



## Submission on Guidelines for Digital Hearings

**Date:** March 11, 2022

**Submitted to:** Superior Court of  
Justice and the Attorney General of  
Ontario

**Submitted by:** The Ontario Bar  
Association



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

I. Introduction	3
II. Overview	3
III. Matters that Should Presumptively Proceed Remotely	5
IV. Matters that Should Presumptively Proceed in Person	5
V. Rebutting the Presumption	6
VI. Hybrid Hearings	6
VII. Conclusion	6



## **I. Introduction**

The Ontario Bar Association appreciates the opportunity to provide this proactive submission to the Superior Court of Justice on proposed guidelines for digital hearings.

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 and 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 professional development programs to a diverse audience of over 16,000 lawyers, judges, students and professors.

This submission was prepared by members of the OBA's Civil Litigation Section and supported by the Insurance and Class Actions Sections. The combined three sections have 1,616 members representing clients before every level of court in Ontario.

## **II. Overview**

The OBA has been working with the SCJ Civil Working Group on ways to improve the efficient and effective use of digital hearings and applaud the SCJ for its ongoing work in this area. In addition to the work that the OBA is supporting before the SCJ Civil Working Group in this area, we hope that this submission provides some additional substantive feedback to assist with this matter.

Remote hearings have a number of advantages over in-person hearings that can promote efficiency, cost-effectiveness, and the most appropriate allocation of judicial resources. This set of proposed guidelines is based on foundational considerations of:

- access to justice, including; ease of access to the courts, preservation of court time, and savings of time and money for participants in the justice system;
- efficiency in respect of advancing proceedings; and
- effectiveness in the allocation of court and judicial resources and availability.

Remote hearing efficiencies are particularly pronounced where travel time and waiting time for justice system participants are disproportionate to the time spent in court or to the significance of the issues to be determined in a proceeding. Scheduling courts, brief chambers appointments, and brief motions in courtrooms hearing multiple matters on the same day are clear examples of these



efficiencies. The Court has confirmed that there are no inherent due process concerns where virtual hearings are concerned.<sup>1</sup>

There are also advantages to in-person hearings. In-person hearings:

- avoid the scientifically-recognized phenomenon of “Zoom fatigue”<sup>2</sup> and its implications for court proceedings;
- facilitate court openness;<sup>3</sup>
- contribute to the decorum of court proceedings, which enhances the administration of justice and respect for the rule of law;
- allow the court to more efficiently supervise the conduct and surroundings of witnesses giving testimony;<sup>4</sup>
- make prohibitions against recording and publishing court proceedings easier to enforce;<sup>5</sup>
- contribute to collegiality amongst members of the bar, and provide opportunities for more junior members of the bar to foster connections within the legal community;
- improve prospects of settlement through continued contact between counsel; and,
- may be more accessible to some self-represented litigants, particularly those without access to the necessary technology.<sup>6</sup>

It has not been established that remote hearings compromise a judge’s ability to evaluate witness credibility.<sup>7</sup> As such, it is suggested that the necessity of a “credibility assessment” is generally not a relevant factor for determining whether a hearing should proceed remotely or in-person.

---

<sup>1</sup> See comments by Justice Myers in *Arconi v Smith*, 2020 ONSC 2782.

<sup>2</sup> <https://news.stanford.edu/2021/02/23/four-causes-zoom-fatigue-solutions/>

<sup>3</sup> Because any member of the public, with or without access to a computer, may attend a courthouse and observe a proceeding. A central listing of Zoom links for each “court room” would further facilitate the openness of virtual proceedings.

<sup>4</sup> Camera placement in proximity to witnesses may address this issue to an extent.

<sup>5</sup> <https://www.thestar.com/news/gta/2021/11/15/four-face-criminal-charges-over-instagram-posts-about-rappers-preliminary-hearing-on-zoom.html>

<sup>6</sup> The OBA is mindful of Justice Myers’ recent comments to the effect that virtual hearings may contribute to accessibility for some self-represented litigants. Virtual hearings may also increase accessibility for many persons with disabilities, both in terms of travel and access for individuals with mobility impairments, and in terms of audio-visual technology for individuals with sensory impairments.

<sup>7</sup> See *Arconti v. Smith*, 2020 ONSC 2782, <https://canlii.ca/t/j6wzr>



In determining whether a matter should be heard remotely or in-person, primary consideration should be given as to whether the benefits of conducting a hearing remotely outweigh the benefits of conducting an in-person hearing. There are numerous advantages that have been recognized by the court to virtual hearings; in many circumstances, there is no reason not to proceed virtually.<sup>8</sup> If so, the hearing should be conducted remotely.

Rather than determine the form of hearing on a case-by-case basis, courts might consider identifying types of matters that will presumptively be heard remotely and matters that will presumptively be heard in person (having regard to the foregoing consideration). Parties in a particular case should have the ability to seek judicial direction to proceed by way of an alternate form of hearing depending on the circumstances of a given case.

### **III. Matters that Should Presumptively Proceed Remotely**

In our view, matters that should presumptively proceed remotely include:

- Procedural matters, chambers appointments, and scheduling appearances (for example, Civil Practice Court or so-called 9:30 appointments on the Commercial List);
- Pre-trials;
- Short motions<sup>9</sup> or applications;
- Motions of any length that do not require witness attendance and are comprised of argument by counsel only; and
- Summary trials.

### **IV. Matters that Should Presumptively Proceed in Person**

Matters not included on the list above should presumptively proceed in person. These matters include, but are not limited to:

- Motions where an individual's Charter rights are engaged in a criminal or quasi-criminal manner, such as contempt motions; and,
- Trials, but with provision for virtual components of trials where appropriate (see discussion of hybrid hearings below).

---

<sup>8</sup> See, for example, the comments by Justice Schabas in *Apotex Inc v Eli Lilly Canada*, 2020 ONSC 7460.

<sup>9</sup> Long and short motions are defined differently in different regions.



## **V. Rebutting the Presumption**

The parties to a given proceeding will best understand the contours of their own cases. The best forum for rebutting the presumption will vary depending on regional scheduling practices and what the court deems appropriate. A party that seeks to have a matter heard in person that would presumptively proceed remotely, or vice versa, may seek to change the method of hearing when scheduling the matter, subject to the discretion of the Judge or Associate Judge hearing the matter. That party will need to offer a compelling basis to satisfy the presiding Judge or Associate Judge that the benefits of conducting the hearing remotely outweigh the benefits of conducting an in-person hearing (in the case of a presumptively remote hearing), or the presumption that the benefits of conducting the hearing in person outweigh the benefits of conducting the hearing remotely (in the case of a presumptively in person hearing). A party that seeks to have a matter heard in a manner that diverges from the presumption shall schedule a case conference to address the request.

## **VI. Hybrid Hearings**

It is recommended that the Court and parties to a proceeding consider hybrid hearings, including virtual components of trials, where appropriate. For example, where the costs, travel time, and inconvenience associated with a witness's attendance in Court are disproportionate to the nature of the hearing, or where there are extenuating circumstances such as age or health related concerns, the Court may consider permitting the witness to testify remotely despite the in-person nature of the hearing.

## **VII. Conclusion**

In closing, we believe that the above recommendations will help improve the use of remote hearings, and create a foundational basis for post-pandemic processes that will be cost-effective, improve efficiency for the courts, and make the best use of available judicial resources.

Thank you for taking the time to review the submission. We would be happy to discuss any of the foregoing in greater detail and look forward to continuing to work with you to help support the court system in Ontario.