April 3, 2023

VIA EMAIL

Rosemarie Juginovic
Senior Criminal Counsel
Office of the Chief Justice
Ontario Superior Court of Justice
Osgoode Hall
130 Queen Street West
Toronto, Ontario M5H 2N5

Dear Ms. Juginovic:

RE: Guidelines to Determine the Mode of Proceeding in Criminal, Civil, Family, and Small Claims Court

Thank you for your February 7, 2023, letter seeking The Advocates' Society's input on the Ontario Superior Court of Justice's Guidelines to Determine the Mode of Proceeding in Criminal, Civil, Family, and Small Claims Court (the "Guidelines").

The Advocates' Society, established in 1963, is a not-for-profit organization representing approximately 5,500 diverse lawyers and students across the country, including approximately 4,500 in Ontario—unified in their calling as advocates. As the leading national association of litigation counsel in Canada, The Advocates' Society and its members are dedicated to promoting a fair and accessible system of justice, excellence in advocacy, and a strong, independent, and courageous bar. A core part of our mission is to provide policymakers with the views of legal advocates on matters that affect access to justice, the administration of justice, the independence of the bar and the judiciary, the practice of law by advocates, and equity, diversity, inclusion, and reconciliation with Indigenous peoples in the justice system and legal profession.

I. The Advocates' Society's Report, *The Right to be Heard: The Future of Advocacy in Canada*

As you know, in 2020, The Advocates' Society struck a national Modern Advocacy Task Force to undertake extensive research, stakeholder consultation, analysis and deliberations regarding how court proceedings ought to be heard in Canada after the COVID-19 pandemic. The Modern Advocacy Task Force's Report, *The Right to be Heard: The Future of Advocacy in Canada* (the "Report", available in English and in French), was published in June 2021 and contains the product of The Advocates' Society's comprehensive work on this important issue. The Report's thoughtful recommendations balance a wide range of key factors, including technological advancements in the justice system, access to justice, the open court principle, the integrity of the court process, proportionality, the achievement of just outcomes, and public confidence in the administration of justice.[1]

[1] See especially Part IV of the Report ("The Way Forward: Key Observations and Task Force Recommendations"), pp. 89ff, which is attached to this letter for your convenient reference.

In particular, Part IV.3 of the Report contains a Model Framework for Determining the Mode of Hearing, which provides specific guidance on when a step in a proceeding should be heard in person, remotely, or in writing.

The Model Framework recommends that, as a general guideline, matters on consent should be dealt with in writing. The Model Framework recommends that courts and parties should embrace the efficiency and flexibility of video hearings for all routine administrative and unopposed hearings, and that a court should order that a step in a proceeding be conducted by a video hearing where the parties consent, unless there is a public interest in an in-person hearing that transcends the consent of the parties.

As a general guideline, the Model Framework recommends that a court should order an in-person hearing where the matter to be determined represents a significant step in the proceeding, and at least one of the parties is seeking such a hearing. "Significant steps" are described in the Report and include (but are not limited to) those:

a. where the outcome of the hearing may be an order or judgment that is legally or practically dispositive of a material issue in the case (e.g., a trial, application or interlocutory motion that might have the practical effect of ending the litigation);
b. where the order sought at the hearing may impact on the liberty or similar substantial interest of a litigant (e.g., a child protection matter or motion for contempt);
c. where the decision will require the court to understand and resolve complex factual and/or legal issues or an important point of law; and
d. where credibility is reasonably in issue and it is expected that *viva voce* evidence will play an important part in the determination of credibility.

The Model Framework's general guidelines may be departed from based on principles of proportionality, fairness, and efficiency. The following list of additional operative factors is included in the Model Framework for consideration by parties and the court in determining the mode of hearing:

a. the general principle that evidence and argument should be presented in open court;
b. the nature and complexity of the legal, factual, and/or credibility issues to be determined;
c. the relative impact on the parties, witnesses and/or counsel of attending in person or virtually, including in relation to accessibility, travel, access to reliable technology, timing and cost;
d. any concerns regarding the safety and security of the participants and/or the integrity of the proceeding;
e. whether a matter relates to an Indigenous person or group and/or Indigenous rights or interests, bearing in mind the principle of reconciliation;
f. access to justice considerations, particularly for members of communities that have been traditionally disadvantaged within the justice system; and
g. the importance of the matter to the public interest and administration of justice.

The process for determining the mode of hearing is intended to be efficient and brief.[2]

[2] Report, pp. 94-98.

The Advocates' Society was very pleased that the Ontario Superior Court of Justice's Guidelines, which came into effect on April 19, 2022, substantially align with the Report's recommendations.

With The Advocates' Society's Report in mind, and with the additional benefit of our members' practical experience with the Court's Guidelines over the past year, we offer the following comments for your consideration.

II. Overarching Comments on All Guidelines

1. The Guidelines Are Useful, but More Consistency and Predictability Are Needed

The Advocates' Society agrees that it is helpful for the Court to set out presumptive methods of attendance for proceedings in the Superior Court of Justice. The Guidelines provide a degree of predictability to the parties, while retaining flexibility for particular cases and circumstances. In addition, the Guidelines appropriately assign the onus of departing from the presumptive method of attendance to the party who believes a different method would be more suitable to the circumstances of the matter before the Court.

In order to maximize predictability for parties, The Advocates' Society recommends that:

- The Court work to diminish and (if possible) ultimately eliminate regional variation in presumptive methods of attendance;

- The Court promote consistency between and within regions regarding the process parties have to follow to depart from the presumptive method of attendance; and

- The Court provide more fulsome direction in the Guidelines on the specific factors it will consider when deciding whether to depart from the presumptive method of attendance. In this regard, The Advocates' Society has noted that decisions regarding method of attendance are often (but not always) made at case conferences and no reasons are issued. As such, there is a dearth of case law surrounding methods of attendance and it is unlikely that a body of jurisprudence will develop to help parties make reasonable decisions with respect to method of attendance and to help judges of the Court make consistent decisions on when to depart from the Guidelines.

2. Investments in Technology and Human Resources Are Needed to Support In-Person Proceedings

The Advocates' Society applauds the Court's rapid adoption of Justice Services Online and CaseLines during the pandemic. However, in The Advocates' Society's members' experience, electronic document management in hearings via CaseLines tends to work more smoothly in remote hearings than in-person hearings. As the presumptive mode of hearing for many matters remains in-person, The Advocates' Society recommends that investments in technology continue to be made to support the use of electronic documents in in-person hearings. The Advocates' Society further recommends that investments in human resources continue to be made to ensure court staff are proficient in managing courtroom technology.

If documents are submitted to the Court electronically, they should ideally be worked with electronically throughout the proceeding, whether a step in the proceeding occurs in person or via remote means. Parties should not be asked to print copies of materials already submitted to the Court electronically, as they are sometimes requested to do.

Courtrooms across the province should also be equipped with standard technology that permits electronic access to and sharing of documents via CaseLines, including reliable Wi-Fi, screens for counsel and judges, and displays. In addition, court staff should be consistently trained on the use of the standard technology. Currently, counsel are preparing multiple redundancies to ensure they retain access to documents during a hearing, including bringing their own portable Wi-Fi, printing hard copies of the documents, and downloading PDF copies of the documents back off of CaseLines for offline access. The need for these contingency plans increases the amount of time counsel need to spend preparing for the hearing, increasing costs for clients.

3. Promoting Reconciliation with Indigenous Peoples in the Guidelines

The Advocates' Society's Report states that

> Public confidence in the administration of justice in Canada requires an open, transparent and inclusive process that recognizes and validates oral traditions and encourages the engagement and participation of Indigenous peoples. For Indigenous litigants, determining the mode of hearing should be approached through the lens of reconciliation, which includes consideration of the cross-cultural impacts of the mode of hearing chosen and whether that decision will uphold or erode the confidence of an Indigenous litigant in the fairness and integrity of the justice system.[3]

As such, and as noted above, the Report's Model Framework specifies that an additional relevant factor to be considered in determining the mode of hearing is "whether a matter relates to an Indigenous person or group and/or Indigenous rights or interests, bearing in mind the principle of reconciliation".[4] In some cases, this factor may militate in favour of proceeding in person, either in a courtroom or community setting (for example, if an Elder is called as a witness to testify to a First Nation's oral history); in other cases, this factor may favour proceeding virtually (for example, if an Indigenous party to the proceeding is located in a remote region with access to adequate broadband and from which travel costs may be prohibitive).

The Advocates' Society believes that an explicit reference to such a factor ought to be included in Section A of the Criminal, Civil, and Family Court Guidelines ("Over-arching principles in the application of the presumptive guidelines"); and in Section C of the Small Claims Court Guidelines ("Requesting a different hearing method", in the list of principles that will guide judicial officers' decisions with respect to hearing methods).

4. Promoting the Accessibility of the Court by Means of the Guidelines and Other Publicly-Available Information

While much of society is cautiously emerging from the pandemic, it must be acknowledged that COVID-19 is still circulating amongst the Canadian population, including in Ontario, and the disease continues to pose a greater danger to some segments of the population than others (for example, individuals who have an immune deficiency or individuals who are pregnant).

While some measures have been taken to diminish the risk of transmission of COVID-19 amongst court participants at an in-person hearing, public information is lacking about what measures are in place in

[3] Report, pp. 92-93.
[4] Report, p. 96.

particular courthouses or courtrooms and/or what additional measures will be enforced by the presiding judge. As has been acknowledged throughout the pandemic, courthouses are essential places that individuals can be compelled to attend. The Advocates' Society recommends that the Court publish information on a centralized website about the measures that are in place in particular courthouses and courtrooms to diminish the risk of transmission of COVID-19. This information will assist parties in making informed decisions about whether or not to request a departure from the presumptive mode of hearing.

In addition, The Advocates' Society recommends that the Guidelines expressly provide that accessibility is a relevant factor in determining the mode of hearing, including whether a participant in the proceeding needs to be reasonably accommodated via a departure from the presumptive mode of hearing. We further recommend that procedures be put in place, perhaps via the office of the Accessibility Coordinator, so counsel in particular are not required to put the reason for their need for accommodation on the court record when requesting a departure from the presumptive mode of hearing on this basis.

5. In-Person Training Opportunities for Newer Counsel Must Remain a Priority

Advocates who have joined the profession since the beginning of the pandemic may have never had the opportunity to attend an in-person proceeding as counsel. The Advocates' Society recommends that the Court remain open to proceeding in-person, particularly on more routine or minor matters that may otherwise proceed virtually, in order to ensure the professional development of the next generation of advocates. Efficiency ought not to override in-person training opportunities for newer members of our profession.

6. Virtual Proceedings Must Respect the Open Court Principle

While not directly related to the content of the Guidelines, The Advocates' Society takes this consultation as an opportunity to provide the Court with some observations about the openness of virtual court proceedings. The Advocates' Society's Report observed that

> For justice to be done, it must be seen to be done, both by the parties and the public. This means that we must have an open, transparent and fair court system, which allows for the participation and engagement of those who are involved in and affected by it. The open court principle is fundamental to public confidence in the administration of justice.[5]

The Advocates' Society members have reported that virtual court proceedings in the Superior Court of Justice are not as open to the public as in-person court proceedings. This discrepancy is likely a result of the speed with which the Court had to shift to virtual proceedings at the beginning of the pandemic. However, as the Court is now establishing permanent, forward-looking policies, this is a good opportunity to ensure that virtual proceedings respect the open court principle to the same degree as in-person proceedings.

The Advocates' Society submits that where a proceeding would have been open to the public before the pandemic via public access to the courthouse, it ought to be equally open to the public when happening virtually. The Court should provide the public with links to all virtual proceedings that are not *in camera* or subject to other exclusionary orders. The Advocates' Society recommends that the Ontario Superior Court of Justice and Ontario Court of Justice Daily Court Lists website (https://www.ontariocourtdates.ca)

[5] Report, p. 91.

provide the link to virtual proceedings (perhaps under the 'Room' or 'Appearance Type' categories). If a matter is expected to attract a substantial public audience, we recommend that the link provided be to a Zoom webinar or YouTube livestream rather than a Zoom meeting to avoid disruptions to the proceedings.

The Advocates' Society submits that if, as envisioned by the Guidelines, important matters before the Court are going to continue to proceed virtually, then those matters must be subject to the same public scrutiny as similar matters proceeding in person.

7. Virtual Proceedings Present an Opportunity to Make Full Use of the Court's Judicial Complement

As the Court has recognized by piloting virtual trial sittings for civil, non-jury cases in the Southwest Region, virtual proceedings present an opportunity to mobilize the Court's judicial complement across the province to support busier or more backlogged regions. The Advocates' Society encourages the Court to continue to explore this potential.

III. Guidelines To Determine Mode of Proceeding in Civil Court

The Advocates' Society's comments on the Guidelines to Determine the Mode of Proceeding in Civil Court are limited to the presumption for examinations for discovery.

The current presumption in the Guidelines for examinations for discovery in civil matters is that "[a]ll examinations for discovery will be held in person, unless the parties consent to it being conducted virtually or unless the Court specifies a different mode of proceeding."

In the vast majority of cases, counsel agree on the mode of conducting examinations for discovery. As such, a presumptive guideline for examinations for discovery is likely to operate only in the minority of cases where counsel cannot come to consensus. Any presumption has the potential to work mischief in these cases: there is the possibility that a presumption will be wielded tactically by a party or that an economically disadvantaged party will be forced to go to court for an order to depart from the presumption. Some of The Advocates' Society's members are in favour of an in-person presumption for examinations for discovery, while others favour a virtual presumption, and still others favour leaving the mode of examination to the election of the examining party.

Regardless of whether a presumption is included in the Court's revised Guidelines, and what that presumption is, The Advocates' Society recommends that the Guidelines include a list of factors the Court will consider when parties cannot agree on the mode of hearing for an examination for discovery and the matter comes to the Court for decision. The Advocates' Society recommends that these factors should include (but not be limited to):

- Financial hardship to a party;
- Location(s) of the witness and counsel (i.e. if travel would be required, a virtual examination may be preferred, while if all counsel and witness(es) are local, an in-person examination may be preferred);
- The complexity of the matter;
- The number of documents to be put to the person to be examined;
- Whether there is a power imbalance between the parties;

- Whether a party has legitimate concerns regarding the ability and/or willingness of the person to be examined to respect the applicable rules while being examined remotely;
- Relevant cultural practices or norms.

IV. Guidelines to Determine Mode of Proceeding in Family Court

The Advocates' Society believes that the presumption for family case conferences can be converted from in-person to virtual.[6] Holding these more administrative conferences virtually may reduce costs for litigants by mitigating the need to travel long distances, find child care solutions, or take time off work to physically attend court.[7] Exceptions to this presumption may need to be made for litigants without access to the requisite technology at home.

The Advocates' Society is aware that some members of the Bar strongly believe that more family law matters ought to presumptively proceed virtually. However, The Advocates' Society is of the view that the current Guidelines overall strike the right balance between virtual and in-person proceedings.

However, The Advocates' Society encourages the Court to be particularly flexible in its approach to the mode of hearing family law matters when faced with a request to depart from the presumption. While, as set out above in section II.1 of this letter, we recommend that the Court take a consistent approach to departing from the presumptive mode of hearing both procedurally and substantively, we recommend the Court remain sensitive to the particular circumstances of the parties and the proceeding in family matters. By way of example, in some cases, issues of family violence may militate in favour of proceeding virtually so that the parties are not required to be in the same room; in other cases of family violence, such as if the parties do not yet live in separate homes, proceeding in person may be preferable. This is simply an example of the way that specific factors to consider in determining whether to depart from the presumptive mode of hearing may tend in different directions depending on the circumstances of each case.

V. Guidelines to Determine Mode of Proceeding in Criminal Court

The Advocates' Society is of the view that the Guidelines to Determine the Mode of Proceeding in Criminal Court are working well.

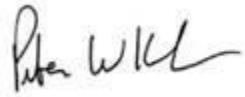
VI. Guidelines to Determine Hearing Method in the Small Claims Court

The current presumption in the Small Claims Court Guidelines for settlement conferences is that "All settlement conferences will be held remotely, unless the Court specifies otherwise." The Guidelines define a remote hearing as a "telephone or videoconference". There is inconsistency among regions as to whether settlement conferences will generally be heard by telephone or video. The Advocates' Society suggests that remote hearings in the Small Claims Court make use of videoconferencing technology where all parties have reasonable access to the technology and the attendance is not purely administrative.

[6] The current presumption, in section C.I.4 reads: "All (i) case conferences, (ii) settlement conferences, and (iii) trial management conferences with a settlement focus, will be held in person unless a different method of attendance is approved by the Court in advance."
[7] Report, p. 47.

Thank you for the opportunity to make these submissions. We would be pleased to answer any questions you may have.

Yours sincerely,



Peter W. Kryworuk
President

Attachments:

1. *The Right to be Heard: The Future of Advocacy in Canada*, Extract of Part IV ("The Way Forward: Key Observations and Task Force Recommendations")

CC: Vicki White, Chief Executive Officer, The Advocates' Society

The Advocates Society's Modes of Hearing Task Force:

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The Advocates' Society

The Right to be Heard: The Future of Advocacy in Canada

Final Report of the Modern Advocacy Task Force

June 2021

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PART IV
The Way Forward: Key Observations and Task Force Recommendations

IV.1 The Work of the Task Force

The work undertaken by the Modern Advocacy Task Force has been extensive. The focus of the Task Force Report is on the place and role of oral advocacy in our justice system, bearing in mind the overarching interests in the efficient and effective administration of justice and the crucial task of promoting and maintaining public confidence in the justice system. The Report reflects a wide-ranging review of the historical foundations, jurisprudence, disciplines, perspectives, and stakeholder experiences relating to oral advocacy.

This Part identifies the key observations and core principles distilled from the work of the Task Force which form the basis for recommendations that:

- recognize the advances in practices and technology that permit justice system participants (judges, parties, counsel and the public) to conduct video or telephone hearings where such hearings are appropriate;
- incorporate the reflections, perspectives and experiences described to the Task Force by a range of stakeholders in the Canadian justice system;
- reflect the historical, jurisprudential and cultural foundations of the Canadian justice system;
- reinforce the importance of continued public confidence in the integrity of and access to the justice system, including with a commitment to reconciliation and consideration of Indigenous perspectives;
- consider the approaches taken prior to, during, and in anticipation of the end of the COVID pandemic in Canada and select other jurisdictions; and
- provide a principled and predictable framework for determining the most appropriate mode of hearing for steps in a proceeding.

The COVID pandemic has necessitated significantly expanded use of technology in the court system. The recommendations of the Task Force focus on the post-COVID environment, when remote modes of hearing are no longer a matter of necessity.

IV.2 Key Observations and Principles Informing the Task Force's Recommendations

The following are the key observations distilled from the work of the Task Force:

1. The goal of the Task Force was to identify what was learned from the pandemic experience to ensure that the beneficial aspects of new and modified procedures can be carried forward with the objective of improving processes, outcomes and access to justice. At the same time, the work has underscored the need to identify and preserve those aspects of the pre-pandemic practices that are essential to maintaining and enhancing public confidence in the legal system and to improving and delivering meaningful access to justice.

2. During the COVID pandemic, by necessity a wide range of in-person court hearings transitioned to video court hearings, from case conferences to trials to appeals. These adaptations have provided an opportunity to assess the benefits and drawbacks of such technology as a substitute for traditional in-person court appearances. The use of video technology has been found to be generally convenient and efficient, and has quickly become the preferred way of addressing routine steps within a court proceeding. Given the ease of use of video technology, telephone hearings have become a less preferred mode of hearing, except where necessary due to technology challenges or for the most routine matters.

3. The pandemic also forced courts to make provision for online service and filing and organization of case materials. While this advancement is not limited to any particular mode of hearing, it is a *de facto* precondition to the conduct of video hearings.

4. The Task Force heard that the administration of justice continues to suffer from a scarcity of resources at all levels. Court systems across the country continue to struggle to provide necessary support, including training, staff and technology resources. Other participants in the justice system have varying access to technology. For example, access to computers and internet availability and stability are not a reality for significant portions of the Canadian population, for reasons which include economic disparity and geographic broadband limitations. It cannot be assumed that litigants and members of the public have the resources to access the justice system remotely in a stable and safe way that ensures the continued integrity of the proceeding. It also cannot be assumed that video hearings are faster or more efficient (particularly when addressing substantive matters or where there is a large volume of evidence), as the hearing time remains the same (at best).

5. While recognizing the benefits of video hearings, there remains a widespread recognition of the value of an in-person oral hearing for significant steps in a proceeding. The opportunity to engage in person with the court, the other parties, witnesses and the public meets a fundamental need for human interaction in respect of what is typically a

significant event for the litigants and others affected by the hearing.

6. Oral advocacy – by which we mean the "live" presentation of evidence and argument, whether conducted in-person or remotely – continues to be an essential and irreplaceable feature of our system of justice that enables the positions of the parties to be presented most effectively, equips judges and other decision-makers to arrive at fully reasoned and just outcomes, and reinforces the critical experience for litigants of witnessing the process ("seeing justice be done") and having confidence that their positions and arguments have been heard and considered.

7. That said, for matters involving a significant step in the proceeding (as described in the model Framework below), in-person oral hearings remain the preferable mode of hearing to ensure the integrity of evidence and to achieve just outcomes. Hearings for unopposed matters and matters of an administrative nature are generally suitably conducted by an alternative to an in-person hearing.

8. Four overarching principles were repeatedly identified and emphasized throughout the work of the Task Force. In assessing the appropriate mode of hearing, these key principles should guide the parties and form the basis for the court's determination:

   I. The Open Court Principle

   II. The Imperative of Access to Justice

   III. The Integrity of the Court Process

   IV. The Principle of Proportionality

I. The Open Court Principle

For justice to be done, it must be seen to be done, both by the parties and the public. This means that we must have an open, transparent and fair court system, which allows for the participation and engagement of those who are involved in and affected by it. The open court principle is fundamental to public confidence in the administration of justice. The presentation of evidence and oral argument in open court has been a fundamental tenet of the Canadian justice system since its inception, for sound reasons. As the TAS President states in his Foreword to this Report, what happens in the crucible of the actual courtroom is a uniquely human endeavour that cannot be easily supplanted by technology without a cost.

The traditional perspective of courts, counsel and litigants in this country is rooted in Anglo-Canadian practices, infused with the civil law tradition in the province of Québec, developed over centuries. Even today, the adversary trial calls on advocates to use logic and reason, persuasion through credibility, and an appeal to emotion in the pursuit of justice. Indigenous perspectives, through an understanding of oral histories and oral traditions,

teach us about the richness and complexity of oral communications that are critical to the process of seeking justice. Ensuring that the system accommodates oral histories for Indigenous litigants is not only essential to the project of reconciliation, but its incorporation will strengthen the legal system more generally.

The research on learning in educational and legal settings demonstrates that oral presentation facilitates a deeper understanding and knowledge of the subject matter. The results of the Task Force's jurisdictional scan and the stakeholder consultations provide further support for the idea that the existing presumption of an oral hearing for all material matters contributes in important ways to maintaining the integrity of the justice system, particularly as it relates to the presentation of evidence, but more broadly in relation to all aspects of oral, and in-person, court proceedings. Thus the "gold standard" of adjudication – whereby courts consider oral testimony of witnesses and, where appropriate, both written and oral argument – is firmly grounded in our history, our practices, and empirical evidence.

The pandemic has also shown us that the open court principle may be enhanced through remote technology by allowing the public to observe hearings without attending a physical courtroom. This benefit can be provided whether the hearing is in-person or remote.

II. The Imperative of Access to Justice

As the Supreme Court of Canada reminds us, "[e]nsuring access to justice is the greatest challenge to the rule of law in Canada today."[394] Technological advances made during the pandemic have demonstrated that there are many efficiencies and benefits to remote hearings which could operate to address some of the access to justice concerns that have plagued the system in recent years. For example, timeliness is a factor in access to justice, and there are efficiency gains where litigants and advocates are not required to travel to attend physical courtrooms for hours on end for routine or consent matters.

How does oral advocacy advance access to justice? By providing high quality legal outcomes and ensuring that the *process* of justice allows for informed and meaningful participation of those who are affected. The opportunity to observe the judge and how he or she controls the courtroom and shows respect for the parties, counsel, witnesses and the public; the reaction of parties, counsel, witnesses and the public to a compelling portion of oral testimony; the "feel" of a courtroom shifting from inclining to the position of one party to the opposite party as the argument unfolds; the way in which the judge delivers a ruling – these are crucial elements in the delivery of justice that is not only done, but is seen to be done.

Public confidence in the administration of justice in Canada requires an open, transparent and inclusive process that recognizes and validates oral traditions and encourages the engagement and participation of Indigenous peoples. For Indigenous litigants, determining the mode of hearing should be approached through the lens of reconciliation, which includes consideration of the cross-cultural impacts of the mode of hearing chosen and

whether that decision will uphold or erode the confidence of an Indigenous litigant in the fairness and integrity of the justice system.

The Task Force recognizes that for the majority of litigants, outcomes are not the product of a judgment after trial, but through negotiated resolution. The Task Force heard that when court proceedings are not conducted in person, there are fewer opportunities for informal discussions amongst counsel, including with respect to potential resolution, narrowing of issues in dispute, and procedural matters. There are also fewer opportunities for self-represented litigants to obtain assistance and informal guidance from counsel, court staff and judges. These challenges are particularly acute where matters are decided only in writing, leaving self-represented litigants effectively unable to address important interests in the absence of interplay with the judge.

If our justice system is to evolve to reduce the frequency of in-person oral hearings, significant changes will be required, the experience of the pandemic notwithstanding. The stakeholder consultations confirmed that vulnerable and self-represented litigants often lack not only the requisite technology but also the ability to access and use it effectively. The need to ensure that the necessary technology (network access and devices) is reasonably available to individuals and communities who wish to access the proceedings must be a condition precedent to any material changes to the presumptive mode of hearing. The system is clearly not there yet.

III. The Integrity of the Court Process

The integrity of the court process was identified as the core consideration by many in assessing the continued importance of in-person hearings. This includes the ability of the court to control its process, ensure the integrity of the admission of evidence, observe the demeanour of witnesses, assess the credibility of witness testimony, and fully engage with counsel on the legal issues.

Many expressed concern that the absence of in-person hearings could or did diminish the integrity of the judicial process. We now have sufficient experience to appreciate that conducting court proceedings through remote or video platforms gives rise to a number of concerns about the security and integrity of parties, witnesses and proceedings. The court's ability to control the surroundings and conduct of a party appearing by video, for example, is significantly reduced. Anecdotal evidence suggests that witnesses do not demonstrate the same respect for the process and understanding of the importance of truthfulness and decorum in a remote setting. Judges and counsel frequently refer to "Zoom fatigue" and the need for more breaks or shorter hearing days to offset the challenges of remote participation. A team from Stanford University recently drew the same conclusion: video platforms are fatiguing and impose a much higher "cognitive load" on participants.[395] Further empirical research is needed to determine the impact on justice system participants of the

particular circumstances under which hearings are conducted.

Additional challenges include the need to develop legal or technical means to prevent the inappropriate use of remote hearing technology (unauthorized recordings, screenshots, photographs, "Zoom bombing", or any other disruption of a hearing; inappropriate publishing of court material and events; offensive commentary on social media; and online intimidation and trolling). Such activities may contribute to diminishing the public's respect for and confidence in the administration of justice.

The solemnity, decorum and gravity of the court process unfolding in a traditional court setting contribute greatly to the integrity of the administration of justice. The diminished ability of courts to protect the integrity of the court process when conducted through video or other technology-assisted settings was identified by the Task Force as a critical challenge. Concerns were expressed about the potential erosion of respect for the court as an institution when proceedings are conducted remotely. Stakeholders also raised the impact on collegiality, learning, and mentoring opportunities when courthouse gatherings are reduced or eliminated.

IV. The Principle of Proportionality

In a system with many competing priorities and limited resources, access to justice is inextricably tied to the principle of proportionality. The Task Force was reminded often of the need to apply the principle of proportionality when assessing the delivery of access to justice in an open, transparent and fair manner. It follows that the mode of hearing adopted must be proportional to the significance of the matters in issue, bearing in mind that video hearings are not necessarily shorter or less costly. To achieve timely and affordable access to the justice system, we must be open to applying proportionality principles to ensure that resources are appropriately allocated. At the same time, proportionality principles do not override the importance of access to high quality adjudication and the importance of the open court principle.

Assessing whether the mode of hearing is proportional to the matter in issue must be left to the judicial decision-makers where the parties do not agree. The exercise of this discretion should be reasonably predictable and may be informed by guidelines which can be displaced based on relevant considerations. In most cases, the determination as to the mode of hearing should be relatively straightforward and ought not to be allowed to become yet another extensively contested step in a proceeding.

IV.3 Recommendations: Model Framework for Determining the Mode of Hearing

The Task Force recommends the following model Framework which is intended to provide

guidance to parties, counsel and the courts when considering the mode of hearing. The Task Force notes that as parties, counsel and courts grapple with determinations as to modes of hearing, case law and generally accepted practice will develop, and approaches and expectations will adjust. The Task Force encourages counsel to give serious consideration to the appropriate mode of hearing and act reasonably in assessing the circumstances and interests of the parties. Counsel should strive to reach agreement wherever possible so as to avoid an additional procedural step to determine the mode of hearing.

The Framework is generally structured so as to be suitable for adaptation, where appropriate, into rules or practice directions or other guidance from courts, and to work alongside of the existing frameworks across various types of matters addressed by courts in all Canadian jurisdictions.[396] The Task Force also recognizes that the applicability of some of the guidelines will differ as between courts of first instance and appellate courts.

Modes of Hearing

1. In this Framework, modes of hearing are:

    a. In writing;

    b. By telephone;

    c. By videoconference;

    d. By in-person hearing in a physical courtroom;

    e. A combination of some or all of the above.

Guidelines and Factors to be Considered

2. As a general guideline, matters on consent should be dealt with in writing.

3. Courts and parties should embrace the efficiency and flexibility of video hearings for all routine administrative and unopposed hearings. As a general guideline, a court should order that a step in a proceeding be conducted by a video hearing where the parties consent, unless there is a public interest in an in-person hearing that transcends the consent of the parties.

4. A court should not order a written hearing over the objection of one of the parties except for matters traditionally addressed in writing (e.g., costs, motions to settle the form of an order, or leave to appeal).

5. As a general guideline, a court should order an in-person hearing where the matter to be determined represents a significant step in the proceeding, and at least one of the parties is

seeking such a hearing.[397] The definition of what constitutes a "significant step in a proceeding" will vary from case to case. It may include matters of substantive fact and law as well as important procedural steps within a proceeding.

Significant steps include (but are not limited to) those:

a. where the outcome of the hearing may be an order or judgment that is legally or practically dispositive of a material issue in the case (e.g., a trial, application or interlocutory motion that might have the practical effect of ending the litigation);

b. where the order sought at the hearing may impact on the liberty or similar substantial interest of a litigant (e.g., a child protection matter or motion for contempt);

c. where the decision will require the court to understand and resolve complex factual and/or legal issues or an important point of law; and

d. where credibility is reasonably in issue and it is expected that *viva voce* evidence will play an important part in the determination of credibility.

6. Proportionality, fairness and efficiency are appropriate considerations in determining whether to depart from the guidelines set out above.

7. In addition to the guidelines set out above, when determining the mode of hearing other relevant factors include:

a. the general principle that evidence and argument should be presented in open court;[398]

b. the nature and complexity of the legal, factual, and/or credibility issues to be determined;

c. the relative impact on the parties, witnesses and/or counsel of attending in person or virtually, including in relation to accessibility, travel, access to reliable technology, timing and cost;

d. any concerns regarding the safety and security of the participants and/or the integrity of the proceeding;

e. whether a matter relates to an Indigenous person or group and/or Indigenous rights or interests, bearing in mind principle of reconciliation;

f. access to justice considerations, particularly for members of communities that have been traditionally disadvantaged within the justice system; and

g. the importance of the matter to the public interest and administration of justice.

Procedure for Determining the Mode of Hearing

8. A party initiating a particular step in a proceeding will specify a proposed mode of hearing for that step in the initiating notice, applying the guidelines set out above.

9. If a responding party disagrees with the initiating party's proposed mode of hearing, the responding party is required promptly to indicate its objection in writing.

10. If the responding party does not object, the proposed mode of hearing will typically be ordered. The court always retains the authority to require an in-person hearing notwithstanding the parties' agreement to proceed by video or in writing.

11. Where there is disagreement regarding the mode of hearing, the court will determine the mode of hearing after receiving written and/or oral submissions as the court may direct. The disposition of the dispute regarding the mode of hearing should be determined by the court in an efficient fashion.[399]

Cost Consequences

12. The court may make an order of costs following disposition of the hearing if the court determines that a party unreasonably opposed a mode of hearing for tactical or other inappropriate reasons.

Best Practices for Remote Hearings

13. Where hearings and other litigation procedures are conducted other than in-person, appropriate steps must be taken to ensure the integrity of the court process. The Advocates' Society's "Best Practices for Remote Hearings"[400] sets out procedures and protections applicable to remote proceedings and should be incorporated into rules or guidance for remote hearings.

Out of Court Examinations and Other Proceedings

14. The guidelines set out above apply, with appropriate modifications, to out of court examinations such as examinations for discovery and cross-examinations.

15. Where one party wishes to proceed with an examination in person, that should be the mode of examination. Where a party objects to proceeding in person, the court may determine the mode of examination having regard to the guidelines and factors set out above, with appropriate modifications.

16. The determination, whether by consent or court ruling, of the mode of an out of court examination shall not affect the determination regarding the mode of hearing for the proceeding itself.

IV.4 Recommendations Regarding Further Action

The Task Force heard loud and clear from stakeholders across the country: the administration of justice in Canada faces significant challenges. As noted in the Introduction, the mandate of the Task Force was to examine the role of oral advocacy in the justice system – only one piece of a much larger puzzle. The Task Force echoes the concerns expressed by stakeholders, joins in the call for a thorough evaluation of the system across the country, and adds its voice to the call for greater resources to be allocated to the administration of justice in Canada.

While the mandate of the MATF did not allow for the background work required to identify and formulate all aspects of further actions required for reform of the justice system in Canada, stakeholder input into the work of the Task Force consistently supported the following broad policy recommendations.

Expansion of Technology in the Justice System

1. Electronic service and filing and organization of case materials for use in court should be a permanent feature of the Canadian court system.[401] This includes making all materials filed with the court available online to the public without fee and in fully searchable format, with appropriate protections where there are sealing, confidentiality or protective orders,[402] and with due consideration to privacy issues.

2. Where access to and reliability of technology varies, including by region and by participant in the system,[403] court administration services should make accommodations and provide access to technology.

3. It is imperative that governments prioritize providing court systems with the resources necessary to continue to modernize the Canadian justice system. This includes training and appropriate equipment for judges, court staff and publicly-supported lawyers. The allocation of resources is an essential precondition to the effective use of technology in the courts and to ensuring access to justice for those participants in the justice system who lack access to technology.[404]

4. Changes to the justice system based on the expansion of the use of technology should be subject to regular review[405] and consideration of further refinements.

Review of Justice System Requirements

5. Quite apart from additional resources required to enable to permanent expansion of technology use in the court system, the administration of justice continues to suffer from a scarcity of resources at all levels across the country. The importance of the justice system to Canadian society is not reflected in the allocation of resources to its operation, and that needs to be addressed by government.

6. Legal aid funding has been continuously reduced. We are at a stage where legal aid is only consistently available across the country for serious criminal matters, and at amounts that are so low as to make it economically unfeasible for most lawyers to take on legal aid mandates. For most people in Canada, involvement with the justice system is a seminal event in their lives; it should not be acceptable that they have to proceed without adequate (or any) legal representation because there is such limited funding available for people of modest means.

7. Alternative means of resolution of litigated (overwhelmingly civil) disputes are being used across the country, ranging from private mediation and arbitration (unavailable to all but the best-resourced litigants), mandatory mediation through court systems, online dispute resolution systems such as the online Civil Resolution Tribunal in British Columbia, and others. Principles of proportionality, fairness and efficiency mandate further examination and potential expansion of publicly-funded alternatives,[406] including assessments of the relative quality of outcomes through different means of dispute resolution.

8. There appears to be no comprehensive collection of data with respect to court systems and outcomes, including numbers of cases handled, timelines, assessment of outcomes, resources required, etc. This is a significant gap: there is effectively a universal belief amongst judges, counsel and other stakeholders that the administration of and access to justice must be improved, but a lack of data to evaluate and support long overdue changes.[407]

A Final Word

The administration of justice is truly fundamental to Canadian values – clearly it is worthy of committed, focused and timely study and review.[408] The need for reform of the justice system in Canada has been forcefully and repeatedly expressed. There is a clear opportunity to take the lessons learned from experience with the adaptations required by the COVID pandemic and build on them to improve how justice is administered in Canada.