



OBA Recommendations to Improve Virtual Case Management Courts

Submitted to: Office of the Chief Justice,
Ontario Court of Justice

Copied to: Office of the Attorney General,
Ministry of the Attorney General
Legal Aid Ontario

Submitted by: Ontario Bar Association

Date: March 23, 2021



ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

L'ASSOCIATION DU
BARREAU DE L'ONTARIO
Une division de l'Association
du Barreau canadien



Table of Contents

Introduction.....	3
The Ontario Bar Association	3
Challenges Experienced in Current Virtual Case Management Courts	3
OBA Recommendations	5
1. Remove as many litigants from the set date “stream” as quickly as possible.....	5
2. Ensure publicly accessible information for connecting to virtual case management courts.....	7
3. Utilize time in waiting rooms more effectively and triage.....	7
4. Ensure consistent and structured scheduling of matters in case management court	9
5. Expand and improve the use of virtual sign-up sheets	10
6. Stream different types of matters and establish temporary surge case management courts	11
7. Ensure sufficient duty counsel	11
Conclusion	12



Introduction

The Ontario Bar Association (OBA) appreciates the opportunity to provide these recommendations to assist in improving the operation of virtual case management courts in the Ontario Court of Justice.

The Ontario Bar Association

Established in 1907, the OBA is the largest volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system and who provide services to people and businesses in virtually every area of law in every part of the province.

Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public, and delivers over 325 in-person and online professional development programs to an audience of over 12,000 lawyers, judges, students and professors.

This submission was prepared by members of the OBA Criminal Justice Section which includes both Crown and defence counsel practicing in a wide range of criminal justice matters before all levels of Court.

Challenges Experienced in Current Virtual Case Management Courts

The OBA supports a move to a virtual platform for case management courts – not only during the COVID-19 pandemic, but also on a go-forward basis. The pandemic has provided a valuable opportunity to make permanent improvements to the system to increase efficiencies and reduce costs. Virtual case management courts are a prime example. They avoid the time and expense associated with traveling to courts, and enable counsel to address matters in different courthouses on the same day.



That said, the current virtual case management courts are overwhelmed and inefficient, resulting in significant challenges for all justice participants. Anecdotally, OBA members have reported the following challenges:

- Dockets are increasingly lengthy and reaching unrealistic levels for Crown, defence, and court staff. One member reported a set date docket of 1100 matters in a relatively small jurisdiction. Another reported that the list was so long that not all matters could be reached, and thus outstanding matters were adjourned to a presumptive date – despite counsel being ready and available to address them.
- As a result of lengthy dockets, the time spent waiting to address matters in many set date courts is unwieldy. Members have reported waiting on Zoom for five to nine hours to have a matter reached.
- Unfortunately, the virtual sign-up sheets have often been ineffective to date. Members have reported that, despite sign up beginning as early as 7:00am, matters may still not be reached until late in the afternoon. There are reports of names being erased and moved around on the list in an attempt to jump the queue. Matters on the list are not consistently checked off, so defence counsel are unable to determine what matter is being addressed at any given time.
- Counsel are being held in the Zoom waiting room for lengthy periods (often hours). While in the waiting room, they are unable to see and hear what is happening in court, and miss any instructions or comments from the Justice of the Peace regarding timing.
- Call-in details for courtrooms are constantly changing or not readily available. Members have reported often not knowing where to call in, or seeing incorrect information being circulated. This increases burdens on court staff and Crowns as defence counsel and accused persons are turning to them to provide this information.
- The time slots for in-custody accused are only being provided by the jails the morning of the appearance. Members reported the challenges this causes for defence counsel in effectively managing their practice, as they often must attend to many matters in many jurisdictions.



Crown members also reported frustration with this practice, as sometimes assigned Crowns will need to address their own matters.

- Crown members have reported that self-represented accused are often lost and are not being provided with adequate assistance, since duty counsel are no longer available to assist.

OBA Recommendations

As outlined above, the OBA supports virtual case management courts; however, care must be taken not to simply reproduce in the digital world the inefficiencies of the paper system. Instead, there is room for a wider discussion on how the number of set date appearances can be reduced or even eliminated, and whether case management can occur through other means. As former Chief Justice Beverley McLachlin remarked on modernizing the court system in the context of the pandemic:

We must review our processes and requirements, with a meaningful and calculated assessment of what is redundant, no longer necessary in the age of technology, not essential to the functioning of justice, or anachronistic.¹

With this in mind, the following recommendations include both measures that can be immediately implemented to improve efficiencies within the existing technological framework, and others that may require additional investment in resources and technology, but offer an even greater opportunity for enhancing the criminal justice system.

1. Remove as many litigants from the set date “stream” as quickly as possible

Currently, set date lists are exceptionally long. This is the result of matters returning on presumptive dates; the fact that not all cases have been able to move out of the set date stream, as many matters are still awaiting trial or preliminary inquiry dates to be set; and the sheer volume of pre-COVID cases, combined with the backlog of new cases since the March 2020 shutdown for all but emergency and in custody matters.

¹ The Honourable Beverley McLachlin, *Access to Justice: Justice in the time of social distancing*. The Lawyer's Daily. (March 31, 2020). Available at <https://www.thelawyersdaily.ca/articles/18386/access-to-justice-justice-in-the-time-of-social-distancing-beverley-mclachlin?spotlight=1>



The OBA recommends moving as many litigants out of set date court as possible and as quickly as possible. This will reduce the burden on the courts, judiciary, counsel and accused of numerous appearances. There are multiple ways to do this, including by reducing the number of “set date” appearances in court and moving them towards “off record” administrative appearances, setting matters for preliminary inquiry quickly, and through resolution of the charges.

The introduction of the Enhanced Designation has been a valuable step towards reducing the need for multiple case management appearances to reduce lengthy dockets. The OBA recommends expanding the use of enhanced designations beyond the initial 12-week adjournment. Rather than have an in person or Zoom appearance, counsel matters can continue to be administratively adjourned “off record” using email provided all parties agree on a return date.² A similar system is already in place in other jurisdictions such as British Columbia with the result that in-person “set date” appearances are less frequent, thereby reducing the length of the docket. Further, the emails exchanged provide a written record of the matter’s history in the event s. 11(b) becomes a live issue. The latter has made some counsel weary of using Enhanced Designations in the first place, and a written record also increases efficiency as transcripts do not have to be ordered in the event an issue arises. The emails can be attached to the information or otherwise maintained in the court file.

The implementation of Enhanced Designations has posed challenges. First, counsel typically do not receive confirmation that the Enhanced Designation has been filed. This leads to counsel either attending the court appearance “just in case” or repeatedly calling the Clerk’s Office to confirm. The OBA recommends implementing a system for providing written confirmation that the Enhanced Designation has been attached to the Information. This could take the form of a written response upon filing or adding an asterisk to the online court docket that the matter will be dealt with in an administrative manner.

Delays in setting matters for trials, particularly for matters that were adjourned or not set during the COVID trial court operation suspensions, also results in more matters remaining on the case management court docket unnecessarily. Trial coordinators in some jurisdictions appear to be

² It should be noted that both Crown and defence agree on a return date most of the time in court. Very few set date appearances are contentious.



overwhelmed and unable to expeditiously set matters for trial. Technology can be utilized to alleviate the workload of trial coordinators and reduce the number of appearances required. For example: An electronic system, similar to that existing in Alberta, can be utilized to permit the scheduling of hearings (preliminary hearings, judicial pre-trials, trials) electronically, without requiring an appearance (in-person or remotely), by using a fillable form and online court scheduling software.

2. Ensure publicly accessible information for connecting to virtual case management courts

The bar has reported challenges in accessing the correct connection information for matters. This often requires defence counsel to contact the court or Crown's office directly, which is inefficient for all those involved. While connection information is currently available on ontariocourts.ca, it is problematic in two significant ways:

1. While some connection information is available for each courthouse, information is not available for every courtroom; and
2. The connection information published is often out of date, as connection details frequently change.

We recommend that the Ontario Court of Justice publish the virtual connection information for every courthouse and every courtroom on a daily basis. This could be done by linking each courthouse (which are currently linked to a PDF document with the above-mentioned limited connection information) to a google document listing the audio and zoom connection details for every courtroom. A google document provides greater flexibility for court staff to update the connection information daily to ensure it is accurate at all times. Settings can be used to ensure the document can only be edited by certain court staff, but viewed by the public.

It must be stressed that the current information on the OCJ website can be confusing and difficult to find. This most significantly impacts self-represented accused, who are not familiar with navigating the system and may only have access to the internet on a smartphones.

3. Utilize time in waiting rooms more effectively and triage

To limit the number of individuals in the virtual courtroom itself, counsel and self-represented accused are spending a significant amount of time in virtual waiting rooms before they are admitted



into the virtual courtroom. The time spent in the waiting room can be more effectively used to deal with preliminary matters that will reduce the amount of time required “on the record” once in the virtual courtroom.

For example: The wait screens could be customized to display relevant information, such as legal aid information or an explanation of what will happen in court. This will save time once “on the record” as basic information will have already been provided.

Matters can also be screened before entering the courtroom. Several courthouses have implemented a triage approach (e.g. Scarborough, 1000 Finch, Newmarket) that is proving efficient in clearing set date lists more quickly and moving matters forward. The OBA supports the expansion of this approach to all courthouses.

Under this triage approach, a Crown screens matters in the waiting room. The screening Crown gathers basic information from counsel and can discuss any outstanding issues in advance. He/she can also speak with self-represented accused off the record. All parties are more prepared before entering the virtual courtroom itself, which saves time on the record. Furthermore, the screening Crown can also ask if counsel are content that the matter be spoken to in an administrative manner without counsel appearing in court to save time and with a discretionary warrant for their client.

In Scarborough, this project currently runs in courtroom 407. All persons who dial into the courtroom are first admitted into a waiting room. From there, counsel matters are sent into 407 court if counsel wish to speak to the matter on record. The vast majority of callers, however, are sent to a triage room, which includes a duty counsel, a legal aid worker, and a Crown attorney. This includes those who are unrepresented, or who have counsel but do not have instructions. In the triage room, the parties determine the following matters:

- Whether a legal aid application is required. If so, the Crown will provide a charge screening form and the application will be processed by the legal aid worker immediately, or the accused will be given the legal aid number to call in order to process the application



- Whether disclosure has arrived. If not, Crown counsel will obtain the email for the accused and send disclosure directly to them. Crown counsel can also advise when disclosure is expected to be available.
- Whether a CPT, JPT, or trial needs to be scheduled, and the steps required.

At the conclusion of the triage session, individuals will be provided a next court-date, and then admitted into 407 court to simply put the date on the record or discuss further substantive issues, if necessary.

4. Ensure consistent and structured scheduling of matters in case management court

As mentioned above, the time spent waiting for a matter to be called can be lengthy, even with the virtual sign up sheets. The OBA recommends a more structured, consistent, and transparent format to virtual case management court. This could consist of scheduling time slots throughout the day for various types of appearances. For example:

9:00-10:00am	Counsel matters with surnames A-G
10:00-11:30am	In custody matters
12:00-1:00pm	Counsel matters with surnames H-M
2:15-3:30pm	Counsel matters with surnames N-Z
3:30-4:30pm	Self-represented matters
4:30-5:00pm	“Catch all” time for matters not previously addressed

These time slots should not change from day to day, in order to provide consistency and predictability to all justice participants. Virtual sign up sheets could still be used during particular slots for counsel to sign up and address their matters. We provide some recommendations below on how these virtual sign up sheets can be improved. Self-represented accused may also prefer later time slots after work. The above is but one example. The specific schedule could be different at each courthouse to address local considerations, provided it is publicized and consistent.

With such a system, all those participating in a particular time slot could be immediately admitted to the virtual courtroom, without being held in the waiting room. This would allow counsel to have a



better sense of what is happening in court. Court staff already have the ability to remove or mute any unruly individual from virtual court if need be.

The above assumes a fixed schedule for in custody matters. Presently, court staff are only advised each morning of the correctional centres' timetable for calling inmates at various units. This ad hoc, last minute approach makes it difficult for the courts and counsel to schedule and prioritize matters. The OBA recommends that a designated and consistent time slot for in custody matters be arranged with each correctional facility, taking into account court break times and essential activities at the correctional facility (such as meal times). We appreciate that a lack of video equipment and phone lines continues to be an issue at some institutions, and investment in the necessary technology must be prioritized. It must also be noted that counsel, in particular duty counsel, still do not have a reliable means of speaking privately with in custody clients during their appearance. This poses particular challenges when trying to help difficult clients or those who may have mental health issues to understand what is happening.

5. Expand and improve the use of virtual sign-up sheets

Virtual sign-up sheets allow for counsel and articling students to sign up, indicate their matter and request, and be called on a first-come-first-served bases. These sign-up sheets are aimed at improving the orderly calling of the lists, and allowing everyone to follow where their matter is on the list. Many jurisdictions call the list by seniority (i.e., by year of call), which results in unfair and arbitrary wait times, and can be disorderly. Virtual sign-up sheets should be adopted in all jurisdictions, and made publicly available by an online link posted in the same location as the call-in information.

That said, as indicated above, the current operation of virtual sign up sheets is problematic. To improve the use of sign-up sheets, slots should be created to allow counsel and articling students to fill out as much information as possible, including: name, stage of proceedings, retainer status, purpose of appearance, and adjournment request. Crown counsel should regularly check the list to ensure that it is being followed, and not being tampered with. The Crown should regularly delete or cross off matters that have been dealt with.



6. Stream different types of matters and establish temporary surge case management courts

The number of matters in set date court has increased substantially during the COVID-19 pandemic. This is likely a temporary phenomenon from matters being put over to presumptive dates. That said, the result is unmanageably large dockets.

We recommend establishing temporary “surge” set date courts to split up lists and better case manage the matters coming before the court. For example, dockets could be split between counsel and self-represented accused since the latter typically require more time to address. Each can have a dedicated courtroom. Once counsel are retained, the matter can move to the counsel stream.

Since a physical courtroom is not required for virtual court, this could be accomplished by having all judicial actors joining by phone from any location.

While this may require some additional resources, such as judicial and court staff time, it would significantly assist to reduce delays in addressing matters, reduce burdens on Crown and court staff to deal with unwieldy dockets, and ensure adequate time to make effective use of set date court to advance matters. Again, it is stressed that this is a temporary solution during the pandemic to address the current backlog in the system.

7. Ensure sufficient duty counsel

Duty counsel play an important role in reducing the backlog of cases and improving efficiencies; however, they are often understaffed and stretched thin. Working with Legal Aid Ontario to increase the pool of per diem duty counsel or arranging for additional duty counsel at each courthouse would assist to move matters more efficiently through virtual case management court.

Moreover, duty counsel are currently only available to act as agents for counsel on in-custody matters. Thus, counsel acting on legal aid certificates are now required to call in for each set date. This is an inefficient use of court time and legal aid resources. Instead of one duty counsel speaking to all counsel matters in a streamlined fashion, numerous counsel acting on legal aid certificates must call in, requiring additional court time – not to mention the challenges for private counsel. This will only become worse once presumptive adjournments end. The OBA recommends, at a minimum,



temporarily expanding the role of duty counsel to include speak to's for counsel matters on legal aid certificates.

Conclusion

The OBA appreciates this opportunity to provide these recommendations on how virtual case management courts can be improved, both immediately using currently available resources and in future with appropriate investment in new processes and technology. We look forward to continuing the conversations on how to modernize the court system in the long term in the months ahead.