

Exploring the Impact of Virtual Court Proceedings on Historically Marginalized Individuals and Communities in Nova Scotia: What We Heard

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Project Scope

Videoconferencing and teleconferencing, also referred to as “virtual” technology, have enabled court proceedings globally to continue during the COVID-19 pandemic. This development comes with benefits and challenges for court users, counsel and the community justice organizations who support them. As the use of virtual court is likely to continue, understanding these impacts is essential.

The All Courts Virtual Court Committee (ACVCC) was created in 2020 to oversee the launch of fully virtual court proceedings in Nova Scotia. As part of their work, the judicial members of the committee felt it was important to explore the impact of virtual court on historically marginalized individuals and communities. The committee commissioned three law students — Enniael Stair, Emily Stapleton and Olivia Feschuk — from [Pro Bono Dalhousie](#) at the Schulich School of Law to assist. Pro Bono Dalhousie has operated continuously at the university since its inception in 2000, and is among one of the first Pro Bono student programs founded at Canadian law schools.

For the purposes of this work, “historically marginalized” refers to persons who identify as a member of a community that has been systemically excluded from full participation in social, economic, and political life due to unequal treatment and a lack of access to rights, resources, and opportunities. Virtual court refers to court proceedings conducted by videoconferencing, teleconferencing or a combination of these technologies.

This work specifically sought out the experiences of Nova Scotians who identified as Indigenous, African Nova Scotian, an individual of other racial or ethnic backgrounds, an immigrant, refugee or new Canadian, 2SLGBTQQIA+, living with a mental illness and/or physical disability, experiencing issues with substance abuse, or experiencing homelessness and/or poverty.

Methods

Two standardized surveys were developed: one for community leaders, including counsel, and one for court users. Thirty-six individuals from 24 community justice organizations were interviewed. Thirty-four indicated they were involved in assisting court users with virtual court appearances since the beginning of the pandemic. Six court users were also interviewed. Of those six, two self-identified as Indigenous, one as 2SLGBTQQIA+, four as living with mental illness, two were experiencing issues with substance abuse, and one was experiencing homelessness. All six court users reported having a lawyer at some point during their court process.

The judicial members of the ACVCC and nine judicial assistants were also interviewed for this project. The judicial assistants interviewed work across Nova Scotia, including in the Domestic Violence Court Program, Provincial Court in Halifax, and the Supreme Court of Nova Scotia (both the General and Family Divisions) in Bridgewater, Sydney, and Halifax.

Methodological Limitations

There were two main limitations related to the methods of this work. First, despite the request of all lawyers and community leaders to provide suggestions and referrals to court users to interview, few court users ultimately participated in interviews.

Second, most people interviewed for this project either work or live in urban centers, presenting a potential skew in the data collected. Further research would be required to better understand what court users in rural communities want and need from virtual court proceedings.

It is also worth noting that through these interviews, the Nova Scotia Court of Appeal was not made aware of any issues for members of historically marginalized communities participating in virtual appeal or Chambers proceedings. Many participants in the Court of Appeal have been represented by counsel and self-represented litigants have been accommodated in person. Thus, the feedback in this overview document focuses primarily on the trial courts in Nova Scotia.

Assistance for Court Users

The community leaders who were interviewed offered various types of assistance to court users during the pandemic, including access to a telephone, computer or other mobile device; access to a reliable Internet connection; IT support before or during court; and assistance with child care or other family members. Other less frequent types of support for virtual court included:

- Encouraging court users to create their own email accounts, if possible
- Helping court users to create their own email accounts, if possible
- Helping court users to conduct test calls from their homes or meeting spaces
- Providing community members with a physical space in which to attend virtual court
- Coordinating with HRM libraries to provide court users with computers and private rooms in which to attend virtual court
- Helping to navigate the virtual court system generally

Editor's Note: This document provides an overview of the feedback and experiences of survey participants that relates specifically to the impact of virtual court on historically marginalized individuals. Feedback outside the scope of the project was not included in this overview. Thank you to all the participants who took the time to share their experiences for this project.

Advantages of Virtual Proceedings

Affordable Access

Virtual court proceedings remove the need for transportation. That means court users and other participants do not have to navigate traffic and parking concerns, or alternatively, they do not have to navigate bus schedules and routes. They also do not have to pay for transportation costs, such as gas, bus tickets or taxi fares. Virtual court proceedings allow some individuals without reliable transportation to attend court more easily. This is especially true for Indigenous court users who live in First Nations communities with few public transportation options.

As well, virtual court proceedings often require less time for participants. Not having to physically attend court cuts down on transportation time and can help when a user has parenting or other family responsibilities, as they may not need to pay for child care. These advantages are especially beneficial when the court appearance itself is short. Virtual court proceedings can also make it easier for court users to fit court appearances into their schedule. For example, a person may not have to take a day off work and lose out on their pay.

Less Expensive

Decreased travel time helps reduce costs. If lawyers spend less time traveling to and from court, this reduces their time spent on a file, which reduces costs to their clients. Further, this can help improve access to justice, as these lawyers can use that time to help serve more clients. This is particularly impactful for legal aid lawyers.

Decreased Anxiety

Virtual court proceedings are often less stressful and anxiety-inducing than attending in-person court proceedings. Some participants who were interviewed also reported that virtual court proceedings can be less intimidating than attending court in person.

Increased Safety

Virtual court appearances can increase safety for court participants. Some courthouses are set up in a way that accused individuals have to pass through public areas on their way to the courtroom. This has the potential for confrontations to occur. Virtual court proceedings can help reduce those risks.

Accessibility

Individuals with certain types of physical challenges, including elderly individuals, can more easily participate in virtual court proceedings from their home. In some instances, virtual court proceedings can also improve audibility. Some older courtrooms in the province are particularly

difficult to hear in, even with handheld devices to increase audibility. Hearing matters virtually allows participants to adjust the volume of the proceedings to tailor to their auditory needs.

Disadvantages of Virtual Proceedings

Access to Technology

Access to technology can be a significant challenge for some marginalized individuals, especially those representing themselves. They may not have access to telephones or computers, or if they do, they may not be able to afford minutes to call into court. Others may not have access to a stable internet connection for videoconferencing.

Further to this, for court users from marginalized groups, limited access to hardware or technology can mean missed court appearances and breaching release conditions. Breach charges can further criminalize marginalized individuals, simply because they did not have the same access to resources as others.

Access to technology was a particular concern for people experiencing homelessness or poverty, as well as Indigenous people living in First Nations communities. Individuals living in shelters who have no access to a phone, or who may have had their cell phone stolen, have no way to know when their court appearance is and no means of contacting their lawyer or being contacted themselves. Likewise, court users who do not have access to personal email or voicemail are difficult to contact to share information about a virtual court appearance.

Technological Literacy

Even in situations where individuals have the necessary resources to access virtual court, some court users do not understand how to use the technology. For individuals who experience these difficulties, virtual court proceedings made it harder to get into the “courtroom” compared to in-person proceedings.

Decreased Efficiency

Virtual court proceedings can decrease efficiency. Participants are given a specific time to call in, but must make themselves available for an indeterminate amount of time before their matter is dealt with. Some court participants also shared concerns about the consequences of connectivity issues. Matters are often adjourned if someone has internet problems. That can prolong the court process for marginalized individuals.

Receiving information in virtual court proceedings can also be a challenge. Service providers like probation and victim services often receive information about files second-hand from court users if they are not directly involved in the virtual court proceeding. These delays can also affect the lawyers’ ability to review information with their clients before they meet with service providers.

Communication with Counsel

Virtual court proceedings can make communication between lawyers and their clients more difficult, especially during court. Clients are not able to ask what is happening, preventing them from engaging fully in the proceedings. Counsel reported that the practice of meeting with their clients in person prior to the proceedings is also not possible with virtual court. Clients often used this opportunity to discuss what was going to happen and what to expect. This was reported to be an even bigger issue in rural areas.

Accountability

Some participants expressed concerns about the perceived lack of accountability with virtual court proceedings. Court users may be less likely to remember when their appearances are and may forget to call into court. Participants explained that this is because virtual court appearances are often not perceived as important or significant as an in-person appearance. The formality and seriousness of the courtroom setting for in-person proceedings can actually improve participants' understanding and trust in the justice system.

Comprehension Issues

Virtual court proceedings can present comprehension challenges. With multiple people calling into court at the same time, it can be difficult to determine who is talking. In addition, court participants often join the line and cause disruptions if they do not mute their telephone. These constant interruptions can make it challenging to follow what is happening in court. Additionally, court participants, including counsel, are less likely to know when to speak or if someone is speaking to them.

For all these reasons, court users can easily misunderstand instructions or leave a virtual court appearance unsure of what is expected of them. During in-person proceedings, court support workers and other staff can help litigants understand what is happening, especially if someone does not have a lawyer. That assistance is often lost with virtual court.

Translation Issues

Virtual court proceedings can impose further barriers for people who speak English as a second language or who do not speak English at all. Access to translators during virtual court proceedings was cited as an issue. Even when a translator is available, it is often difficult for them to keep track of who they are supposed to be translating for in the multitude of voices on the telephone.

Privacy

There can be privacy concerns with virtual court proceedings. Court users may live in shared residences that make it difficult to find a space to attend virtual court proceedings or meetings with their lawyers.

Emotional Toll

Survey respondents indicated that one of the most significant challenges with virtual court proceedings was the lack of support available to court users. Many court users are left to navigate the court process alone. Many community leaders who would typically accompany people to court are not able to do so if they are not given the call-in information or the link for the virtual appearance.

Survey respondents also indicated that virtual court proceedings sometimes increase the stress involved with court appearances. There is often apprehension about using the technology and skepticism about whether it will work.

Survey respondents also noted that some court users were uncomfortable speaking over a webcam for video proceedings, especially when there were many cases on the docket and several other parties in the virtual courtroom.

Human Interaction

Court users are often expected to speak about the most vulnerable parts of their lives in court. When virtual court proceedings are conducted by telephone in particular, court users do not get to see the individuals making decisions that affect their lives. Further to that, communication is not merely about speech. Non-verbal cues are also crucial for effective communication, and those cues can be lost in virtual court proceedings.

Identity Issues

Some participants reported instances where they were repeatedly misgendered during virtual court proceedings, particularly when the proceedings were conducted by telephone. Proceedings conducted by teleconference can also make it difficult to know a court user's racial and cultural identity.

Skin Tone

Participants in virtual court proceedings should be aware that video is known to neutralize skin tone. A side effect of this is that it can be difficult for someone's features (depending on skin tone) to be seen on the screen. Having sufficient background lighting can help address this issue.

Bail Hearings

Individuals interviewed reported that virtual bail hearings can make it more difficult to speak to individuals in custody to develop bail plans that address their specific needs. Further to this, virtual bail hearings can make it difficult to communicate with sureties, as those people are not there in person.

Habeas Corpus Applications

Some participants shared concerns about conducting *habeas corpus* applications by video. They noted that *habeas corpus* means to “show the body” or “bring the body to court” but this is not physically possible with virtual court proceedings. There can also be a significant power imbalance with holding these hearings virtually. The individual making the application is forced to speak about the unfair treatment they are allegedly experiencing in custody from the place where that treatment is allegedly happening. It is significantly more challenging for the applicants to bring this type of application when the proceeding is virtual.

Open Courts Principle

Participants expressed concerns about maintaining the openness of the courts when matters are heard virtually. Telephone and video appearances can be more difficult to access, as call-in information and video links are not always readily available to the public.

The open courts principle is a fundamental part of the justice system and helps maintain confidence in the administration of justice. By this standard, any court that would be open to the public to observe the proceedings in pre-COVID times should remain open even if the court moves to a virtual format.

Conclusion

The COVID-19 pandemic, and the resulting adaptations undertaken by the Nova Scotia Courts, have demonstrated that the justice system is capable of quickly adapting to meet the needs of society. Although virtual court proceedings were instrumental in keeping the justice system operating during a public health crisis, careful thought must be taken when considering the long-term adoption of virtual court proceedings. It is crucial for decision-makers to consider which subsets of the population virtual court best serves. It is also vital for decision-makers to bear in mind that satisfying the majority could still be to the detriment of individuals from historically marginalized communities.

In assessing when a matter should be heard virtually, the court, through the presiding judge, should consider the type of proceeding, the length of the proceeding, the individual litigants’ specific circumstances, including their ability to access and adequately use technology, the preferences of the litigants, and what type of proceeding best maintains the integrity of the administration of justice in each circumstance.

Further Reading on the Impact of Virtual Court Proceedings

Additional research was conducted through this study's period into perspectives and reports from other jurisdictions, both interprovincially and internationally. Now two years into the pandemic, there is a wealth of information online with worldwide perspectives of virtual courts. As such, this list of resources is not comprehensive but instead a summary of highlighted sources reviewed or considered for this project. Notably, two Canadian databases already exist online, which have compiled up-to-date resources regarding virtual court proceedings.

Queen's University "COVID and the Courts"

<https://conflictanalytics.queenslaw.ca/covid-and-the-courts>

This database is updated with responses and changes made by courts across the country in response to COVID-19 and provides links to relevant releases and procedures. It also has a short section providing links to similar information from other jurisdictions.

Council of Canadian Administrative Tribunals, "COVID-19 Resource Repository"

<https://www.ccat-ctac.org/covid-19-resource-repository/>

This database holds many relevant articles and reports on the subject, both from Canadian and international perspectives.

Reports

The Canadian Bar Association, "No Turning Back: CBA Task Force Report on Justice Issues Arising from COVID-19"

https://www.cba.org/CBAMediaLibrary/cba_na/PDFs/Publications%20And%20Resources/2021/CBATaskForce.pdf

Action Committee on Court Operations in Response to COVID-19, "Examining the Disproportionate Impact of the COVID-19 Pandemic on Access to Justice for Marginalized Individuals"

<https://www.fja-cmf.gc.ca/COVID-19/Justice-for-Marginalized-Individuals-An-Overview-Access-a-la-justice-pour-les-personnes-marginalisees-vue-densemble-eng.html>

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<https://www.thelawyersdaily.ca/articles/19174/post-covid-courts-could-see-less-oral-advocacy-more-paper-based-and-remote-adjudication-scc-s-wagner>

In the Media

Law in the time of COVID: How the pandemic radically reoriented Ontario's justice system (CBC News)

<https://www.cbc.ca/news/canada/ottawa/legal-system-ontario-covid-19-pandemic-1.6278927>

Access to justice still a problem as some Ontario family courts return to in-person hearings (CBC News)

<https://www.cbc.ca/news/canada/london/ontario-family-court-pandemic-1.6397469>

Maybe COVID-19 is what it will take to modernize Canada's antiquated courts (National Post)

<https://nationalpost.com/opinion/opinion-maybe-covid-19-is-what-it-will-take-to-modernize-canadas-antiquated-courts>

Journal Articles

Naik: Technology will improve justice for some in the COVID-19 world – but not for all (Ottawa Citizen)

<https://ottawacitizen.com/opinion/naik-technology-will-improve-justice-for-some-in-the-covid-19-world-but-not-for-all>

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https://www.lexisnexis.co.uk/research-and-reports/bar/digital-courts-during-covid19-italy-edition.html?utm_source=content&utm_medium=FOL&utm_campaign=the-future-of-virtual-justice-is-there-still-a-place-for-brick-mortar-courts

https://www.thelawyersdaily.ca/articles/21391/techniques-for-making-video-trials-fair?article_related_content=1

https://www.cba.org/CBAMediaLibrary/cba_na/PDFs/Publications%20And%20Resources/2021/CBATaskForce.pdf

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The Court System in a Time of Crisis: COVID- 19 and Issues in Court Administration, (2020) 57 Osgoode Hall LJ 869 - 904

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Sossin, Lorne and Yetnikoff, Zimra, "I Can See Clearly Now: Videoconference Hearings and the Legal Limit on how Tribunals Allocate Resources" *Windsor Yearbook of Access to Justice* 25.2 (2007): 247-272.

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