsellors, who might not have the time to attend court in person, but would be able to join a virtual hearing.

The conditions a given litigant or witness requires to best participate will help to determine whether in-person or virtual participation is most appropriate in that context.

- *Cultural needs of the family.* The best interests of the child should be considered in light of their cultural background. Particularly in situations involving Indigenous children, the court should consider the extent that virtual hearings may affect its ability to fully consider the child's cultural



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needs or the possibility of alternative family arrangements (e.g., custom adoption), as well as to accommodate broader community involvement in the process, where appropriate.

Similarly, in many jurisdictions across Canada, Indigenous peoples have opportunities to integrate cultural and spiritual practices into court proceedings. This may include access to smudging, eagle feathers or other sacred objects for oath-taking, or access to elders or other community leaders. If an Indigenous person is going to participate in a court process remotely, it may be necessary to determine if the remote participation will provide equivalent access to resources that can meet their cultural and spiritual needs.

- *Comfort with interacting online.* Litigants who are not used to interacting online may find it more difficult to tell their story effectively in a virtual setting. This could include older persons or those from cultures where internet use is less common. On the other hand, if children will be directly involved in the proceeding at any point, their comfort with speaking through video-chat platforms may make virtual participation an ideal option, if the court is confident that the child has access to a private location to participate and that they are provided with supports to participate easily and safely.
- *Likelihood of children overhearing virtual hearings.* It is difficult for the court to ensure that a child is not present when their parent is participating in a hearing from home. When deciding whether a virtual hearing is appropriate, consider the extent to which it is possible for the party to appear in a location in which children will neither hear the proceeding nor be exposed to documentary evidence. This could be a secure location in their home, at a community service provider's office, or their lawyer's office, for represented litigants.
- *Relevance of credibility.* Perspectives vary widely concerning both the importance of relying on physical cues to make credibility assessments, and whether this can be done as effectively online as in person. Consultations revealed that some find it difficult to assess credibility on screen without seeing a person's full body, while others find that virtual platforms can actually enhance this ability, since they allow for closer observation of facial expressions. Others place limited reliance on visual cues to assess credibility, so were unconcerned about the effects of virtual technology on their ability to perform this assessment.

For those who do rely on visual cues to assess credibility, the relevance of this factor to a decision concerning the mode of hearing will vary depending on both the other tools they have at their disposal and the relative importance of credibility in the situation at hand. When the court has access to an affidavit that contains all of a witness' evidence, assessing their demeanour may be less relevant to the ability to make a determination in the best interests of the child, as the judge can review the written testimony to ascertain whether the witness' story is internally consistent. Likewise, the credibility of expert witnesses or professionals – such as teachers or social workers – may be less central to the decision to be made, so the inability of the judge to see all of the cues they would usually use to assess credibility may be less important.

4. TIPS FOR VIRTUAL FAMILY HEARINGS

If the balance of all relevant factors supports the use of a virtual hearing, courts and counsel may need to adapt their practices and policies to create an optimal environment to advance the best interests of the child. Some modifications will be relatively easy to implement, while others may require more systemic changes or creative approaches to how virtual hearing technology is used.

4.1 Preparing for the Hearing

- Provide space for virtual litigants to appear outside of the home. For represented individuals, this could be at their lawyer's office. For SRLs, the justice system may need to consider how it can adapt its own facilities, such as courthouses, or enter into partnerships with social service and



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community organizations to provide a secure and private space for individuals to participate in virtual hearings.

- Promote the pre-hearing work necessary to facilitate effective participation and speedy resolution. Depending on the type of proceeding, preparing draft orders or fulsome affidavits and carefully organizing materials and evidence can all facilitate settlement. Common processes like exhibit books with clear page numbers or a form that parties must sign to ensure all exhibits they intend to rely upon are organized and served can also support a smooth hearing.
- Walk clients and witnesses through what to expect ahead of the proceeding. For represented individuals, counsel can take on this role, while courts may wish to develop – with or without the assistance of public legal education or community organizations – videos or other self-help materials to help SRLs prepare for virtual court.
- Ensure that appropriate measures are in place so that the voice of the child can be heard. If a professional will be providing evidence on their behalf, make sure that individual has the information and tools necessary to participate in the virtual hearing. If the child will be speaking to the court directly at any time in the process, ensure that they have access to a private location to participate and that they are provided with supports to participate easily and safely.
- Consider how virtual settlement discussions can be scheduled and managed with the flexibility to allow them to continue until resolution is reached. Elements of the in-person process that have often been difficult to recreate virtually, and may require creative solutions, include:
 - pre-hearing hallway discussions between counsel that can often lead to a settlement or the narrowing of issues in dispute
 - the ability to have orders that reflect a full or partial settlement signed or agreement entered into the record immediately after it is reached
 - the continuation of discussions immediately after a settlement meeting with the judge, with the ability to return to the judge and have an order signed without scheduling a future appearance

4.2 During the Hearing

- Set the tone before the virtual hearing starts. This might include implementing processes that reinforce the seriousness of the proceedings and encourage the parties to work towards resolution. A notice on the wait screen or a briefing by court staff for parties waiting to enter the virtual courtroom can reinforce that they are appearing formally in a courtroom, rather than just attending a meeting. Reiterate the rules of conduct if parties deviate from them.
- Take the time to connect with the participants before jumping into the business of the hearing. This is particularly important for less formal processes like settlement discussions and judicial dispute resolution where the judge and parties will be working together to come up with solutions. Taking a few minutes to say hello and introduce yourself can set the participants at ease and improve their comfort with both the judge and the process.
- Use the “breakout room” feature of the virtual platform to recreate the ability for parties to “step out of the room” to speak with their lawyers or to each other without the judge present. Having multiple breakout rooms managed by court staff can help to recreate the in-person practice of sending parties away to finalize an agreement while the next matter begins and then return during a break to have it endorsed. The Action Committee’s previous guidance on [Functionalities and Suggested Settings](#) for virtual hearing platforms outlines the breakout room functionality in the top platforms used by Canadian courts.



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- If a lawyer is in the courtroom while their client is appearing virtually, ensure they have a way to communicate privately. For example, consider allowing the lawyer to use their cell phone to text or message with the virtual client.

5. ADDITIONAL RESOURCES

Publications by the Action Committee

[Virtual Hearings: Orienting Principles](#)

[Virtual Hearings: Operational Considerations – Benefits and Challenges](#)

[Virtual Hearings: Checklist of Considerations to Determine the Mode of Hearing](#)

[Virtual Hearings: Areas for Further Study](#)

[Virtual Hearings and Services: Tools and Resources for Court Users and Personnel](#)

[Virtual Hearing Platforms: Functionalities and Suggested Settings for Participants and Observers](#)

[Applying the Canadian Judicial Council's Statement of Principles on Self-Represented Litigants and Accused Persons: special considerations arising from the COVID-19 pandemic](#)

Other Guidance

The joint E-Hearings Task Force of The Advocates' Society, the Ontario Bar Association, the Federation of Ontario Law Associations, and the Ontario Trial Lawyers Association, [Best Practices for Remote Hearings](#), Second Edition, May 28, 2021

Studies and Reports

Houston, Claire et. al., [Ontario family justice in "lockdown": Early pandemic cases and professional experience](#), Family Court Review Volume 60, Issue 2 (March 2022).

Jane Evans and Anna Ndegwa, Justice Canada, [Use of Technology in the Family Justice System – Annotated Bibliography](#), Jane Evans and Anna Ndegwa, Justice Canada (2022).

Lisa Harker and Mary Ryan, Nuffield Family Justice Observatory, [Remote Hearings in family courts in England and Wales during COVID-19: Insights and Lessons](#), Family Court Review Volume 60, Issue 2 (March 2022).

Mary Ryan et. al., Nuffield Family Justice Observatory, [Remote Hearings in the Family Court Post Pandemic](#), (July 2021).