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Memorandum

To: Gavin Leeb, Director, Legal Branch
From: Erin Carr, Articling Student, Legal Branch
Date: May 29, 2020
Re: Best practices for virtual hearings

This memo contains practice guidelines for representatives (or lawyers) looking to use videoconferencing in administrative tribunals and court hearings. Before relying on these guidelines, representatives should check with the relevant board or court for the most recent guidelines and information on virtual hearings.

Background

Many administrative bodies have offered videoconferencing options for hearings for over a decade, including the Immigration and Refugee Board of Canada and most human rights, labour and landlord/tenant boards. Fully-equipped virtual courtrooms located in Vancouver, Toronto and Nova Scotia also offer videoconference hearings on criminal, civil, family and tax law matters. Rules and/or legislative amendments have permitted videoconferencing since the 1990s with changes to the *Federal Court Rules*, the *Ontario Rules of Civil Procedure*, and the *Criminal Code*.

Nevertheless, videoconferencing is rarely used in a final determination of a dispute. To date, videoconferencing is generally reserved for procedural matters or circumstances where parties would be excessively burdened by an in-person hearing due to disability, remote location or multi-jurisdictional disputes. Videoconferencing is typically not available in disputes involving complex issues, many parties or where credibility is a prevailing issue. See *Berkim Construction*, OLRB File No. 0029-19-R, March 30, 2020.

However, over the coming months, virtual hearings are likely to become a routine fixture in most labour boards and courts. While many disputes will remain ill-suited for videoconferencing, ongoing travel restrictions and social distancing practices associated with COVID-19 have brought court operations to a halt, and videoconferencing offers a relatively easy-to-implement and inexpensive option for proceeding in most cases.

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Links

Best Practices for Using Video Teleconferencing in Adjudicatory Hearings (American):
<https://www.acus.gov/sites/default/files/documents/handbook-on-best-practices-for-using-VTC-in-adjudicatory-hearings.pdf>

Review of Videoconferencing in Refugee Hearings:
<https://irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/Video.aspx>

Chart on Appellate Courts' Response to COVID-19 (including videoconferencing plans):
<https://www.osler.com/en/blogs/appeal/april-2020/appellate-courts-response-to-covid-19-updated>

Best Practices

1. Technical considerations

a) *Equipment*

- i. **Screen** – Screens should be large enough for participants to see the image clearly from their location in the hearing room. In a small office where the participant is seated at a computer desk, a desktop monitor is sufficient. In larger hearing rooms where the participant is seated at a separate table, a projector or television is recommended. Ideally, participants should have two screens so that one may be used to display the videoconference proceeding and the other to display documents and exhibits.
- ii. **Microphone** – The best practice is to speak directly into a microphone. In a small office, the built-in microphone in most desktop computers should be sufficient. Where participants are not seated directly in front of the unit, an external microphone should be connected to the participant. Ideally, participants should use a headset microphone to reduce echo and feedback.
- iii. **Camera** – Most built-in or external webcams are designed for high definition video transmission and should be sufficient. Poor image quality, such as pixilation and lag, is likely caused by low bandwidth.

b) *Bandwidth*

Without a high bandwidth internet connection, a strong connection may not be possible. If bandwidth is insufficient and cannot be increased, the best practice is to not conduct a video hearing. Representatives should consider whether the matter is suitable for teleconference. Otherwise, the matter should be adjourned until a stronger connection is available or the hearing can be held in-person.

If you are unsure whether you have sufficient bandwidth, conduct a speed test by googling “speed test” or visiting www.speedtest.net. The minimum upload/download speed for HD video calling is 1.2Mbps/1.2Mbps. However, anything above 500kbps/500kbps should be enough for high quality videoconferencing. Another way to check your bandwidth is to ask your internet service provider whether you have enough bandwidth for HD videoconferencing.

Where possible, use hardwired internet rather than wireless internet.

Note that public networks are not secure and should not be used for videoconferencing.

c) *Software*

Some arbitrators and labour boards will direct parties to use a particular service designed for video hearings (such as CourtCall or Reportex). In those cases, parties will be given instructions on how to install the service and what steps to take to prepare for the hearing. Otherwise, parties can select their own service (such as Zoom, WebEx, Google Hangouts or Skype for Business) based on personal preference.

2. Environment

a) *Physical configuration of the room*

- i. **Parties** – Participants should face the camera from an appropriate distance to provide a similar image as an in-person hearing. For example, if a witness is typically visible from the waist up during an in-person arbitration, the witness should be positioned to provide the same view during the videoconference.
- ii. **Camera** – The camera should be placed around eye level directly adjacent to the monitor to allow participants to maintain eye contact with those on screen. If participants are seated at a distance from the unit, the area between the camera and the participant should be clear of furniture.
- iii. **Light source** – The primary light source should be behind and/or above the camera, and should provide soft, evenly-dispersed light to avoid dark shadows, overexposure and glare. There should be enough light to clearly read written documents. The camera should not face a window.

b) *Noise*

Where possible, hearing rooms should not be located along exterior walls, windows, elevators, machine rooms or restrooms. Carpeting will reduce any ambient noise and echo which could detract from audio quality.

c) *Décor*

Neutral colors are more conducive to clearer images and produce less strain on the viewer's eyes. Extremely dark, light or vibrant colours may negatively impact the image's white balance and colour balance.

3. Procedural practices before the call

a) *Test calls*

Representatives should conduct a test call before the hearing to ensure that the equipment functions and the internet connection is strong. If the connection is strong during the test call but poor during the hearing, it may be due to another participant's connection. Establishing a quality connection may require disconnecting and reconnecting with the site.

During the test call, each participant should conduct all activities that are expected to take place during the videoconference. For example, conduct a short "mock" examination on an unrelated subject, including objections by defending counsel, use of an interpreter (where applicable), and use of the platform's breakout room function.

Check whether a software update is available for your videoconferencing platform 24 hours before the meeting.

b) *Prepare parties/witnesses*

In addition to standard preparation, representatives should:

- Prepare witnesses to testify by practicing using the service that will be used on hearing day (witnesses may be uncomfortable testifying while observing themselves on the screen).
- Direct witnesses to be alone in the room when testifying and not to look at or refer to notes or other documents unless directed to do so by a representative or the arbitrator.
- Ensure witnesses understand their obligation to provide their evidence without resorting to any outside information.
- Inform participants of what will appear on screen and who will be present remotely.
- Warn participants of the possibility of technical failure during the videoconference.

c) *Prepare equipment*

Clean the screen and camera lens to ensure high video quality. Organize cables so devices can be accessed easily during the videoconference. Where possible, have spare equipment ready in case equipment malfunctions during the hearing.

d) *Circulate documents/exhibits in advance*

The best practice is to submit documents/exhibits three (3) days in advance where possible. Some labour boards may implement a policy that requires documents to be filed several days before a video or teleconference. Even where no policy is in place, filing documents in advance can reduce issues that often arise with last minute filing. If documents need to be submitted last minute, ensure the document is saved in a format that can be shared with the other parties and create an electronic folder that can be accessed during the videoconference.

Other tips on evidence:

- If you are unsure whether a particular document will become necessary to admit into evidence during the hearing, password protect the document so that it can only be reviewed by the parties if you decide to admit it during the hearing.
- Parties should minimize reliance on *viva voce* evidence where possible by using an agreed statement of facts and 'will-say' statements.
- If the evidence includes sensitive or confidential material, get an order from the arbitrator to return or destroy that material at the end of the hearing and prohibit any copying or distribution.

e) *Make plans for communicating with the advisee*

Representatives should plan a way to communicate privately with the advisee during the hearing. Unlike during in-person hearings, representatives will not be able to pass notes to the advisee during a videoconference. While some videoconferencing platforms have virtual breakout rooms to allow participants to speak privately during a break in the hearing, advisees and representatives should also have a method of communicating discretely as the hearing takes place. Ideally, they should do so by email only. Most chat features are not appropriate for confidential messages because it is too easy for people to slip up and send a chat "to everyone". Further, the meeting host can access a record of all messages sent using the platform during the meeting, including private messages.

If the representative chooses to communicate through text messages, participants should:

- Refrain from texting during the hearing other than to communicate with the representative.
- Text as discretely as possible. If your phone becomes a distraction during the hearing, an arbitrator (or judge) may ask you to refrain from texting.
- Adjust screen brightness to avoid casting a glare on your face or glasses.

- Disable keyboard clicks and silence your phone completely. Keep your phone screen visible to see incoming messages. Do not leave your phone on vibrate as microphones can pick up and amplify vibrations.

f) *Emergency notification/backup plan*

Create a process by which participants who lose connection to the videoconference may notify the arbitrator (e.g. text messaging or a telephone call to a designated person who can notify the arbitrator). Identify a back-up plan (e.g. by teleconference) in the event this occurs.

4. Day of the hearing

- a) Dress as you typically would for a hearing. Avoid stripes or other busy prints. Neutral solid colors are best.
- b) Turn off your landline during the call to avoid disruptions.
- c) Ensure there are no unnecessary applications running on your device.
- d) Lock the office door to minimize potential interruptions.
- e) Connect to the call five (5) minutes early.
- f) Use the same degree of courtesy and etiquette as required for in-person hearings.
- g) Mute your microphone until it is time to speak.
- h) Assume the other participants can see and hear you at all times, even if the connection seems lost at your end.
- i) State your name for the record each time you speak.
- j) Do not leave your phone on vibrate—silence it completely.
- k) Representatives should consider leaving themselves un-muted during cross-examinations, so they can raise objections with no delay. Everyone else (except the witness) should be muted.