

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

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**SUB-COMMITTEE ON THE OPEN COURT PRINCIPLE**

**VIRTUAL HEARINGS AND VIRTUAL ACCESS: PRIVACY AND  
SECURITY OF VICTIMS AND VULNERABLE WITNESSES  
RELATED TO TESTIMONY IN CRIMINAL PROCEEDINGS**

**FINAL REPORT OF THE SUB-COMMITTEE  
NOVEMBER 2023**

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## 1. EXECUTIVE SUMMARY

The open court principle promotes transparency and accountability of courts by ensuring that hearings and related information are accessible to the public, and open to its scrutiny. The media act as gatekeepers of this principle by reporting on matters for the public's benefit. But the open court principle also engages a broad range of protected rights and interests that courts must carefully balance to uphold the fundamental values of our justice system and public confidence in the courts. A perfect hearing – namely, one that balances all relevant rights and interests – is not necessarily a perfectly open hearing: regulating access, and in some cases restricting access, is required to achieve this balance.

This report of the Sub-Committee on the Open Court Principle outlines key needs identified in balancing open courts with the rights of victims of crime and vulnerable witnesses in virtual courts in particular, and makes recommendations to the Steering Committee on Justice Efficiencies and Access to the Justice System to address those needs. The report focuses on two key areas: virtual access to hearings involving testimony, and virtual testimony of victims and vulnerable witnesses.

In appropriate circumstances, and with the right safeguards in place, virtual access to hearings and virtual testimony can both promote access to justice and open courts and protect the safety and wellbeing of victims and vulnerable witnesses, thus fostering their meaningful participation and leading to fairer outcomes. This in turn can improve the administration of justice and public confidence in the justice system.

But virtual access and virtual testimony also create a need for frameworks and measures to protect the privacy and security rights of victims of crime and vulnerable witnesses who testify in open courts. Without proper protection, victims and witnesses may be reluctant to report crimes and participate in court proceedings, or may be unable to tell their stories fully and effectively. This impeded participation could, in turn, hinder access to justice, disrupt the proper administration of justice, and impede the court's truth seeking function, thus subverting the very values that the open court principle seeks to uphold.

*On virtual access:* Currently, virtual access to hearings involving the testimony of a victim or vulnerable witness raises real and foreseeable privacy and security risks to which courts are currently ill-equipped to respond. Improved frameworks and data collection are needed to address this issue. But virtual access also offers opportunities to promote the open court principle: improved media access is needed to achieve this objective. See Recommendations 2-7 at Appendix C of this report.

*On virtual testimony:* As with virtual access, virtual testimony involves both opportunities and risks. Although it is legally available to victims and vulnerable witnesses in certain circumstances where it would be beneficial to their participation or safety, not all courts are equipped to offer virtual testimony; legal considerations are not applied consistently across the country for adult victims and vulnerable witnesses; and frameworks to protect safety and the integrity of testimony are lacking. There is a need to improve technology in the courts, review the applicable legal and policy framework, and collect and analyze data on the use and impacts of virtual testimony for adult victims and vulnerable witnesses to optimize its use when appropriate, while recognizing that the needs and preferences of each victim or witness should be assessed on a case-by-case basis. See

Recommendations 8-12 at Appendix C of this report.

## **2. SUB-COMMITTEE ON THE OPEN COURT PRINCIPLE**

### **2.1 Composition and Role**

In May 2022, the Steering Committee on Justice Efficiencies and Access to the Justice System (*Steering Committee*) established a Sub-Committee on the Open Court Principle (*Sub-Committee*), composed of a provincial deputy minister of Justice, and representatives from the Canadian Judicial Council, the Canadian Council of Chief Judges (*ad hoc*), defence bar, and the police community.

As a first tranche of study, the Efficiencies Committee mandated the Sub-Committee:

- In the context of the open court principle, to identify existing or emerging challenges and benefits relating to the privacy and security rights of victims of crime and vulnerable witnesses who testify in criminal proceedings virtually (*virtual testimony*), or with members of the public as virtual observers (*virtual access*)
- To make practical recommendations for consideration by the Steering Committee members for endorsement or further discussion and work

### **2.2 Methodology**

In carrying out its work, the Efficiencies Committee asked the Sub-Committee to 1) review and analyze academic literature, operational practices, and relevant case law across Canada and internationally, where relevant; and 2) identify, and solicit input and support from, subject-matter experts as needed.

#### *Written Sources*

The Sub-Committee reviewed relevant reports, case law, court policies and practice directions, and other documentary sources from Canada and abroad. Key sources are listed in the selected bibliography at Appendix A.

#### *Consultations*

The Sub-Committee consulted a wide range of justice sector partners who support criminal court proceedings in various Canadian jurisdictions through both small group and individual interviews, and receipt of written feedback. Diverse perspectives were sought from those working in urban, rural, remote and Indigenous communities. Input collected focused on qualitative rather than quantitative assessments.

Partners consulted include representatives of the judiciary in trial level courts; federal and provincial departments responsible for Justice; Heads of Court Administration; the police community; federal, provincial, and police-based victim services; prosecution services; defence bar; the Canadian Media Lawyers' Association; and the Federal Ombudsperson for Victims of Crime. Members of the Sub-Committee and organizations consulted are listed in Appendix B.

### **2.3 Definitions**

The following definitions apply to key concepts used throughout this report.

*Virtual Access* – Refers to media or public observers accessing a court hearing either by audioconference (phone) or a videoconferencing platform such as Zoom, MS Teams or WebEx.

*Virtual Testimony* – Refers to testimony given by way of technology. Depending on the context, it can include testimony through CCTV in a remote room in a courthouse or a remote facility, or testimony by audio or videoconference from a secure location (e.g. police station, victim services office) or unsecure location (e.g. home).

*Victim* – Refers to a witness who meets the definition of “victim” under section 2 of the *Criminal Code* and/or section 2 of the *Canadian Victims Bills of Rights*. Recognizing the presumption of innocence, this includes alleged victims.

*Vulnerable Witness* – Refers to any witness whose privacy or security may be at particular risk from testifying, or who may need testimonial aids or other accommodations to testify safely and effectively. This may include lay witnesses, as well as police officers working in certain types of investigations or in an undercover capacity.

*Hearing Participant* – Refers to accused persons, victims and other witnesses for the Crown or defence, as well as professional justice system participants such as judges, police and counsel. While this report focuses mainly on victims and vulnerable witnesses, findings and recommendations extending to other hearing participants are included when supported by research and consultations.

*Recognized Media* – Refers to media outlets or journalists who are accredited or recognized according to court policies or practice directions in order to benefit from relaxed rules of access to hearings or use of electronic devices in the courtroom. They are expected to follow professional and ethical standards of journalism.

### **3. CONTEXT**

#### **3.1 The Open Court Principle: Underlying Values and Balancing Considerations**

The open court principle is a hallmark of the Canadian justice system. It ensures that court hearings and related information are accessible to the public, and that the media are able to report upon them fully and accurately for the public’s benefit and scrutiny. The aim is to uphold transparency and accountability: hearing cases under the public eye, and not in secrecy, promotes public confidence in the courts, which is essential to our democracy and the rule of law.

But the open court principle also engages a broad range of protected rights and interests that courts must carefully balance in order to achieve equitable access to justice for accused persons, victims and witnesses; fulfill their truth seeking function; uphold the integrity of the process; and ensure the proper administration of justice. Each of these elements is essential to upholding public confidence in the courts.

Protected rights to consider include the following:

- Open courts are a recognized component of freedom of expression and of the media (s. 2, *Canadian Charter of Rights and Freedoms*)

- An accused's right to a fair and public hearing is enshrined in the presumption of innocence (s. 11(d), *Canadian Charter of Rights and Freedoms*)
- Victims have the right: to participate by having their views considered; to have their security and privacy considered by appropriate authorities in the criminal justice system; and to have authorities take reasonable and necessary measures to protect them against intimidation and retaliation (ss. 14 and 9-11, *Canadian Victims Bill of Rights*) – these quasi-constitutional rights are recognized components of the proper administration of justice, and the onus is on relevant authorities to uphold them

Whether courts provide access to hearings in person, virtually, or both, they must establish parameters of access that balance all of these rights and interests: open access does not imply unregulated or unsupervised access. And since in-person and virtual access involve different logistical capacities and risks, parameters of access may vary by necessity in these two contexts to achieve similar outcomes<sup>1</sup>.

### 3.2 Key Issues: Open Courts in the Virtual Context

*It is unclear at present whether technology is a threat or boon to openness and access to justice values, and it may be both at once. – Professor Jamie Cameron, Victim Privacy and Open Justice 2.0: At the Frontiers of Change (2020)*

*While it is often assumed that 'openness' will improve 'public confidence' in the courts, there are many circumstances where it can have the opposite effect. For example, those who are unwillingly and directly drawn into court proceedings, such as jurors, key witnesses and victims of crime will undoubtedly have increased confidence in the court if they know that their personal information, the circumstances surrounding their involvement and their expressed views will be respected and managed carefully by the court. – Canadian Judicial Council, Court Information Management: Policy Framework to Accommodate the Digital Environment (2013)*

Technology in the courts is a double-edged sword: depending on how it is used, it can either enhance or impede the open court principle and its underlying values. Similarly, it can create both opportunities and risks for protecting the privacy and safety of victims, vulnerable witnesses, and other hearing participants. And technology is not one-size-fits-all: what may be beneficial to a given case or hearing participant may be detrimental to another. Adding to this complexity, technology continues to evolve at breakneck speed and its impacts are often far-reaching and irreversible, particularly when it is used maliciously or irresponsibly under the veil of anonymity.

#### *Benefits and Opportunities*

Virtual access can enable more participants from broader geographical areas and backgrounds to observe hearings, subject to platform and bandwidth limitations. Comparatively, for in-person access, observers must travel to court, seating is limited, and wait times can be long.

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<sup>1</sup> For a thorough analysis of the logistical distinctions between in person and virtual access, see the tip sheet of the Action Committee on Modernizing Court Operations on [Virtual Access to Hearings: Options and Implementation Scenarios](#).

Virtual testimony can enable certain victims and vulnerable witnesses to participate more effectively and safely in a hearing, while minimizing system-induced trauma. For example, some victims and witnesses may face hardships in getting to court, while others may experience severe anxiety at having to attend a court facility or at seeing the accused. In some cases, in-person attendance could expose victims and witnesses to safety or privacy risks, for example intimidation by the accused or their friends and family, or threats of violence from criminal organizations.

### *Challenges and Risks*

Virtual access to hearings makes it more difficult for courts to communicate, monitor, and enforce the rules of access compared with in-person access that allows judges and court staff to continuously oversee the physical surroundings and conduct of observers. As a result, privacy and security risks are greater in the virtual context, and the capacity to both prevent and sanction breaches is reduced.

Virtual testimony can create privacy and safety risks for victims and vulnerable witnesses, as well as risks of interference with their testimony, particularly if testimony occurs in an unsecure location without proper safeguards in place. And the lack of adequate technology to support virtual testimony can affect access to justice, credibility assessments, and fair trial rights.

## **4. KEY FINDINGS AND RECOMMENDATIONS**

The Sub-Committee has identified the following key challenges, needs, and proposed recommendations – along with implementing partners – to improve the current landscape surrounding the use of virtual access and of virtual testimony in criminal hearings involving a victim or vulnerable witness.

The Sub-Committee recommends that the Steering Committee endorse the recommendations in this report, publish the report, and communicate it to relevant stakeholders and partners in the justice system. The Sub-Committee acknowledges that implementing certain recommendations will require financial, infrastructural, and/or technological investments in addition to partner commitments.

### **General Recommendation 1 – For Endorsement**

- ✓ Publish this report with its endorsed recommendations, and communicate it to relevant stakeholders and partners

*Implementing partner: Steering Committee*

## **4.1 On Virtual Access**

### **4.1.1 Current Landscape and Challenges**

*Key Issue: Virtual Access Involves Higher Privacy and Security Risks*

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Virtual access to hearings involving the testimony of a victim or vulnerable witness raises

real and foreseeable privacy and security risks to which courts are currently ill-equipped to respond.

Many consultation participants raised serious concerns about enabling virtual access for public observers in hearings that involve such testimony. There were a few incidents reported where public observers attended court virtually and unlawfully recorded and posted court footage on social media platforms<sup>2</sup>. Comparatively, concerns surrounding virtual access were minimal for media observers who follow professional journalistic standards and know the rules of access to hearings.

A pressing need was identified to improve virtual access for recognized media observers, while demand from public observers in trial courts – similarly to in-person attendance – appears anecdotally low except in high profile cases. Incidentally, high profile cases – which often involve significant socio-political issues (e.g. Convoy, #MeToo) or mass casualties – may present higher risks of privacy or security breaches or other interference in the virtual context<sup>3</sup>.

## *Legal Framework*

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### **❖ Rules of access to hearings and use of electronic devices in courts**

Courts across Canada have general rules that prohibit or limit the recording and broadcasting of proceedings, and the use of electronic devices in the courtroom that could capture court footage. These rules seek to ensure the integrity of the court process, minimize disruptions to hearings, and protect the privacy and safety of hearing participants. In most jurisdictions, these rules are found in court policies or practice directions; exceptionally, they are legislated, as in Ontario<sup>4</sup>.

These rules are usually less restrictive for recognized media than other public observers, to facilitate the media's reporting on court proceedings as gatekeepers of the open court principle. For example, media observers are often authorized to use their electronic devices in court to send or receive messages, and to audio record proceedings to verify their notes.

Several courts have processes for accrediting or recognizing media, to ensure they adhere to professional standards and rules of access to hearings, thus minimizing privacy and security risks. Common elements of these processes include

- lists of recognized media outlets and/or an application process to seek recognition
- a required undertaking to comply with the rules of access to hearings and use of electronic devices

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<sup>2</sup> A few consultation participants mentioned such incidents, as did Canadian Bar Association representative David Parry when testifying before the Standing Senate Committee on Legal and Constitutional Affairs (44th Parliament, 1st Session) on May 13, 2022. Also, in May 2023, three men in Toronto pleaded guilty to obstructing justice for posting photos and audio footage on social media in November 2021 depicting a murder witness testifying via Zoom at a preliminary inquiry. The Instagram account used for this purpose [reportedly](#) had over 500,000 followers.

<sup>3</sup> For a discussion of challenges and options to promoting public access in high profile cases, see the tip sheet of the Action Committee on Modernizing Court Operations on [Virtual Access to Hearings: Options and Implementation Scenarios](#) (section 3.2).

<sup>4</sup> Section 136 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43



- issuance of media identification cards

Some jurisdictions have adopted practice directions specific to virtual access for public and media observers. These range from simply reiterating that the usual rules of access and use of electronic devices apply in the virtual setting, to outlining specific expectations or duties for observers. Common elements of the more robust practice directions include

- pre-registration and identification processes for observers
- cutoff times for observers to login or dial-in, and rules against reconnecting if disconnected
- duty of observers to mute themselves and keep their cameras off
- duty of observers not to reuse or share access links or dial-in details
- written undertakings from observers to follow the rules of access, particularly the non-recording and non-broadcasting of court proceedings

In many cases, these practice directions leave it to virtual observers to control their own identification and access features (e.g. camera, microphone) rather than designating court staff to oversee these aspects.

#### ❖ ***Enforcement and sanction provisions***

Most Canadian courts lack enforcement and sanction provisions to adequately address breaches of the rules of access to hearings, such as the unauthorized recording and dissemination of court footage. In some cases, a publication ban may make it a summary offence to disclose the identity of a victim or witness<sup>5</sup>, but privacy and security breaches can also occur in cases where there is no publication ban.

Unless a publication ban is violated or rules of access are legislated, contempt of court proceedings are often the only remedy for breaching the rules of access to hearings. And since provincial and territorial courts lack inherent jurisdiction, they can only initiate contempt proceedings and order the removal of court footage from online platforms if the court witnessed the breach. While proceedings could be initiated in Superior Court in such circumstances, evidentiary barriers often exist. Jurisdiction over extraterritorial observers is also unclear.

#### ➤ *Some promising practices:*

- *In Ontario, section 136(4) of the Courts of Justice Act makes it an offence punishable by a fine of up to \$25,000 and/or a jail term of up to six months to record, broadcast or otherwise disseminate footage of court proceedings or their participants without lawful permission.*
- *In the United Kingdom, section 85B of the Courts Act 2003<sup>6</sup> makes it a summary offence and a contempt of court for a remote observer to record and transmit an image or sound of court proceedings, or to attempt to do so.*

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<sup>5</sup> See section 486.6 of the *Criminal Code*, R.S.C., 1985, c. C-46

<sup>6</sup> See section 199 of the *Police, Crime, Sentencing and Courts Act 2022*, enacting section 85B of the *Courts Act 2003*.

❖ ***Inconsistent parameters of virtual access across Canada***

Availability and parameters of virtual access to criminal hearings for media and public observers are inconsistent across Canada. Many jurisdictions do not offer virtual access to in-person hearings, which comprises most hearings involving witness evidence. Some level of virtual access is being offered for hearings that proceed virtually without a designated courtroom, in order to uphold the open court principle. When virtual access is offered, practices vary widely in regulating and monitoring access, which can affect the integrity of court proceedings, and the privacy and security of hearing participants.

In practice, monitoring virtual access is often left to the best efforts of presiding judges and clerks and the goodwill of observers, without clear protocols to regulate access permissions for different types of participants and observers. Reported examples of practices that can disrupt the flow of evidence and impede procedural fairness include

- asking observers to mute themselves rather than proactively disabling their interactive features, such as video, microphone and chat
- interrupting testimony to ask a person who has just logged in to identify themselves, rather than using a private chat to do so, or a virtual waiting room to screen and admit them during a break
- not disabling automatic notifications to participants when someone joins mid-hearing

Standardized guidelines or protocols could promote more effective practices and mitigate many foreseeable disruptions to hearings as well as privacy and security risks to victims, witnesses and other hearing participants.

❖ ***Available technology is driving policies and practices***

Commercial videoconferencing platforms used by courts to facilitate virtual access and virtual testimony are not designed specifically for court hearings and the inherent privacy and security risks of hosting them online. During the pandemic, courts by necessity adapted their practice to available technologies, and these technologies continue to drive practices and policies surrounding virtual access and virtual testimony. Throughout Canada, courts have attempted – with often mitigated success – to customize a variety of commercial platforms to fit their needs, rather than identifying needs first and selecting technology that meets them. And because individual courts have limited buying power with multinational software companies, it is difficult to liaise with these companies to obtain a customized product that adequately protects privacy and security.

Nationally endorsed standards to protect the privacy and security of hearing participants in the context of virtual access could lead to better technology-based solutions, whether they are developed commercially or in-house.

❖ ***Lack of oversight and enforcement capacity***

Virtual access makes it more difficult to oversee the conduct of observers to ensure compliance with rules of access, and to take action against those who breach these rules. Common challenges include:

- Preventing observers from recording and disseminating court footage, which could be misused either out of context, or to intimidate, threaten, retaliate against, or otherwise interfere with a hearing participant
- Identifying virtual observers who breach the rules of access – particularly those who post court footage online – and barriers to taking action against those who do so, even if they are identified. Barriers include investigative difficulties; jurisdictional issues; lack of enforceable sanctions; and lack of police resources to prioritize these investigations, even if the legal framework was considered adequate. Smaller communities with limited policing resources and lack of subject-matter expertise in cyber-investigations may be particularly ill-equipped to respond
- Communicating, and promoting compliance with, witness protection measures such as publication bans to virtual observers. Some promising solutions might include:
  - o A banner at the bottom of the hearing screen, though some courts have reported difficulties implementing this due to platform limitations
  - o A notice for observers in a virtual waiting room, though in some cases observers were screened in too fast for them to read the notice
  - o Posting in the chat that a publication ban is in effect
  - o Reiterating the publication ban at the start and any resumption of the hearing, and admitting observers only at those times rather than throughout the hearing
- The fact that some victims may prefer not to have a publication ban on their identity so they can speak out more freely<sup>7</sup>. The lack of enforceable sanctions when no publication ban exists could jeopardize their security rights, and waiving identity protection should not become a waiver of privacy entirely.

#### ❖ **Loss of practical obscurity**

Accessing court hearings in person – namely, having to travel to the courthouse, secure a seat, and wait for a particular hearing to occur – provides a certain layer of privacy in practice by limiting the number of observers willing and able to attend. This phenomenon is known as practical obscurity<sup>8</sup>. Comparatively, virtual access – where large numbers of anonymous and unseen observers can either login or dial-in from any location with minimal effort and do something else while they wait – can extend to a point where all sense of privacy is lost. This increased exposure can be detrimental to the ability or willingness of some victims and vulnerable witnesses to testify. The loss of practical obscurity and its impacts become even greater if there is a risk of an observer capturing and disseminating court footage online for the world to see.

In smaller communities, concerns were also raised that virtual access might encourage people to tune in for gossip or entertainment, thus exposing victims or vulnerable

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<sup>7</sup> *Bill S-12* received Royal Assent on October 26, 2023, amending the *Criminal Code* to ensure victims are consulted before a publication ban on their identity is sought, and making it easier for interested victims to request the revocation of a publication ban.

<sup>8</sup> The Canadian Judicial Council's *Court Information Management: Policy Framework to Accommodate the Digital Environment* (2013) acknowledges practical obscurity and the negative impacts of its loss if court information is made widely available online.

witnesses to heightened social stigma, embarrassment, or trauma. This could significantly impede their ability or willingness to testify.

❖ ***Non-legitimate observers and related risks inherent to virtual technology***

While any access to hearings can attract public observers who have non-legitimate interests, virtual access presents a higher risk due to difficulties identifying and monitoring observers, and to inherent risks surrounding the use of technology. Non-legitimate interests can include disrupting a hearing; attempting to intimidate a hearing participant; doxing, namely exposing a person's personal data online to threaten, intimidate, harass, embarrass, coerce, or retaliate against them<sup>9</sup>; or tuning in to capture and disseminate court footage. Additional risks inherent to virtual technology can include hacking or cyberattacks, Zoom bombing, and mining of personal information for commercial purposes<sup>10</sup>. Proactive safeguards against these risks are required if virtual access is provided to the public.

In addition, emerging artificial intelligence could enable observers to convincingly alter court footage to misrepresent the portrayal of, or information conveyed by, a hearing participant. For example, deepfakes – videos that depict a person doing or saying something they did not actually say or do – have materialized in many other settings. In the court context, they could lead to disinformation; violations of privacy, security and fair trial rights; disincentive to participate in hearings; further trauma for victims of crime; and loss of public confidence. These risks will continue to grow as technology continues to evolve faster than the legal and policy frameworks governing its use.

❖ ***Lack of control over information posted online***

The risks inherent to virtual technology and the loss of practical obscurity are compounded by an almost complete lack of control over information once it is posted online<sup>11</sup>: as such, disseminated court footage or online intimidation of hearing participants can have devastating, wide-ranging, and long-term consequences. The virtual environment allows people to share information instantly and anonymously with unlimited numbers of other people around the world, or to target specific groups. Removing information from the internet is difficult if not impossible, and the damage is immediate and often irreversible. Identifying perpetrators is often difficult, and taking action against them even more so, which erodes individual accountability for irresponsible or illegal actions. These various hurdles and their effects could also erode victims' and witnesses' confidence in the criminal justice system.

❖ ***Lack of data to understand the impacts of virtual access and related privacy and security breaches***

There is no known data collection happening anywhere in Canada on the use or impacts

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<sup>9</sup> In *R. v. O.S.*, 2022 ONSC 4128 (CanLII), in relation to murder and attempted murder charges, the Ontario Superior Court of Justice ordered a publication ban on a witness's identity to protect them from intimidation and retribution. This order was made in light of expert evidence that outlined risks of doxing by involuntary celibate ("incel") groups, since the accused was found to hold incel beliefs.

<sup>10</sup> *Ibid.* This Framework acknowledges and details these risks inherent to technology.

<sup>11</sup> *Ibid.*

of virtual access by media or public observers on hearing participants, or the frequency and nature of privacy and security breaches arising from virtual access. As such, it is difficult to assess the veritable impacts of virtual access on the ability and willingness of victims and witnesses to participate, on their right to protection against intimidation and retaliation, and on other fundamental values of our justice system that the open court principle seeks to uphold. And the inability to assess those impacts makes it difficult to develop legal and policy frameworks that effectively uphold the open court principle while protecting the rights of hearing participants.

Noted difficulties in collecting such data include the lack of

- relevant indicators in the courts' records management systems
- national consensus on such indicators
- a perceived operational need to collect this information
- consensus on which authorities in the criminal justice system should be responsible for collecting such information

#### **4.1.2 Key Needs Identified and Recommendations**

The future of open courts will depend on promoting in-person and virtual access to recognized media, empirically evaluating the relative benefits and risks of providing virtual access to the public, and developing proper frameworks to regulate virtual access – when such access is deemed appropriate – in ways that balance all the relevant rights and considerations<sup>12</sup>.

As a starting point, the Steering Committee and implementing partners to the recommendations in this report may wish to consider the ongoing experience of the Courts and Parliament of the United Kingdom (UK) on this topic. The UK has analyzed challenges and solutions and taken legislative and policy steps since 2022 to improve open courts in the virtual context while balancing privacy and security, court resources, administration of justice, and other relevant considerations, and has committed to monitoring progress on these fronts<sup>13</sup>.

##### **❖ *Consistent, countrywide, virtual access for media***

Across Canada, virtual access to hearings for recognized media is not consistently available and access procedures are not always communicated effectively: this impedes the media's ability to fulfill its role as gatekeeper of the open court principle.

Currently, media outlets across Canada are facing massive budget and staffing cuts,

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<sup>12</sup> In the same line of thought, the Judiciary of New England and Wales adopted a Practice Guidance in June 2022 on [Open Justice – Remote Observation of Hearings – New Powers](#) that recognizes the safety and privacy of any person involved in proceedings as a mandatory consideration in determining whether to give remote access to observers (paragraph 9). It acknowledges that remote access for reporters, legal commentators and academics is likely to promote public scrutiny and understanding of, and public confidence in, the court process (see paragraph 17). Comparatively, its approach to other remote observers is more nuanced (at paragraph 17) as being “desirable if they would be entitled in principle to have access to a courtroom in which the hearing was taking place, and giving them remote access is both operationally feasible and compatible with the interests of justice.” The Practice Guidance states (at paragraph 21) that “[o]pen justice has been and still can be achieved without remote access.”

<sup>13</sup> See the House of Commons Justice Committee, *Open justice: court reporting in the digital age: Government Response to the Committee's Fifth Report of Session 2022-23*, Seventh Special Report of Session 2022-23 (January 2023).

and journalists no longer have the luxury of spending hours in court in person, or of attending court in remote or out-of-jurisdiction locations that involve travel costs. This reality has led to decreased coverage of court proceedings by professional media, paired with increased commentary on social media that is often unchecked, one-sided or even biased, or presented out of context. As such, the public is exposed to information that is increasingly inaccurate, and potentially damaging to public confidence in the courts<sup>14</sup>.

Within this context, facilitating virtual access for recognized media should be a nationwide court priority to ensure the future of open courts. National consistency, clear communication, and collaboration with the media are key, and in some locations, investment in technology is required. Virtual access – in real time and across jurisdictions – represents a critical tool to ensure that recognized media can continue to provide meaningful coverage of court proceedings in a world of instant news, information overload, and frequent disinformation. Standardized access practices and clear communication of these practices would reduce access barriers for busy journalists.

- *Some promising practices identified in various jurisdictions:*
  - *media liaison committees that include judiciary and media representatives*
  - *designated communications officers or media liaison contacts*
  - *specific portals on court websites dedicated to the media, including relevant resources and contact information*
  
- An issue to monitor: The concept of “recognized media” might evolve as the technological and informational landscape continues to shift. Moving forward, there may be a need to assess whether the concept of “recognized media” should be expanded and, if so, how to ensure proper safeguards are in place to protect the privacy and security of hearing participants. While many courts currently limit “recognized media” to professional journalists employed by known media organizations, some have built in flexibility to assess other relevant factors that might broaden the scope of eligibility for media recognition<sup>15</sup>.

#### **Recommendation on Virtual Access 2 – For Endorsement**

- ✓ Develop a national framework to promote virtual access to hearings for recognized media observers that is consistent and accessible across the country

*Implementing partners: Judicial leaders (CJC/CCCJ), professional media/media lawyers associations, media liaison committees, communications officers/media contacts, court information technology specialists, departments responsible for court services*

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<sup>14</sup> The House of Commons Justice Committee in the United Kingdom highlighted similar challenges in *Open Justice: court reporting in the digital age*, Fifth Report of Session 2022-2023, and proposed solutions to improve the current framework.

<sup>15</sup> See, for example, the Territorial Court of Yukon’s Practice Direction on [Media Accreditation](#) and the Nunavut Court of Justice’s [Media Accreditation Policy](#).

❖ **Clear and consistent parameters of virtual access for public observers**

If virtual access is to be provided to public observers in hearings involving testimony by a victim or vulnerable witness, clear and consistent criteria and parameters are needed to ensure access does not interfere with the integrity of the process or the ability of a witness to testify, and does not jeopardize the privacy and security rights of hearing participants. Standardized policies and practice tools should be developed to assess risks and implement proactive safeguards that align with those risks. Authorities in the justice system responsible for implementing criteria and parameters of virtual access should be trained on any policies and tools developed.

- *Some promising practices:*
  - *Guidance of the Action Committee on Modernizing Court Operations on the topics of virtual access to hearings and virtual hearing platforms<sup>16</sup>*
  - *Practice Guidance of the Judiciary of England and Wales on Open Justice – Remote Observation of Hearings, which sets out relevant criteria to assess the appropriateness of providing remote access for observers*

**Recommendation on Virtual Access 3 – For Endorsement**

- ✓ Develop national criteria and parameters of virtual access for public observers to prevent unauthorized interference during a hearing and minimize privacy and security risks for hearing participants

*Implementing partners: Judicial leaders (CJC/CCCJ), court information technology specialists, departments responsible for court services, prosecution services, defence bar*

❖ **Data and research on the use of virtual access and its impacts on participation, privacy, and security**

High quality data and empirical research are needed to better understand the relative risks and benefits of virtual access, in order to guide future policy-making that adequately balances open courts with the privacy and security rights of victims and vulnerable witnesses. Major data gaps identified include the following:

- Assessing the relative impacts of virtual access for public observers on the ability or willingness of a victim or vulnerable witness to participate, for example, depending on the number of observers and whether the witness sees them
- Monitoring the prevalence, nature and outcomes of incidents involving a breach of privacy or security of a victim or vulnerable witness arising from virtual access to hearings, and any related criminal charges

Building upon the Canadian Judicial Council's Blueprint for the Security of Court

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<sup>16</sup> See the Action Committee's tip sheets on Virtual Access to Hearings: [Privacy, Security and Confidentiality Considerations](#), [Options and Implementation Scenarios](#), and [Challenges and Solutions in Trial Courts](#); and [Virtual Hearing Platforms: Functionalities and Settings for Participants and Observers](#).

Information<sup>17</sup>, which mandates courts to have protocols to report certain incidents tied to information security breaches, courts should establish protocols to report specific security incidents regarding virtual hearings and virtual access to hearings. Sharing data nationally would help to understand the nature and prevalence of such incidents and to improve strategies to prevent or mitigate risks and impacts.

#### **Recommendation on Virtual Access 4 – For Endorsement**

- ✓ Develop a standardized, multi-stakeholder protocol to report incidents involving a privacy or security breach related to virtual hearings or virtual access to hearings by media or public observers

*Implementing partners: Judicial leaders (CJC/CCCJ), Chief justices/Judges in individual courts, departments responsible for court services, police services, prosecution services*

#### **❖ Further study and monitoring of the broader impacts of social media on open courts, privacy and security**

Authorities in the criminal justice system are not formally monitoring social media activity to prevent and address potential interference with, or intimidation of, justice system participants. When such interference or intimidation occurs online, it could have drastic and long-term effects due to how fast and broadly information can spread.

Anecdotal evidence of court-related incidents and concerns expressed by those consulted raise questions as to whether the existing legislative and operational policy frameworks adequately protect victims, vulnerable witnesses and other hearing participants against privacy and security risks specific to the virtual environment. Relevant offences – namely, criminal harassment, uttering threats, intimidation, defamatory libel, obstructing justice, and related offences against the administration of justice – were originally enacted many years ago to address in-person conduct or physical safety. As such, they may not sufficiently address similar online conduct or psychological torment, or other emerging risks inherent to technology outlined in this report, which could have equally devastating impacts on a person’s ability or willingness to participate in proceedings or report crimes<sup>18</sup>.

The lack of available data on how victims and vulnerable witnesses have experienced the use of social media during criminal proceedings makes it difficult to assess this issue empirically. But any gaps in the legal or operational policy frameworks could potentially lead to underreporting, lack of investigation, or lack of prosecution of relevant incidents: this could discourage victims and others from coming forward and ultimately erode the very values that the open court principle seeks to uphold, including public confidence in the courts.

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<sup>17</sup> See the Canadian Judicial Council’s *Blueprint for the Security of Court Information, Sixth Edition* (2021), Policy 10: Incident Management and Reporting.

<sup>18</sup> Comparatively, certain other forms of cyberbullying have received legislative attention to fill such gaps. See, for example, the offence of non-consensual sharing of intimate images enacted in section 162.1 of the *Criminal Code*.



### **Recommendation on Virtual Access 5 – For Further Work or Referral to Other Relevant Bodies**

- ✓ Review the existing legislative and operational policy frameworks surrounding offences of criminal harassment, uttering threats, intimidation, defamatory libel, obstructing justice, and related offences against the administration of justice
  - To assess whether the privacy and safety of accused persons, victims and witnesses, and other justice system participants are adequately protected against risks specific to the virtual environment (e.g. social media exposure, cyberbullying)
  - To identify opportunities and relevant partners to
    - Improve and prioritize data collection on the prevalence and outcomes of these offences (e.g. complaints, charges), and their impacts on the participation of victims and other witnesses
    - Collect data on occurring conduct that is not covered by the current legislative or policy frameworks

### **Recommendation on Virtual Access 6 – For Further Work or Referral to Other Relevant Bodies**

- ✓ Support further research to empirically assess impacts of virtual access to hearings and of social media on the privacy and security of justice participants such as victims, witnesses, and accused persons, and on the fundamental values underlying the open court principle

#### **❖ *Dedicated and trained coordinators of virtual access***

If virtual access is to be provided to public observers in hearings involving testimony by a victim or vulnerable witness, there is a need to have virtual hearing coordinators who are specifically designated and trained for this purpose. Coordinating virtual access permissions should not be an add-on to the other essential tasks of clerks who oversee recordings or minutes of proceedings and swear in witnesses. While courts across Canada are facing unprecedented staffing challenges, adding crucial responsibilities to often undertrained and overwhelmed clerks can exacerbate workforce issues and create avoidable privacy and security risks for hearing participants.

Policies or protocols governing virtual access are also needed to properly train virtual hearing coordinators on their role: in other words, policy should precede and guide training efforts.

### **Recommendation on Virtual Access 7 – For Endorsement**

- ✓ Designate and train virtual hearing coordinators if providing virtual access to hearings for public observers

*Implementing partners: Departments responsible for court services*

## 4.2 On Virtual Testimony

### 4.2.1 Current Landscape and Challenges

*Key Issue: Availability and Use of Virtual Testimony for Adult Victims and Vulnerable Witnesses is Inconsistent across Canada*

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Although virtual testimony is legally available to victims and vulnerable witnesses in certain circumstances where it would be beneficial to their participation or safety, not all courts are equipped to offer virtual testimony, and the law is not applied consistently across the country as it relates to adult victims and witnesses<sup>19</sup>. As a result, they may not have equitable access and opportunity to participate in criminal hearings despite their legal rights.

To address this problem, there is a need to improve the technological landscape in the courts, review the applicable legal and policy framework, and collect and analyze data on the use and impacts of virtual testimony for adult victims and vulnerable witnesses.

#### *Legal Framework*

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The *Criminal Code* sets out various circumstances in which a victim or vulnerable witness may be authorized to testify virtually upon a prosecutor's application. For adult witnesses, most applications are subject to judicial discretion, and factors to be considered vary depending on the means and location of testimony.

In particular, section 486.2(2) allows for remote testimony outside a courtroom as a testimonial aid. As with other protection measures for witnesses, relevant factors to consider include whether the witness needs the order for their security or to protect them from intimidation or retaliation, as well as society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process. As such, this provision explicitly incorporates some key rights protected under the *Canadian Victims Bill of Rights*.

In addition, section 714.1 allows for a witness in Canada to testify by audioconference or videoconference<sup>20</sup>. Factors to consider include the accused's fair trial rights, as well as the location and personal circumstances of the witness, and the suitability of their location to give evidence. However, there is no explicit reference to the participation, security or protection of victims and witnesses, and courts are divided as to whether relevant factors listed under section 486.2(2) can be read into section 714.1. In principle, section 21 of the *Canadian Victims Bill of Rights* requires courts to interpret and apply *Criminal Code* provisions in a way that aligns with the protected rights of victims. But in practice, it is unclear to what extent these rights factor into applications to testify by audioconference or videoconference in any location other than a courthouse, and whether such rights extend to applications for vulnerable witnesses who are not victims

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<sup>19</sup> Since no major inconsistencies were noted regarding the application of virtual testimony for children, this section of the report focuses on adult victims and witnesses, for whom such inconsistencies occurred frequently.

<sup>20</sup> Witnesses outside of Canada are presumably authorized to testify by videoconference under section 714.2 of the *Criminal Code*.

of crime.

### *Practical Challenges*

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#### **❖ *Benefits and challenges vary regarding participation, privacy and security of victims and vulnerable witnesses – there is no one-size fits all***

Each victim or witness is unique, and their needs and preferences must be assessed to determine potential impacts of virtual testimony on privacy, security, and their ability to participate. What may be beneficial to one person can be detrimental to another, and a case-by-case analysis using a trauma-informed approach is key to upholding their participation and protection rights<sup>21</sup>.

Noted benefits of virtual testimony for some victims and vulnerable witnesses include

- reduced barriers to participation related to geographical distance, travel costs, professional or family obligations, or repeat adjournments that can cause victims and witnesses to disengage from the process
- decreased anxiety about testifying or crossing paths unintentionally with the accused
- reduced risk of the witness being followed, harassed or intimidated intentionally or inadvertently by others (e.g. family/friends of the accused) or being targeted for violence (e.g. in organized crime or human trafficking cases)

Noted challenges or limitations of virtual testimony for some victims and vulnerable witnesses include

- wanting to face the accused in person
- the need to testify in an unsecure location that might not offer adequate privacy or security when no secure location is available or accessible
- the lack of availability, reliability, or support for the use of, technology
- the relative ease of fleeing from one's testimony (e.g. disconnecting) compared with in-person attendance
- the potential of further trauma if the alleged crime occurred online (e.g. cyberbullying)
- a certain loss of human connection that occurs naturally in person
- lack of accessibility to post-testimony support and debriefs if testifying from home

Depending on the location and setup, the court's lack of direct oversight over the victim's physical surroundings could also jeopardize their security or the integrity of the court process unless appropriate mitigation measures are taken to protect the witness from interference, intimidation, or imminent physical harm, and to prevent improper access to materials or information (e.g., notes or search engines).

The location of virtual testimony significantly affects the level of privacy and security afforded, and operational safeguards should be tailored to the location to prevent any breaches. Currently, such safeguards are determined *ad hoc*, and could often be refined to minimize the risks of privacy and security breaches or of interference with testimony, especially in unsecure locations.

- Few privacy and security concerns were raised about victims and vulnerable witnesses testifying via closed circuit television (CCTV) from another room in the

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<sup>21</sup> See sections 9-14 of the *Canadian Victims Bill of Rights* on the protection and participation rights of victims of crime.

courthouse, or from another courthouse in a different locality, province or territory.

- Similarly, testifying in a secure, remote (and if needed, undisclosed) location such as a police station, a victim services office or a Child and Youth Advocacy Centre is generally considered safe and easy to control.
- Testifying from an unsecure location such as a home raises potentially significant privacy and security issues, as well as risks of interference with testimony. Risks vary depending on the type of witness and case, and on the safeguards and supports in place.

❖ ***Arrangements and supports for virtual testimony are often an ill-defined responsibility***

In many jurisdictions, the responsibilities of authorities in the criminal justice system for arranging and supporting virtual testimony have often evolved in an *ad hoc* fashion and remain ill-defined. Judges, court staff, police, prosecutors, and victim service providers often take on the task of supporting virtual testimony informally, and as feasible, in addition to their regular duties. As such, and despite best efforts, victims and vulnerable witnesses may not always receive consistent, timely and high-quality support, including information needed to make sure their views are considered in determining whether testimony should occur virtually. Unprecedented staff shortages and high turnover rates throughout the criminal justice system have added to this difficulty.

Coordinating logistical arrangements to support virtual testimony often occurs informally and at the last minute. This challenge is particularly prevalent when arranging for out-of-jurisdiction testimony.

❖ ***Inconsistent application of legal framework and insufficient policy framework governing the use of virtual testimony for adult victims and witnesses leads to inconsistent access and protection***

Both case law and consultations reveal a highly inconsistent application of *Criminal Code* provisions – namely sections 486.2(2) and 714.1 – that govern the use of virtual testimony for adult victims and vulnerable witnesses when it is subject to judicial discretion, and there is insufficient policy to fill in the lack of clarity. For example:

- Prosecutors often apply under both provisions, and in most jurisdictions do not have specific guidelines for applying for virtual testimony – this difficulty is compounded by lack of training and frequent turnover of prosecutors
- Case law is divided
  - o on the exact nature of the location(s) in which testimony can occur under either provision; and, particularly under section 714.1, differential impacts between secure and unsecure locations
  - o on whether the factors in one provision can be read into the other, notably participation and security rights of victims and witnesses that are not explicitly mentioned in section 714.1
  - o on the applicable evidentiary threshold under section 714.1, including whether an affidavit is required and whether a higher threshold applies if credibility is at

stake<sup>22</sup>

Not all courthouses are equipped to offer remote testimony onsite and, in some cases, there are no other secure locations from which a victim or witness might testify virtually. As such, depending on their location and the facilities available, some victims or witnesses may not get equitable access to virtual testimony given the lack of clarity in the legal framework and lack of clear policy to support its consistent application.

❖ ***Inadequate technology or setup in courtrooms and remote testimony facilities can impact credibility and procedural fairness***

Many consultation participants reported that the lack of proper technological equipment and bandwidth, or inadequate setup of technology in certain courtrooms, was a significant barrier to assessing the demeanour, credibility or needs of a victim or vulnerable witness who is testifying virtually. Depending on the situation, this can be detrimental to the wellbeing of the victim or witness, the rights of the accused and/or the decision-making of the court. Comparatively, those in well-equipped and well set-up courts reported much more positive experiences. In fact, many reported that their concerns about due process were significantly mitigated or even eliminated when technology was at its best, namely connectivity with no interruptions or delays, and the ability to see a witness on a large screen.

❖ ***Unequal availability of technology in Canadian courts impedes equitable access to justice and disproportionately impacts northern, remote and Indigenous communities***

Adequate technology to support virtual testimony is not consistently available throughout Canada. Courts in some locations are equipped with state-of-the-art videoconferencing technology, while others struggle to get a clear phone line with audio only.

The lack of adequate technology disproportionately affects many Indigenous, remote and northern communities, many of whom are served by circuit courts. This lack of access is compounded by the lack of brick and mortar facilities to support virtual testimony, and by difficulties in accessing courts in person due to distance, costs, lack of transportation, or severe weather. In addition, repeat adjournments often result in victims and witnesses who attend in person disengaging from the process.

❖ ***Lack of data on the use and impacts of virtual testimony impedes progress***

There is a lack of data on the use of virtual testimony by victims and vulnerable witnesses. As such, it is difficult to empirically assess the true impacts, both positive and negative, of virtual testimony on the participation, privacy and security rights of victims and vulnerable witnesses. And the inability to assess those impacts makes it difficult to develop legal and policy frameworks that effectively protect those rights while also upholding the fair trial rights of the accused.

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<sup>22</sup> Several courts have declined to follow the principle outlined in *R v. S.D.L.*, 2017 NSCA 58 that a higher threshold applies if credibility is at stake. Increasingly, courts are recognizing that credibility can adequately be assessed through virtual testimony, due at least in part to significant technological advances brought about by the pandemic. See, for example, *R. v. J.L.K.*, 2023 BCC 87, *R. v. Chocolate*, 2022, NWTSC 24, and *R. v. K.Z.*, 2021 ONCJ 321.

## 4.2.2 Key Needs Identified and Recommendations

### ❖ *A consistent regime governing virtual testimony of victims and witnesses*

A common understanding and consistent application of virtual testimony provisions is needed to ensure that victims and vulnerable witnesses have equitable access to justice and are able to participate in hearings safely and effectively, no matter their location. While flexibility is needed to decide matters on a case-by-case basis with regard to all relevant circumstances, including the accused's fair trial rights, it should be made clear that the participation and security rights of victims and witnesses also factor into the equation, as required by section 21 of the *Canadian Victims Bill of Rights*.

Our recommendation builds upon Recommendation 4 of the Steering Committee's *Report on the Use of Technology in the Criminal Justice System* (2013), which recognized the need for a standardized regime governing the appearance of witnesses by audio or videoconference based on overarching considerations of fairness, public confidence, and access to justice for the accused, victims and witnesses:

*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.*

While we are pleased to see that Bill C-75<sup>23</sup> and Bill S-4<sup>24</sup> have sought to facilitate the attendance of various hearing participants by audioconference or videoconference where appropriate, the passage of time has shown the need to further review and refine some of these amendments. This is not surprising, given how rapidly the technology landscape in criminal courts has been changing over the past few years.

#### **Recommendation on Virtual Testimony 8 – For Further Work or Referral to Other Relevant Bodies**

- ✓ Review the existing legislative and policy framework surrounding virtual testimony provisions for adult victims and vulnerable witnesses where applications are subject to judicial discretion (ss. 486.2(2) and 714.1 of the *Criminal Code*) to promote consistent application and protect relevant rights under the *Canadian Victim Bill of Rights* and consider whether a unified framework governing virtual testimony is desirable

<sup>23</sup> *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Act* received royal assent on June 21, 2019.

<sup>24</sup> *An Act to amend the Criminal Code and the Identification of Criminals Act and to make related amendments to other Acts (COVID-19 response and other measures)* received royal assent on December 15, 2022.

❖ ***Nationally endorsed technology standards for virtual courtrooms and remote testimony facilities***

The quality and setup of technology can be crucial to both the court's assessment of a witness who testifies virtually and procedural fairness. Developing and endorsing national standards for technology in virtual courtrooms will help to ensure that, moving forward, technology is rolled out effectively to achieve these objectives. Subjects for relevant standards might include bandwidth, screen size and placement, image resolution, camera placement, and view of the witness.

**Recommendation on Virtual Testimony 9 – For Endorsement**

- ✓ Develop a national benchmark for technological standards in virtual courtrooms and remote testimony facilities and incorporate these standards in all newly constructed or significantly renovated court and offsite testimony facilities

*Implementing partners: Judicial leaders (CJC/CCCJ), court information technology specialists, departments responsible for court services, police services, victim services*

❖ ***Improve technological infrastructure in northern, remote and Indigenous communities***

Improving the technological infrastructure in northern, remote and Indigenous communities and for circuit courts, in collaboration with affected Indigenous partners, is key to delivering accessible court services, and to facilitating virtual testimony when appropriate. For victims and vulnerable witnesses in those communities who often face hardship in attending court in person, the ability to testify virtually might be the only way for them to be heard by the court.

Our recommendation builds upon Recommendation 5 of the Final Report, *Reinventing Criminal Justice: The Fourteenth National Symposium* (2022), which recognized systemic issues with access to video and communications technology in northern, remote and fly-in communities, and the need for a real commitment to close these gaps.

**Recommendation on Virtual Testimony 10 – For Endorsement**

- ✓ Put out a national call to action to federal, provincial and territorial governments to work together, in collaboration with affected Indigenous partners, to improve technological infrastructure to deliver court services in northern, remote and Indigenous communities, and to find viable technological solutions for circuit courts, in order to bridge the technological divide and resulting inequities in access to justice

*Implementing partner: Steering Committee*

❖ ***National safeguards and risk assessment tools for virtual testimony in unsecure locations***

In some cases, testifying from an unsecure location such as a home may be the most or only viable option for a victim or vulnerable witness to be able to participate in a hearing, for example, if no secure location is available or accessible. In those circumstances, safeguards and risk assessment tools are needed to ensure that neither the privacy nor security of the witness, nor the integrity of their testimony, is compromised. Developing national tools will help to make practices more safe, consistent and effective.

**Recommendation on Virtual Testimony 11 – For Endorsement**

- ✓ Develop national safeguards and risk assessment tools for testifying virtually in an unsecure, remote location (e.g. private residence), when needed

*Implementing partners: Judicial leaders (CJC/CCCJ), departments responsible for court services, prosecution services, victim services, defence bar, Office of the Federal Ombudsperson for Victims of Crime*

❖ ***Data on the use and impacts of virtual testimony on participation, privacy, security and hearing outcomes***

High-quality data are needed to better track and understand the use and impacts of virtual testimony by victims and vulnerable witnesses, in order to optimize the use of virtual testimony in circumstances where it is beneficial. Major data gaps identified include the following:

- Prevalence, nature of circumstances, and outcomes of applications for victims or vulnerable witnesses under section 486.2(2) to testify in a remote room or under 714.1 to testify by audio or videoconference, and monitoring of evolving trends in Canada and other jurisdictions
- Qualitative research involving victims and vulnerable witnesses, and victim services, on their experiences with virtual testimony, including impacts on victims' and witnesses' privacy and safety, and their ability and willingness to testify

Collecting feedback directly from victims and vulnerable witnesses should be done in ways that minimize the risk of re-victimization. While formal collection of data is also needed, there are informal opportunities to integrate some feedback collection into existing support processes for victims and witnesses who testify virtually, for example as part of a Crown or victim service provider's debrief, and by consulting and collaborating with the Office of the Federal Ombudsperson for Victims of Crime for systemic issues that emerge.

➤ ***Some promising practices:***

- *Some government-embedded victim services have collected qualitative feedback informally from the victims they serve*
- *Some Child and Youth Advocacy Centres are using indicators to collect data on the use of virtual testimony in their facilities*



- *The Office of the Federal Ombudsperson for Victims of Crime may receive clients who share their experiences about the court process and can refer them to relevant authorities to be able to provide valuable information*

**Recommendation on Virtual Testimony 12 – For Endorsement**

- ✓ Identify opportunities and engage relevant partners to improve and prioritize data collection nationwide on the use, outcomes and impacts of virtual testimony for victims and vulnerable witnesses in criminal proceedings

*Implementing partners: Steering Committee, judicial leaders (CJC/CCCJ), departments responsible for court services, prosecution services, victim services, Office of the Federal Ombudsperson for Victims of Crime*

## APPENDIX A: SELECTED BIBLIOGRAPHY

### *Canadian Sources*

- Action Committee on Modernizing Court Operations, Tip Sheets:
  - [Virtual Access to Hearings: Privacy, Security and Confidentiality Considerations](#)
  - [Virtual Access to Hearings: Options and Implementation Scenarios](#)
  - [Virtual Access to Hearings: Challenges and Solutions in Trial Courts](#)
  - [Virtual Hearing Platforms: Functionalities and Settings for Participants and Observers](#)
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- House of Commons Justice Committee, Open justice: court reporting in the digital age: Government Response to the Committee’s Fifth Report of Session 2022-23, Seventh Special Report of Session 2022-23, January 2023

## **APPENDIX B: MEMBERS OF THE SUB-COMMITTEE AND ORGANIZATIONS CONSULTED**

**The following members and former members of the Sub-Committee, and their delegates, supported the work to develop this report:**

- Honourable Glenn Joyal, Chief Justice, Court of King's Bench of Manitoba (co-chair)
- Honourable Scott Hughes, Senior Associate Chief Judge, Court of Quebec (co-chair)
- Honourable Anne Krahn, Judge, Provincial Court of Manitoba (former Associate Chief Judge)
- Honourable Lise Maisonneuve, in her former capacity as Chief Justice, Ontario Court of Justice (former member)
- Honourable Carrie-Ann Downey, KC, in her former capacity as Chief Prosecutor, Ministry of Justice of Alberta (former member)
- Yan Paquette, Deputy Minister of Justice and Deputy Attorney General, Ministère de la Justice du Québec
- Howard Chow, Deputy Chief, Canadian Association of Chiefs of Police
- M<sup>e</sup> Lucie Joncas, Barreau du Québec

**Representatives of the following organizations were consulted in developing this report:**

- Canadian Council of Chief Judges (CCCJ)
- Action Committee on Modernizing Court Operations
- Court of King's Bench of Alberta
- Court of King's Bench of Manitoba
- Provincial Court of British Columbia
- Provincial Court of Manitoba
- Court of Quebec
- Heads of Court Administration
- Public Prosecution Service of Canada (PPSC)
- Manitoba Prosecution Service
- Royal Canadian Mounted Police (RCMP)
- Ontario Provincial Police (OPP)
- Vancouver Police Department (VPD)
- Federal-Provincial-Territorial (FPT) Working Group on Victims of Crime
- Federal Ombudsperson for Victims of Crime
- Department of Justice Canada
- Manitoba Justice
- Ministère de la Justice du Québec
- Nova Scotia Department of Justice
- Association of Legal Aid Lawyers – British Columbia
- Legal Aid Saskatchewan
- Legal Aid Ontario
- Nova Scotia Legal Aid
- Private Bar
- Canadian Media Lawyers Association (CMLA)

## APPENDIX C: SUMMARY OF SUB-COMMITTEE RECOMMENDATIONS

The Sub-Committee on the Open Court Principle recommends that the Steering Committee either endorse the following recommendations or consider them for future work or referral to other relevant bodies, as indicated.

### General Recommendation

1. Publish this report with its endorsed recommendations, and communicate it to relevant stakeholders and partners – for endorsement

*Implementing partner: Steering Committee*

### Recommendations on Virtual Access

2. Develop a national framework to promote virtual access to hearings for recognized media observers that is consistent and accessible across the country – for endorsement

*Implementing partners: Judicial leaders (CJC/CCCJ), professional media/media lawyers associations, media liaison committees, communications officers/media contacts, court information technology specialists, departments responsible for court services*

3. Develop national criteria and parameters of virtual access for public observers to prevent unauthorized interference during a hearing and minimize privacy and security risks for hearing participants – for endorsement

*Implementing partners: Judicial leaders (CJC/CCCJ), court information technology specialists, departments responsible for court services, prosecution services, defence bar*

4. Develop a standardized, multi-stakeholder protocol to report incidents involving a privacy or security breach related to virtual hearings or virtual access to hearings by media or public observers – for endorsement

*Implementing partners: Judicial leaders (CJC/CCCJ), Chief justices/Judges in individual courts, departments responsible for court services, police services, prosecution services*

5. Review the existing legislative and operational policy frameworks surrounding offences of criminal harassment, uttering threats, intimidation, defamatory libel, obstructing justice, and related offences against the administration of justice – for further work or referral to other relevant bodies
  - To assess whether the privacy and safety of accused persons, victims and witnesses, and other justice system participants are adequately protected against risks specific to the virtual environment (e.g. social media exposure, cyberbullying)
  - To identify opportunities and relevant partners to

- Improve and prioritize data collection on the prevalence and outcomes of these offences (e.g. complaints, charges), and their impacts on the participation of victims and other witnesses
  - Collect data on occurring conduct that is not covered by the current legislative or policy frameworks
6. Support further research to empirically assess impacts of virtual access to hearings and of social media on the privacy and security of justice participants such as victims, witnesses, and accused persons, and on the fundamental values underlying the open court principle – for further work or referral to other relevant bodies
  7. Designate and train virtual hearing coordinators if providing virtual access to hearings for public observers – for endorsement

*Implementing partners: Departments responsible for court services*

### Recommendations on Virtual Testimony

8. Review the existing legislative and policy framework surrounding virtual testimony provisions for adult victims and vulnerable witnesses where applications are subject to judicial discretion (ss. 486.2(2) and 714.1 of the *Criminal Code*) to promote consistent application and protect relevant rights under the *Canadian Victim Bill of Rights* and consider whether a unified framework governing virtual testimony is desirable – for further work or referral to other relevant bodies
9. Develop a national benchmark for technological standards in virtual courtrooms and remote testimony facilities and incorporate these standards in all newly constructed or significantly renovated court and offsite testimony facilities – for endorsement

*Implementing partners: Judicial leaders (CJC/CCCJ), court information technology specialists, departments responsible for court services, police services, victim services*

10. Put out a national call to action to federal, provincial and territorial governments to work together, in collaboration with affected Indigenous partners, to improve technological infrastructure to deliver court services in northern, remote and Indigenous communities, and to find viable technological solutions for circuit courts, in order to bridge the technological divide and resulting inequities in access to justice – for endorsement

*Implementing partner: Steering Committee*

11. Develop national safeguards and risk assessment tools for testifying virtually in an unsecure, remote location (e.g. private residence), when needed

*Implementing partners: Judicial leaders (CJC/CCCJ), departments responsible for court services, prosecution services, victim services, defence bar, Office of the Federal Ombudsperson for Victims of Crime*

12. Identify opportunities and engage relevant partners to improve and prioritize data collection nationwide on the use, outcomes and impacts of virtual testimony for victims and vulnerable witnesses in criminal proceedings

*Implementing partners: Steering Committee, judicial leaders (CJC/CCCJ), departments responsible for court services, prosecution services, victim services, Office of the Federal Ombudsperson for Victims of Crime*