Virtual disputes: Best practices and benefits

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The rapid shift to remote court appearances is a prime example of how COVID-19 continues to disrupt the traditional delivery of legal services. While social distancing measures have resulted in limited access to courts across Canada since March, some matters continue to be heard using remote technology.

As an early adopter in planning for COVID-related disruptions, BLG advocates have outlined some best practices to help guide clients through virtual proceedings as well as the benefits to continued use of technology in dispute resolution even after in-person restrictions are lifted.

Canadian courts, changes in operation and virtual dispute options

Virtual disputes is an umbrella term, but we are using it as short-hand for the use of telephone, video and other technology to facilitate or aid dispute resolution processes.

Canadian courts remain open, but the impact to operations have been significant and many courts are only hearing urgent or consent matters. With the volume of hearings dramatically reduced, any matters now proceeding are doing so (a) by telephone or video conferencing, (b) in writing, or (c) a combination of the two by requiring more comprehensive written submissions followed by a brief telephone or video conference only to address questions arising.

Court responses differ by province and by court, but we are seeing virtual initiatives undertaken across Canada as courts grapple with the backlog created by the postponement of in-person hearings.

It is important to note that most court proceedings are traditionally open to the public, and that documents filed in court proceedings are generally publically available. As a result, the security concerns recently raised in the media (and elsewhere) regarding virtual platforms are generally not applicable to court proceedings. Indeed, some courts are specifically choosing to make live streams of their hearings available on YouTube so that members of the public may actively watch the proceedings.

Associated with court proceedings are out-of-court examinations of witnesses, held under oath and before a court reporter to obtain the evidence of the other party (sometimes referred to as examinations for discovery or questioning). Many court reporters are offering the option of video-based examinations so that these matters may proceed without requiring the witness, examiner, and court reporter to be physically in the same space.

Mediation

Mediation is a private negotiation between parties to a dispute that is facilitated by a neutral third party, referred to as a mediator. The mediator may be a lawyer or former judge, or another experienced businessperson or professional that is suited to facilitate resolution between the parties. Unlike a court or arbitrator, the mediator has no power to end the dispute by imposing a resolution.

Many private mediators have taken steps to conduct virtual mediations during the current pandemic. Unlike a court hearing, mediations do raise concerns about the security of the platform used. Parties will want to ensure that any discussions remain confidential and that underlying documents (which are not publically available) are protected from dissemination.

Parties and their counsel should consider and discuss cybersecurity issues with their mediator in advance of exchanging materials and holding the mediation. Certain adjustments from “normal” practice may be needed depending on the sensitivity of the dispute. The mediator’s retainer agreement may need to reflect these considerations.

While some disputes are suited to be done in person, other emotionally charged disputes may benefit from a virtual mediation, where in-person interactions would hinder settlement discussions. In some in-person mediations, the parties sit apart for so long that a virtual mediation may be preferable to one proceeding in-person.

Arbitration

Arbitration must be agreed to by the parties, either by contractual arrangement in advance or once a dispute arises. In the absence of consent to arbitrate by all parties, a dispute must be litigated in the courts.

Arbitrations may be conducted under already established procedural rules which may be modified by the parties (and the arbitrator), or may be bespoke to the dispute. While some arbitrations resemble private litigation, innovations in practice and procedure have meant that arbitrations can be designed to be faster, more flexible, and less expensive than traditional in-court litigation.

Several arbitrators are advertising that they are willing to conduct arbitrations using telephone and video conferencing technology. As with mediation, security concerns should be addressed and can be incorporated into the procedure of the arbitration itself and into the retainer agreement of the arbitrator.

Tips for a successful virtual dispute experience

There are several key considerations and best practices to ensure a successful virtual experience. We identify our top five:

1. Adopt appropriate security protocols.

a. If security concerns are paramount, be sure to consider the following when picking a virtual platform and determining any procedures to adopt during the meeting/hearing: (a) where data is hosted (in cases where location matters); (b) the ability to record proceedings; (c) access rights to any "break-out" rooms where privileged information may be discussed; (d) the cybersecurity of the parties and the court/arbitrator/mediator regarding the sharing, handling, and storage of the underlying materials. Detailed communication amongst all participants on such underlying security protocols can build consensus and confidence about the virtual process itself.
b. Third party service providers, including court reporters, should also consider their own cybersecurity protections and be involved in security discussions, where appropriate.
c. Consider having a "break-out" room through a different technology, including a teleconference line or separate virtual meeting space, that is completely separate from the "main" proceeding. Use the separate and secure space for privileged discussions.
d. Consider whether all parties will use their own "offline" copies of materials or whether materials a secure cloud-based server will be used to upload materials; or screen shared. Each of these approaches comes with their own pros and cons relating to convenience, and potential security risks, and must be weighed accordingly.

2. Understand what should happen.

a. It is important to have a clear understanding about what to expect at the virtual hearing from a process perspective. Discuss expectations with your lawyer.
b. Your lawyer will also need to communicate with the other parties and the court/arbitrator/mediator to ensure that everyone else also has the same expectations about process.
c. Know how to contact your lawyer outside of the virtual platform, particularly to deal with technical issues or to provide privileged instructions.

3. Practice.

a. Virtual hearings will be a new experience for many. Ask for a test run of the platform in advance of the hearing to practice using it. Get comfortable and familiar with the software being used. Be sure you know how to mute and unmute yourself. Troubleshoot any technology issues.
b. Practice using the electronic documents to become familiar with them in advance of the hearing.

4. Meaningfully participate.

a. An Ethernet connection will give you the most stable audio and video connection; however if you are using a Wi-Fi connection, make sure you are within 3 metres of your router.
b. It is best to have a headset for audio, as built-in microphones do not work as well.
c. Having two screens (or devices) available makes it much easier to participate with the proceeding on one screen and refer to documents on another screen.
d. “Arrive” at the meeting/hearing early to ensure that audio and video is working properly.
e. Ensure that you have a location where you can participate in the hearing uninterrupted. Test your camera and the lighting the day before. If you do not feel you have a professional background anywhere in your home, you can use a virtual background to block out the area behind you.
f. If you are attending as a witness to be examined, you may need to adjust your video screen once your participation begins, so that the lawyers, judge or arbitrator can best see your body movements and facial reaction to the cross-examination.
g. If you are attending otherwise, be mindful that the cameras give a much closer view of your face than anyone would have in a typical hearing, so be extra cognizant of facial expressions, yawns, etc.

5. Be nimble and adapt.

a. As the courts, arbitrators and mediators adjust to holding more virtual hearings and meetings, they will become more familiar and comfortable with the technology involved in virtual proceedings. The flow of hearings and meetings will get smoother with practice. With time and experience, best practices will emerge for the more difficult aspects of virtual hearings and meetings, including with respect to handling objections from counsel and interruptions from arbitrators, mediators or judges.
b. There may be microphone glitches, or connectivity issues, from time to time. Participants will need to be patient, but also will need to speak up to correct such issues.

The case for technology in hearings, post-pandemic

Technological innovations in our dispute resolution system have been on the rise for several years prior to the recent health crisis. Online Dispute Resolution has been growing in popularity, as has the use of electronic presentation of evidence in litigation.

Many trials have already been conducted in a paperless, or near paperless, manner.

It is important to note that technology and virtual hearings have the potential to provide for real benefits for parties:

a) Efficient

Remote hearings are time- and cost-efficient. For example, clients save money on travel and wait times, and counsel can dedicate travel time to further preparation.

Digital files also make it easier for all parties to locate relevant information, which can add up significantly through the course of a proceeding, saving hours of time.

b) Paperless

Parties provide all of their documents to the Court and third party electronically, usually in advance of the hearing.

c) Customized

There is no one-size-fits-all approach to virtual dispute resolution. As with an in-person dispute resolution, clients should be informed of all the available options and associated best practices.

d) Varied options

The closing of some court appearances may lead to future backlogs, and clients can consider alternatives to disputes, including mediation and arbitration, should the required parameters be met.

e) Accessible

Remote hearings can be more accessible, and could democratize access to justice.

Key takeaway

Along with the calls for modernization of court rules to reflect technological advances, there is little doubt that court processes will be revised to incorporate technology to facilitate the fair, just, and speedy resolution of matters. Filing practices will shift to online platforms, and electronic presentation of evidence will soon become more common. Increasingly, telephone and video conferencing will be used in litigation, mediation and arbitration. And while Canadians work together to remain safe through this pandemic, current circumstances have highlighted that technology is a valuable tool being used to resolve disputes now.

Justice need not be delayed any further.

BLG was an early adopter in planning for COVID-19-related disruptions, quickly launching the BLG Virtual Disputes Task Force to establish consistent service standards and disseminate firm-wide training, best practices and updates. For more information on virtual proceedings, please reach out to any of our Key Contacts shown below.

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