



# Action Committee on Court Operations in Response to COVID-19

## OPEN COURTS: PRIVACY, SECURITY AND CONFIDENTIALITY CONSIDERATIONS ARISING FROM VIRTUAL ACCESS TO PUBLIC HEARINGS

### ***A Statement from the Action Committee***

*Our Committee exists to support Canada's courts as they work to protect the health and safety of all court users in the COVID-19 context while upholding the fundamental values of our justice system. These mutually sustaining commitments guide all of our efforts.*

### **OVERVIEW**

The open court principle is a hallmark of the Canadian justice system. This principle promotes access to court proceedings (hereafter referred to collectively as “hearings”) for justice system participants, the media and the public. However, certain exceptions may apply in specific contexts, for example to protect the privacy and safety of hearing participants – such as victims, vulnerable witnesses or accused youth – or the confidentiality of sensitive information.

This tip sheet seeks to highlight some relevant considerations and best practices in assessing whether and how privacy, security and confidentiality issues can be safely and adequately addressed in a virtual court setting, particularly when providing virtual access to hearings (for example, through video or audioconference) for the media and the public. The following proposed steps are discussed:

1. Understanding risks and identifying available protection measures
2. Assessing the functionalities and limitations of the virtual platform or tool to be used
3. Establishing measures to regulate access
4. Communicating procedures and rules of access
5. Screening individual cases in advance to identify potential privacy, security or confidentiality issues and establishing a proper course of action
6. Taking action if rules of access are breached, or security or confidentiality is otherwise compromised

This tip sheet also contains two annexes: 1) a checklist of consolidated best practices originating from courts across Canada on addressing privacy, security and confidentiality concerns in a virtual court setting, and 2) sample notices of rules of access for virtual hearings.

The guidance provided in this tip sheet relates specifically to assessing and addressing privacy, security and confidentiality considerations that may arise in a virtual setting. This guidance does not presume whether it is appropriate to proceed virtually in any particular proceeding or circumstance. The Action Committee recognizes that additional considerations and best practices may apply in making such determinations, including the need to assess how the use of technology might impact [access to justice for any marginalized persons](#) involved in a proceeding. Furthermore, the guidance provided in this tip sheet is non-exhaustive and does not replace applicable laws or common law, regulations, or court rules, notices or practice directions. Adaptations may also be required based on the specific context of individual courts and tailored advice from information technology (IT) and information security experts.



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## BACKGROUND

In light of public health restrictions affecting in-person access to court facilities during the pandemic, many courts are now providing virtual access to a variety of court hearings to the media and the public. However, this can raise practical challenges in upholding the integrity of court processes – namely preventing unauthorized intrusions or disruptions in proceedings or misuse of information provided in court – and in protecting the persons and information involved in these processes. Safeguards that may be relatively easy to oversee in person can become more difficult to implement in remote or virtual settings where judges and court staff may not be able to directly or continuously see, hear or interact with hearing participants or observers, monitor their use of electronic or recording devices, or control their ability to let others access the hearing.

## RELEVANT CONSIDERATIONS

An effective strategy to protect hearing participants and sensitive information in hearings that will be accessible virtually to participants, the media and the public should include the following steps, which are accompanied by examples of best practices for implementation.

### 1. Understanding risks and identifying available protection measures

The first step to protecting hearing participants and sensitive information in the context of virtual access is to understand the type of situations that might give rise to privacy, security or confidentiality concerns, identify the legal and procedural measures that exist to address these types of situations, and assess how these measures might need to be adapted for implementation in a virtual setting.

To achieve this, it is important to identify the different categories of participants that might require virtual access to hearings or might be seen or heard virtually by others, and assess their respective needs. Participants may include, amongst others: judges, court clerks or registrars, parties, counsel, self-represented litigants, victims, witnesses – including marginalized persons or persons whose safety might be at risk, such as undercover police officers – as well as support persons, interpreters, media and public observers.

Available measures to protect participants and information may vary depending on the type of proceeding and the circumstances of individual participants, and might include all or some of the following.

#### ***Recording and broadcasting of proceedings***

In all or most jurisdictions, recording proceedings is prohibited subject to authorized purposes for accredited media or to judicial permission, and broadcasting proceedings is prohibited subject to judicial permission. In a virtual setting, it is important to communicate these parameters to all participants and observers (media and public) in advance and at the start or resumption of a hearing, to promote compliance and prevent unauthorized disruptions of proceedings or the improper use of court footage.



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### ***Witness exclusion orders***

Many cases may involve a witness exclusion order so that witnesses who have yet to be heard are not influenced by prior testimony. In a virtual setting, courts may need to determine at what stage each specific witness should be granted virtual access to the hearing, and whether and how to create and monitor virtual waiting rooms for witnesses.

### ***Special measures – In camera orders, publication bans, non-disclosure orders, sealing orders, testimonial aids***

In certain cases, additional measures may be required to protect the privacy or safety of a hearing participant or the confidentiality of sensitive information. These measures are governed by legislation and common law, and may be either mandatory or discretionary depending on the situation. In a virtual setting, implementing these measures requires advance planning, coordination and communication, and ongoing monitoring and control mechanisms. For example:

- *In camera* orders (closed hearings): If there is a need to exclude the public and the media from all or part a hearing, this may require technical safeguards to verify the identity of authorized participants who require virtual access and to prevent unauthorized access by others. If only part of the hearing is held *in camera*, the court may need to determine how to temporarily remove and later restore virtual access for certain persons.
- Publication bans: If there is an order preventing the publication or dissemination of specific information related to a proceeding or a hearing participant, this should be communicated clearly to all participants and observers both in advance and at the start or resumption of the hearing to promote compliance.
- Non-disclosure orders: If there is a need to protect the identity of a witness, this may require extra protection measures, such as preventing the witness from being visible to other participants and/or to public and media observers during the hearing.
- Sealing orders: If confidential or sealed documents are to be filed, this may require technical safeguards to prevent sensitive information from being seen or accessed by unauthorized persons.
- Testimonial aids: If a vulnerable witness in a criminal proceeding is permitted to testify without seeing the accused, this may require controlling or customizing virtual access permissions for this witness.

## **2. Assessing the Functionalities and Limitations of the Virtual Platform or Tool**

In order to establish what measures might be required to effectively regulate virtual access to hearings, it is important to assess the functionalities and limitations of the chosen virtual platform or tool. Consider the following questions, which are not exhaustive:

- What types of tools are available (e.g. meeting, seminar) and what are their respective functionalities, level of customizability, and maximum participant capacity?
- Can the identity of participants be accurately verified?



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- Can participant access and permissions be adequately controlled? In particular:
  - Can secure access be provided if needed, for example through password-protected or encrypted links?
  - How can the court ensure that unauthorized persons cannot gain access to a hearing?
  - Can the ability of participants and observers to intervene by video, audio, chat, screen-sharing and document-sharing be controlled?
  - Can different participants be granted different levels of permissions?
- How secure is the platform from unauthorized intrusion? Are any additional safeguards available if needed?
- What are the security risks of participants or observers logging in through public Wi-Fi, and how can these risks be mitigated?
- Does the platform enable the recording of proceedings? If so:
  - Who controls the recording function, and can such controls be restricted?
  - Where is the recording stored, and how can access be provided and regulated?
  - How can the recording be retrieved if needed?
- If using a private platform, are there ways to ensure the provider cannot gather, use or disseminate any information on participants or proceedings for commercial purposes?

Consult with relevant experts to choose and customize a virtual platform to fit the court's needs.

### 3. Establishing Measures to Regulate Access

Based on the established rules and parameters of access, and taking into account the functionalities of the chosen virtual platform or tool, courts should create a list of measures and related resources to effectively implement each of these rules and parameters in practice. This should include clearly defined roles and responsibilities along with practical guidance for judges and designated court personnel involved in implementing and monitoring these measures.

Consider the different types of participants that will require virtual access and what types of access permissions they should be granted based on their role in the hearing. Permissions may include the use of video, audio, chat, screen-sharing, document-filing or sharing, and the ability to control the permissions of other participants. Special measures may also need to be considered for certain categories of participants, such as virtual waiting rooms for witnesses or secure breakout rooms for counsel to speak privately with their client.

Consider also the various types of privacy, security and confidentiality scenarios that may arise in a hearing, the types of special measures they may require, and the technical safeguards that might need to be put in place to regulate access in accordance with these measures.

### 4. Communicating Procedures and Rules of Access

Hearing participants, the media and the public should be clearly informed of how to obtain virtual access to a hearing. They will need to know in advance what hearings are scheduled;



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whether they need to request a permission to attend virtually, and if so, how to proceed; and how to access the hearing itself, including any technical requirements they need to meet, where to find the link, and how to log in. Providing an opportunity for test runs is encouraged.

Hearing participants, the media and the public should also be clearly notified of the rules governing virtual access to a hearing, including any prohibitions or limitations on the recording and broadcasting of proceedings; whether there is a publication ban, non-disclosure order or sealing order in effect; and potential consequences of non-compliance with these rules and orders. This information should be communicated in advance and reiterated at the beginning and resumption of a hearing.

### 5. Screening Cases for Privacy, Security or Confidentiality Issues

It is important to screen individual cases in advance to identify any privacy, security or confidentiality issues and corresponding safeguards that may need to be implemented in a virtual setting, so that advance measures can be taken as needed. Relevant screening questions may include the following, which are not exhaustive:

- Does either party have any privacy, confidentiality, security or safety concerns regarding any participant in the hearing, any observer to the hearing (e.g. family of the victim or accused), or any information related to the hearing? If so, how should these be addressed either before or during the hearing?
- Should certain participants (e.g. victims, witnesses) be given instructions on how to inform the court if their safety becomes compromised during a hearing?
- Do the circumstances give rise to a mandatory or discretionary *in camera* order, publication ban, or non-disclosure order?
- Is the court required to notify an affected party of their right to seek any special measures or orders? If so, how should the party be notified?
- Does the media have the right to intervene before a special order is made? If so, how should they be informed of this right?
- If a discretionary order is sought, when and how will interested parties be able to intervene?

Consider implementing structured procedures to facilitate advance screening of these issues.

### 6. Taking Action in the Event of a Breach

Proper safeguards, as described throughout this tip sheet, can help to minimize the risk of privacy, security and confidentiality breaches occurring in the context of virtual access to hearings. However, despite all best efforts, in rare instances breaches may nonetheless occur, often unexpectedly.

In these instances, it is important for courts to take timely action to put an end to the breach and reduce or, if possible, eliminate any adverse impacts. In some instances, it may also be appropriate to contemplate formal proceedings against the instigator of a breach.



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### ANNEX 1: CHECKLIST – BEST PRACTICES FOR ADDRESSING PRIVACY, SECURITY AND CONFIDENTIALITY CONCERNS IN A VIRTUAL COURT SETTING

This checklist consolidates best practices originating from courts across Canada on how to promote virtual access to public hearings while implementing adequate measures to protect the privacy and safety of hearing participants and the confidentiality of sensitive information when needed. There are six proposed steps to consider as part of an effective overall strategy. While the recommended access measures described in this checklist may apply to all types of public hearings, recommended protection measures may vary based on the type of proceeding and the circumstances of individual participants.

#### ✓ **Step 1: Understand risks and identify available protection measures**

- ☐ Identify the legal and procedural framework governing the recording and broadcasting of proceedings, witness exclusion orders and special measures
- ☐ Map out the various types of privacy, security and confidentiality scenarios that may arise in a hearing, and the types of protection measures they may require
- ☐ Consider how these protection measures might be impacted by, and adapted to, the context of virtual access
- ☐ Consider the special needs of marginalized persons who may be involved in proceedings and how technology might impact their access to justice

#### ✓ **Step 2: Assess the functionalities and limitations of the virtual platform or tool**

- ☐ Consult IT and information security staff, and external experts as needed
- ☐ Consult information guides published by the platform designer / service provider
- ☐ Consult user guides published by other courts using the same platform
- ☐ When considering a private platform, assess its vulnerabilities and ensure participant information can be effectively protected against unauthorized commercial use
- ☐ Customize the chosen platform with enhanced safeguards as needed and available
- ☐ Conduct test runs of required control measures and technical safeguards
- ☐ Obtain feedback from participants and adapt the platform or its use as needed

#### ✓ **Step 3: Establish measures to regulate access**

- ☐ Establish guides or protocols for judges and court staff on how to regulate access to virtual hearings
  - Identify the types of participants and observers involved and their access permissions
  - Set out a naming protocol for participants and observers joining a hearing
  - Set out foreseeable privacy, security and confidentiality scenarios and corresponding safeguards that may be required



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- Provide step-by-step instructions on how to implement various safeguards, and include screenshots to illustrate
- ☐ Designate and train judges and court personnel responsible for implementing measures in a virtual setting
  - Define respective roles and responsibilities clearly
  - Designate a monitor or moderator to control access and permissions during a hearing
  - Designate an IT person or hotline to troubleshoot any issues during a hearing
- ☐ Establish protocols or guides in plain language for participants and observers outlining step-by-step procedures (including screenshots) and rules of access to a hearing
- ☐ Create/provide separate links with different permissions for participants and observers
- ☐ Set up separate virtual waiting rooms for witnesses who are waiting to testify
- ☐ Implement measures to enable counsel to speak privately with their client as needed during a hearing – for example, set up secure virtual breakout rooms or a protocol to stand down matters so counsel may call their client on a different device or platform
- ☐ Review the list of participants and observers before a hearing begins or resumes, to ensure all essential participants – but no unauthorized persons – are logged in

### ***Regulating access – special measures to protect privacy, security or confidentiality (as required)***

- ☐ Verify the identity of authorized participants and observers before providing them with an access link – for example, ask legal professionals and authorized media participants for their full name and professional contact information, and verify this information with bar or media associations
- ☐ Avoid using public links or access codes; instead, provide personalized links and access codes to authorized participants and observers through pre-verified means (e.g., by phone or personal email) – add encryption or password protections as needed
- ☐ Ensure links cannot be accessed by more than one person or device
- ☐ Obtain an undertaking from authorized participants and observers not to share their personalized link or provide access to the hearing or related documents to any other person
- ☐ Establish a protocol for at risk participants (e.g. victims, witnesses) to safely and confidentially inform the court immediately if their safety becomes compromised during a hearing
- ☐ Ensure that any confidential or sealed documents that are to be filed electronically are designated clearly as sealed or confidential, are password protected to control access, and are sent through encrypted means to prevent unauthorized intrusion
- ☐ Ask participants and observers to do a visual sweep of their room to confirm there are no unauthorized persons present or recording devices set up during a hearing

### **✓ Step 4: Communicate procedures and rules of access**

- ☐ Post lists of public hearings in advance on the courts' website, along with information on how to obtain access (e.g. phone line/email and timeframe to request permission, or open link to a specific hearing or courtroom)





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- ☐ Distribute lists of public hearings in advance to relevant stakeholders, such as legal associations, prosecution offices and media contacts
- ☐ Publish user guides in plain language for hearing participants, the media and the public on rules and procedures of access for virtual hearings
- ☐ Send a written confirmation (e.g. email) to registered participants and observers with a notice of, or link to rules of access (e.g. legislation, practice direction, policy or guide), and outline any special rules or orders that apply to a specific hearing
- ☐ Outline the rules of access clearly at the start and resumption of a hearing, either
  - As a banner in the virtual waiting room
  - As a pre-recorded notice for participants and observers joining in by teleconference
  - By having participants and observers acknowledge their consent to the rules when logging in
  - By having the court clerk, registrar or presiding judge read the notice out loudSee examples of notices included in annex 2 of this tip sheet
- ☐ Have a designated phone line and email account for public and media enquiries

### ✓ **Step 5: Screen individual cases in advance to identify privacy, security or confidentiality issues and establish a proper course of action**

- ☐ Identify privacy, security or confidentiality issues and related needs in advance, either through
  - A written application filed by a party requesting a discretionary order or special measure
  - A standard form filed by the parties identifying any privacy, security or confidentiality concerns
  - A case management hearing or pre-trial conference

### ✓ **Step 6: Take action if privacy, security or confidentiality is breached or compromised**

Depending on the specific nature and circumstances of the breach, relevant steps to mitigate ongoing risks might include

- ☐ Suspending the hearing and informing law enforcement authorities immediately if there is an imminent risk to the life or safety of a hearing participant or other person (e.g. victim, witness, informant)
- ☐ Removing virtual access for any person who breaches the rules of access
- ☐ Suspending or postponing the hearing if needed to implement additional safeguards
- ☐ Liaising with in-house experts and external service providers as needed, for example to have video or audio records of court proceedings removed from public viewing platforms (e.g., YouTube)
- ☐ Establishing a protocol for referring breaches to competent authorities who may initiate criminal or penal proceedings if an offence has been committed
- ☐ Initiating contempt of court proceedings – provided the court has the power to do so – if a court order has been deliberately contravened or a person continues to disrupt a hearing or breach the rules despite a court warning





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### ANNEX 2: SAMPLE NOTICES – RULES OF ACCESS FOR VIRTUAL HEARINGS

The following are sample notices originating from various Canadian courts. These notices may be used and adapted as needed to inform hearing participants, along with media and public observers, of the rules governing virtual access to a court hearing. These samples are meant to be informative but not exhaustive; models adopted by other courts may also warrant consideration.

<p><b>Supreme Court of Canada</b></p>	<p><b><u>Webcasts – Restrictions</u></b></p> <p>Webcasts and audio files of Supreme Court of Canada proceedings may not be broadcast, rebroadcast, transmitted, communicated to the public by telecommunication, or otherwise be made available in whole or in part in any form or by any means, electronic or otherwise, except in accordance with the Copyright Act or with the written authorization of the Court. To request permission to use such material or to request a copy on DVD, please fill out the on-line <a href="#">Request to Use Court Photographs, Webcasts or Audio/Video Recordings</a>. <a href="#">Live</a> and <a href="#">archived Webcasts</a> of appeal hearings are available on the Court Website.</p> <p><b><u>Publication Bans and Other Limitations of Access</u></b></p> <p>While the media, in general terms, has a constitutional right to publish information about cases, there are limitations on this right. The Court may (and frequently must) impose a publication ban, for example to protect the privacy of victims and witnesses or as required by legislation, for example to ensure the names of young offenders are not disclosed.</p> <p>In order to check whether there is a publication ban in effect in a particular case, visit the <a href="#">SCC Case Information</a> page and enter the case name or docket number. If there is a publication ban in place, this will be indicated on the "Docket" page.</p> <p>There are serious consequences for breaching a publication ban. When reporting decisions of the Court, members of the media bear the responsibility of ensuring that the terms of any publication ban are respected. On occasion, it may be prudent to obtain legal advice on whether publication is permitted.</p>
<p><b>Federal Court</b></p>	<p><b><u>Virtual hearings at the Federal Court – User Guide for Participants</u></b></p> <p><b>IV. Recording and Broadcasting Policy</b></p> <p>Recording and/or broadcasting virtual hearings is prohibited, except under certain conditions outlined in the <a href="#">Policy on Public and Media Access</a>.</p> <p>Parties who use Zoom to view the virtual hearing are expected to follow this Policy. By clicking on the link to join the hearing they will be acknowledging that they have accepted these terms.</p> <p><b><u>Policy on Public and Media Access</u></b></p> <p><u>Recording and Photographing Court Proceedings</u></p> <p>Members of the media holding valid credentials may record proceedings to verify their notes of what was said and done in court, but not for broadcast.</p>



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	<p>Others (i.e., counsel or members of the public) must seek permission of the presiding judge; requests should be directed to Court personnel or commissioners. [...]</p>
Ontario Courts	<p><b>Court of Appeal of Ontario:</b> <a href="#">Practice Direction – Public and Media Remote Observation of Oral Hearings – COVID-19</a></p> <p><b>II. PROHIBITION ON RECORDING</b></p> <p>Hearing participants and observers are reminded that, unless permission is given by the court, it is an offence under s. 136 of the <i>Courts of Justice Act</i>, R.S.O. 1990, c. C.43, punishable by a fine of not more than \$25,000 or imprisonment of up to six months, or both, to record any part of a hearing, including by way of screenshot/capture and photograph, as well as to publish, broadcast, reproduce or disseminate any such recording.</p> <p><b>Ontario Court of Justice:</b> <a href="#">Public and Media Access to Court Proceedings</a></p> <p>It is an offence under section 136 of the <i>Courts of Justice Act</i>, and may constitute contempt of court, to record, photograph, publish or broadcast a court proceeding in any way, unless prior judicial authorization has been granted. Audio recording of proceedings is permitted by counsel, paralegals licensed by the Law Society of Ontario, court staff, members of the media, and litigants provided it is done <i>solely for note-taking purposes</i> and the presiding judicial officer has been advised before the recording commences. Audio recording of proceedings is also permitted by members of the public provided it is done <i>solely for note-taking purposes</i> and the express permission of the presiding judicial officer is first obtained. These audio recordings cannot be transmitted. The Court's <a href="#">Protocol Regarding the Use of Electronic Communication Devices in Court Proceedings</a> remains in effect.</p>
Quebec Courts	<p><b>Justice Québec:</b> <a href="#">Hearings Conducted Through Technological Means: Microsoft Teams User Guide for the General Public</a></p> <p><b>RULES</b></p> <p>Anyone attending a hearing conducted through technological means agrees not to:</p> <ul style="list-style-type: none"> <li>• take any screenshots or make any video or sound recordings of all or part of the virtual or semi-virtual hearing in any form whatsoever. Journalists who have proven their status may, however, make an audio recording of the hearing, provided they do not broadcast it in any way;</li> <li>• reproduce or disclose in any manner whatsoever all or part of the video or audio of the virtual or semi-virtual hearing;</li> <li>• share the meeting ID received to attend or participate in a closed virtual hearing;</li> <li>• allow other people to attend the closed virtual or semi-virtual hearing.</li> </ul> <p>These rules apply unless a court decides otherwise.</p> <p>Any breach of these rules may result in legal action or contempt of court.</p> <p>By connecting to a virtual or semi-virtual courtroom, you confirm that you are aware of the terms of use and agree to comply with them.</p>