

## Virtual court operations in Saskatchewan

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Despite the availability of virtual technology, it remains impossible in many Canadian courts to file court documents online, or hold video hearings. This article argues that Canadian court systems face two options during the COVID-19 pandemic:

1. First, resign themselves to pause the vast majority of civil matters indefinitely, risking the loss of public confidence, and lack of justice, which could result;<sup>1</sup>
2. Alternatively, use this time to make swift investments in e-filing systems, and video technology, to allow virtual operations to continue as normal.

The rule of law is not something that society can suspend indefinitely. In an era in which many people conduct their lives online, the legal profession should embrace virtual court processes to maintain public access to court services.

### **Saskatchewan courts and the COVID-19 pandemic:**

By mid March of 2020, the COVID-19 pandemic had caused unprecedented disruption to courts across the world. Here in Saskatchewan, the Court of Queen's Bench made clear the following:

1. Effective 12:01 a.m. Friday, March 20, 2020, regular operations of the Saskatchewan Court of Queen's Bench were suspended;
2. Until further notice, only urgent and emergency matters will be heard by the Court; and
3. Non-urgent matters were adjourned without a specific return date.

This swift closure was fully justified by public health, and the Court acted wisely in moving so quickly.

However, without the ability to conduct operations virtually, many Queen's Bench Chambers applications will come to a halt. While perhaps not "urgent", many proceedings still remain important to the parties involved, and applications will need eventually to be heard. The eventual backlog that this will cause is concerning, if nothing is done in the interim.

Most Canadian courts are primarily paper-based, and will struggle to conduct operations without brick and mortar courtrooms. A recent National Post article on this topic was written by Ontario lawyer Kathryn Marshall, entitled *Maybe COVID-19 is what it will take to modernize Canada's antiquated courts*. The article observed as follows:

[The Canadian judicial system] is so woefully unprepared to deal with the present realities that operations have almost ground to a complete halt. Practically every province and territory has suspended most of its court functions.

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For a system that even in the best of days is riddled with lengthy delays, the current court suspension is going to cause a dreaded backlog that is almost unimaginable

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<sup>1</sup> The author is most familiar with civil litigation, and this article focuses on that area of judicial resolution.

The current lockdown provides an excellent opportunity to change this reality. Given the technology readily available, it is eminently possible that all Saskatchewan courts could soon accept evidence and hear submissions in virtual form.

This article outlines some tangible steps on how this could be done.

### **What have other judicial systems done?**

Before offering specific suggestions, it is worthwhile to realize that many courts have already implemented virtual hearings. Take but the following examples:

#### **1. Australia**

Following the pandemic's rise, in the Australian state of Victoria, (which includes the City of Melbourne) Supreme Court Chief Justice Anne Ferguson announced plans for e-courts. She said "in both the criminal and civil courts, we are rapidly moving to a position where appearances will be managed through the electronic and digital environment".<sup>2</sup> Chief Justice Ferguson noted that "not all courts have the technical capability yet, but considerable work is underway to build that as soon as possible."

#### **2. India**

Some Indian courts have begun to carry out proceedings via video conferencing, a new experience for many advocates. When the court closure was announced, the lawyers arguing in listed matters were simply provided instructions, and required to join the video conference from their homes or offices.

All the counsel were connected to the judges via a link provided to them by the court. After an initial video hearing, the following review was offered by one advocate:

It was a very enriching experience and I think it is going to be the order of the day for the future. What was amazing was that there was absolutely no hitch or any break and the 45 minutes long hearing went on absolutely smoothly.

...

**Hearing through Video conferencing can be much more relaxing than the the Courtroom... What I would advise the lawyers is to be calm and patient and let the other person finish his conversation and then begin.**

#### **3. United Kingdom**

The Lord Chief Justice of England and Wales announced as early as March 17, 2020, that COVID-19 will impact the operation of all courts. He spoke of an urgent need to increase the use of telephone and video technology immediately.

The United Kingdom is bringing in emergency legislation, *The Coronavirus Bill (2020)*, to expand the use of the video and audio link to variety of different proceedings.<sup>3</sup> The United

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<sup>2</sup> <https://www.itnews.com.au/news/victoria-races-to-scale-up-virtual-courts-amid-coronavirus-outbreak-539625>

<sup>3</sup> <https://www.barandbench.com/columns/litigation-columns/time-for-india-to-embrace-virtual-courts>

Kingdom government said this initiative was designed to give “judges more options for avoiding adjournments and keeping business moving through the courts”:

The measures will enable a wider range of proceedings to be carried out by video, so that courts can continue to function and remain open to the public, without the need for participants to attend in person. This will give judges more options for avoiding adjournments and keeping business moving through the courts to help reduce delays in the administration of justice and alleviate the impact on families, victims, witnesses and defendants.<sup>4</sup>

#### **4. The Saskatchewan Court of Appeal**

Here at home, the Saskatchewan Court of Appeal announced that normal operations would continue, through hearings occurring by video conference:

- (a) Filing can be conducted electronically. Documents can be delivered to the Court of Appeal Registry via eCourt or by regular mail, email or fax. For documents delivered via the eCourt system, automatic notification is sent to the filing party when the document is approved for filing or rejected;
- (b) The Court of Appeal would move to allow argument by video. All parties, save the clerk, will appear by video. The technology used will permit all involved to appear on screen.
- (c) As Mr. Chief Justice Richards explained “What we’re doing hasn’t changed, the volume of what we are doing hasn’t really changed, but how we are doing it has changed. And that change in the how is made possible because of the technology we’ve got.”<sup>5</sup>

#### **Practical steps to implement virtual hearings in the Court of Queen’s Bench:**

As shown above, the pandemic has not stopped many other courts from transitioning to virtual functioning.

While full virtual trials may be some ways off, there is so much that can be done in the interim to allow other civil matters to function. This includes:

1. Allow electronic filing of documents;
2. Allow virtual appearances for:
  - (a) Chambers matters (Chambers matters comprise the vast majority of interactions, that any given lawsuit may have with the Court of Queen’s Bench);
  - (b) Pre-trial conferences;
  - (c) Taxation of costs;
  - (d) Passing of executor accounts.

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<sup>4</sup> <https://www.gov.uk/government/publications/coronavirus-bill-what-it-will-do/what-the-coronavirus-bill-will-do>

<sup>5</sup> <https://leaderpost.com/news/saskatchewan/court-of-appeal-uses-technology-to-continue-hearings/>

In terms of tangible steps to consider or adopt, this article suggests the below:

**1. Service of documents**

- (a) All Saskatchewan civil litigants, or their counsel, should be required to immediately list an email address for future service. For example, a plaintiff should not be permitted to issue a statement of claim, without providing an email address for future service. The same should be true of any party filing a Notice of Withdrawal;

**2. Filing of documents**

- (a) Documents could be filed electronically via an eCourt system, similar to that used by the Saskatchewan Court of Appeal. Automatic notification would be sent to the filing party when a given document is approved for filing, or rejected;
- (b) An addition innovation, however, might be to allow access for the counsel to log on and view all documents on a specific court file. Then, all parties could see the same court file, at all times, and be certain of what was on said file;
- (c) Similarly, the justice assigned to Chambers for a given week, could simply log on to the eCourt file. This would presumably assist in allowing remote judicial working;
- (d) The benefits of an eCourt file would remain after the pandemic has abated:
  - (i) There are costs and inefficiencies in producing, transporting, and storing large quantities of paper;
  - (ii) Even if in-court hearings someday resume, the need to attend at court with massive pleadings binders might be reduced. One could imagine counsel eventually bringing laptops or tablets to the podium, instead of physical binders.

**3. Video presentation of argument**

- (a) To permit social distancing, virtual argument would become the norm for the immediate future.
- (b) To implement this, video cameras and screens would be placed in each court chamber, or in a Justice's office;
- (c) All lawyers or parties would need to obtain computers equipped with cameras, which are very common;
- (d) For a given civil Chambers day, all participants could be given a link to a real-time list of matters for that Chambers day. The link could highlight which specific matter was being argued, at a given moment. This could give a rough approximation of how much time a counsel had, before expecting their matter to be reached on the list;
- (e) Consideration could be given to the type of video software which would accommodate the video conferencing for Chambers argument. One imagines a software which could link to the eCourt file. Whomever was speaking – the Justice, or counsel – would have the ability to click between pages of affidavits or briefs, with

the selected pages then appearing in front of all parties, allowing all parties to immediately view the same document.

**Other considerations:**

It is hoped that the current suspension of the court will offer time to reflect on early adoption of some of the virtual infrastructure in all Saskatchewan courthouses.

It is entirely understandable that not all courts are immediately able to pivot readily to virtual operation. It is also recognized that some hurdles involved in implementing virtual processes will include the below:

1. Implementation of e-filing portals, and video technology, will require time, money and training, for already hard-working courts, often short of their complete complement of judges;
2. Physical infrastructure changes may be required in some courthouses, as to increase Internet connectivity and Wi-Fi;
3. The financial resources needed to fully implement virtual hearings will require government allocation;
4. Eventually, a revision of certain Queen's Bench Rules will be required

However, the courts and profession are equal to the challenge. Moreover, sheer necessity is an underlying reality. In a free society, the normal functioning of civil courts cannot be suspended indefinitely.

**Conclusion:**

To conclude, while social distancing was a valid reason for closing the court, social distancing need not force it to remain closed indefinitely.

As shown by many other countries, virtual operations are no longer a matter of science fiction, but already a reality. As the aforementioned National Post article observed:

Maybe this terrible pandemic will finally be the impetus we needed to modernize the justice system. The delays and unnecessary expense to litigants caused by a system that hobbles along on long-retired technology and ways of doing things shouldn't be acceptable. There can be no access to justice when that access depends on technology that hasn't been adopted and embraced with open arms.

Society should try to generate positive outcomes out of this current crisis. This present period offers an exciting opportunity to build a more modern and accessible justice system. With the help of the court and the legal profession as a whole, we can all improve how justice is delivered to the public.