

**STEERING COMMITTEE ON JUSTICE EFFICIENCIES
AND ACCESS TO THE JUSTICE SYSTEM**

**REPORT ON THE USE OF TECHNOLOGY
IN THE CRIMINAL JUSTICE SYSTEM**

JUNE 2013

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1. BACKGROUND

This Report was developed with the objective of proposing recommendations for the optimal use of technology in order to improve the efficiency and effectiveness of the criminal justice system and access to justice.

Current provisions in the *Criminal Code* relating to teleconferencing technology in court proceedings at first instance were reviewed with a view to better implement technology as well as better organize, rationalize and modernize those provisions.

2. THE CURRENT *CRIMINAL CODE* PROVISIONS RELATING TO TECHNOLOGY

2.1 Judicial Authorizations and the Use of Technology

Current *Criminal Code* provisions on the use of technology relate to judicial authorizations (warrants, etc.) and court proceedings. Although the Committee chose to focus its work on the latter, it notes that currently, telewarrants¹ are limited to certain judicial authorizations and are only available where it would be impracticable in the circumstances for the applicant to appear personally before the judge or justice. Bill C-31,² which died on the Order Paper at prorogation on December 2009 and was not reintroduced, proposed to extend the use of the telewarrant procedure to sections where it does not currently apply and remove the requirement that the telewarrant procedure be used only where appearing in person would be impracticable. However, where an application would be made by telephone or other means of telecommunication that does not produce a writing, the applicant would be required to demonstrate why it would be impracticable to use a means of telecommunication that *does* produce a writing. The Committee supports these proposals, noting that the use of telewarrants allows for speedier access to judicial authorizations and saves resources.

2.2 The Use of Technology for Remote Appearances

2.2.1 Appearance of the Accused

The *Criminal Code* permits the use of technology for remote appearances of the accused for most court proceedings. There are different requirements and criteria depending on the stage of the criminal justice proceeding (i.e. bail, pleas, preliminary inquiry, trial, appeal). This paper focuses on court proceedings at trial level.

Section 848 deals with the remote appearance of accused persons in custody. It provides a framework for the other provisions of the *Criminal Code* specifying that, where the accused is in custody and is not represented by counsel, the court must be satisfied that the accused

¹ A telewarrant is a warrant for which a peace officer applies by “a means of telecommunication” (e.g., telephone or fax) rather than by appearing in person before a judge or justice.

² Bill C-31, *An Act to amend the Criminal Code, the Corruption of Foreign Public Officials Act and the Identification of Criminals Act and to make a consequential amendment to another Act* (40th Parliament, 2nd Session):

<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=3906483&File=24>.

understands the proceedings and he or she is acting voluntarily prior to authorizing remote appearances:

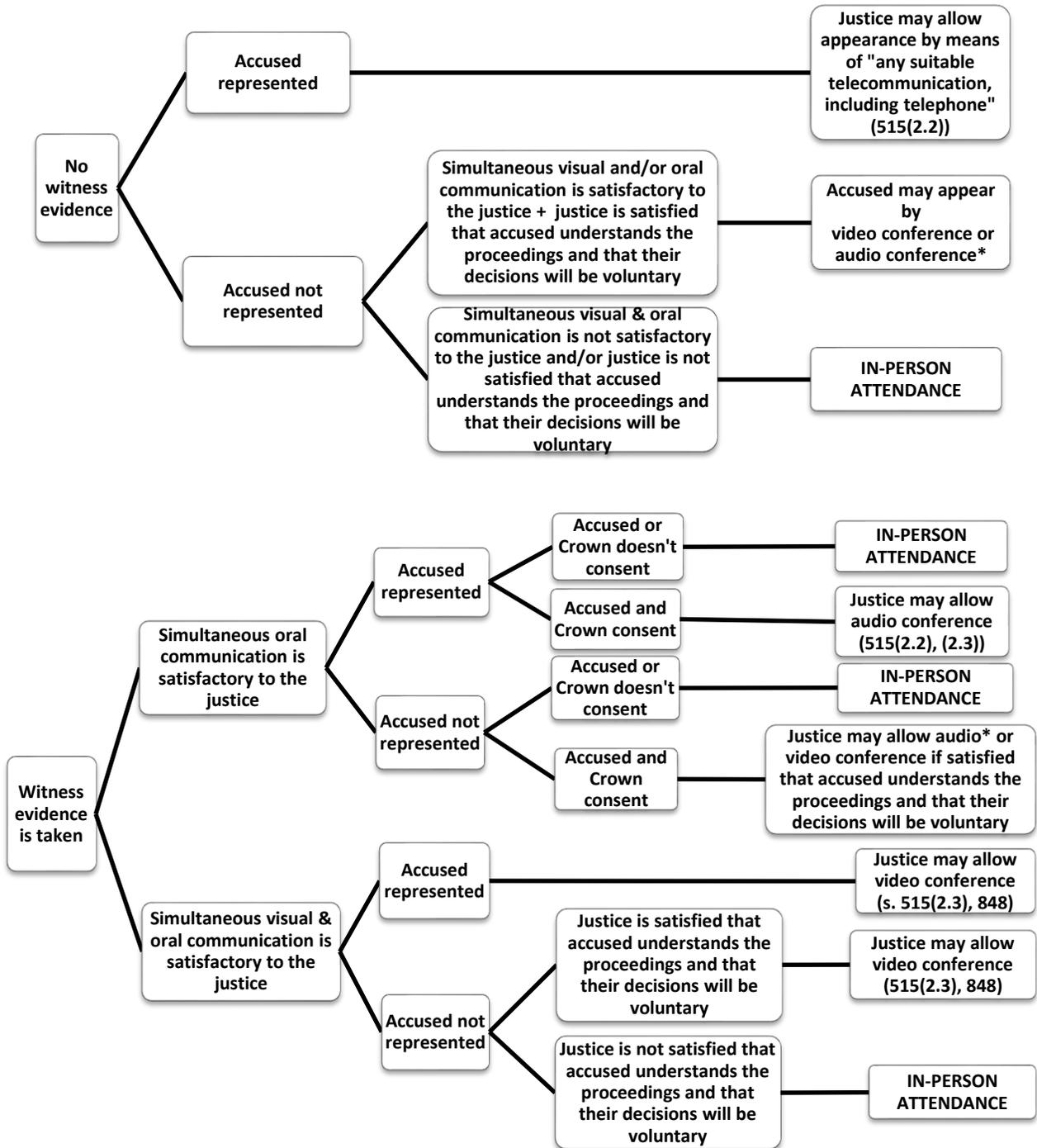
848. Despite anything in this Act, if an accused who is in prison does not have access to legal advice during the proceedings, the court shall, before permitting the accused to appear by a means of communication that allows the court and the accused to engage in simultaneous visual and oral communication, be satisfied that the accused will be able to understand the proceedings and that any decisions made by the accused during the proceedings will be voluntary.

It is clear from this section that it deals exclusively with appearances by a means of technology that allows the judge and the accused to “engage in simultaneous visual and oral communication”; it does not mention remote appearances by means, for example, of telephone technology.

Subsection 515(2.2), which deals with remote appearances during an interim release hearing provides that the justice may allow the accused to appear by any means of telecommunication, including telephone. Consent of the accused and the Crown is only required if the evidence of a witness is to be taken and the technology does not allow the court and the accused to “engage in simultaneous visual and oral communication” (subsection 515(2.3)).

Does the combined effect of section 848 and subsections 515(2.2) and 515(2.3) make it possible for an unrepresented accused to appear by telephone at the interim release stage? Some may argue that it does not on the basis that Parliament excluded that possibility by only mentioning appearance by videoconferencing in section 848. This would, in the Committee’s opinion, give too broad an interpretation to section 848 and misapprehend the purpose of that provision. In our view, section 848 is a statement of principle aimed essentially at ensuring that the unrepresented accused understands the proceedings and that his or her decisions are voluntary. It is not aimed at restricting the notion of “remote appearance” in the case of unrepresented accused persons who are in custody. According to our information, a number of jurisdictions regularly have unrepresented accused appear by telephone at the interim release stage on the basis of subsections 515(2.2) and (2.3) of the *Criminal Code*. In order to avoid any ambiguity as to the legality of such a practice, we believe that section 848 should be amended so as to refer to any form of remote appearance by means of technology, including appearance by telephone (see Recommendation 3 below).

DIAGRAM 1: ACCUSED'S REMOTE APPEARANCE AT THE BAIL STAGE



*Subject to interpretation of section 848 as discussed above.

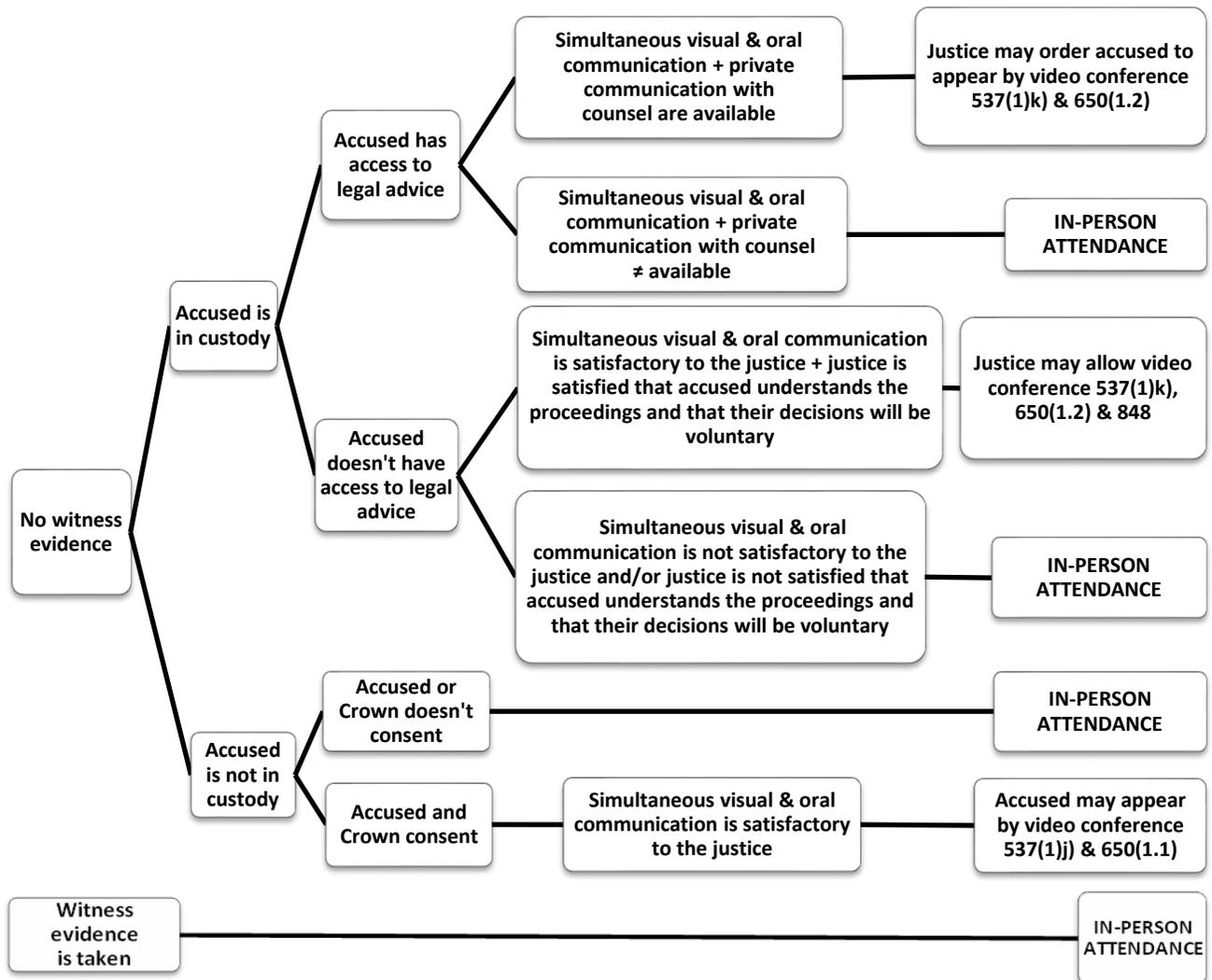
Section 606 deals with pleas by the accused (guilty, not guilty, *autrefois acquit*, etc.). Subsection 606(5) provides that subsections 650(1.1) and (1.2) “apply, with any modification that the circumstances require, (...) if the accused has agreed to the means referred to in these subsections.” Accordingly, the accused may enter a plea by any technological means that allows the court and the accused to engage in visual and oral communication, if he or she agrees to the use of this technology and, where the accused is in custody and is not represented by counsel, the court is “satisfied that the accused will be able to understand the proceedings and that any decisions made by the accused during the proceedings will be voluntary” (section 848).

At the preliminary inquiry stage, the *Criminal Code* prohibits the remote appearance of the accused, even on consent, for any part of the inquiry in which witness evidence is taken (paragraph 537(1)(j)). Where no evidence of a witness is taken, the accused may appear remotely if both the Crown and the accused consent. Consent of the accused is not required where he or she is in custody and the technology allows “the court and the accused to engage in simultaneous visual and oral communication, if the accused is also able to communicate privately with counsel, in a case in which the accused is represented by counsel” (paragraph 537(1)(k)). If the accused is in custody and is not represented by counsel, the provisions of section 848 apply and the justice of the peace must, before permitting the accused to appear by video conference, be satisfied that the accused will be able to understand the proceedings and that any decisions made by the accused during the proceedings will be voluntary.

The same rules apply at the trial stage for an indictable offence (subsection 650(1.1)).³

³ *R v Gates*, 2002 BCCA 128, leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 200.

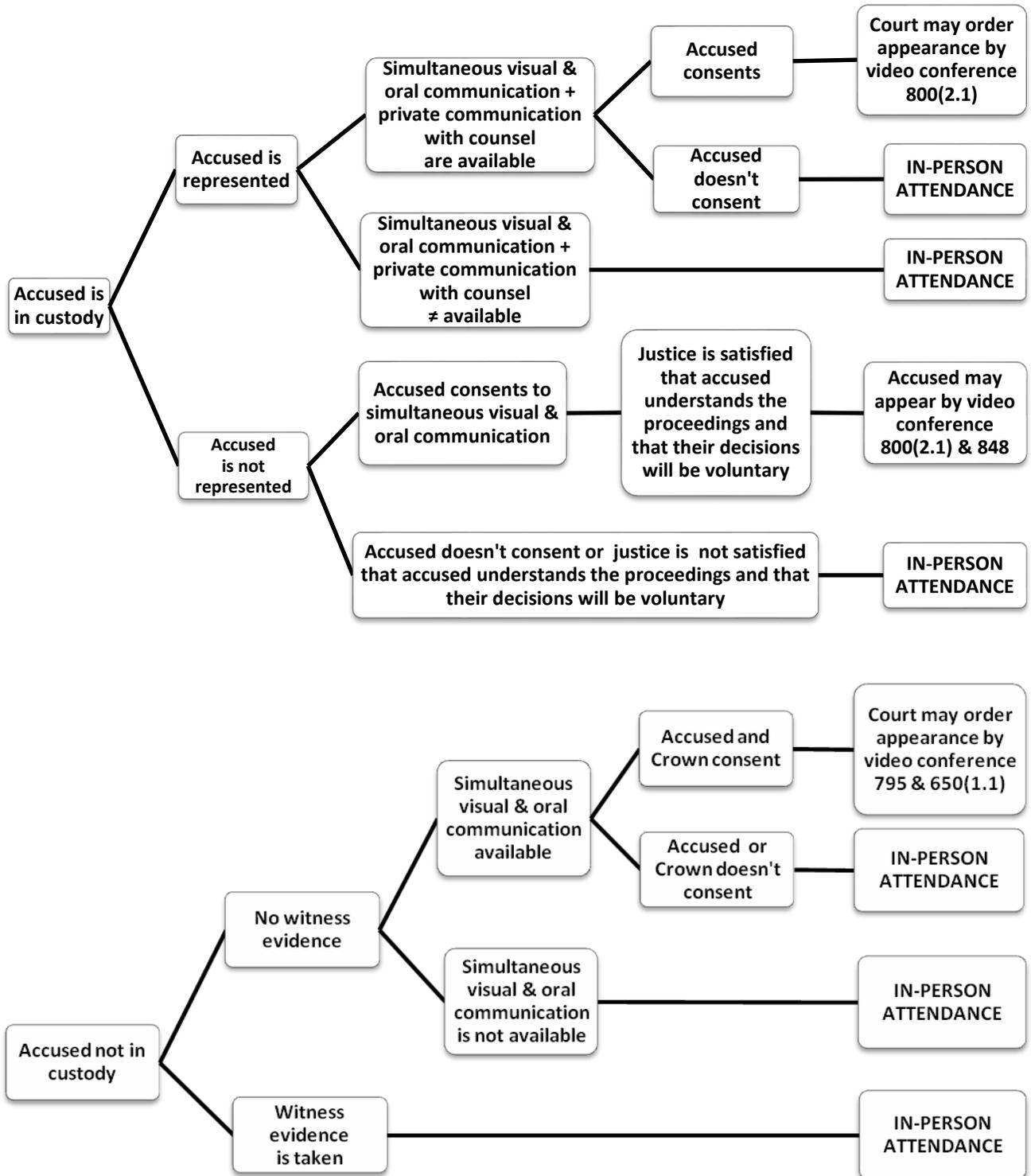
DIAGRAM 2: ACCUSED’S REMOTE APPEARANCE AT PRELIMINARY INQUIRY AND AT TRIAL FOR AN INDICTABLE OFFENCE



Part XXVII provides a slightly different regime for summary trials whereby, where the accused is in custody, their consent to videoconferencing is required and the regime applies irrespective of whether or not witness evidence will be taken (subsection 800(2.1)). If the accused is not represented by counsel, the provisions of section 848 apply and the court must, before permitting the accused to appear by video conference, be satisfied that the accused will be able to understand the proceedings and that any decisions made by the accused during the proceedings will be voluntary.

Part XXVII does not include any provision dealing with the remote appearance of an accused who is not in custody. However, section 795 provides that the provisions of Part XX (Procedure in Jury Trials), including subsection 650(1.1), apply to proceedings under Part XXVII. As a result, a summary conviction court may order the remote appearance of an accused person who is not in custody, for any part of the trial where no witness evidence is taken, if the Crown and the accused agree and if the technology allows simultaneous visual and oral communication.

DIAGRAM 3: ACCUSED’S REMOTE APPEARANCE UNDER PART XXVII (SUMMARY CONVICTION TRIALS)



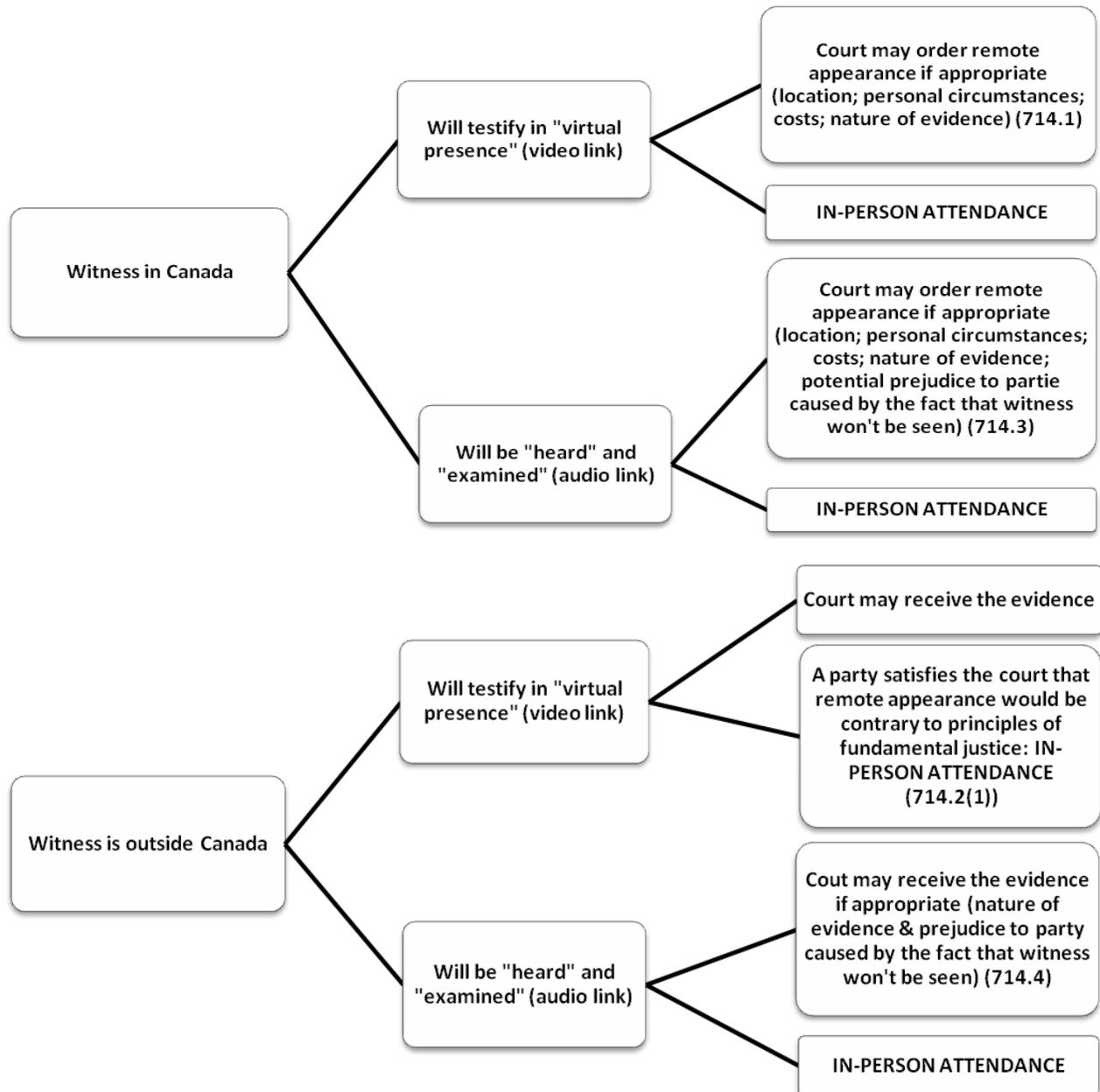
The *Criminal Code*'s DNA order and sex offender registration regimes also include provisions allowing the remote appearance of offenders where the court and the offender can engage in simultaneous visual and oral communication and where the offender is given the opportunity to

communicate privately with counsel if they are represented by counsel (487.053(2)(c), 487.055(3.01) and 490.012(4), respectively).

2.2.2 Appearance of Witness

A number of *Criminal Code* provisions deal with the remote appearance of witnesses and cover situations where, for example, a witness is in a remote location in Canada, is outside Canada, is under the age of eighteen, or has a disability.

DIAGRAM 4: WITNESS REMOTE APPEARANCE

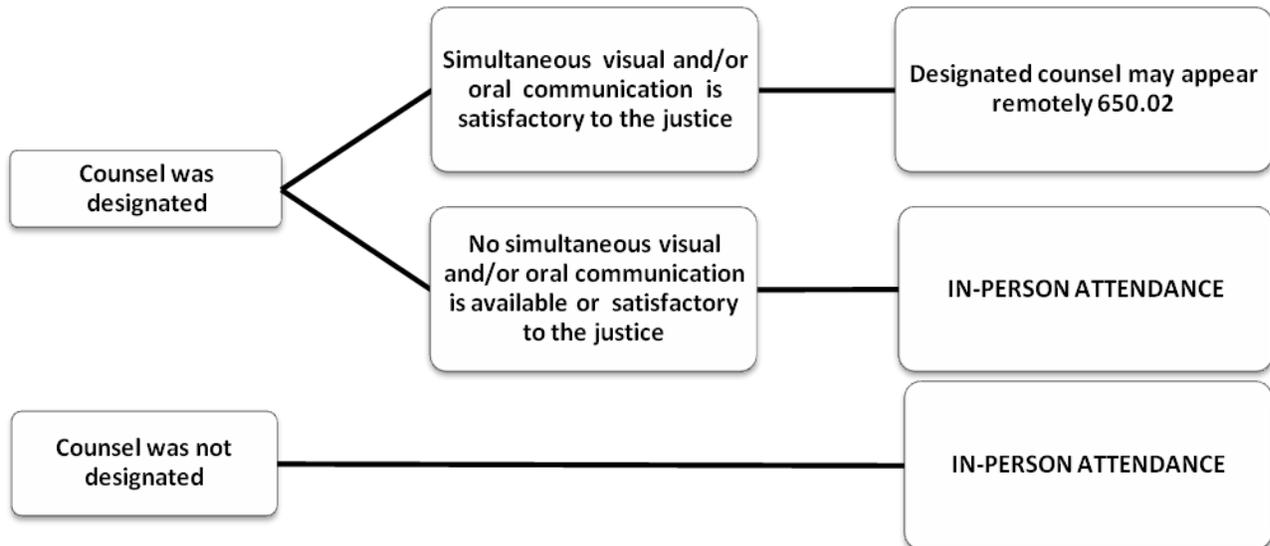


Section 486.2 of the *Criminal Code* also provides a special remote appearance regime whereby a witness under the age of eighteen or who has a disability may, *inter alia*, be ordered to testify outside the court room, unless the court is “of the opinion that the order would interfere with the administration of justice.” A similar order may also be made with respect to other witnesses, or where the accused is charged with certain offences, if the court finds that such a measure is necessary “to obtain a full and candid account from the witness of the facts complained of.” Subsection 486.2(7) provides that a witness may not testify from outside the courtroom unless arrangements are made for the accused and the court to watch the testimony by closed-circuit television, and the accused is permitted to communicate with counsel while watching the testimony.

2.2.3 Remote Appearance of Counsel

Under section 650.01 of the *Criminal Code*, accused persons may appoint counsel to represent them by filing a designation with the court. This designation allows counsel to appear for the accused for any part of the proceedings, other than a part during which oral evidence of a witness is taken or jurors are being selected. Under section 650.02, designated counsel “may appear before the court by any technological means satisfactory to the court that permits the court and all counsel to communicate simultaneously.”

DIAGRAM 5: REMOTE APPEARANCE OF COUNSEL



2.2.4 Remote Appearance of the Judge or Justice

The *Criminal Code* does not include any provision dealing with the remote appearance of the Judge or Justice at any stage of the proceedings at trial level.

3. OVERVIEW OF RECENT CASE LAW AND ACADEMIC LITERATURE ON THE USE OF VIDEO CONFERENCE IN CRIMINAL PROCEEDINGS

3.1 Factors Governing the Decision Whether to Allow Video conferences

The Committee examined some of the more salient court decisions in Canada regarding the use of teleconferencing and videoconferencing. In considering whether receiving evidence by a means of technology would be appropriate, the power of the court is not limited to the factors enumerated at section 714.1, it can take into account “all the circumstances”⁴. Relevant factors identified by the courts include:

- The accused’s rights to a fair trial and to full answer and defence (for example, would the ability of defence counsel to cross-examine the witness be negatively impacted?);⁵
- The nature of the witness’ anticipated evidence (for example, is the person a key witness; will his or her evidence play an important role in making findings of credibility?);⁶
- The distance the witness would have to travel to testify;
- Costs;
- Inconvenience or hardship which may be caused to the witness;⁷
- Witness safety;⁸
- The seriousness of the offence;⁹
- The integrity of the proposed examination site.¹⁰

The courts have also stated that they should not be reluctant to avail themselves of the benefit of modern technology¹¹ and that the accused’s right to a fair trial does not include a right to physically confront a witness.¹²

⁴ *R. v. T.P.S.*, 2003 YKSC 52 (par. 17) <http://canlii.org/en/yk/yksc/doc/2003/2003yksc52/2003yksc52.html>

⁵ *R. v. Osmond*, 2010 CanLII 6535 (NLPC) (par. 19- 27).
<http://canlii.org/en/nl/nlpc/doc/2010/2010canlii6535/2010canlii6535.html>.

⁶ *R. v. Young*, 2000 SKQB 419 <http://canlii.org/en/sk/skqb/doc/2000/2000skqb419/2000skqb419.html>; *R. v. Chappel*, 2005 BCSC 383 <http://canlii.org/en/bc/bcsc/doc/2005/2005bcsc383/2005bcsc383.html>; *R. v. Raj*, 2002 BCSC 193 <http://canlii.org/en/bc/bcsc/doc/2002/2002bcsc193/2002bcsc193.html>; *R. v. Kim MacNearney*, 2010 NWTSC 77; *R. v. Cardinal*, 2006 YKTC (par. 19) 67
<http://canlii.org/en/yk/yksc/doc/2006/2006yksc67/2006yksc67.html>; *R. v. Ragan*, 2008 ABQB 58
<http://canlii.org/en/ab/abqb/doc/2008/2008abqb658/2008abqb658.html>

⁷ *R. v. Denham*, 2010 ABPC 82 <http://canlii.org/en/ab/abpc/doc/2010/2010abpc82/2010abpc82.html>; *R. v. T.P.S.*, *supra*.

⁸ *R. v. Allen*, [2007] O.J. No. 1353 (when physical safety of a witness is at risk) <http://www.lexisnexis.com/ca/legal/docview/getDocForCuiReq?lni=4NJP-SV00-TWVB-315C&csi=280717&oc=00240&perma=true>.

⁹ *R. v. Denham*, *supra*.

¹⁰ In *R. v. Haimu*, 2011 NUCJ 14 (<http://www.lexisnexis.com/ca/legal/docview/getDocForCuiReq?lni=53DB-0HM1-DYH1-F309&csi=281030&oc=00240&perma=true>), the court stated: “This Court is not about to allow videoconferencing by Skype from a busy high school cafeteria. (...) The videoconferencing location must be secure. The Court expects the undivided attention of any witness as he or she testifies. This is so whether the person is physically present in court or “virtually present” by means of a videoconferencing link.”

¹¹ *R. v. Chappel*, *supra*.

¹² *R. v. Denham*, *supra*.

3.2 Advantages of the Video conference

There can be no doubt that the use of audio and video conference can improve access to justice and court efficiencies while reducing costs. In their article “*I Can See Clearly Now: Videoconference Hearings and the Legal Limit on How Tribunals Allocate Resources*”, Lorne Sossin & Zimra Yetnikoff identified the following benefits to using this technology:

(...) this technology promises unprecedented levels of access to administrative decision-making, especially in rural jurisdictions in Canada characterized by sparse populations and vast geography. In the criminal justice setting, videoconferencing may save significant resources now expended on transporting prisoners for court appearances and witnesses for criminal proceedings. (...)

Videoconferencing, and the use of video for witness testimony in particular, clearly has progressive potential. Rather than have a child victim of an assault relive the trauma of the assault by having to recount her or his experience before the accused person, videoconferencing allows for the child to be examined or even cross-examined from a secure and more comfortable location.¹³ Experts who could not be flown in to a trial could, through the use of video technology nonetheless participate in a hearing.¹⁴ In many instances, this enhances the opportunity for a fair hearing.¹⁵

The use of audio or video conference may reduce the inconvenience caused to victims and witnesses by having to testify in person. This may include cost of travel (particularly for individuals residing in remote communities), interference in their personal life and career, and impact on their health. In some cases, allowing a victim to appear remotely may reduce the risk of witness intimidation and respond to witness safety issues.¹⁶ Audio and video conferences can also assist in ensuring that decision-makers are available in a timely fashion. For example, many jurisdictions outside of large, urban centers hold bail hearings by teleconference to facilitate timely access to a justice of the peace. This ensures compliance with subsection 503(1) of the *Criminal Code*, which provides that, in general, arrested persons must be taken before a justice within twenty-four hours of their arrest.

The use of technology can also promote early case resolution. It may be easier for counsel to fit an audio or video conference into their often busy schedule rather than making an in-person

¹³ *Criminal Code* R.S.C. 1985 c. C-46, S.715.1 allows a complainant under the age of 18 to testify by videotape in relation to offences involving child molestation or sexual assault. The videotape must be made within a reasonable time after the alleged offence, and is only admissible in evidence if the complainant adopts the contents of the videotape when testifying in court. Section 486(2.1) of the *Criminal Code* allows the presiding judge in similar cases to order that a complainant or witness under the age of 18 give testimony outside of the courtroom or behind a screen so that the complainant or witness does not have to see the accused, if this exclusion is necessary to obtain a full and candid testimony.

¹⁴ See *Innisfil (Township) v. Vespra (Township)*, [1980] 2 S.C.R. 145, where cross-examination was alleged to be denied because an out-of-town expert was not produced for cross-examination.

¹⁵ (2007) 25 Windsor Y.B. Access Just. 247, page 3.

¹⁶ *R.v. Allen, supra*, par.15.

attendance in court. The use of this technology can streamline the scheduling of court cases. More cases can be dealt with in a shorter amount of time with the available court personnel.¹⁷

Sossin and Yetnikoff¹⁸ also mention the following advantages associated with holding a hearing by video conference:

One advantage is the ability to see the witness face-on and with more clarity. The Yukon Territorial Court in R. v. Heynen held that camera angles and close-up views enhance the ability to assess demeanour.¹⁹ The Ontario Superior Court of Justice in Pack-All Manufacturing held that seeing the witness face-on and in full colour is as good, or arguably better than, seeing the witness obliquely from the witness box.²⁰ The British Columbia Supreme Court in R. v. Gibson went so far as to say that a well-placed camera may enhance the expressions of a witness under cross-examination.²¹ The Alberta Court of Queen's Bench in R. v. Dix held that the technological sophistication of a videoconference facility could safeguard witness reliability.²² In other cases, the courts have held that videoconferencing is just as good as an in-person hearing.²³

On a societal level, insisting on in-person court appearances in all circumstances may become increasingly anachronistic in times where a significant portion of the population regularly relies on technology such as “Skype” audio and video calling for its communications.²⁴

3.3 Challenges

There are a number of challenges associated with the use of technology and, in particular, witness testimony by video conference. The academic literature on videoconferencing points out that a video image is only as good as what it captures. For example, such things as insufficient lighting and bad camera angles may decrease the information available to the trier of fact as they make it difficult to discern expressions, assess body language and observe the dynamics taking place between trial participants. Some academics argue that eye contact and in-person communication are important factors in assessing credibility²⁵ and that “long-distance justice” may threaten the courtroom’s humanity and solemnity, as well as jeopardize the public’s confidence in the administration of justice.²⁶

¹⁷ Anne Bowen Poulin, "Criminal Justice and Videoconferencing Technology: The Remote Defendant" (2004) 78 Tul. L. Rev. 1089 at 1098-1101.

¹⁸ *Supra*, p.10.

¹⁹ [2000] Y.J. No. 6 at para. 315 (Yk.Terr.Ct.).

²⁰ *Pack All Manufacturing Inc. v. Triad Plastics Inc.* [2001] O.J. No. 5882 at para. 6 (On.Sup.Ct.).

²¹ [2003] B.C.J. No. 812 at para. 5 (B.C.S.C.).

²² [1998] A.J. No. 486 at para. 24 (A.B.Q.B.).

²³ See *Maggio Holding* [2003] O.J. Na 1810 (On.Sup.Ct.) (QL), *J.S. v. Canada* [2003] S.J.No.44 (Sk. Q.B.).

²⁴ On July 6, 2011, Skype CEO Tony Bates revealed new statistics showing that Skype users are averaging 300 million minutes per month of video calling. Bates says that 50 percent of Skype’s traffic is video calling.

²⁵ Cormac T. Connor, "Human Rights Violations in the Information Age" (2001) 16 Geo. Immigr. L.J. 207 at 216-218; Poulin, *supra*, p. 1106-1111.

²⁶ Frederic I. Lederer, "The Road to the Virtual Courtroom? A Consideration of Today's - And Tomorrow's - High-Technology Courtrooms" (1999) 50 S.C.L. Rev. 799, at 28.

Canadian courts have consistently been very reluctant to allow a witness' appearance by videoconferencing when credibility is at issue.²⁷

4. PROPOSALS FOR REFORM

4.1 Proposed Codification of a Definition of “Video Conference” and “Audio Conference”

The Committee noted that at least three different phrases are used in the *Criminal Code* to refer to the technology of videoconferencing: “closed-circuit television or otherwise,”²⁸ “means of technology that permits the witness to testify (...) in the virtual presence of the parties and the court,”²⁹ and “closed-circuit television or any other means that allow the court and the [person/the accused] to engage in simultaneous visual and oral communication.”³⁰

The Committee notes that section 714.1 as well as subsection 714.2(1); 650(1.1) and (1.2); 672.5(13); and 800(2.1) are all titled “Video Links,” which further supports the argument that these provisions describe the same technology.

The Committee is of the view that harmonizing these different phrases would be useful and, in particular, that the repetition of the phrase “Closed-circuit television or any other means that allow the court and the [person/the accused] to engage in simultaneous visual and oral communication” currently found in more than ten provisions in the *Criminal Code* could be avoided, resulting in a simplification of these provisions.

The Committee submits that a video conference should be defined as a technological means that permits a remote appearance and allows simultaneous visual and oral communication between the court, accused persons, witness, counsel, or any other person, as the case may be. This definition is sufficiently flexible to include closed-circuit television and any other similar technology that may emerge in the future.

Similar observations may be made with respect to the current *Criminal Code* provisions allowing the use of audio conference. This technology is described in a number of ways in the *Code*: “telecommunication device, including telephone,”³¹ “technological means (...) that permits the court and all counsel to communicate simultaneously;”³² and “technology that permits the parties and the court to hear and examine the witness.”³³

²⁷ *R. v. Chappel, supra; R. v. Young, supra; R. v. Raj, supra; R. v. Kim MacNearney, supra; R. v. Cardinal, supra; R. v. Ragan, supra.*

²⁸ 486.2(7).

²⁹ 714.1; and ss. 714.2(1).

³⁰ 487.053(2)(c); ss. 487.055(3.01); ss. 490.012(4)(c); ss. 515(2.3); ss. 537(1)(j) and (k); ss. 650(1.1) and (1.2); ss. 672.5(13) (This provision, which is found in Part XX.1 - Mental Disorder, refers to “the Review Board” instead of “the court”); ss. 688(2.1)(b); and ss. 800(2.1)

³¹ 515(2.2); ss. 688(2.1)(a).

³² s.650.02.

³³ s.714.3; s. 714.4.

As it pertains to audio conferences, the Committee submits that a definition should be added to the *Criminal Code* that would provide that an audio conference is a technological means that permits a remote appearance and allows simultaneous oral communication between the court, accused persons, witnesses, victims, counsel, or any other person as ordered by the court.

RECOMMENDATION 1: DEFINITIONS

Definitions of “video conference” and “audio conference” (or any similar expressions identified by legislative drafters) should be included in the *Criminal Code*.

Video conference should be defined as a technological means that permits a remote appearance and allows audiovisual communications between the court, accused persons, witnesses, victims, counsel, or any other person as ordered by the court.

Similarly, audio conference should be defined as a technological means that permits a remote appearance and allows simultaneous oral communication between the court, accused persons, witnesses, victims, counsel, or any other person as ordered by the court.

***Criminal Code* provisions relating to the use of video conference and audio conference should be amended and simplified to reflect the creation of those definitions.**

4.2 Judicial Discretion

All current *Criminal Code* provisions dealing with the use of audio or video conferencing leave it up to the judge or justice to decide whether or not to allow remote appearances, even where both parties consent to the use of technology.³⁴ This judicial discretion allows the court to consider a range of factors, such as the suitability of the technology in the context of the case; the potential shortcomings or limitations of the technology, convenience, efficiency, cost, etc. Furthermore, as the judge or justice is the trier of fact in most trials, he or she is best placed to determine whether the use of technology will impact their ability to assess a witness’ credibility where it is at issue.

The Committee is of the view that the decision of whether or not to use audio or video technology should continue to ultimately rest with the judge or justice. Any attempt at reforming the *Criminal Code* provisions on the use of audio or video conferences in criminal proceedings should ensure that judicial discretion in this area is strictly preserved.

RECOMMENDATION 2: JUDICIAL DISCRETION

The decision of whether or not to use audio or video technology should continue to ultimately rest with the judge or justice.

³⁴ See for example, subsection 650(1.1).

4.3 Scope of the Principles Set Out in Section 848

As mentioned in Chapter 2.2.1, the scope of section 848 is ambiguous and a broad interpretation of this section could undermine the possibility of allowing an accused who is in custody and does not have access to legal advice to appear by audio conference. Section 848 provides certain precautions which the court must take prior to ordering an accused in that situation to appear by video conference. In our view, this section, which offers a statement of principle, should be amended to specify that it applies to all forms of remote appearance, including appearances by audio conference. Such an amendment would confirm that the purpose of this section is not to limit the technology by which an accused who is in custody and is not represented can appear, while giving broader application to the guarantees provided for in section 848.

RECOMMENDATION 3: AMENDMENT OF SECTION 848

That section 848 of the *Criminal Code* should be amended to specify that it applies to all forms of remote appearance, including appearances by audio conference.

4.4 General Regime of Remote Appearance

After reviewing the current regime of the *Criminal Code*, the Committee finds that the provisions governing remote appearance are unnecessarily complex and compartmentalized. Thus, the *Criminal Code* makes special provisions governing the remote appearance of the accused (depending on the various stages of the proceedings and whether or not he or she is represented), the remote appearance of the witnesses (depending on whether they are in Canada or abroad) and the remote appearance of counsel.

The Committee is of the opinion that such provisions could be simplified and standardized and that a general regime should apply to the accused as well as any person (witness, counsel, interpreter, victim, etc.) having to appear, testify or make submissions before the court and wishing³⁵ to do so remotely. The new general regime would be valid for all stages of the judicial process.

The Committee examined in detail whether the general regime should provide a non-exhaustive list of objectives for the court's consideration of whether to order a person's remote appearance by means of technology, or whether the general regime should only refer to general guiding principles. Ultimately, the Committee concluded in favour of codifying a key principle, the proper administration of justice, along with a non-exhaustive list of objectives, i.e. ensuring a fair and efficient hearing, protecting public confidence in the administration of justice, or enhancing access to justice for the accused, the victim or any witness.

The Committee noted that these three objectives encompass the majority of specific considerations that have been examined in caselaw regarding the decision to allow the use of technology:

³⁵ Nevertheless, as mentioned in Part 4.5, an accused in custody could be ordered to appear remotely before his or her trial.

- **Ensuring a fair and efficient hearing:** This objective would invite the courts to consider, for example, the positions of the parties, whether the remote appearance by means of technology of the accused or a witness would impact the accused’s right to full answer and defence and, on the other hand, how such a measure may optimize the effective use of criminal justice system resources.
- **Protecting public confidence in the administration of justice:** This objective would invite the court to consider, among other things, whether counsel’s remote appearance by technology could affect the court’s decorum; or whether the fact that the judge is presiding remotely may affect the linkages between the court and the local community.
- **Enhancing access to justice for the accused, the victim or any witness:** This objective would invite the court to consider, for example, how allowing a witness to appear by video conference may reduce the inconvenience to this witness or result in a speedier trial for the accused.

4.4.1 Remote Appearance of the Accused by Consent

As illustrated in Diagram 2, the current provisions of the *Criminal Code* do not allow the accused to appear by audio conference for any part of the preliminary inquiry, even on consent by the Crown and the defence. Audio conferences are not allowed in any situation. The justice may, however, allow the accused to appear by video conference “where the prosecutor and the accused so agree” and no witness evidence is to be taken (paragraph 537(1)(j)).

It is interesting to note that the *Criminal Code* is very permissive as regards allowing the accused’s remote appearance in a number of situations at the bail stage, while it offers the opportunity for video conference appearances in only very limited situations, and prohibits teleconference appearances altogether, at the preliminary inquiry stage. This seems somewhat paradoxical given that the court may permit the accused to be out of court during the whole or any part of the inquiry (paragraph 537(1)(j.1)). Furthermore, the preliminary inquiry usually serves essentially as a discovery mechanism for the defence, and its outcomes often have much less impact on the accused than the decision on bail.

The Committee therefore finds that the current regime governing the accused’s remote appearance at the preliminary inquiry stage is too restrictive and that there does not seem to be any precise rationale for the limitations outlined above. For example, there may be a number of circumstances where accused persons who are represented by counsel and are not in custody may wish to appear at their preliminary inquiry remotely. Such may be the case, for example, where the accused is employed or is studying in a remote location, would need to travel great distances to attend court, or has limited physical mobility. Considering that a justice may permit the represented accused to be out of court for all of the inquiry, the Committee believes that the court should also have the power to order the accused, with their consent, to appear by audio or video conferences on any conditions that the justice considers appropriate.

At the trial stage, section 650.01 allows designated counsel to appear for accused persons in their absence for any part of the trial other than proceedings where witness evidence is taken, where jurors are being selected or during an application for a writ of *habeas corpus*. However, there

may be circumstances where an accused, who could be represented by counsel in his absence, would prefer to appear at the proceedings but would need to travel extensively to do so in person. Additionally, an accused person with limited physical mobility may wish to appear by videoconferencing technology where witness evidence is expected to be very technical or mainly undisputed. In situations such as these, the use of video conferences may assist in ensuring that the trial proceeds fairly and efficiently and improve access to justice.

Members of the Committee considered whether this power should be conditional to the accused being given the opportunity to communicate privately with counsel. Members noted that, where the justice orders that the accused appear by video conference, this criterion is effectively met by providing the accused with the opportunity and the means to communicate privately with counsel. For example, in the Ottawa video remand court, a private telephone line has been set up between the correctional facility and an isolated booth adjacent to the courtroom and accessible to defence counsel. When the accused is out of custody and requests permission for his or her remote appearance, any obligation on the court should be limited to providing the accused with the opportunity to communicate privately with counsel. This obligation could be met, for example, by allowing regular breaks during the hearing to allow the accused to reach counsel on his or her mobile phone.

Subject to the amendment suggested in Recommendation 3 herein, section 848 should continue to apply to the situation where an unrepresented accused person who is in custody requests to appear remotely.

4.4.2 Remote Appearance of a Witness

Sections 714.1 to 714.4 of the *Criminal Code* deal with the remote appearance of a witness and provide a different regime depending on whether the witness is in Canada or abroad. The Committee recommends that a witness' request to appear remotely be governed by the general regime regarding remote appearances, regardless of whether the witness is in Canada or abroad.

4.4.3 Where Counsel Seeks to Appear Remotely

As mentioned in Chapter 2.2.3, section 650.02 allows designated counsel to appear for the accused for any part of the proceedings (other than a part during which oral evidence of a witness is taken or jurors are being selected) "by any technological means satisfactory to the court that permits the court and all counsel to communicate simultaneously."

The Committee is of the view that section 650.02 is unnecessarily restrictive and considers that the appearance by audio or video conference of counsel should be subject to the general regime governing remote appearances. Thus, the court could allow any counsel to appear remotely where appropriate, either as designated counsel for the accused who is not present, or on their own behalf, such as to make submissions or speak to adjournments, etc., when the accused is making his or her own appearance. Counsel's remote appearance would be subject to any conditions that the court considers appropriate.

4.4.4 Remote Appearance of Any Other Person

A number of persons other than the parties themselves may wish to appear remotely in criminal proceedings. This may be the case, for example, for an interpreter, a third party against whom an *O'Connor* production application is brought, a person who lays an information under section 810, etc. The Committee considers that remote appearance by such persons should be governed by the proposed general regime.

RECOMMENDATION 4: GENERAL REGIME GOVERNING REMOTE APPEARANCE

The *Criminal Code* should be amended to create a general regime governing remote appearance by which the court may order the use of audio or video conference where the court is satisfied that such an order would serve the proper administration of justice by, among other things, ensuring a fair and efficient hearing, protecting public confidence in the administration of justice or enhancing access to justice for the accused, the victim and any witness.

4.5 Regime Governing Remote Appearance, Without Consent, of Accused in Custody Prior to the Trial

With regard to the accused, the general regime proposed above would only apply to situations where the accused consents to a remote appearance. However, what happens when a detained accused does not consent to his or her remote appearance? The Committee is proposing to extend to all pre-trial stages the regime that currently governs the detained accused's remote appearance at the interim release stage.

As outlined above at Diagram 1, the current *Criminal Code* provisions framing the use of audio and video conferencing at the interim release stage provide that the justice may order the accused to appear by audio conference where no evidence is taken (subsections 515(2.2) and (2.3)). In many jurisdictions, interim release hearings proceed on the basis of information provided by counsel and rarely involve the testimony of witnesses. In these circumstances, the use of audio conferences can ensure timely access to a justice of the peace and expedient decisions regarding the interim release of accused persons by allowing the accused to appear while in custody at the police station or in a correctional facility. If the evidence of a witness is to be taken, the justice may, under the current *Criminal Code* regime, order the accused to appear by video conference if he or she has access to legal advice (subsection 515(2.3)). However, where the accused does not have such access, a justice of the peace may only allow video conferencing if they are satisfied that the accused understands the proceedings and that their decisions will be voluntary (section 848).

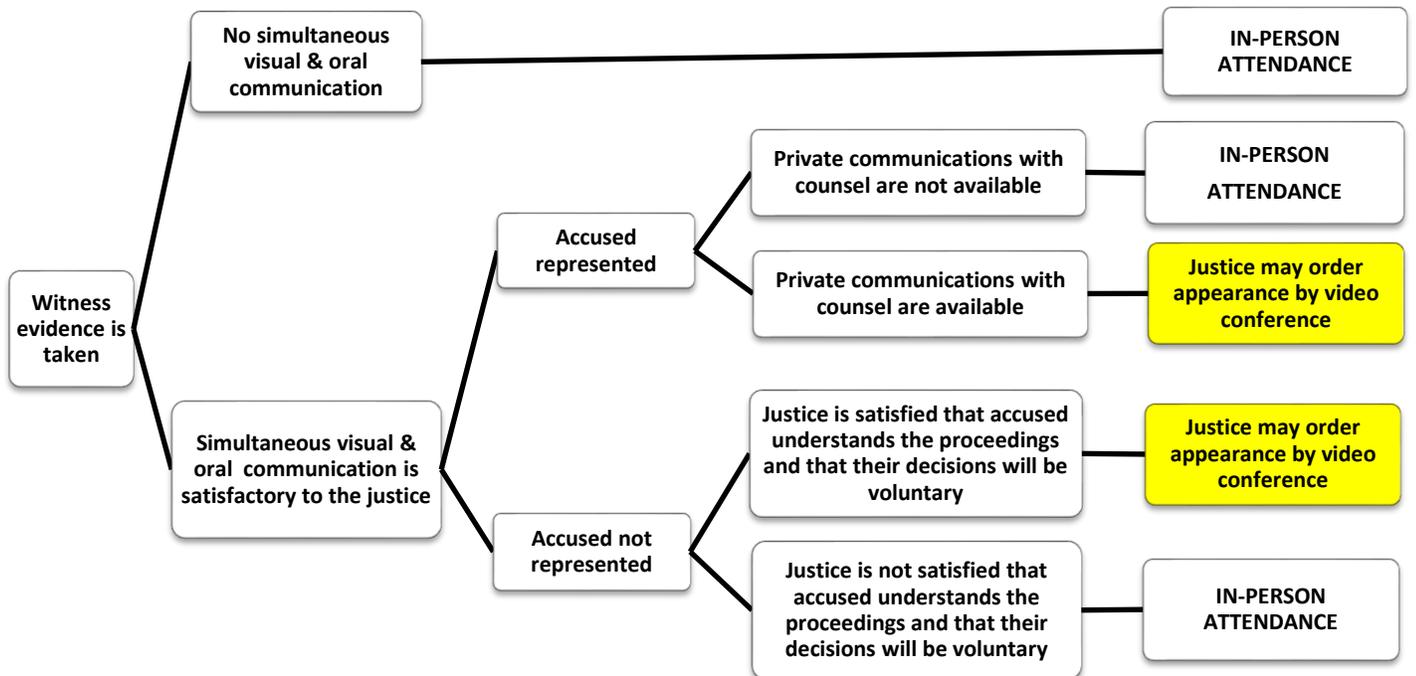
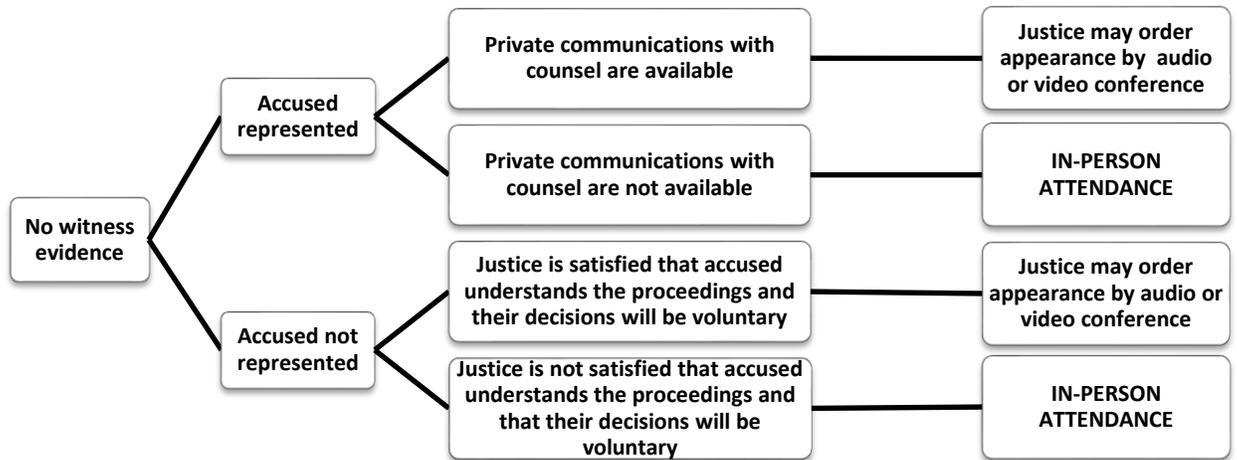
At the preliminary inquiry stage, current *Criminal Code* provisions allow a justice to order accused persons who are in custody to appear by video conference where no witness evidence is taken and where accused are given the opportunity to communicate privately with counsel (paragraph 537(1)k). Under the proposed amendments, the justice could order that the detained accused appear by audio or video conference where no evidence is taken, both at the interim release and preliminary inquiry stage. Where witness evidence is taken, the justice may order the

appearance by video conference of the accused in custody who is represented. Where the accused is not represented, the justice may order that the accused appear by video conference if “satisfied that the accused will be able to understand the proceedings and that any decisions made by the accused during the proceedings will be voluntary.”

When the court orders accused persons who are in custody to appear remotely, they must be provided with the opportunity and the means to communicate privately with counsel.

DIAGRAM 6: REMOTE APPEARANCE, WITHOUT CONSENT OF ACCUSED IN CUSTODY PRIOR TO THE TRIAL (Reforms expanding the use of video conferencing at the preliminary inquiry stage are highlighted in yellow).

General regime: The court may order the use of audio or videoconference where, in its opinion, it would serve the proper administration of justice by, among other things, ensuring a fair and efficient hearing or enhancing access to justice for the accused, the victim and any witness.



4.6 Regime Governing the Remote Appearance, Without Consent, of Accused in Custody at his or her Trial

As noted above, the *Criminal Code* regime governing the accused's appearance by video conference at his or her trial, includes slightly different criteria for trials involving indictable or summary offences.³⁶

The Committee is of the view that, subject to the exceptions provided at section 650.01, in-person appearance should remain the norm for the accused at the trial stage. At the sentencing stage, however, the Committee recommends that the general regime apply. This means that the judge will have discretion to order a remote appearance for sentencing even if the accused wishes to appear personally. In the exercise of this discretion the judge will apply the test set out in the general regime, which requires that the remote appearance serve the proper administration of justice and the other objectives set out earlier in this report. Therefore the positions of the parties will be considered but are not determinative.

The provisions of section 848 should continue to apply to the remote appearance of unrepresented accused persons who are in custody (subject to Recommendation 3 above).

4.7 Remote Appearance of the Judge

As previously mentioned, there is currently no provision in the *Criminal Code* allowing a judge or justice to appear remotely during any part of criminal proceedings at first level. The Committee is of the view that it would be appropriate to codify this option. For example, it may be necessary in certain circumstances for a justice to hear a bail application remotely, particularly in remote jurisdictions outside of large urban centers.

That said, the Committee recognizes the need for the courts to continue ensuring the regular presence of their judges in regions outside of large urban centres. Some have expressed their concerns about a potential "urbanization" of justice to the detriment of remote regions. It is important for the courts to maintain their involvement in rural areas and judges should continue to sit in person and locally in the majority of cases. The Committee recognizes that the remote appearance of judges must be available in the appropriate circumstances, on a case-by-case basis, but that these situations should not undermine the tribunal's close ties with the community in which it sits. This should be one of the considerations the judge takes into consideration when determining whether appearing remotely would be in the interest of the administration of justice.

4.7.1 Remote Appearance of the Justice Prior to Trial

As noted above, the *Criminal Code* currently allows the justice to order the accused to appear remotely for the purpose of his or her bail hearing, provided certain conditions are met (see Diagram 1). Many bail courts in this country make extensive use of videoconferencing to allow an accused in custody to appear for their interim release hearing. In these circumstances, also allowing the justice to preside over a bail hearing by a means of technology would not entail a

³⁶ See Diagrams 2 and 3.

marked change of culture among justice system participants. Allowing the justice to appear remotely would also provide one more means of ensuring that the bail hearing takes place quickly after the accused's arrest.

Some, however, may argue that the situation differs in the case of the preliminary inquiry, which usually involves more witnesses than the bail hearing and is subject to stricter rules with respect to admissibility of evidence. As noted above, Canadian courts have consistently been very reluctant to allow a witness' appearance by videoconferencing when credibility is at issue. In-person communication, it is argued, provides more information to the trier of fact. Similar arguments can be raised where the judge is presiding remotely and, as a result, he or she is not in the physical presence of the witness. However, credibility is generally not at issue at the preliminary inquiry stage.³⁷ Allowing the justice to conduct all or part of the preliminary inquiry by audio or video conference may, in certain circumstances, improve access to justice and increase the efficiency of the criminal justice system. For example, this power may prove very useful in situations where a visiting justice presiding over an inquiry in a remote jurisdiction is unable to complete the hearing before the end of his or her stay. The justice would have the option of completing the hearing by video conference at a later date. In another scenario, this power would allow a justice to render by teleconference his or her decision on an application for a publication ban, for example.

The Committee is of the view that, as a norm, justices should preside in-person over bail hearings and preliminary inquiries. However, the Committee recognizes that allowing a justice to preside remotely may in some circumstance assist in the proper administration of justice by, for example, ensuring that proceedings can take place in a timely fashion. The Committee thus recommends that a regime be created in the *Criminal Code* to allow a justice, where necessary for the proper administration of justice, to conduct a bail hearing or a preliminary inquiry by audio conference where no witness evidence is taken, or by video conference where witness testimony is taken.

To ensure that the court's jurisdiction over the charge or the accused is not lost, the *Criminal Code* should also provide that, where a justice conducts a bail hearing by audio or video conference, the hearing is deemed to take place in the jurisdiction where the Information was sworn and filed.

**RECOMMENDATION 5: JUSTICE PRESIDING REMOTELY PRIOR TO TRIAL
(See Diagram 7)**

The *Criminal Code* should be amended to allow a justice (where this would serve the proper administration of justice) to conduct an interim release hearing or preliminary inquiry:

- **by audio or video conference where no witness evidence is taken,**
- **by video conference where witness evidence is taken.**

The *Criminal Code* should also be amended to provide that, where the justice conducts the interim release hearing or preliminary inquiry by audio or video conference, the hearing is deemed to take place in the jurisdiction where the Information was sworn and filed.

³⁷ *R. v. Seaboyer*, [1991] 2 S.C.R. 577.

DIAGRAM 7: JUSTICE PRESIDING REMOTELY PRIOR TO TRIAL (proposed reforms are highlighted in yellow)



4.7.2 Remote Appearance of the Judge at Trial-Related Hearings (including the preliminary motions and sentencing stages)

As the *Criminal Code* is currently silent on this practice, the Committee recommends that Parliament adopt clear rules that would allow a judge to preside at trial by remote appearance, in whole or in part, in certain circumstances. While it is clear that the in-person appearance of the judge should remain the norm at the trial stage, there may be situations where allowing a judge to preside over the trial by remote appearance would be beneficial. This may be the case, for example, when the judge is to discuss case-management issues with the parties, or is to render a decision on a preliminary issue. The Committee acknowledges that trial-related hearings where a witness’ credibility is not at issue are more suitable for remote appearance. However, there may be situations in which the parties would consent to the judge’s remote appearance at the trial stage so as to deal with the matter expeditiously and efficiently. Such may be the case, for example, for a summary trial involving a breach of probation.

Pre-trial conferences provided at section 625.1 of the *Criminal Code* are usually more informal in nature than other court proceedings and often the accused is not present. Additional case-management powers at the trial stage were codified in the 2011 *Fair and Efficient Criminal Trials Act*, at subsection 553.1(1). As with pre-trial conferences, the judge, be it a case management judge or a “regular” trial judge, need not order a formal hearing for the purposes of exercising these powers (see subsection 553.1(2), *a contrario*).

In light of this, the Committee believes that a judge exercising case management powers such as those listed at paragraphs 551.3(1)(a), (b), (c), (d) or (f) or provided at section 625.1 of the *Criminal Code* should have full latitude to do so by video conference where necessary for the proper administration of justice. The use of audio conference for the purpose of exercising case management powers should also be permitted where both parties consent.

Where the judge is exercising any other powers in trial-related hearings, including where evidence is presented, he or she may preside by video conference where necessary for the proper administration of justice and both parties consent. The Committee discussed the possibility of

codifying a list of additional circumstances or objectives that would frame the decision to preside remotely over a hearing. However, the Committee found that obtaining the consent of the two parties would be a reliable means to ensure that the judge’s remote appearance does not compromise the fairness of the trial. In addition, the judge would need to consider whether presiding at trial by remote appearance would serve the proper administration of justice.

Furthermore, to ensure that the court’s jurisdiction over the charge or the accused is not lost, the *Criminal Code* should also provide that, where a justice or judge conducts a trial hearing by audio or video conference, the hearing is deemed to take place in the jurisdiction where the Information was sworn and filed.

RECOMMENDATION 6: APPEARANCE BY AUDIO OR VIDEO CONFERENCE OF PRESIDING JUDGE IN A TRIAL-RELATED HEARING

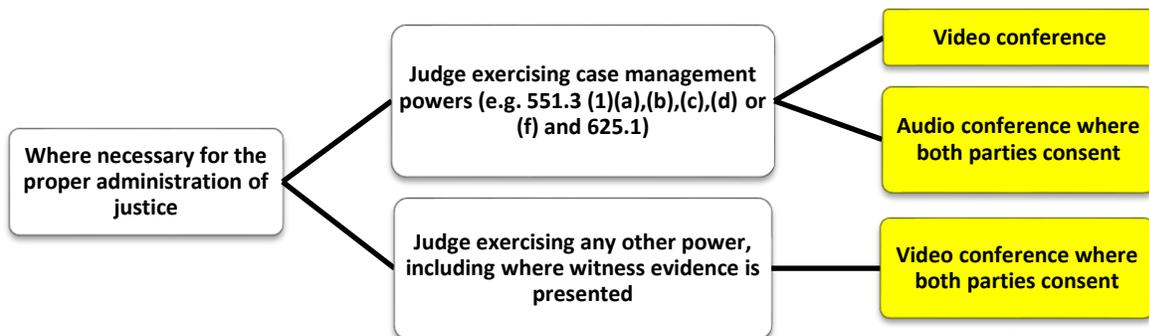
In-person appearance of the judge should remain the norm at the trial stage. However, the *Criminal Code* should be amended to provide that a judge exercising case management powers such as those listed at paragraphs 551.3(1)(a), (b), (c), (d), or (f), or provided at section 625.1 of the *Criminal Code* should have full latitude to do so by video conference where necessary for the proper administration of justice.

The use of audio conferencing for the purpose of exercising case management powers should also be permitted where necessary for the proper administration of justice and both parties consent.

Where the judge is exercising any other power in trial-related hearings, including where evidence is presented, he or she may preside by video conference where this would serve the proper administration of justice and both parties consent.

The *Criminal Code* should also provide that, where a judge conducts a trial hearing by audio or video conference, the hearing is deemed to take place in the jurisdiction where the Information was sworn and filed.

DIAGRAM 8: JUDGE PRESIDING REMOTELY OVER TRIAL-RELATED PROCEEDINGS (proposed reforms are highlighted)



APPENDIX 1 – SUMMARY OF RECOMMENDATIONS

1. Definitions of “video conference” and “audio conference” (or any similar expressions identified by legislative drafters) should be included in the *Criminal Code*. Video conference should be defined as a technological means that permits a remote appearance and allows audiovisual communications between the court, accused persons, witnesses, victims, counsel, or any other person as ordered by the court.

Similarly, audio conference should be defined as a technological means that permits a remote appearance and allows simultaneous oral communication between the court, accused persons, witnesses, victims, counsel, or any other person as ordered by the court. *Criminal Code* provisions relating to the use of video conference and audio conference should be amended and simplified to reflect the creation of those definitions.

2. The decision of whether or not to use audio or video technology should continue to ultimately rest with the judge or justice.
3. That section 848 of the *Criminal Code* should be amended to specify that it applies to all forms of remote appearance, including appearances by audio conference.
4. The *Criminal Code* should be amended to create a general regime governing remote appearance by which the court may order the use of audio or video conference where the court is satisfied that such an order would serve the proper administration of justice by, among other things, ensuring a fair and efficient hearing, protecting public confidence in the administration of justice or enhancing access to justice for the accused, the victim and any witness.
5. The *Criminal Code* should be amended to allow a justice where this would serve the proper administration of justice, to conduct an interim release hearing or preliminary inquiry
 - by audio or video conference where no witness evidence is taken,
 - by video conference where witness evidence is taken.

The *Criminal Code* should also be amended to provide that, where the justice conducts the interim release hearing or preliminary inquiry by audio or video conference, the hearing is deemed to take place in the jurisdiction where the Information was sworn and filed.

6. In-person appearance of the judge should remain the norm at the trial stage. However, the *Criminal Code* should be amended to provide that a judge exercising case management powers such as those listed at paragraphs 551.3(1)(a), (b), (c), (d), or (f), or provided at section 625.1 of the *Criminal Code* should have full latitude to do so by video conference where necessary for the proper administration of justice.

The use of audio conferencing for the purpose of exercising case management powers should also be permitted where necessary for the proper administration of justice and both parties consent.

Where the judge is exercising any other power in trial-related hearings, including where evidence is presented, he or she may preside by video conference where this would serve the proper administration of justice and both parties consent.

The *Criminal Code* should also provide that, where a judge conducts a trial hearing by audio or video conference, the hearing is deemed to take place in the jurisdiction where the information was sworn and filed.

**APPENDIX 2 – REFORMS TO REMOTE APPEARANCE REGIME
(CONCEPTUAL MODEL)**

		PROCEEDINGS PRIOR TO TRIAL	TRIAL RELATED PROCEEDINGS (including preliminary motions and sentencing stages)
	ACCUSED DETAINED NOT CONSENTING	Diagram 6	In-person appearance (except for a sentencing hearing)
Recommendation 4	ACCUSED DETAINED CONSENTING	General regime	General regime
	ACCUSED NOT DETAINED & SEEKING LEAVE TO APPEAR REMOTELY	General regime	General regime
	COUNSEL, WITNESS, INTERPRETER, COMPLAINANT, THIRD PARTY AND ANY OTHER PERSON	General regime	General regime
Recommendation 5 & 6	JUSTICE/JUDGE	<p>Where necessary for the proper administration of justice, the justice may preside</p> <ul style="list-style-type: none"> ➤ by AUDIO OR VIDEO CONFERENCE if no witness evidence is taken ➤ by VIDEO CONFERENCE if witness evidence is taken 	<p>Where necessary for the proper administration of justice, the judge or justice may preside</p> <ul style="list-style-type: none"> ➤ by VIDEO CONFERENCE: for the purpose of exercising case management powers such as those listed at paragraphs 551.3(1)(a),(b),(c),(d) or (f) and section 625.1, where no witness evidence is taken . He/she may also preside by AUDIO CONFERENCE for this purpose where both parties consent ➤ By VIDEO CONFERENCE: for any other purposes, including where witness evidence is taken, where both parties consent.