

PRACTICE DIRECTIVE

Video Appearances for Trials and Preliminary Hearings In The Provincial Court of Manitoba

The Provincial Court of Manitoba (the “Court”) recognizes the shared responsibility it has for the timely hearing of trials, as reinforced by the Supreme Court of Canada in *R. v. Jordan* 2016 SCC 27. The Court starts from the presumption that trials will proceed as scheduled. Adjournments of trials should not be presumed and counsel should consider alternative ways in which to have the trial proceed, including remote appearances. The COVID-19 pandemic has created exceptional circumstances requiring different approaches to the timely resolution of criminal matters.

While any correctional centre is at a restricted level based on the COVID-19 Pandemic Response System of Manitoba; and while Corrections has advised the Court it will not transport inmates to appear in person based on advice it has received from Public Health of Manitoba; the Court has developed this Practice Directive to accommodate the remote attendance of a participant at trial or preliminary hearing by video, where appropriate, while maintaining the integrity of the hearing process.

The video accommodation from a correctional centre is targeted at the following types of appearances and will require an Application to be filed with the Court:

- Trials and preliminary hearings; and
- To allow for the attendance of an inmate who is a witness at a trial.

The Court currently has very limited access to video platforms to accommodate remote appearances. Given this, prior to requesting a video appearance under this Directive, it is essential there be a high degree of certainty on the part of counsel, the matter will in fact proceed to trial or preliminary hearing to maximize the use of this limited resource.

In order for a trial or preliminary hearing to proceed with the accused or witness appearing by video, the trial Judge must be satisfied the evidence to be presented at the hearing will be properly seen and heard by the participants including the person attending remotely.

In order for counsel to have the necessary information to request an accused or in custody witness appear by video, the Video Appearance Co-ordinator will be available to assist in gathering the required information from Corrections and Courts Administration. The process will be as follows:

1. Counsel will contact the trial coordinator by email in the relevant court centre and inquire as to whether a courtroom, which is capable of hosting a video appearance, is available. Counsel can copy the Video Appearance Coordinator on the email. Counsel will provide the name of the case, name of individual appearing via video, date(s) and time(s) required.

2. The trial coordinator will confirm if a courtroom is available and if yes, the trial coordinator will advise the Video Appearance Coordinator.
3. The Video Appearance Coordinator will contact counsel to discuss the technological requirements given the nature of the evidence intended to be presented and will work with counsel (and IT where necessary) to determine if the technological requirements can be satisfied. The Video Appearance Coordinator will confirm if a suitable video room, or other technological platform is available at the correctional centre, so that an accused and/or in custody witness can attend remotely.
4. The trial coordinator will advise the administrative judges of the application. The assigned administrative judge will consider the implications of the request on all of the matters scheduled for video appearances in the province on the date requested and will advise counsel if there are limitations on the video infrastructure which makes a video trial unavailable.
5. If both a courtroom and a video room at the correctional centre are available, and the Administrative Judge is satisfied there is suitable video capacity for the matter to proceed, the trial coordinator will assign a trial Judge to the matter.
6. Once counsel has gathered all of the relevant information, they will file an Application with a supporting affidavit and serve counsel opposite. As of December 1, and subject to paragraph 13 below, the Application must be filed with the trial Judge, 14 days in advance of the trial.
7. If the Application is opposed, the matter will be set for a one hour hearing before the trial Judge to determine if the Application will be allowed.
8. If the Application is made with the consent of both parties (Consent Application), it will be indicated as such in the Application and supporting affidavit. If the matter proceeds with the consent of the parties, the Application will be filed with the Court and the trial Judge will review it in Chambers.
9. Upon review of the Consent Application materials the trial Judge may approve the Application in which case they will notify the parties by email. If the Consent Application is not approved, the trial Judge will schedule a hearing in court with counsel to hear submissions on the issues.
10. If the Application is contested or the trial Judge orders a hearing to take place, it will be set down for a one hour hearing in court. The parties will be notified as to the time of the hearing. Any materials necessary to the hearing will be filed no later than two days in advance of the hearing.
11. Video appearances by an accused, from a correctional centre for trial or preliminary hearing will be overbooked. If a trial or preliminary hearing is scheduled in an overbooking slot, counsel will be advised and will have to consent to the overbooking.

12. Given the limited video resources, only matters which are highly likely to proceed should be the subject of these Applications. Counsel should have spoken to either their client or material witnesses(s) and have canvassed any possibility of resolution before filing an Application.
13. Where there has been a failure or inability to comply with the requirements of this Practice Directive, or where counsel requests the Court to dispense with one or more of the requirements of this Practice Directive, the Court may, in the interests of justice:
 - (a) grant such order that is appropriate in the circumstances; or
 - (b) subject to the requirements of any statute, dispense with compliance with any particular requirement of the Practice Directive at any time.

Counsel should consider including in their affidavit information on the following factors, if relevant, in order for the trial Judge to make an informed decision. Counsel may include other relevant information and the trial Judge may require additional information:

1. The reason for the request;
2. The charges;
3. The court location requested;
4. Length of the trial/hearing;
5. The number of witnesses, and if there are any child witnesses or witnesses with other vulnerabilities (FASD);
6. Whether the accused has any vulnerabilities (FASD etc.) which may impact their ability to understand and participate in the proceedings;
7. The nature of the evidence expected to be called, i.e. *viva voce*, surveillance video, expert evidence, photographs to be filed, other documents etc.;
8. If an Interpreter is required and the language of the interpreter;
9. Whether there is agreement of counsel to proceed with the accused (or a witness in custody) appearing remotely by video;
10. Whether the accused consents and has provided a waiver and understands the process and the proceedings;
11. Confirmation from the correctional centre the accused has the degree of privacy necessary to have the matter heard;
12. Confirmation the accused can have independent and confidential communication with counsel;
13. Confirmation the accused will be able to see and hear all parties in the courtroom;

14. Confirmation the video equipment is working in a manner which allows for the proper hearing of the trial including the viewing of evidence presented at the trial;
15. Requests for any special equipment if required at the hearing;
16. If the matter is contested, any reasons for opposition to the matter proceeding; and
17. Any other relevant matters to be considered by the trial Judge to ensure the fair and proper conduct of the trial.

Having considered all relevant factors, the trial Judge will decide if the matter can proceed with the witness and/or accused attending remotely. The trial Judge will also determine if any other conditions will apply to the hearing. All other parties to the hearing will appear in person in the courtroom, unless otherwise ordered in advance by the trial Judge. If at any time, in the trial Judge's opinion, the hearing is not proceeding in a manner which protects the integrity of the trial process, the trial Judge may adjourn the hearing.

In the event the trial Judge is not available to hear the Application in a timely manner, and so as to not delay the hearing of the Application, an Administrative Judge may hear the Application instead of the trial Judge. If an Administrative Judge hears the Application, the trial Judge maintains the discretion to impose any conditions they deem appropriate at the hearing of the trial.