

PRACTICE DIRECTION

COURT OF QUEEN'S BENCH OF MANITOBA

RE: CRIMINAL TRIALS: ACCUSED'S REMOTE APPEARANCE BY VIDEO CONFERENCE

BACKGROUND

As a result of the evolving seriousness of the COVID-19 pandemic in Manitoba, there are now increasing obstacles and limitations that are affecting in-person appearances for accused persons in criminal proceedings. This is particularly so for accused persons in custody. Accordingly, there is now more than ever, a need for a principled consideration and approach respecting when an accused person may appear by video conference for his or her trial. The institutional role of the Court of Queen's Bench (as an essential service) and the need to ensure the proper administration of justice, require nothing less than the operational flexibility that comes from at least considering the use of such video conference technology. The statutory authority for the use of such video conference technology is found in section 715.22 of the *Criminal Code* where the stated purpose of the relevant provision is "to serve the proper administration of justice, including by ensuring fair and efficient proceedings and enhancing access to justice".

THE "PROPER ADMINISTRATION OF JUSTICE" AND A FAIR TRIAL

In the context of criminal proceedings, any reference to "the proper administration of justice" must be understood to include the interests of accused persons, victims, witnesses and as well, the broader societal

interest of knowing and perceiving that the justice system and the judiciary (and the essential service it performs even in a pandemic) continue, to the extent possible, to function in a way so as to bring to any serious criminal proceeding, a needed finality and closure.

In any discussion of the “proper administration of justice”, the fundamental objective of our criminal justice system is that an accused receive a fair trial. A fair trial occurs when an accused is able to make full answer and defence. This is a right guaranteed by section 7 of the *Charter*. As stated by Justice McLachlin (as she then was) in *R. v. O’Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411, at paragraph 193, “[w]hat constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process...What the law demands is not perfect justice, but fundamentally fair justice.”

THE INHERENT JURISDICTION OF THE COURT OF QUEEN’S BENCH TO REGULATE ITS PROCEEDINGS IN A WAY SO AS TO ENSURE THE PROPER ADMINISTRATION OF JUSTICE

In *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, at paragraph 26, Karakatsanis J. acknowledged that the inherent jurisdiction of superior courts provides powers that are indeed essential to the administration of justice and the maintenance of the rule of law in the Constitution. That would include those residual powers required to permit the courts to fulfill the judicial function of administering justice according to the law in a regular, orderly and effective manner subject of course to any statutory provisions.

In *R. v. Anderson*, 2014 SCC 41, at paragraph 58, Moldaver J. noted as follows:

Superior courts possess inherent jurisdiction to ensure that the machinery of the court functions in an orderly and effective manner: *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 18; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 26. Similarly, in order to function as courts of law, statutory courts have implicit powers that derive from the court's authority to control its own process: *Cunningham*, at para. 18....

In *R. v. Cunningham*, 2010 SCC 10, Rothstein J. noted at paragraph 18, as follows:

Superior courts possess inherent jurisdiction to ensure they can function as courts of law and fulfil their mandate to administer justice [citation omitted]. Inherent jurisdiction includes the authority to control the process of the court, prevent abuses of process, and ensure the machinery of the court functions in an orderly and effective manner. As counsel are key actors in the administration of justice, the court has authority to exercise some control over counsel when necessary to protect its process. ...

Finally, I note the comments of Cromwell J. in *Endean v. British Columbia*, 2016 SCC 42, where at paragraph 60, he observed:

I mentioned earlier that the superior courts' inherent jurisdiction is a residual source of power which a superior court may draw on in order to ensure due process, prevent vexation and to do justice according to law between the parties. One aspect of these inherent powers is the power to regulate the court's process and proceedings: Jacob, at pp. 25 and 32-40. As Master Jacob put it, "it is difficult to set the limits upon the powers of the court in the exercise of its inherent jurisdiction to control and regulate its process, for these limits are coincident with the needs of the court to fulfil its judicial functions in the administration of justice": p. 33. In short, inherent jurisdiction, among other things, empowers a superior court to regulate its proceedings in a way that secures convenience, expeditiousness and efficiency in the administration of justice.

In the context of a pandemic, the proper administration of justice requires the Court to act so as to ensure both the access to and delivery of justice in

ways that although new, nonetheless represent processes that are fair and equitable.

VIDEO CONFERENCE AS A NECESSARY ALTERNATIVE TO THE ADJOURNING OF A TRIAL

Since the onset of the pandemic, the use of technology has become increasingly normalized in the Court of Queen's Bench. For some time now, in the realm of criminal proceedings, the Court, possessed as it is of its inherent jurisdiction as a superior court, has insisted on and has successfully provided for appearances by audio and video conferences at the hearings of pre-trial conferences, resolution conferences, case management conferences, bails, bail reviews, motions, summary conviction appeals and sentencings. Given the evolution of the pandemic and the Court's inherent jurisdiction to ensure the always pressing imperative of the proper administration of justice, the need has now arisen to more clearly examine how, in the event that an accused cannot be present for his or her trial, the use of video conference may present a viable alternative to the adjourning of the trial. It is now well established that the adjournment of scheduled criminal trials in the Court of Queen's Bench occurs only in the most exceptional circumstances and such adjournments happen only upon the application to the Chief Justice or his or her designate.

THE COURT'S OVERSIGHT ROLE OVER THE ADJOURNMENT OF SCHEDULED TRIALS

This Practice Direction is meant to now more specifically stipulate the procedures, presumptions and relevant factors that will govern those situations where an accused is unable to be present in Court during the whole of his or her trial and where as a result, the trial risks being adjourned.

In other words, this Practice Direction will address for example, those situations where:

- i. the accused is not able to be present in Court for his or her trial;
- ii. the trial would and should otherwise not be adjourned (as determined by the Chief Justice or his or her designate); and
- iii. the accused is nonetheless still able to appear remotely by video conference.

In such circumstances, an application will be required so as to permit the Court to exercise its oversight function prior to adjourning any criminal trial in order to determine whether the trial in question is one that may proceed with the accused appearing at the trial by video conference. That determination will be made pursuant to the procedure and reference points set out in this Practice Direction and more foundationally, such determinations will be made mindful of sections 715.22 and 715.23 of the *Criminal Code*.

Any determination respecting whether the accused's trial should proceed with the accused's appearance by video conference, will involve by necessity, a principled consideration of how, in the unique circumstances of the COVID-19 pandemic, the "proper administration of justice" may be achieved. Such a principled consideration will recognize that in the context of the Court's consideration of all of the various relevant factors to be addressed and balanced, the Court's determination will frequently involve situations of "colliding interests" or "rights in tension" over which the Court must exercise both its functions of oversight and adjudication. Those colliding interests and rights may include not only the accused's right to a

trial within a reasonable time and not only his or her right to be present at his or her trial, but also the constitutionalized principle of judicial independence as it relates to the Court's administrative/institutional control of its present and future scheduling and allocation of its limited human and infrastructural resources (see *Ontario v. Criminal Lawyers' Association of Ontario*, at paragraph 40). No less part of this mix is the broader societal interest that relates to the potential consequences of adjourned trials for victims, witnesses and the citizenry generally, all of whom have an important interest in finality and closure.

THE REQUIRED EXPLORATION AND ENQUIRY BY THE COURT (IRRESPECTIVE OF THE POSITION OF THE CROWN OR THE ACCUSED) INTO THE POSSIBILITY OF HAVING THE ACCUSED APPEAR BY VIDEO CONFERENCE PRIOR TO ANY ADJOURNMENT OF THE TRIAL

Given the Court's oversight function and its concern for the administration of justice (properly and broadly understood), the Court wishes to underscore that even if, in the context of a criminal trial, the issue of delay is implicitly or explicitly waived by the accused, through for example, his or her refusal to proceed by video conference (perhaps causing the Crown itself to be less concerned about delaying a trial), it does not follow that the Court will automatically adjourn the trial. It must be remembered that the important implications and concerns surrounding the issue of delay as noted in *R. v. Jordan*, 2016 SCC 27, are not concerns that attach to the exclusive domain of the criminal law. In other words, adjourning a criminal trial where it is possible to proceed in an otherwise fair and equitable manner by way of video conference, could, at least in a superior court, have prejudicial implications for the rescheduling of either that matter, other criminal matters

or other matters generally under the Court's jurisdiction in relation to child protection, family or civil adjudications. In that sense, such an unnecessary delay brought about by an unjustified or unpersuasive opposition by either the Crown or the accused as it relates to the video conference option, can have broader, even if less obvious prejudicial implications, for the proper administration of justice.

To summarize, the proposed procedure discussed below in this Practice Direction, is designed to set out a process and a set of reference points that address what may well be situations of colliding rights and interests in a context where the Court must attempt to pursue and achieve the proper administration of justice. The Court must do so recognizing Parliament's clear intention to provide (where it is fair and equitable to do so) new and innovative technological alternatives that enhance both the access to and the delivery of justice. Parliament's clear intention in this regard is underscored and reflected in section 715.23(2), which provides that if a judge does not make an order for the use of a video conference under section 715.23(1), the judge must provide reasons for doing so.

PREMISES AND PRESUMPTIONS INFORMING THE COURT'S APPROACH TO THE ISSUE OF THE ACCUSED ATTENDING THE TRIAL BY VIDEO CONFERENCE

As can be discerned from this Practice Direction and the discussion below, the following premises and in some cases, presumptions, inform the Court's approach to the issue of the accused attending his or her trial by video conference:

1. The Court will perform its oversight function prior to the adjournment of any criminal trial.

2. Criminal trials are adjourned only by the Chief Justice or his or her designate in circumstances where there is a clear and in most such circumstances, an exceptional justification for doing so.
3. It is presumed that the accused shall be present in Court during the whole of his or her trial.
4. Prior to the adjournment of any criminal trial where an accused cannot be present at his or her trial, there must be an application to the Chief Justice or his or her designate consistent with the current practice. In that circumstance, irrespective of the positions of the parties, if the trial in question, but for the unavailability of the accused, is one which would or should not otherwise be adjourned, the Court will explore whether, pursuant to sections 715.22 and 715.23, the trial may proceed with the accused attending by video conference.
5. The threshold determination made by the Chief Justice or the Associate Chief Justice respecting whether the accused can attend his or her trial by video conference, will not be conditional upon the consent of the accused and/or the Crown, either individually or jointly expressed. There is nothing in section 715.22 nor section 715.23 that requires the consent of the accused or the Crown. While the consent of the accused will be a relevant factor, assuming that all other relevant factors in the provisions in question can be otherwise adequately addressed, including and most importantly those that inform the integrity and fairness of the trial, neither the accused nor the Crown will have what would amount to a *veto* with respect to the question of whether a trial will proceed where the trial in question, but

for the unavailability of the accused, is one which would or should otherwise not be adjourned. In the circumstances of the present pandemic, a great many cases could potentially be adjourned if either the accused or the Crown could individually or jointly assert such a *veto*. In that context, the Court of Queen's Bench as a superior court, would be quickly deprived of both its powers of oversight in respect of its rota (thereby indirectly implicating one of the administrative and institutional dimensions of judicial independence) and its powers that flow from its inherent jurisdiction to ensure the proper unfolding of the administration of justice as the full scope of that concept was earlier explained.

PROCEDURE TO BE FOLLOWED AND FACTORS TO BE CONSIDERED IN THOSE SITUATIONS WHERE AN ACCUSED IS UNABLE TO BE PRESENT IN COURT DURING THE WHOLE OF HIS OR HER TRIAL

1. Where an accused cannot be present in Court during the whole of his or her trial and is able to appear remotely by video conference, an application is required to either adjourn the trial or for the accused to appear at the trial by video conference. That is, prior to the adjournment of any trial where an accused cannot be present at his or her trial and, but for that fact, the trial would or should otherwise not be adjourned, it will be determined whether the accused's trial may proceed with the accused appearing by video conference pursuant to sections 715.22 and 715.23(1). That application at first instance, is returnable before the Chief Justice, the Associate Chief Justice or their designate, who will provide a timely and summary "threshold" determination as to whether the presumption that the accused attend his or her trial in person has been displaced. If so, it

will then be determined whether the accused will be permitted or required to appear at his or her trial by video conference. At this appearance, the following will be addressed:

- The reason why the accused cannot be present in Court during the whole of his or her trial.
- Where the reason is satisfactory, it will then be determined whether it would be appropriate for an accused to appear by video conference. That determination will be made having regard to all the circumstances including whether the integrity and fairness of the trial can be preserved and as well, having regard to those factors specifically outlined in section 715.23(1). Those factors are as follows:

- a) the location and personal circumstances of the accused;
- b) the costs that would be incurred if the accused were to appear personally;
- c) the suitability of the location from where the accused will appear;
- d) the accused's right to a fair and public hearing; and
- e) the nature and seriousness of the offence.

- As part of the consideration of whether the integrity and fairness of the trial is preserved, it is expected that there will be the following basic assurances:

- a) the accused is able to appear by video conference from his or her remote location and the Court is able to accommodate this appearance;
- b) all participants are able to see and hear each other;
- c) the accused is able to see and hear the evidence that is being presented at trial;
- d) the accused is able to reasonably communicate in private with his or her counsel throughout the trial; and
- e) there are no concerns about creating and preserving the Court record.

While the consent of the accused and/or the Crown may be relevant considerations, in the context of the pandemic, given the need to ensure the proper administration of justice and the Court's inherent jurisdiction and responsibility to do so, such consent will only be one factor amongst others, and will not be required or determinative. Even if one or both of the Crown and defence are opposed to the accused appearing at his or her trial by available video conference, it remains open to the presiding judge to require such a remote appearance where the integrity and fairness of the trial will be preserved.

If it is determined that an accused cannot otherwise be present at his or her trial and if it is determined upon the consideration of the relevant factors that the accused should not be permitted or required to attend his or her trial by video conference, the trial will be adjourned.

If it is determined that an accused is permitted or required to appear at his or her trial by video conference, there will be a stipulation as to any limitations or measures required to ensure the integrity and fairness of the trial.

It is expected that by limiting this first instance appearance/application to the Chief Justice or the Associate Chief Justice, there will be a resulting and more helpful consistency, uniformity, predictability and transparency to the determination of these preliminary issues in advance of the trial. Most practitioners will welcome this approach for the anticipated clarity and principled predictability it will bring to a process which, particularly in the context of the fluid circumstances of the pandemic, will increasingly require quick responses from the Court.

2. Following any determination by the Chief Justice or Associate Chief Justice that the accused will be permitted or required to appear at his or her trial by video conference, it will be for the presiding trial judge to stipulate any measures required over and above what may have already been addressed so as to ensure the integrity and fairness of the trial. However, for the sake of predictability, absent new and exceptional circumstances, such refinements of procedure by the trial judge should not negate the earlier threshold and principled determination to have the trial proceed with the accused attending by video conference.

OTHER WITNESSES

Although situations involving the need for other witnesses to appear by video conference will continue to arise in the ordinary course, such situations do not require an application to either the Chief Justice or the Associate Chief Justice. Accordingly, where for example, a witness is in custody and is unable to appear by video conference, it is expected that the same principled approach, as discussed above, would be applied by the presiding trial judge once assigned. If such an issue involving a witness arises in a case where the trial judge has not yet been assigned, the issue should be immediately brought to the attention of the pre-trial judge who will then make the necessary determination.

ISSUED BY:

“Original signed by Chief Justice Joyal”

**The Honourable Chief Justice Glenn D. Joyal
Court of Queen’s Bench (Manitoba)**

DATE: November 17, 2020