



Public Access to Virtual Proceedings: Ensuring Open Courts

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BAR ASSOCIATION
A Branch of the
Canadian Bar Association

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BARREAU DE L'ONTARIO
Une division de l'Association
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SUMMARY

The Ontario Bar Association (“OBA”) appreciates the Ontario Superior Court of Justice’s invitation to provide comments on public access to virtual proceedings and how access should be facilitated. This submission exclusively addresses purely virtual hearings that the public can only access online. There is a broader discussion with respect to streaming proceedings from a courtroom. We would appreciate the opportunity to have that broader discussion in due course.

With respect to virtual proceedings:

- The open court principle should apply equally to in-person and virtual court proceedings;
- Measures should be implemented to ensure that the level of public access to virtual hearings mirrors that of in-person hearings;
- Where there are risks to be mitigated in the virtual context, technological and creative solutions, rather than restrictions on public access, should be employed; and
- Members of the public should be able to easily access hearing schedules and should be provided with transparent and clear instructions on how to attend court virtually.

The Ontario Bar Association (OBA)

The OBA is the largest volunteer lawyer association in Ontario, with approximately 16,000 members, practicing in every area of law in every region of the province. We provide updates and education on every area of the law to combined audiences of 20,000 lawyers annually. The members of our 40 practice sections include leading experts in their field who provide practical advice to government and other decisionmakers to ensure the economy and the justice sector work effectively and efficiently to support access to high-quality justice for Ontarians.

A critical cross-section of the bar participated in this submission, including lawyers from the Civil Litigation, Insurance Law, Entertainment, Media, and Communications Law, Constitutional, Civil Liberties and Human Rights Law, Public Sector Lawyers, Criminal Justice, Family Law, and the Child & Youth Law sections. Members from these sections come from every region in Ontario and include highly experienced



experts who regularly appear in virtual court proceedings and represent a wide range of perspectives.

Comments

Open Access

The open court principle requires that court proceedings be presumptively open and accessible to the public and to the media. This is a fundamental element of Canadian law, and a hallmark of a democratic society. It ensures that the Canadian justice system is transparent, fair and accountable. There are, of course, some limits on open proceedings including, but not limited to, confidentiality orders and specific statutory limits.

In *Sherman Estates*, the Supreme Court of Canada recently reaffirmed that the presumption in favour of open courts is a strong one, holding¹:

...there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings

In order to justify a restriction on open courts it must be demonstrated that:

...openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is **necessary** to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects (emphasis added).

In the context of virtual hearings, this “high bar” test for restrictions on open courts makes it incumbent on the players in the justice sector to find, develop and use all of the innovative methods afforded by technology to protect the other interests of public importance. Restricting public access to the courts will not be necessary or justified where a technological or creative solution can achieve the same benefit.

¹ *Sherman Estates v Donovan* 2021 SCC 25



Application of Open Court Principle for In-Person Proceedings

Before the pandemic, virtual hearings were rare and if a member of the public wanted to watch a court proceeding, they would need to come to the courthouse in person. However, when attending hearings in person at the courthouse, individuals would not be required to self-identify, provide personal information, or seek permission from the court. Generally, information lists identifying proceedings would be posted on the outside of each courtroom, and/or would be available through the court office, or the information desk/board upon entering the courthouse. It is the OBA's position that pursuant to the open court principle, *this* is the level of open access that needs to be provided to members of the public and the media.

Access to Virtual Hearings

With the onset of the pandemic, court proceedings moved on-line because of the risks to health and safety. Technologies for facilitating virtual hearings were relatively new and untried by the courts and the public at large. Initially, there were concerns about maintaining the security of confidential personal information and documents and preserving the integrity of the hearing process considering “Zoom bombings” and other potential mischief associated with online modes of communication. This gave rise to the implementation of precautionary measures including limiting who and how Zoom links could be obtained. In particular, many courts required that members of the public request access to obtain the Zoom link for the proceeding by first providing their name and email address, and imposed restrictions on sharing the link. These requirements remain in place in most courthouses across the country. But is this precaution really necessary?

Technology has evolved and, today, a range of features are available on various electronic platforms to promote access to hearings, while maintaining the court's ability to control the hearing process. Features such as breakout rooms, waiting rooms and the ability for the “host” of the meeting to control the cameras as well as the audio of participants have increased the confidence of participants in virtual hearings.²

² In Appendix A, enclosed, we have included a list of the most common concerns expressed by the OBA working group with respect to differences between in person and virtual proceedings which need to be considered moving forward, and the corresponding solution or response to the objection or concern. We note that many of these concerns were applicable to family law and criminal law matters in particular.



Position of the OBA

The open court principle should be applied equally, regardless of the mode of proceedings. The promise of technology is that it can make the open court principle more of a practical reality while at the same time providing innovative ways to ensure the safety of witnesses and reduce other risks. There are risks to be addressed in both the in-person and virtual settings. Addressing those risks in a way that protects public access to courts is no less critical in one setting than the other.

The current process of having to request a link to a virtual proceeding from the court is an additional step impeding public access to proceedings which no longer appears to be necessary or warranted. The additional step of gatekeeping virtual links also creates more work for court staff. The time has come for public access to virtual proceedings to more closely mirror the level of open access which is available with in person proceedings. This goal could be achieved through the following steps:

- Information about scheduled hearings must be “posted” in equivalent manners for both virtual and in person proceedings and be easy to find. For example, many courthouses electronically disseminate daily dockets listing the proceedings occurring, with the names of the parties and presiding judges and courtroom. The Zoom hyperlink for the virtual proceeding could easily be added to the docket list (or equivalent mode of distribution).
- Just as a member of the public can attend at court and obtain the docket list or courtroom number for any matter without having to provide their name or other personal information, Zoom links should be readily available to the public or the media without them having to take any additional steps that are not required for in-person hearings.
- Just as easily as members of the public can search online to find court locations or other information about the court and its processes, instructions for accessing hearings virtually need to be clear and easy to locate.
- Statutory and common-law limitations on the presumption of openness should apply equally to all proceedings, regardless of the mode of proceeding. There should be no distinctions drawn in the application of the open court principle (and its limitations) based solely on the mode of proceeding.
- The court could also consider building a custom “public view” of proceedings leveraging the Zoom



development tools (e.g. Video SDK and Zoom API) along with third-party tools³.

As always, we would be pleased to discuss this issue further, and work to support the court as it moves towards implementing measures for virtual proceedings that more closely mirror the level of open access that exists for in person proceedings.

³ <https://developers.zoom.us/docs/api/rest/zoom-video-sdk-api/>; and see also: <https://www.zoom.com/en/industry/government/resources/future-of-courts/>. This may also be an opportunity to consider building a provincial virtual courthouse. We would be happy to discuss this possibility with you.



Appendix A

Concerns for Limiting Public Access to Zoom Links

Solution/Response

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| <ul style="list-style-type: none">• The need to prevent disruptions to virtual proceedings and the risk of “Zoom bombing” | <ul style="list-style-type: none">• In circumstances where there are no concerns about the identity of people in the court gallery, the best protection against disruption is for the participants (parties, judges, jurors, court staff and witnesses) to be in a Zoom meeting that is then streamed separately to the public through a Zoom custom livestream (this would be streamed through a dedicated channel for the courtroom). This allows the participants to interact but does not give observers the opportunity to disrupt.• In circumstances where it is necessary to use Zoom Meeting for observers as well as participants (such as where the gallery needs to be seen and even canvassed), as we go forward, we will be relying on court staff who are becoming more and more proficient with Zoom features to handle disruptions quickly, as they do in a physical courtroom. |
| <ul style="list-style-type: none">• Court security officers who monitor and remove members of the public in an in-person setting, where warranted, are not available for virtual hearings. | <ul style="list-style-type: none">• Removing a member of the gallery in the Zoom context is less time-consuming and does not require physical engagement – it is the press of a button. While the resource required for removal in the virtual context is different than in the in-person context, it must still be recognized that virtual courtrooms, like physical courtrooms, need to have the staff resources necessary to help the judge control the courtroom. |
| <ul style="list-style-type: none">• In-person proceedings allow the parties to see and identify who is in the courtroom. This is important in cases where there is an order excluding witnesses or other extraordinary risks to participants that must be managed. | <ul style="list-style-type: none">• Judges must have the discretion to control the virtual courtroom, including the gallery, just as they control a physical courtroom (with the same flexibility and subject to the same constitutional limitations). The technology currently used by the Ontario courts makes that possible in most circumstances.• The need to identify gallery members should be canvassed pre-hearing.• If the lawyers and judges need to see the people in the gallery to ensure, for example, that there are no excluded witnesses etc., the judge can require all observers to turn on their cameras. |
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Concerns for Limiting Public Access to Zoom Links

Solution/Response

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- In circumstances where the gallery of a physical courtroom would be required to identify themselves, the judge can canvass the gallery in Zoom meeting.
 - In the rare circumstance where viewing and identifying witnesses is determined to be warranted it can be done in a controlled virtual courtroom – the process could even be separated from the main courtroom, where necessary.
 - The judge can request the removal of anything that obscures the features of an observer and ever-improving virtual verification technology will ensure filters etc. are not being used.
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- Proceedings are not to be recorded and broadcast outside the physical or virtual real-time courtroom. It is easier to record a proceeding with phone or other device in the virtual context than in the physical context.
 - The record feature on Zoom can be disabled by the court. This would not, of course, prevent recording with phones or other devices.
 - The court can provide the same instructions in-person and over Zoom that explicitly prohibit the electronic recording of hearings. The same charges and penalties would apply to those who record and broadcast illegally.
 - Attention should be paid to the dangers of recording where there may be particularly concerning motivations and risks. The risk is not the dissemination of the content of testimony or, in most cases, the identity of the witness. Both of those things can be shared broadly, outside the context of publication bans and similar orders. In an open court setting testimony can be recorded in a non-digital format and shared broadly. The same restrictions and principles apply in both settings. The essence of the concern about recording is really the dissemination of the image of the witness giving that testimony. Where there may be nefarious motivation and risk in disseminating the image, rather than just the content of the testimony, consideration can be given to obscuring the image and altering the voices. This would mitigate risks and reduce nefarious motivations for illegally recording testimony. Research should be done to find technologies that allow the image and voice to be obscured for the gallery and not necessarily for the participants. The OBA would be pleased to assist.
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- The number of people watching a hearing on Zoom cannot be controlled. This potentially
 - Virtual access has the potential to broaden public participation in, and scrutiny of, courts as a result of the ability to view from more convenient locations. It is



Concerns for Limiting Public Access to Zoom Links

Solution/Response

increases the number of viewers.

important that none of the custodians of the justice system are seen to be suggesting that the public was given access to the courts only as long as, or even because, their attendance was impractical and unlikely.

- There are risks to having all participants in person at a hearing. Witnesses, lawyers and judges can be intimidated, retraumatized by facing their abusers, followed and physically hurt. Counsel and the courts have learned to mitigate these significant risks.
- It must be recognized that there are also unique risks in the virtual world, including: (a) intimidating witnesses while they testify in a non-court setting without the protection of counsel and court staff (e.g. parking outside one's former spouse's house); or (b) witnesses may be intimidated by sheer number of unfriendly observers made practical by the virtual streaming (this is a factor that is controlled for even in physical setting in the family law context for example). The unique risks must be recognized and controlled for through safe sites for testifying (where the courtroom is not used) and the judge's discretion to control the virtual courtroom.
- If there is a circumstance where allowing people to view virtually is truly more dangerous than having the parties together in a physical environment, then that should be a factor in determining whether the hearing can be a virtual one. If other factors make a virtual hearing necessary, and the risks of streaming the hearing cannot be controlled, consideration can be given to an in-person gallery viewing a virtual hearing from one monitored location.

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- In some cases, the safety of witnesses may be jeopardized by enabling easy access to their identity and testimony. There are safeguards in place for in person hearings.

- There may be less risk of an immediate threat to the safety of witnesses, as they will not be in the same room or physical location as a potential bad actor and cannot be followed out of the courthouse.
- A person providing testimony in person could just as easily be followed out of a courtroom and threatened in person.
- Confidentiality orders are available regardless of the mode of proceeding.
- The dangers that exist in virtual hearings that do not exist in physical hearings are addressed above.

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- Requiring the public and media to register (when they have to request access to a Zoom link)

- Members of the public and media are not required to register or ask permission to attend a hearing in person.



Concerns for Limiting Public Access to Zoom Links

Solution/Response

provides a safeguard by enabling court staff and the parties to identify who is asking for the link - both to prevent mischief, or access to the proceedings by someone who would otherwise not be permitted or not wanted in the hearing room (i.e. witnesses or persons who are seeking to intimidate or threaten witnesses), and as a way to identify potential violators of the terms and conditions (i.e. not filming or recording the proceedings).

- In-person hearings provide an opportunity for the parties to discuss how to manage a hearing amongst themselves in the hallway when a witness of concern is seen, or with the court. This cannot be done virtually.
- There is no information about who is vetting access to Zoom links, or what criteria are used to deny providing access to the link, or way to appeal or challenge this determination.
- Asking for a name and email does not ensure the veracity of the information provided. Someone determined to watch a virtual hearing can provide a false or spoofed identity, making the “vetting” process ineffective.
- Individuals who are intent on watching proceedings will find a way to access the information.
- The potential risks are better addressed through the methods of controlling the courtroom outlined above.
- Issues can be raised and addressed by the court at the pre-hearing stage or at the beginning of the hearing, just as they are dealt with before, or at the start of, an in-person hearing.
- Parties can meet privately in breakout rooms to discuss those management issues they will raise with the court or with witnesses and clients.