

## **PRACTICE DIRECTION**

### **COURT OF QUEEN'S BENCH OF MANITOBA (GENERAL DIVISION)**

#### **RE: ADJUSTMENTS TO CURRENT SCHEDULING PROTOCOLS – JANUARY 11 TO 29, 2021, VIDEO CONFERENCE CIVIL TRIALS AND THE CONTINUATION OF OTHER REMOTE SERVICES**

##### **I. Adjustments to Current Scheduling Protocols – January 11 to 29, 2021**

The ongoing and worrisome concerns that led to the Government of Manitoba's most recent and restrictive health orders remain in effect. They may remain in effect well beyond January 8, 2021, which is the last date covered by the Court of Queen's Bench's Notice of December 3, 2020, wherein we suspended in-person hearings for all trials except scheduled in-custody criminal trials. So as to provide some predictability following the holiday season, this notice is to advise that the adjustments to the Court's scheduling protocols as announced in the December 3<sup>rd</sup> Notice will now also extend and apply to the period of **January 11 to 29, 2021**.

Accordingly, in the General Division, with the exception of those judge-alone criminal trials involving accused persons who are in custody, all currently scheduled trials set to proceed between Monday, January 11 and Friday, January 29, 2021, will be adjourned to administrative lists for rescheduling, subject to the stipulation respecting virtual trials for civil matters as set out in the November 10<sup>th</sup> Notice. Those adjourned trials will be appearing on Administrative Lists on Friday, January 29, 2021.

All other judicial services currently being offered by the Court of Queen's Bench by video or audio conference in the areas of criminal and civil law will continue as before, unchanged.

All jury trials scheduled to commence between Monday, January 11 and Friday, January 29, 2021, will be adjourned to the January 29, 2021 Administrative List.

## **II. Commencement of Video Conference Civil Trials**

Mindful of the Court of Queen's Bench's ongoing effort to balance (during the COVID-19 pandemic) the safety of all Court participants with its obvious responsibility to deliver the requisite judicial service in all areas of its varied jurisdiction, the use of technology has been and will be increasingly utilized by the Court. The Court has been advised by Manitoba Justice Courts Division that the technical capacity has now increased so as to enable the Court to offer in a relatively normalized way, video conference trials for civil matters.

The willingness to explore and use technology in an innovative way during such unprecedented and challenging times, may be the difference between providing and not providing a meaningful access to justice for as many Manitobans as possible. As can be noted from this Court's recent November 17, 2020 Notice [**respecting Criminal Trials: Accused's Remote Appearance by Video Conference**], the institutional role of the Court of Queen's Bench (as an essential service), and its 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 technology. A similar acknowledgment respecting the utilization of technology was made in the recent December 3, 2020 Practice Direction respecting Family Division matters. In that Practice Direction, the Court announced the use of video conference trials for Family and Child Protection trials.

It is with the above in mind that this Practice Direction addresses the use of video conference trials for civil trials scheduled from February 1, 2021. That of course is subject to a further notice by the Court of a resumption of in-person trials which could occur in the event of a change in the Government's Code Red designation (pursuant to the Pandemic Response System). In addition to setting out the working presumptions, parameters, and the basic practice that will surround and govern such proceedings, this Practice Direction also includes the attached Appendix A which provides some direction and guidance which should be considered and, if necessary, raised with the presiding trial judge to ensure an orderly, rigorous, but at the same time flexible, approach to video trials.

Subject to a further notice by the Court of a resumption of in-person trials, and subject to any determination by the trial judge once the trial has commenced, **commencing Monday, February 1, 2021, where there are counsel representing all parties, all civil trials already scheduled are to**

**be viewed as presumptively proceeding by video hearing.** In addition to the discretion of the trial judge regarding the trial proceeding by video conference once it has commenced, as it relates to how the trial will proceed by video conference it is open to the trial judge to refine and customize the process as the trial judge considers appropriate.

In keeping with this Court's now well-established approach as outlined in previous Practice Directions and as stipulated in the Court of Queen's Bench Rules, an adjournment of a civil trial will occur only in exceptional circumstances and will require, where the trial has not yet commenced, the approval of the Chief Justice or his designate.

Absent exceptional circumstances and/or a party establishing that the integrity and fairness of a trial cannot be preserved were the trial in question to proceed by video, a civil trial scheduled from February 1, 2021 onward will generally not be adjourned. Even if and where all parties are consenting to adjourn a trial, pursuant to this Court's previously-described oversight role, if the trial in question is one which would or should otherwise not be adjourned and if it can properly and fairly proceed by video, the matter will not be adjourned.

Any request to adjourn a trial must be made by letter received by the Chief Justice no later than the Monday of the week preceding the commencement of the trial. Counsel must describe in their correspondence the alleged exceptional circumstances justifying the adjournment or set out the facts which are relied upon in any contention that the integrity and fairness of a trial would not be preserved if the trial were to proceed by video conference.

In determining whether the integrity and fairness of the trial will be preserved by a trial by video conference, the Chief Justice or his designate will consider a number of factors and requirements. They will include:

1. Are the parties and their witnesses able to appear by video conference and is the Court able to accommodate their appearances?
2. Are the parties able to see and hear the evidence that is being presented at trial?
3. Is each party able to reasonably communicate in private with his or her counsel throughout the trial?

A trial will be adjourned and will not proceed virtually if the integrity and fairness of the trial cannot be preserved. While the necessary rigour will be attached to the threshold question as to whether or not a video trial can proceed in a fair and equitable way, it must not be forgotten that the practical limits of the system of justice at any given time and the lawful interests of others require a realistic recognition that, “[w]hat the law demands is not perfect justice, but fundamentally fair justice”, *R. v. O’Connor*, [1995] 4 SCR 411 at para. 193.

Any trial that will proceed by video conference will do so during the already-scheduled trial time assigned for that matter.

The Court will host the video conference and initiate the recording of the proceedings.

As earlier noted, proceeding by video conference for civil matters is only available where all parties are represented by legal counsel.

Prior to February 1, 2021, it is anticipated that the Court will provide on its website a video tutorial on the functioning of a video conference civil trial.

### **Coming into effect**

This Practice Direction comes into effect immediately.

### **ISSUED BY:**

**“Original signed by Chief Justice Glenn D. Joyal”**

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

**DATE: December 18, 2020**

## **Appendix A**

### **Direction and Guidance Respecting Electronic Invite, Exhibits and Witnesses in Civil Trials**

A scheduled civil trial that is proceeding presumptively by video conference should take into account the following:

#### 1. Electronic Invite

- a. The Court will send a Microsoft Teams meeting invitation to both counsel. Counsel will be responsible for forwarding the invitation to their clients and any required witnesses.
- b. A separate electronic invite will be provided to counsel for each day of the trial.

#### 2. Exhibits

- a. All proposed exhibits for direct and cross-examination should be forwarded to the court office by counsel and exchanged with each other at least three business days in advance of the trial.
- b. Any exhibits counsel wish to bring up on screen should be scanned by counsel.

#### 3. Witnesses

- a. Where witnesses are not appearing in the same location as counsel, witnesses should be easily reachable by telephone or email when it is time for them to testify. Witnesses should not log into the hearing until they receive direction by counsel to do so.
- b. Witnesses should have a copy of any exhibits being put to them or counsel should scan the item or photo and share it on their screen.
- c. Witnesses should be in a brightly-lit, quiet room with a laptop or device with sufficient Wi-Fi.
- d. If witnesses wish to be sworn using a bible or eagle feather, they should have the item with them, otherwise they will be affirmed.
- e. The oath should include confirmation that the witness is alone, is not in communication with anyone off-screen, and has no notes or other aids.

### Best practices:

- All parties should have a laptop or device with reliable internal and/or external microphones and webcams enabled.
- All parties should be in a location that has an internet connection with sufficient bandwidth.
- Parties should be cautioned that they must speak one person at a time, should give a clear pause in speech between speakers and should not rustle papers or any objects near the microphone on their device.
- When not speaking, a party's microphone is to be muted.
- Counsel should identify themselves for the monitor on a regular basis.
- Counsel should have a means of private conversation (i.e., phone, etc. to communicate with their client if their client is not in the same location as them). They should mute their microphone and disable their webcam when speaking to their client.
- The clerk should always have a means of reaching counsel outside of the video conference (i.e., phone or email) in the event of technical difficulties or for any other reason that they need to be quickly contacted.