The Advocates' Society

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

Final Report of the Modern Advocacy Task Force

June 2021

Table of Contents

Foreword from Guy J. Pratte, President of The Advocates' Society

For most litigants, involvement in the justice system will be a rare and important, if not seminal, event in their lives. It will often culminate in a hearing held at a courthouse. Until very recently, such hearings have almost universally taken place in an actual courtroom where real people (judge, lawyers, litigants, witnesses) gathered *together*. Whether the courthouse was as impressive as the Supreme Court of Canada in Ottawa, or a more modest building in a small town, that courthouse held a certain aura. The delivery of justice in the physical spaces designed for that purpose has always represented our collective effort to capture and reflect the importance of open and transparent justice in a civil society.

We could have devised an entirely different system, as some contend we should. Indeed, we could dispense justice in many (if not most) cases by proceedings conducted entirely in writing. This, some believe, would be much more efficient. But even if we were to accept that exclusive reliance on a written process results in equally sound judicial decision-making (a proposition at odds with the limited research and the experience of many judges), such reliance would in any event miss a critical dimension of achieving justice aptly captured in the well-known adage, "justice must not only be done, but must be seen to be done".

Indeed, experience teaches that nothing renders an unfavourable decision more acceptable to the losing party than her having been in the courtroom with the judge, able to see and hear that the judge kept an open mind and understood her case thoroughly. That human experience can simply not be duplicated or replaced by exclusive reliance on written advocacy.

With the onset of the COVID pandemic, the tradition of oral advocacy conducted in the presence of all participants in the same physical place was upended and often displaced by video technology. The use of this technology to conduct hearings outside of physical courtrooms has allowed judges, litigants, lawyers and the public to "gather" virtually. For some, these new platforms have demonstrated that the old ways of dispensing justice in stuffy courtrooms were not only antiquated, but an impediment to access to justice that should be relegated to the trash heap.

There is no denying that the availability of new video technology essentially "saved the justice system" during the pandemic: it allowed for the delivery of justice at a time when health and safety exigencies required alternate means of conducting court proceedings, and did so with relative ease, unthinkable just a few years ago. Its undeniable advantages have led many – judges, litigants and counsel – to support its permanent use, at least for routine and administrative matters and for substantive matters where practical impediments hinder in-person participation. This recent experience, forced upon us by the pandemic, affords us a great opportunity to consider the scope of the permanent use of video technology to improve access to and the administration of justice.

As we consider these new possibilities, we should not, in my view, equate virtual reality with reality. It is not. For judges and lawyers who regularly (if not daily) spend their lives in courthouses, the courtroom environment may have become second nature. But that is *not so* for most litigants and witnesses or even some advocates. The delivery of justice – or at least the good faith effort to do so – is a most profound, important and *human* endeavour which requires solemnity, transparency, visibility and communication between all individuals involved in the process. To repeat: justice must not only be done, it must also be seen to be done. "Seeing" on video when there is effectively no safe alternative has been a reasonable facsimile, but it *is* a facsimile.

Indeed, in other areas of our lives, the availability of virtual platforms, while undoubtedly

helpful during this pandemic, has served to underscore the critical importance of in-person interaction. In this time of crisis, we have conducted parliamentary activity, primary and secondary school education, religious services, and family gatherings – to give a few examples – remotely. Yet few would say that this remote way of conducting activities of such importance to our civic, community, and personal lives is the "right" way to proceed when we are not in a worldwide pandemic. I, for one, will not choose to have "FaceTime dinners" with friends or family when social distancing measures are lifted and it is again possible to have actual in-person get-togethers.

The Report of the Modern Advocacy Task Force readily recognizes the very significant contribution that video technology can make to improving the administration of justice, and recommends its permanent use for many matters. The Report also seeks to remind us all that the seeking of justice is, after all, a *human* endeavour, where the crucible of the actual courtroom allows all to know, hear, and see that we are together involved in that enterprise. Conducting justice in the *same room*; being able to observe and listen to the judge in the *same room*; having the witnesses confronting the court and the parties in the *same room* – few activities are more important to the cohesion of civil society than the meting out of justice by an independent judiciary in a truly public and common setting. In my view, we should think long and hard about its wholesale replacement by reasonable facsimile, except where circumstances genuinely and reasonably justify it.

I hope that, as we seek to learn from the recent pandemic experience, we do not forget entirely the reasons why in-person hearings and oral advocacy have always played such a prominent role in the administration of justice in Canada. Improvements to the justice system made possible by modern technology can and should be made, as the recommendations made in this Report clearly attest. But these changes should not be mistaken as a panacea for the grave challenges of access to justice, nor as an adequate replacement for in-person justice in all, or even most, cases.

In-person oral advocacy consecrates the gravity, importance and solemnity with which the administration of justice is ideally imbued. Of course, ideals are just that: they cannot always be realized, and we must bend to the imperatives of pragmatism when the ideal becomes an enemy of the good. But we should never lose sight of the ideal – lest, having lost our beacon, we lose our way altogether.

Acknowledgments

Since its founding some sixty years ago, The Advocates' Society has been dedicated to protecting and promoting the right of Canadians to be heard through robust and effective advocacy. Nearly a year in the making, this Report faithfully reflects that commitment. I hope that it will serve as a valuable resource to all those concerned with modernizing our justice system and making it more accessible, without compromising the fundamental values that have informed its legacy.

On behalf of our Board of Directors and members of The Advocates' Society, I would like to acknowledge and express my sincere gratitude to all those who contributed so much of their time, energy and talent to this Report. We especially thank the members of our Modern Advocacy Task Force and Modern Advocacy Advisory Group.

Guy J. Pratte, Ad. E., LSM
President, The Advocates' Society

Members of the Modern Advocacy Task Force

Peter J. Osborne, Lenczner Slaght, Chair
Scott C. Hutchison, Henein Hutchison LLP, Vice-Chair
Katherine L. Kay, Stikeman Elliott LLP, Vice-Chair
Brian K. Awad, McInnes Cooper
Michael Bookman, Babin Bessner Spry LLP
Robin Clinker, Petrone & Partners
Andrew Faith, Polley Faith LLP, Co-Chair, Stakeholder Consultation Sub-Committee
Steven G. Frankel, Davies Ward Phillips & Vineberg LLP
Sheila Gibb, Epstein Cole LLP, Chair, Symposium: The Right to be Heard; Drafting Committee
Kathleen Lickers, LSM, Barrister & Solicitor, Co-Chair, Indigenous Perspectives Sub-Committee
Doug Mitchell, IMK S.e.n.c.r.l
Ken McEwan, Q.C., McEwan Partners LLP
Christine Mohr, Department of Justice, Drafting Committee
Anthony Moustacalis, Anthony Moustacalis & Associates
Lillian Ying Pan, Q.C., Dentons Canada LLP, Co-Chair, Stakeholder Consultation Sub-Committee
Frédéric Plamondon, Osler, Hoskin & Harcourt S.E.N.C.R.L./s.r.l.
The Honourable Alexander Pless, Superior Court of Québec, Chair, History, Writing and Jurisprudence Sub-Committee (prior to appointment to the judiciary)
Guy J. Pratte, Ad. E., LSM, Borden Ladner Gervais LLP
Owen M. Rees, M.S.M., Department of Justice, Chair, History, Writing and Jurisprudence Sub-Committee
Alexandra K.W. Shelley, Torys LLP, Drafting Committee
Chloe Snider, Dentons Canada LLP
Sapna Thakker, Lax O'Sullivan Lisus Gottlieb LLP
William Thompson, Addario Law Group
Maureen Whelton, Stevenson Whelton LLP, Co-Chair, Other Disciplines and Perspectives Sub-Committee
Adrienne Woodyard, DLA Piper (Canada) LLP, Chair, Jurisdictional Scan Sub-Committee

Members of the Modern Advocacy Advisory Group

The Right Honourable Beverley McLachlin, P.C., C.C.
The Honourable Ian C. Binnie, C.C., Q.C., ASM
The Honourable Thomas A. Cromwell, C.C.
The Honourable Marie Deschamps, C.C., Ad.E.
The Honourable Clément Gascon
The Honourable John C. Major, C.C., Q.C.
The Honourable Marshall E. Rothstein, C.C., Q.C.
The Honourable Eleanore A. Cronk, ASM
The Honourable Constance Hunt
The Honourable John J.L. Hunter
The Honourable John I. Laskin
The Honourable Yves-Marie Morissette
The Honourable Kathryn Neilson
The Honourable Dennis O'Connor, O.C., O.Ont., Q.C., ASM
The Honourable Jamie W.S. Saunders
The Honourable Robert J. Sharpe
The Honourable Benjamin Zarnett
Sheila R. Block, LSM, ASM
Gérald R. Tremblay, C.M., O.Q., Q.C., Ad.E.

The Advocates' Society Staff

Suzanne Amiel, Policy Lawyer
Annie Chu, Professional Development Lawyer
Lara Ellery, Program Coordinator
Miriam Kalin, Policy Lawyer
Dave Mollica, Director of Policy & Professional Development
Vicki White, Chief Executive Officer
Lisa-Marie Williams, Policy Lawyer

Executive Summary

The Modern Advocacy Task Force (MATF) of The Advocates' Society (TAS) was struck to examine and consider the future of oral advocacy in the Canadian justice system, having its genesis prior to the SARS-CoV-2 (COVID) pandemic.

In March of 2020, the COVID pandemic became a reality in Canada. Dramatic changes to the Canadian justice system were implemented almost overnight, testing the flexibility of courts and the adaptability of a profession that, prior to the pandemic, remained largely tethered to books, pens, and paper. Courts scrambled to digitize filing and document handling practices, and judges, litigants and lawyers adapted to video hearings as part of the "new normal".

Mindful of the admonition never to let a good crisis go to waste, the Task Force shifted its focus to examine the adaptations necessitated by the pandemic and to critically evaluate their impacts. The MATF considered important questions about the future of advocacy in Canada. What is the tradition and history behind the right to be heard? What are the reasons for having and preserving the role of oral advocacy? Which of the COVID adaptations should we maintain when the pandemic is behind us? What are the core principles that should inform consideration of the mode of hearing and how can they be realized with limited resources and ever louder calls to address barriers to access to justice?

The work of the Task Force was conducted over many months, exploring to the extent that time and resources permitted, everything from the origins of oral advocacy in the courts of ancient Greece to the risk of internet trolls infiltrating video hearings.

This Report, "*The Right to be Heard: The Future of Advocacy in Canada*", begins with an examination of the history and cultural origins of orality through the lenses of the common law, civil law and Indigenous traditions, and then moves to examine other disciplines like psychology and education to consider how people learn and absorb information, and canvasses research examining outcomes with video and other modes of hearing. The Report then shifts to a survey of the approaches to modes of hearing across Canada and in select other jurisdictions. This section culminates in a consolidation of input received from hundreds of stakeholders across Canada, ranging from judges at all levels of courts, to advocates in all practice areas, to advocacy groups and other justice system participants, all with a view to learning what works and what does not, what the challenges are, and how might they be addressed as we move forward.

The final section of the Report distills all of that learning and input and sets out the key observations and four core principles which animated the Task Force's recommendations regarding the selection of the mode of hearing for particular types of proceedings:

1. the open court principle;
2. the imperative of access to justice;
3. the integrity of the court process; and
4. the principle of proportionality.

Drawing on these principles, the final section of the Report sets out the recommendation of the Task Force for a model Framework. The Framework provides general guidance regarding the factors which parties, their counsel and courts should consider with respect to the choice of mode of hearing for a particular proceeding, and is suitable for adaptation into court rules or practice directions.

The general guideline recommended in the MATF Framework is that courts and litigants embrace the efficiency and flexibility of video hearings for routine administrative matters and unopposed hearings, and that consent matters be dealt with in writing. Where the matter to be heard involves a significant step in the proceeding (which the Framework defines), the recommended general guideline is for an in-person oral hearing. The general guidelines may be departed from based on principles of proportionality, fairness, and efficiency, and a list of additional operative factors is included for consideration by the parties and the court. The process for determining the mode of hearing is intended to be efficient and brief, and it is anticipated that parties, counsel and the courts will adapt as experience grows and case law develops.

Throughout its work, the Task Force was struck by feedback consistently received from stakeholders about challenges faced by the justice system that extend well beyond the role of oral advocacy and the Task Force's mandate. Oral advocacy is but a small – important, but small – piece of the justice system. This examination of the role to be given to oral advocacy post-pandemic cannot and does not purport to address the problems of access to justice and the lack of adequate resources to support the system.

Nevertheless, the feedback received from stakeholders led the MATF to close the Report with some recommendations regarding further actions to be taken with respect to the administration of justice in Canada, including the development and maintenance of electronic court filing systems accessible to the public; the allocation of greater resources for the justice system, including by way of investment in technology and increased funding for legal aid; the need to evaluate and consider alternative means of dispute resolution, including by making assessments of the relative quality of outcomes through different means of dispute resolution; and the need to quantitatively assess the burdens on the justice system so as to better understand what long overdue changes should be implemented.

The interest in the work of the Task Force and the passion demonstrated by those who participated was inspirational. From Task Force members, to an Advisory Group of eminent former and current senior jurists and counsel, to the hundreds of advocates and others who took the time to attend the kick-off Symposium, participate in interviews, respond to surveys and polls, and attend Town Halls and other group meetings held across the country, the Task Force benefited from unprecedented participation and response.

As the Report concludes, the administration of justice is truly fundamental to Canadian values. People who participate in the Canadian justice system care deeply about it and are anxious to contribute to strengthening it in meaningful ways. The Task Force and The Advocates' Society join in the call to mobilize government and public support for committed, focused and timely study and review of justice system issues in Canada.

PART I
The Modern Advocacy Task Force: Genesis, Mandate and Objectives

I.1 The Advocates' Society

The Advocates' Society is Canada's authoritative voice of advocates within the justice system, with a long-standing tradition of protecting and advocating for the rule of law, a strong and independent judiciary, and a fair and accessible justice system of which Canadians can be proud.

I.2 The Genesis and *Raison D'être* of the Modern Advocacy Task Force

The genesis of the Modern Advocacy Task Force and this Report precedes the onset of the COVID pandemic. As conceived, the purpose of the Task Force was to assess whether the traditional role of in-person oral advocacy in the resolution of disputes between citizens, or between citizens and the state, should continue. Oral advocacy had increasingly been viewed by some as unnecessarily burdensome, inefficient and time consuming – at least to the extent it was required for virtually all matters that came before the courts, whether procedural or substantive. Some believed that this indiscriminate use of in-person advocacy exacerbated persistent problems of access to justice that have continued to plague the justice system.

As the pandemic swept across Canada in the early part of 2020 and physical distancing and other restrictions were imposed, it was not clear how, or even if, the justice system could continue to function. Yet, surprisingly quickly, participants in the justice system shifted to using recently improved video technology, and were able to conduct examinations for discovery, hearings, trials and appeals quite efficiently in many cases, provided that litigants and their counsel actually had access to the requisite technology.

With this revelation – and indeed it was a revelation to many – some participants in the justice system hastened to the conclusion that this technology could be *the* solution to the longstanding and stubborn access to justice problems. Lawyers would no longer have to travel to court, witnesses could simply testify from home, and even judges could hold court proceedings without actually going to court. Consequently, those observers concluded, costs would be significantly reduced.

As the Task Force conducted its research and national stakeholder consultations regarding the role of oral advocacy, it became clear that the justice system adaptations necessitated by the pandemic had underscored the persistent and daunting obstacles to access to justice in this country. While concerns about access to justice are frequently expressed by judges, lawyers and other participants in the justice system, they have not attracted sufficient public interest to provoke real political action and commitment of the necessary public resources. Funding for the justice system rarely makes news headlines or captures political attention, and justice allocations in federal, provincial and territorial government budgets have stagnated or declined as other priorities have increasingly preoccupied the public and their elected representatives.

This Report examines the role of in-person oral advocacy in a "modern" justice system. But the role of oral advocacy in the Canadian justice system, while indisputably intertwined with access to justice issues, should not be equated with an examination of and prescription for resolving those issues. The Task Force mandate relates to only one element of the entire access to justice puzzle, albeit a crucial piece of it: is there still a place for oral advocacy (by which we mean the opportunity to present one's case – evidence and argument – before a judge in an open and public court setting) in the Canadian justice system? Can it be replaced, if not entirely then at least significantly, by written advocacy only and, if so, in what instances? Do case management conferences matters really require in-person attendances? Is oral advocacy conducted via video a suitable replacement for in-person hearings? Has video technology attained such a level of perfection that in-person hearings add no significant value to the delivery of quality justice, such that they should be altogether eliminated and courtrooms closed, or at best reserved for exceptional and rare occasions?

The Task Force has asked these and many other questions of the hundreds of people who have been consulted and have contributed to its work. As reflected in the MATF's Recommendations that address the principal issue of what form of "hearing" (written, in-person, telephone, video, or hybrid) is justified in particular circumstances, the Task Force has concluded that hearings involving truly procedural or case management issues are suitably conducted via alternatives to in-person attendances, and consent matters (absent a compelling public interest) should be addressed in writing or by another alternative to in-person hearings.

The Task Force also concluded that where the matters before the court constitute significant steps in a legal proceeding, in-person oral hearings are still the preferable mode of achieving justice. The ideal for meaningful access to justice is achieved when parties can see and hear their judges – and can be seen and heard by those judges – in an actual physical courtroom. The principle of proportionality recognizes that the ideal is not suitable for all matters, particularly given the reality of limited resources. Where, for example, practical obstacles (such as distance, cost, or disability) preclude reasonable access to the courtroom, the advantages of an oral hearing conducted by video may outweigh the disadvantages.

But the Task Force heard, repeatedly and consistently, that for substantive matters, the ideal of an in-person hearing with oral advocacy is to be preserved and is worth advocating for. The Task Force recognizes that this approach may attract criticism as wishful thinking devised by an interested collection of advocates. To the contrary, the MATF Recommendations are the product of a year's work, distilled in this Report, which is believed to represent the deepest and widest analysis and consultation on the role and place of oral advocacy in the Canadian justice system yet undertaken.

I.3 The Mandate and Organization of the Modern Advocacy Task Force

The Board of Directors of TAS approved the formation of the MATF in May 2020, with the following mandate:

1. to undertake a comprehensive review of the circumstances wherein in-person oral advocacy is currently used as a means of dispute resolution in the civil and criminal courts of Canada;
2. to consider, to the extent reasonably feasible, how and when in-person oral advocacy is used in other countries for the purpose of dispute resolution;
3. to make recommendations concerning facets of the dispute resolution processes where alternate means of communication could be employed, in order to improve access to justice and efficiency, without sacrificing the quality and acceptability of civil and criminal adjudication in Canada; and
4. to identify those facets of civil and criminal dispute resolution where in-person oral advocacy should be preserved as essential to judicial adjudication, and provide appropriate justification for ensuring that those aspects of the judicial adjudication process remain open to litigants.

The Task Force is composed of a national group of members of TAS Board of Directors, 10+ Standing Committee,[1] and Young Advocates' Standing Committee,[2] with expertise across all areas of law. They have been guided by an advisory panel of some of the most respected jurists and senior counsel in our country, including former justices of the Supreme Court of Canada and current and former judges of provincial appellate courts.

With an ambitious scope of work, the Task Force was divided into five sub-committees, each with a specific mandate to provide inputs and data:

1. The History, Writing and Jurisprudence sub-committee reviewed legal history, literature and jurisprudence in order to discern the origins and development of the oral hearing. It analyzed important judicial decisions to consider the nature and scope of the "right" to an oral hearing and the policy rationale behind it;
2. The Indigenous Perspectives sub-committee reviewed the rich history of oral learning and storytelling within Indigenous communities, including how orality informs dispute resolution. Principles of reconciliation call for the justice system to take account of the traditions of Canada's First People, and those traditions enhance our thinking about the role of oral advocacy in the administration of justice today;
3. The Other Disciplines and Perspectives sub-committee went beyond the law, drawing on literature in the fields of psychology and education to consider how people learn and are persuaded. The sub-committee also reviewed international research within the legal field about the impact of different modes of hearing on adjudicated outcomes;
4. The Jurisdictional Scan sub-committee conducted a review of the ways in which judicial proceedings in jurisdictions across Canada and in select international jurisdictions are conducted, with a focus on the circumstances in which the right to be heard includes the right to an oral hearing; and
5. The Stakeholder Consultation sub-committee consulted with stakeholders in the justice system across Canada, including advocates in every field and jurisdiction, the judiciary at all levels of courts, umbrella organizations, and others, through personal interviews, surveys, discussion groups and town hall sessions.

I.4 The Modern Advocacy Symposium

When the Task Force was struck, the Board of Directors of The Advocates' Society also directed the organization of a special event focused on the future of oral advocacy. On September 29, 2020, the Task Force held a virtual symposium: "The Right to be Heard: The Future of Advocacy in Post-Pandemic Canada".

The Symposium included presentations, panel discussions and input from thought leaders from across Canada, the United Kingdom and the United States, sharing different perspectives from different disciplines, including law, education, psychology, Indigenous traditions, and literature.

The topics that were addressed as part of the Symposium by the presenters from across Canada and beyond included the following:

- an empirical analysis of the impact of oral advocacy in the United States, where some of these data has been collected and analysed;
- the oral tradition in Indigenous justice in Canada;
- the impact remote hearings on access to justice;
- human psychology elements and impacts on live versus written hearings; and
- perspectives from the judiciary presiding over different modes of hearing.

The objective in bringing together these thought leaders at the Symposium was the facilitation of an informed discussion about what the right to be heard means from different perspectives, viewpoints and histories, and whether and why an oral hearing is important to the administration of justice in Canada.

Approximately 600 participants attended the Symposium, engaging in thoughtful consideration and debate. Attendees also participated in an interactive poll eliciting views on topics such as whether oral arguments have an impact on the outcome of hearings, the importance of efficiency as a value for the justice system, and what factors are most important in assessing the role of oral advocacy in a modern justice system.

The themes which emerged from the Symposium were echoed in the work undertaken by the Task Force over many months: from the examination of the historical and jurisprudential bases for oral advocacy and oral traditions; to the research from the fields of psychology, education and law; to the review of modes of hearing across Canada and other select jurisdictions; to the extensive process of stakeholder consultation. The Symposium was an excellent kick-off to the work of the Task Force, and its lessons are reflected in the Recommendations set out in Part IV of this Report.

The Symposium agenda, poll results, and a link to the archived webcast of the event are attached at Appendix A.

I.5 The Structure of this Report

This Report is divided into four Parts. Part I (this section) describes the genesis, mandate and organization of the Task Force and this Report.

Part II, with two principal sections, canvasses the past. The first section in Part II reviews the foundations of oral advocacy in history and jurisprudence, including examining Anglo-Canadian origins and the Civilian tradition in the province of Québec. The second section in Part II examines Indigenous perspectives and oral traditions. Orality has been an essential part of the delivery of justice in this country for hundreds of years; it also plays a central role in Indigenous traditions.

Part III, with three principal sections, shifts focus from the past, examines the present, and looks to the future. The first section in Part III considers learning and persuasion by drawing on other disciplines and reviewing research in the legal field about modes of hearing and adjudicated outcomes. The second section in Part III canvasses the modes of hearing used in various types of legal proceedings in courts across Canada and in selected other jurisdictions. The final section in Part III attempts to summarize the themes which emerged from input received from a broad and diverse range of stakeholders across Canada, who gave so generously of their time and insight in support of the work of the MATF. The focus of the stakeholder consultation was to consider, informed by the experience with pandemic-imposed restrictions, what should remain as permanent features for the conduct of legal proceedings in Canada.

Part IV represents the Task Force's attempt to describe the way forward regarding the role of oral advocacy in the Canadian justice system. The first section of Part IV distills the learning from all of the previous sections of the Report, noting key observations and four core principles – the open court principle, the imperative of access to justice, the integrity of the court process, and the principle of proportionality – all of which informed the MATF's recommendations.

The second section of Part IV is the recommendation of the Task Force for a model Framework regarding the determination of the mode of hearing for the different types of proceedings and issues that courts must adjudicate from the time a proceeding is initiated to its ultimate resolution.

It is hoped that the summary of key observations, the core principles and the model Framework provide a basis for thoughtful consideration by counsel, courts, Attorneys General, and those bodies tasked with writing and revising procedural rules for civil and criminal courts, when faced with a decision about the mode of hearing for particular proceedings. Finally, in the third section of Part IV, the Task Force makes Recommendations that flow from its work, but move beyond the MATF mandate to suggest areas for further examination and action regarding the Canadian justice system.

I.6 A Broader Call to Action

Although beyond the scope of its mandate, it is the hope of the Task Force that this Report will be received not only as an attempt to highlight the crucial role that oral advocacy should continue to play in a modern justice system, but also as a *cri de coeur* to mobilize lawyers, judges, justice system administration officials, governments and the public to devote the care, attention and effort required to truly examine all features of the current legal system that must be addressed in order to genuinely address its long-overdue modernization. While this Report does not purport to have addressed or proposed solutions for the myriad challenges faced by the justice system in Canada, the Task Force echoes the passionate call for that work to be done.

PART II
The Origins of Oral Advocacy

II.1 The Foundations of Oral Advocacy in History and Jurisprudence

Overview

In contemplating the future of oral advocacy, it is necessary to first consider its origins and examine its place within our Indigenous,[3] common law and civil law legal systems.

This section begins with an overview of the historical foundations of oral advocacy and traces its development in English common law and

Québec civil law, before considering jurisprudence related to the procedural rights of parties to advocate their position through oral hearings. It then turns to a review of the historical rationale underlying the role of oral advocacy in the way legal disputes are resolved today.

While the rationale for the continued reliance of Canadian courts on oral advocacy is multi-faceted, complex, and the result of our unique history, the tradition of oral advocacy and, ultimately, public confidence in the administration of justice, endures in large part due to the principle that justice must be seen in order to be done.

Discussion

The Origins of Oral Advocacy

The tradition of oral advocacy in English common law dates back more than two thousand years to the ancient civilizations of the Mediterranean.[4] Appellate review is said to have originated in Greece, where there existed a right to appeal decisions of the magistrate in Athens.[5]

Aristotle and Cicero emphasized oral advocacy as an instrumental component in persuading an audience.[6] In the classic work *Rhetoric*, Aristotle outlined three modes of persuasion: *logos, pathos* and *ethos*:[7] *logos* aims to appeal to the listener by using logic and reason, *pathos* appeals to the listener's emotions, and *ethos* aims to persuade the audience through credibility.[8] Cicero and Quintilian[9] expanded on these concepts, noting that the purpose of these modes of persuasion was to connect to, and manipulate, judges and juries.[10]

Any consideration of the work of Aristotle and Cicero on the matter of oral advocacy demands a reference to Plato's *Gorgias*, the philosopher's famous dialogue on rhetoric. Its criticism of empty rhetoric, and his presentation of the issue where cosmetics, cooking, rhetoric and sophistic are presented as simulations, respectively, of the arts of gymnastics, medicine, justice and legislation, remains relevant today. Plato suggests that rhetoric is persuasion, and enables one to persuade "judges, members of the assembly and others that deal with governmental issues" and ties inextricably together rhetoric and persuasion. (See *Gorgias, Polus and Socrates on Rhetoric in Plato's Gorgias*, Paper presented at the 47th Annual Meeting, Linguistic Circle of Manitoba and North Dakota, Daniel Erickson Dept. of Modern & Classical Languages and Literatures, University of North Dakota, 2005).

It is informative to consider how these teachings applied in practice in ancient courts. After a change in leadership in ancient Greece, there was a shift from purely magistral courts to large juries of hundreds of Athenian citizens, and "brilliant oratorical displays" and "rousing dramatics" by lawyers to persuade and entertain them.[11] Rather than rely on reason, lawyers appealed to the "highly emotional mentality of the Athenian populace".[12] The outcome of a case turned on personality, showmanship, and rhetorical skill. Colourful language generated reactions from the large crowds, arousing sentiment in favour of one party or the other.[13] The impact of such displays was intimately connected to the fact that they occurred orally: "[n]othing could serve the interest of the litigant or defendant so well as a speech delivered in person."[14]

While such behaviour is generally incompatible with the ethical standards of the modern legal profession, it is nonetheless instructive to look back to the early days of oral advocacy as theatre.

The Evolution of Oral Advocacy in English Common Law and in the Canadian Common Law and Civil Law Systems

The Evolution of Common Law

Throughout the history of western culture, "speech was the favoured method of communication."[15] In the early days of the common law, oral argument was made necessary by the fact that literacy levels were relatively low.[16] The origins of oral proceedings can also be traced to the evolution of English legal process,[17] and, in particular, to adversarial civil and criminal procedures.

Indeed, the importance of oral hearings stemmed from "fundamentals of procedure at law imported from England, including trial by jury and the right to cross-examine all witnesses whose testimony forms the basis of decision."[18] This English legal tradition influenced other common law countries and became the traditional method of advocacy in such jurisdictions.[19] This applies to Ontario and other common law jurisdictions in Canada. The origins of Ontario's Superior Court of Justice, for example, trace back to the 1790s. At that time, the legal system in place in what was then Upper Canada was based on English common law and modelled after the English legal system.[20]

A key feature of today's Anglo-Canadian trial is that we entrust "lawyers-partisans with the responsibility of gathering, selecting, presenting and probing the evidence."[21] The court then chooses between two competing stories presented by the advocates. Unlike inquisitorial systems prevalent in some continental countries, such as France, the trial court does not generally investigate on its own. While England's criminal and civil trials developed on different tracks, these adversarial procedures took on a common form in the late eighteenth century.

There are also historical differences relating to the right of advocates to appear in English and Canadian courts; however, statutory rights of audience persist in both systems. The common elements of the adversary trial and statutory rights of audience continue to be foundational to the current legal system.

The Adversary Civil Trial

Little is known about English civil trials before the nineteenth century. It is known, however, that the adversarial model came from the civil courts. Lawyers emerged as central to civil proceedings earlier than for criminal proceedings, and parties routinely retained counsel in civil matters to shape the litigation to partisan advantage.[22]

While the criminal jurisdiction was trial-centred, the civil jurisdiction was trial-avoiding, focusing on pleadings. The civil process organised cases into those that turned on a point of law that a judge could resolve, as opposed to those that turned on the facts, which would go before a jury. Medieval pleading practice began in court, where the plaintiff, appearing in person or through counsel, stated the complaint. The purpose of the pleading was to amplify the writ and state the details of the cause of action. The defendant was then called on in court to agree with or deny the facts asserted by the plaintiff. Pleadings were tentative until the clerk of the court enrolled them on the rolls and the rolls were handed in at the end of the court term. Hypothetical questions of law arose from the tentative pleading before trial; the facts could be tried later. Judges did not give reasoned decisions. Rather, they acted as umpires.[23]

Reforms in the fifteenth and sixteenth centuries introduced written pleadings, which marked the beginning of civil litigation as it is known today. By the sixteenth century, judges began making authoritative decisions of law based on established or admitted facts. Pleadings practice, however, became increasingly specialized and obscure, such that the niceties of pleadings became the focus of civil practice.[24]

To address these problems, civil procedure in England was simplified in the nineteenth century.[25] Most significantly, the *Judicature Acts* (U.K.) 1873-75 introduced the modern system of pleading that is familiar to us today.[26] As a result of these reforms, pleadings focused on substance rather than on form.

Historically, parties to a civil action were disqualified from testifying on the basis of interest.[27] This rule sought both to avoid the parties perjuring themselves and to prevent the receipt of tainted evidence. The rule had the effect of placing dispositive weight on the documents, disputes over which could be resolved out of court.[28] The law in England was amended in 1843 to permit interested persons to give evidence,[29] but it was not until 1851 that the law in England was amended to permit the parties themselves to testify.[30] A similar evolution occurred in Canada, where parties to a civil action were under a similar disability until the rule was reformed by statute.[31]

The emergence of counsel to act for parties in civil proceedings followed closely on the appearance of professional judges in the thirteenth century.[32] From this early time, civil proceedings embodied the adversarial model: lawyer partisans marshalling, selecting and presenting the evidence on behalf of their clients, and the court choosing between two alternate stories.

The Adversary Criminal Trial[33]

The principal elements of the modern adversarial criminal trial emerged in the century between 1690 and 1790 for serious crime.[34] Prior to this time, by the end of the Middle Ages, the criminal trial in England took the form of an altercation, an unstructured trial between the accuser and the accused, including witnesses, before a jury of twelve local men.[35] Jurors often intervened to ask questions or comment.[36] The principal purpose of a trial was to give the accused the opportunity to address the charges and evidence against them. Through the later sixteenth century until the eighteenth century, accused parties spoke for themselves, but were forbidden to testify under oath. As a result, while accused could serve at trial as an informational resource, they spoke unsworn. This rule was only abandoned in England in 1898.[37] Canada allowed accused parties to testify under oath in their own defence in 1893.[38]

Lawyers could act for the prosecution, but were rarely employed except in cases of alleged treason. Counsel were prevented from representing the accused before the court, a rule designed to pressure the accused to speak in their own defence. During this period, denying counsel to the accused was seen as a benefit: a falsely charged accused would establish his innocence through the "simplicity and innocence" of their evidence, while the guilty would incriminate himself by disclosing the truth. It was believed that defence counsel would hamper this truth-seeking function[39] and prolong trials.[40]

Confidence in the truth-seeking function of the "accused-speaks" criminal trial was undermined by the treason trials of the later Stuarts. Following the restoration of the Stuart monarchy after the Interregnum (1649-60), England experienced significant political instability. Charles II dissolved Parliament in 1681. He and his successor, James II, used the courts to prosecute political crimes. Between 1678-1685, a series of major treason trials were held, arising from the Popish Plot (1678),[41] the Rye House Plot (1683),[42] and Monmouth's Rebellion (1685).[43]

The unfairness of the treason trials led to pressure for reform. The trials suffered from a number of defects: judicial bias in favour of the prosecution, restrictions on the accused's pre-trial preparation, and the denial of counsel to the accused.[44] Following the Glorious Revolution, concerns over these defects led to the *Treason Trials Act* of 1696[45] and the *Act of Settlement* of 1701.

The preamble to the 1696 statute reflected a preoccupation that the accused may be innocent and the principle of the equality of arms between the accused and prosecution. As Langbein observes, "the Act's chosen instrument to achieve this equality was defence counsel, fortified by other changes in trial procedure".[46] These included the disclosure of the indictment, assistance of counsel and solicitors in the pretrial, trial counsel, and the right of the accused to call witnesses. The 1696 law left unchanged the rule that accused could not testify under oath in their defence.[47]

By the 1730s, lawyers were increasingly employed in the prosecution of felony offences: solicitors for the pre-trial preparation of the case and prosecution counsel at trial. Because of the reward system for serious crime, private, for-profit "thief takers" had emerged for investigating crime, and apprehending and prosecuting alleged offenders.[48] Prosecutors also began relying on cooperating witnesses, who were motivated to give evidence against former confederates in exchange for immunity from prosecution.[49] Both the reward system and use of cooperating witnesses led to concerns over perjured evidence.

In response, judges permitted accused in felony trials to have defence counsel to cross-examine witnesses.[50] Defence counsel were initially still prohibited from addressing the jury, so as to maintain pressure on the accused to speak.[51] Although the judges intended defence counsel as an aid to accused, the introduction of defence counsel in felony trials changed the dynamics and theory of the trial. Defence counsel pressed for further procedural innovations, sometimes making an end run around the prohibition on putting the defendant's case to the jury or receiving permission from the court as a matter of grace. In 1836, defence counsel received the statutory right to address the jury on the evidence and the merits of the case.[52] It was in this period that England witnessed the emergence of the criminal bar.

These developments changed the theory of the criminal trial from one designed to force the accused to speak in response to his accuser, establishing innocence or guilt, to the modern theory where the trial is the opportunity for defence counsel to test the prosecution's case.[53]

The Evolution of Québec Civil Law

Many of same principles underlying the evolution of the common law are also hallmarks of the civil law system in Québec. Generally, criminal law and procedure and public law are governed by the English tradition, and significant portions of commercial law, civil procedure and rules on evidence are anchored in the common law. Apart from civil jury trials, which were eliminated in Québec in 1976, a civil trial in Québec City or Montréal very closely resembles a civil trial in Toronto or Calgary, subject obviously to some differences of substantive and procedural law.

Québec is unique in that its legal system reflects elements of both the civil and common law traditions; indeed, while it is "the only jurisdiction in Canada to adhere to the civilian legal tradition in the realm of private law, [it] has been characterized as a mixed legal system primarily by virtue of its bijurality."[54] As a general observation, the common law tends to place more emphasis on oral argument, whereas the continental civilian tradition relies more heavily on written argument:[55]

> In the common law, the emphasis is placed on oral evidence and oral argumentation whereas in the continental civilian tradition, sometimes referred to as the "dossier system," proof is essentially written, with little or no examination or cross-examination of witnesses in open court.[56]

While the maxim reflected in this quote remains apt, this observation remains a generalization and has its exceptions, as evidenced in the discussion of the dwindling role of oral advocacy in the appellate context in the United States, relative to the United Kingdom, for example.

There are many other differences as well. The law of evidence in Québec, for example, incorporates some civil law institutions patterned after French civil law, such as notarial deeds. However, it also incorporates a codification of the law of hearsay, which was not part of European continental civil law. Hypothecs continue as rights typically related to property that ensure obligations will be performed, analogous in some ways to instruments familiar to the common law including guarantees or security instruments such as mortgages.

Historically, however, in Québec there was no right to counsel or to have counsel present a case. The New France of 1763 included no lawyers, Samuel de Champlain having years earlier been authorized by the colonial authorities in France to forbid the establishment of lawyers at the colony. By the time of the Treaty of Paris 20 years later, however, there were forty-three notaries in new France who handled non-litigious legal matters involving private parties. The *Conseil souverain*, which after 1663 operated as a general court of appeal for the colony, did not hear lawyers. Lawyers appeared as an integral part of judicial processes of the courts of Québec with the importation of English systems and traditions.

At the trial level, civil procedure in Québec aligns more closely with that of the common law. Trials are adversarial, characterized by oral advocacy and include pre-trial processes such as discovery.[57]

Current appellate procedure in Québec also reflects more of a common law approach.[58] For instance, appeals in Québec are manifestly distinct from appeals in France, which have as their primary function the retrial of cases. In contrast, appellate courts in Canada have made it clear that their role is not to retry cases.[59] Moreover, in France, written procedure far outweighs the role of oral advocacy at both the trial and appeal stage.[60] As observed by Justice Yves-Marie Morissette of the Québec Court of Appeal, appellate procedure in Québec shares more commonalities with the common law tradition.[61] Appeals in Québec most closely resemble appellate procedure in other Canadian appeal courts, where orality is an undeniably important part of the process.[62]

Accordingly, Québec, like the balance of the Canadian provinces and territories, seems to fall somewhere in between the circumscribed approach to oral advocacy in the United States and the oral-centric approach of England.

The Right to Appear: Statutory Rights of Audience

To understand the importance of oral argument, it is also helpful to consider the rights of audience granted to advocates by statute, and how Canadian law developed differently in this respect compared to English law.

Laws regulating the legal profession in Canada, despite differing among jurisdictions since they are regulated provincially, grant rights of audience to all lawyers licensed in their respective jurisdictions, regardless of the "type" of lawyer.

For example, British Columbia's *Legal Profession Act* permits all "practising lawyers" to "practise law", which is defined in that Act to include advocacy.[63] In Alberta, the *Legal Profession Act* states that active members of the Law Society of Alberta, who are designated as barristers and solicitors, have a "right of audience" in the Court of Queen's Bench (the superior court of inherent jurisdiction) and all other courts of record in Alberta.[64]

In Québec, the *Act respecting the Barreau du Québec* prescribes that rights of audience "shall be the exclusive prerogative of the practicing advocate and not of the solicitor."[65] An "advocate" under this statute is defined as "a person entered on the Roll" and therefore includes all active lawyers called to the Bar in Québec. Significantly, a "solicitor" is not employed in the traditional British sense, but is instead defined in the Act as "an advocate from another province or a territory of Canada or a law professor who is entered on the Roll under a restrictive permit".

In addition, the legal profession in Québec has two branches: lawyers and notaries. Notaries in their professional capacity however are not involved in litigation; that institution is one of civil law.

At the same time, the historical distinction in England's legal profession between barristers and solicitors persisted until 1990. While solicitors mainly performed legal work outside the courtroom, only barristers acted as advocates in the courtroom.[66] Barristers had a monopoly on "[appearing] in open court to represent litigants at trial and [making] oral arguments on their behalf."[67] This function

performed by barristers contributed to the perception that they were superior and more significant than their solicitor counterparts.[68]

The dynamic between the two branches remained relatively unchanged until 1990, when the English Parliament passed the *Courts and Legal Services Act*, which reformed the structure of the English legal profession. Notably, this statute conferred full statutory rights of audience to *both* barristers and solicitors, breaking the monopoly held by barristers over advocacy and litigation.[69]

A similar distinction existed for a significant period of time in civil law jurisdictions, between *avocats* (barristers) and *avoués* (solicitors). As a professional corps in France, *avoués* were abolished in 1971 at all lower levels of court but not at the courts of appeal. In 2012, they merged with the *Barreau* and became *avocats*.

In Canada, there was no such division of the legal profession. Although English Canada historically recognized in practice the dichotomy between barristers and solicitors in practice, perhaps as a reflection of the profession's English roots, the small population of lawyers relative to a vast territory made it more practical for Canadian law societies to train lawyers in both functions.[70]

Aside from lawyers, litigants in Canada have rights of audience when they represent themselves before the courts, subject to a few exceptions, such as corporations.[71]

Legal Principles Underlying the Right to be Heard

The right to be heard is well-established in Canadian law where a person's rights, interests, or privileges are at issue. This right, reflected in the maxim *audi alterum partem*, is considered one of the two components of natural justice, the other being the right to an impartial decision-maker, or *nemo iudex in causa sua*. Although this general right is established, its scope and form are highly contextual and may, in certain cases, be limited by legislation.

One of the central factors affecting the right to be heard is whether the matter at issue arises in a judicial or administrative context.

There is a robust body of jurisprudence rooted in the principles of the rule of law and supremacy of Parliament that establishes very few constraints on legislative authority to determine procedural rights.

The *audi alterum partem* principle has a long provenance in English law. Beginning in the seventeenth century, it developed in a line of cases addressing the deprivation of offices, which held that the office holder was entitled to notice and a hearing before the deprivation.[72] While hearings were normally held to be oral ones where the public law decision was characterized as "quasi-judicial" as opposed to "administrative" or "legislative" in nature, this was not invariably the case in England.[73]

Administrative law in Canada followed a similar path. Traditionally, natural justice generally required an oral hearing, but not in every case.[74] As the reach of procedural fairness rights was expanded to administrative functions,[75] the courts recognized that a range of hearing processes could satisfy the requirements of procedural fairness.[76] The content of the hearing right will be determined by the nature of the decision being made and the process followed in making it; the nature of the statutory scheme and the terms of the enabling statute; the importance of the decision to the individual or individuals affected; the legitimate expectations of the individual affected; and the choices of procedure made by the decision-maker.[77] Even where s. 7 *Charter* rights are engaged, the Supreme Court has held that an oral hearing is not necessarily required.[78] However, it is a common law norm in Canada that an oral hearing will be required where credibility is at issue.[79]

In the judicial context, the jurisprudence is less comprehensive.[80] Legislatures have historically respected traditional procedural rights in the judicial context and as a result, courts have been given few opportunities to examine the legitimacy, legality, or wisdom of measures. The right to be heard in an in-person oral hearing is reflected in civil and criminal trials through the law on summary judgment motions, the right of the accused to be present throughout trial,[81] the law on opening and closing addresses,[82] and the law on cross-examination. Moreover, a number of cases establish some constitutional limits on Parliament's authority to limit access to judicial process.

The Right to a Trial vs. Summary Judgment Processes

While concerns regarding access to justice led the Supreme Court of Canada to hold that "a trial is not the default procedure" in Ontario following the amendments to the summary judgment motion rules of civil procedure, and led it to broaden access to the summary judgment procedure,[83] the privileged position given to an oral, in-person trial has consistently been reflected in our jurisprudence on appellate review.[84] As the Ontario Court of Appeal observed:

> […] the trial judge is a trier of fact who participates in the dynamic of a trial, sees witnesses testify, follows the trial narrative, asks questions when in doubt as to the substance of the evidence, monitors the cut and thrust of the adversaries, and hears the evidence in the words of the witnesses. As expressed by the majority in Housen, at para. 25, the trial judge is in a "privileged position". The trial judge's role as a participant in the unfolding of the evidence at trial provides a greater assurance of fairness in the process for resolving the dispute. The nature of the process is such that it is unlikely that the judge will overlook evidence as it is adduced into the record in his or her presence. […][85]

The trial dynamic also affords the parties the opportunity to present their case in the manner of their choice. Advocates acknowledge that the order in which witnesses are called, the manner in which they are examined and cross-examined, and how the introduction of documents is interspersed with and explained by the oral evidence, is of significance. This "trial narrative" may have an impact on the outcome.

The Right to Cross-Examine

Further, courts have commented on the centrality of cross-examination in the context of the adversarial criminal trial.[86] The Supreme Court held that "the right of an accused to cross-examine witnesses for the prosecution —without significant and unwarranted constraint— is an essential component of the right to make full answer and defence."[87] The Court has gone so far as to observe that

"[a]t times, there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed."[88] In the same vein, the right to see a witness's face is a requirement of a fair criminal trial where the credibility of the witness's evidence is important to the matter being tried.[89]

Although advocates have long recognized the tactical benefits of addressing the jury last, a narrowly divided Supreme Court held that there is no constitutional right for an accused to do so under ss. 7 or 11 of the *Charter*. In *R. v. Rose*, the majority of the Court did not agree that "order of jury addresses significantly affects the knowledge that the accused will have, at the time of the defence address, regarding the Crown's theory of the case and interpretation of the evidence".[90] For our purposes, *Rose* is more important for the recognition that a closing address in itself has a key role in making full answer and defence.

Statutory Limits on Access to Oral Hearings in the Administrative and Judicial Contexts

In the administrative law context, unless a *Charter* right is at issue, procedural rights may be limited by clear statutory language.[91] Where the law is silent as to the procedure to be followed, the common law fills the gap to ensure that the procedures followed respect the requirements of natural justice.[92] This right, however, is "eminently variable and [that] its content is to be decided in the specific context of each case".[93] This means that even at common law, no particular procedural right is guaranteed. Depending on the context, the right to be heard may be respected with written representations, for example.

In the judicial context, certain core procedural rights enjoy constitutional protection. For example, judicial independence has been recognized as an unwritten norm. However, the strength of other important features of advocacy is less certain. While the right to access the courts is firmly entrenched, the right to counsel has only been exceptionally found outside the criminal context.

In its decision in *B.C.G.E.U. v. British Columbia (Attorney General),* the Supreme Court affirmed a constitutional right to access the courts. In that case, striking employees were picketing the courthouse and, even though they were issuing passes to cross the picket line to anyone who sought one, the Supreme Court considered the right of access was practically absolute. They adopted as their own the formulation of the British Columbia Court of Appeal which strongly endorsed the right of access to the courts:

> We have no doubt that the right to access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens. It is the preservation of that right with which we are concerned in this case. Any action that interferes with such access by any person or groups of persons will rally the court's powers to ensure the citizen of his or her day in court. Here, the action causing interference happens to be picketing. As we have already indicated, interference from whatever source falls into the same category.[94] (Emphasis added)

Similarly, when the British Columbia legislature sought to impose a charge as a condition of access to the superior court, the charge was struck down as an infringement of guaranteed access to the courts. As the Supreme Court noted in that case, the "historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law." Indeed, the court held these roles are "central to what the courts do" and that "[t]o prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts.[95]

As noted above, outside of the criminal context,[96] the right to a lawyer has been narrowly construed. The Supreme Court has recognized a right to counsel in a non-criminal context only in one case and only because a woman's s. 7 rights were engaged by the removal of her children.[97] The Supreme Court has rejected a general right to counsel as a component of the rule of law in *British Columbia (Attorney General) v. Christie*.[98] The Court in that case was assessing the constitutional validity of a tax on legal services that the court below had found limited the parties' ability to be represented.

The Court concluded that "…the text of the Constitution, the jurisprudence and the historical understanding of the rule of law do not foreclose the possibility that a right to counsel may be recognized in specific and varied situations. But at the same time, they do not support the conclusion that there is a general constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations."[99] The Court adopted this position notwithstanding the recognition that access to s. 96 courts – both in the physical sense[100] and the jurisdictional[101] sense – enjoys constitutional protection.

As noted above, in the administrative context, the right to be heard does not necessarily mean the right to be heard in person. The right to be heard in person has been thoroughly canvassed in the administrative context where the right only exists where credibility is at stake.[102] In the same vein, the right to see a witness's face is a requirement of a fair trial where the credibility of the witness's evidence is important to the matter being tried.[103]

Historical Rationale for the Importance of Oral Advocacy

The reasons justifying the enduring role of oral advocacy in Canadian courts are complex and are rarely discussed in the literature. In contrast, the right to an oral hearing before administrative tribunals and decision-makers has been the subject of frequent debate in administrative law.[104] Notably, one of the factors in determining the content of the duty of procedural fairness in administrative law is the nature of the decision and the procedures followed by the decision-maker. Indeed, the closeness of the administrative process to the judicial process is an indicator of whether an oral hearing may be warranted in the administrative context.[105] This reasoning appears to be founded on the theory or view that the judicial process must or should involve an oral hearing.

In the trial context, an oral hearing has remained central across jurisdictions as the principal medium for proof-taking. Indeed, oral testimony and the examination of witnesses has been the traditional manner of gathering evidence in jury trials.[106] The effectiveness of cross-examinations in large part depends on the spontaneity and immediacy of an oral response to an oral question, before a judge or jury who can assess the witness's credibility firsthand.[107] Such assessments tend to be informed by the verbal and non-verbal nuances

of the witness through personal observation.[108]

That said, the Canadian legal system has seen a shift in recent years towards a greater emphasis on providing timely and affordable access to the civil justice system.[109] In *Hryniak v. Mauldin*, the Supreme Court called for a culture shift, in which it cited the need for the simplification of pre-trial procedures and "moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case."[110] In particular, the summary judgment motion, which is a procedural mechanism allowing for a judgment to be rendered in a more condensed way and without the need for a full trial, was seen as a way to improve access to justice. Although the summary judgment motion does not exist in Québec, courts can rely on other tools, such as their case management powers, to achieve generally similar results.[111] Thus, the benefits of the oral presentation of evidence at trial are subject to the principle of proportionality.

In the appellate context, the American legal system has experienced an earlier transition to a more text-focused legal process, while oral advocacy has remained the preferred method in other common law jurisdictions, such as in England, Canada and Australia.[112] A brief review of the different approaches taken in each of these legal systems can help inform why a preference for oral advocacy has persisted in Canada.

In its early days of advocacy, the United States had a speech-centered legal process. Lawyers such as Daniel Webster and William Pinkney delivered theatrical arguments to large audiences without any limitation on time or interruptions by the judge.[113] Although the tactics were not nearly as unscrupulous as those employed by lawyers in courts of ancient Greece, the American lawyers of this time "directed their arguments as much to the public as to the bench" and used colorful and emotional rhetoric in order to win their cases.[114]

Eventually, the United States opted for a more writing-centered appellate legal process, in stark contrast to England and Canada.[115] In 1849, the United States Supreme Court imposed a two-hour time limit on oral arguments and required counsel to submit printed summaries of arguments and authorities.[116] Additional reductions to oral argument were made in 1858, 1870, 1911 and 1984, the latter of which involved imposing a thirty-minute, one lawyer per side limit.[117] Opportunities for oral argument in federal appellate courts in the United States have also been progressively curtailed.[118]

A number of factors have been cited for the curtailment of the oral appellate tradition in the United States. The increase in the United States Supreme Court's caseload may have prompted some of these changes, given the size of the American population and the volume of cases that reached the Court.[119] The demands of travel in early nineteenth-century America and the "riding circuit" also contributed to the push towards efficiency that a written brief provides.[120] With the development of the commercial printer, the written word became the norm for governmental communication, presumably leading to greater acceptance of writing as an equal alternative to speech.[121] Aside from the practical issues that led to a shift toward a text-based legal process, a deep-seated distrust of courts in early nineteenth-century America may also have motivated legislative requirements that courts commit their judgments to paper.[122]

In contrast, England and Canada retained their traditional speech-centered legal process in the appellate context.[123] The Supreme Court of Canada has consistently recognized the "extreme importance" of oral advocacy, as have representatives of various Canadian courts.[124] Moreover, oral advocacy is particularly important in Canada, compared to other jurisdictions.[125]

While there are obvious similarities in the Canadian and English practice today, the differences are worthy of mention. For example, *factums*, or written argument, have been a hallmark of Canadian appellate litigation for a significant period of time. This remains true today, although almost all appellate courts impose page limits and other restrictions.

In the United Kingdom, in contrast, before Sir John Donaldson succeeded Lord Denning as Master of the Rolls in the English Court of Appeal, there were no written arguments. They were introduced progressively by Donaldson MR in a series of Practice Notes[126] which met considerable resistance from the bar. Gavin Drewey *et al*. in *The Court of Appeal*, Hart Publishing, Oxford, 2007, writes: "His [Donaldson's] espousal of the technique of the skeleton argument by counsel was an innovation which did much to distil the point of an appeal. This practice has happily persisted, although skeleton arguments tend nowadays not to be all that skeletal." Nonetheless, the introduction of written argument has dramatically shortened what were previously lengthy appeals, often lasting days or weeks.

As noted above, this practice is in stark contrast to that in the United States, as observed by Justice Morissette, where appellate courts routinely dispose of matters without any oral argument at all.[127] This contrast is continuing and indeed widening.[128] Statistics collected by Justice Morissette, drawing on records of the Administrative Office of the United States Courts[129] and from the Federal Judicial Center, for a paper presented to The Advocates' Society in 2017, indicated that from 2005 to 2006, of 34,580 processed appeals, 8,956, or about twenty-five percent, proceeded with an oral hearing.

A decade later, 6,392, or seventeen percent of 36,547 appeals processed, included an oral hearing. The US Courts of Appeals sit in 13 circuits in total. 12 of those circuits, (or regions) hear appeals from the 94 district courts in those 12 circuits. The Court of Appeals for the Federal Circuit adds one more, for a total of 13. Statistics with respect to oral hearings vary materially among the circuits. For example, the 4th Circuit (Virginia, West Virginia, North Carolina, South Carolina) is the least inclined to hear oral argument on appeals. In 2015-2016, only 5.9% (or 287 out of 4874) of appeals included an oral hearing.[130]

The attachment to tradition and past practices should not be underestimated.[131] United States District Judge Mark Kravitz suggests that the longevity of oral appellate advocacy in England is not necessarily attributable to the fact that it is superior to the written form, but rather that English lawyers may simply be more attached to this tradition than their American counterparts.[132] Judge Kravitz posits that we do not pay enough attention to the "spectacle, or ceremonial, aspects of oral argument."[133] He argues that "[p]art of the reason that the English legal system has [maintained] oral argument is the English belief that justice must be seen in order to be done."[134] There is undoubtedly great value in ensuring that litigants witness the decision-maker grapple with the issues and the parties' concerns in a face-to-face encounter.

A similar argument can be made for Canada, which did not share the same historical distrust of courts as the United States, and of course

did not sever its ties with England as formally, or as violently.[135] This perspective aligns with the traditionalist view of oral argument, which sees oral argument as an institution,[136] and in which the public's trust in the justice system turns on visibility and accountability.[137]

Nonetheless, there is some acceptance in Canada that part of the appeal process can proceed in writing. Applications for leave to appeal to the Supreme Court of Canada are now heard in writing,[138] as are motions for leave to appeal to the Ontario Court of Appeal.[139] More recently, the Supreme Court of Canada has curtailed the time allotted to interveners on appeals and even occasionally restricted them to written submissions. The Supreme Court, which otherwise has control over its docket and only grants leave to appeals raising issues of public importance, regularly limits parties in criminal appeals as of right to thirty minutes of oral argument each.

In a nod to the classical foundations of oral advocacy explored above, part of the appeal of oral argument is that lawyers are able to "tap human emotions in a way other mediums do not allow", as eliciting the sympathy or interest of a judge can be instrumental in persuasion.[140] The auditory and visual aspects of oral argument are a powerful way to transmit ideas.[141] Although the appeal to the decision-maker's emotions does not have as important a role as it did in the classical era, effective modern advocates are sensitive to the "emotional climate" of the case and the non-rational factors that can affect a decision-maker, such as an advocate's personal integrity.[142] *Logos*, *ethos* and *pathos* each continue to play a role in modern oral advocacy.

Conclusion

In looking back to the historical foundations of oral advocacy, many of its central features are still relevant today, albeit in a diminished form. Notably, the ceremonial aspects of oral argument and the value in allowing litigants and the public to watch judges arrive at their decisions have made it such that orality has become a firmly rooted tradition in the Canadian legal system. While there may not be a right to an oral hearing in all contexts, the confidence of the public in the administration of justice may depend in no small part on its ability to see and to hear justice being done, and for litigants to feel that they have been heard, and literally have had their "day in court".

The notion that oral hearings in judicial proceedings are the preferred medium has deep roots in the traditions and historical development of our legal system. It is also widely recognized that oral proceedings offer significant advantages not only with respect to the presentation of evidence, particularly in cases where credibility is at issue, but also in terms of an advocate's ability to connect with and persuade the decision-maker. At the same time, our courts have demonstrated a growing acceptance that access to justice may require the application of principles of proportionality in order to afford litigants timely and efficient processes.

II.2 Indigenous Perspectives and Oral Traditions

Overview

Indigenous peoples[143] in Canada have been and continue to be oral societies, with a tradition of histories, legends, stories, and accounts passed down through the generations in oral form.[144] These traditions form both the purpose of repeating oral accounts from the past, and their intellectual foundations.[145] Just as our jurisprudence has begun to recognize and better account for the multifaceted elements of orality, a greater understanding of Indigenous oral traditions may enrich our appreciation of the role and importance of oral advocacy in our legal system.

This section begins with a discussion of the nature and complexity of Indigenous oral traditions. It then considers how these traditions have been received into Canadian law, before explaining why greater acceptance of oral traditions by our legal systems is essential for reconciliation with Indigenous peoples and for ensuring public confidence in an open, transparent and inclusive process.

Discussion

Understanding Indigenous Oral Traditions

Oral societies record and document their histories in intricate and sophisticated ways, including performative practices.[146] Mnemonic devices, used by Indigenous peoples to record their histories, are not cultural artifacts but multifaceted instruments through which principles, systems and relationships are understood.[147]

The Wampum belts of the Haudenosaunee, for example, "have extended human memories of inherited knowledge through interconnected, nonlinear designs and associative storage and retrieval methods—long before the "discovery" of western hypertext."[148] Wampum embodies memories through use such that "[w]ampum records are maintained by regularly revisiting and re-"reading" them through community memory and performance, as wampum is a living rhetoric that communicates a mutual relationship between two or more parties".

Oral history in numerous First Nations is conveyed through interwoven layers of culture that entwine to sustain national memories through many generations.[149] The transmission of oral tradition is bound up with the configuration of language, political structures, economic systems, social relations, intellectual methodologies, morality, ideology, and the physical world.[150] These factors assist people in knitting historic memories tightly in their minds.[151]

The meaning to be drawn from an oral account depends on who is telling it, the circumstances in which the account is told, and the interpretation the listener gives to what has been heard. Not unlike written text, the transmission of oral history may be to educate the listener, to communicate aspects of culture, to socialize people into a cultural tradition, or to validate the claims of a particular family. Those who hear the oral accounts draw their own conclusions from what they have heard, and they do so in the particular context of the telling.[152]

Oral history is therefore much more comprehensive and complex than simply distilling history to "what went on in the past" in the western tradition of recounting history.[153] Indigenous peoples invite advocates of western law to listen to the words and sense of oral history rather than merely seeking verification of a factual record.[154]

As Muscogee poet Joy Harjo explains, the myth that oral traditions are less reliable than written communications emerged from the class of cultures and the failure of colonizers to appreciate the depth and sophistication of skilled oration:

> When the colonizers from the European continent stepped into our tribal territories, we were assumed illiterate because we did not communicate primarily with written languages, nor did we store our memory in books and on papers. The equating of written languages to literacy came with an oppositional world view, a belief set in place as a tool for genocide. Yet Indigenous nations prized and continue to value the word. The ability to speak in metaphor, to bring people together, to set them free in imagination, to train and to teach, was and is considered valuable, more useful than gold, oil or anything else the newcomers craved. Many of our known texts, though preserved in orality, stand next to the top world literary texts, oral or written.[155]

Oral Tradition and Oral History

The terms "oral tradition" and "oral history" are used interchangeably. Some may suggest that each term should be treated separately, with oral history representing the product of communication, and oral tradition signifying the process of communication. They need not be separated, however, because as Professor John Borrows explains, "the product and process of communication are inseparably intertwined."[156]

Oral tradition does not stand alone but is given meaning through the context of the larger cultural experiences that surround it.[157] Many types of traditions are a product of this process: memorialized speech, formalized group accounts, genealogies, epics, tales, proverbs, and sayings. In their aggregation, each of these cultural strands are wound together. They are made up of complex customs such as mnemonic devices, ceremonial repetition, the appointment of witnesses, dances, feasts, songs, poems, and the use of testing to help ensure that certain traditions are accredited within the community.[158]

The perception that these oral traditions represent an earlier period in Indigenous societies --as if the oral were merely a stage in historical development on the way to the written-- has much to do with the production of what Susan Gingell calls "textualized orature," that is, literature that has been recorded and transcribed.[159] To textualize an oral narrative is to write it which may include its translation. Although it permits documenting the story, as Gingell writes, all textualization permits others to turn the narrative to purposes the originators did not necessarily expect or intend.

Further, textualizing stories can fossilize them, whereas storytellers continue to use oral stories in new contexts to perform new functions. Modern storytellers work in full awareness of these difficulties, often using the English language to tell their stories.[160] As Gingell explains, transcriptions and print omit gestures, tone of voice, loudness, and other performative features; print strips orature of its intonation and context. These erosions of expression, Gingell concludes, can act as colonizing practices, and may explain why recent scholars have tried to find terms that reflect the idea that oral stories are not inferior to literature.[161]

These multifaceted elements of oral tradition, however, make working with it difficult and those who may be attentive to its substance and methodology are left with the task of trying to explain its usefulness for historical and legal inquiry.[162] The tendency to dichotomize oral and documentary history are legion. The diversity of interpretation is not necessarily a result of the way in which they were transmitted, but instead reflects that there were different interpreters of history who have different interests.[163]

From the Royal Commission on Aboriginal Peoples, and more recently the Truth and Reconciliation Commission, we know that Canada systematically used its laws and court processes to eradicate these oral traditions: to solve the "Indian problem" and take the "Indian out of the Indian."[164] Yet, in many parts of the country certain oral traditions are most relevant precisely because they keep alive the memory of their unconscionable mistreatment at the hands of the British and Canadian legal systems.[165]

Canadian law has constrained Indigenous peoples' reliance on the richness of their orality in the resolution of disputes. When considering the future of oral advocacy in Canada, it is vital not only to recognize and respect this history, but also to attempt to incorporate Indigenous oral traditions into the Canadian justice system in an accretive way.

Indigenous Oral Tradition in Canadian Courts: The Gulf Between Two Cultures

The Decontextualization of Oral Tradition in Legal Processes

It was the newcomers who insisted on written treaties, and in doing so they recorded and relied upon their own languages, their own concepts, and practices, all of which were foreign to the other negotiating parties.[166] As a result, they bound the written treaties in the limitations found within their languages, concepts and practices. Disputes concerning the interpretation of the written text of treaties and the understanding of the First Nation signatories within Canadian courts are legion. These differences of interpretation between the written text and the oral promises understood by one party or another is the genesis of much jurisprudence in Canada concerning Aboriginal[167] and treaty rights.

In the non-Aboriginal tradition, the purpose of historical study has often been the analysis of particular events in an effort to establish what "really" happened as a matter of objective historical truth, or more modestly, to marshal facts in support of a particular interpretation

of past events.[168] Written history does not present a dialogue so much as a static record of an authority's singular recounting of a series of events. Readers may interpret these writings, but the writing itself remains the same.

For the Indigenous community, "rendering accurately the history of a cross-cultural relationship is not simple or straightforward. History is not an exact science … important differences derive from the methodology of history … how the past is examined, recorded, and communicated. The non-Aboriginal historical tradition in Canada is rooted in western scientific methodology and emphasizes scholarly documentation and written records. It seeks objectivity and assumes that persons recording or interpreting events attempt to escape the limitations of their worn philosophies, cultures and outlooks."[169] Oral narratives, on the other hand, do not have to be told the same way. What is fundamental is whether or not they carry the same message.[170]

Opposite to the understanding of oral tradition in its context is the very real fear that oral tradition is de-contextualized in legal processes: in being heard in a courtroom its "fractured into slices by both direct and cross-examination". This is the fundamental challenge of one legal system judging another.[171] Western discourse has come to prioritize the written word as the dominant form of record keeping and until recently, has generally considered oral societies to be peoples without history, a grave misapprehension of the truth.[172] As discussed above, oral societies in fact record and document their histories in complex and sophisticated ways, including performative practices.[173] There is legitimate concern that without oral narrative evidence, Indigenous people cannot adequately present their own evidence in litigation.[174]

As expressed aptly by Erin Hanson in her article, "*Oral Traditions*" written for the University of British Columbia's website project developed by its First Nations and Indigenous Studies Disciplines: Indigenous Foundations:

> "Discussions of oral history have occasionally been framed in oversimplistic oppositional binaries: oral/writing, uncivilized/civilized, subjective/objective. Critics wary of oral history tend to frame oral history as subjective and biased, in comparison to writing's presumed rationality and objectivity. In western contexts, authors of written documents are received automatically as authorities on their subjects and what is written down is taken as fact. Such assumptions ignore the fact that authors of written documents bring their own experiences, agendas, and biases to their work—that is, they are subjective."[175]

Historical and Present-Day Statutory and Common Law Rules that Limit the Receipt of Oral History

The dispute resolution process available through Canadian courts is inherently adversarial and when encountering questions of fact and Canadian law that involve Indigenous people and their communities, they have historically been faced with a bias toward legitimizing its colonialist roots.[176]

It is little known that the British Columbia *Evidence Act* for example, repealed only in 1968, permitted a judge to receive evidence from an Aboriginal person only as a matter of discretion, as it was implicitly assumed that otherwise such a person's testimony would be suspect and unreliable. The Act read "… it shall be lawful for any Court … in the discretion of such Court … to receive evidence of any Aboriginal, Native, or Native of the halfblood, of the Continent of North America, or of the Islands adjacent thereto, being an uncivilized person, destitute of the knowledge of God, and of any fixed and clear belief in religion or in a future state of rewards and punishments, without administering the usual form of oath to any such Aboriginal, Native or Native of the halfblood …"[177]

Confronting such common law values is the experience of Indigenous peoples and in its current form, the greatest hurdle for the inclusion of oral history is the evidentiary rule against hearsay. This rule excludes communication that is considered "second-hand". Such evidence is considered untrustworthy.[178] There are, however, exceptions such as necessity and reliability. It is the trial judge who determines whether the hearsay exceptions of necessity and reliability apply.

Through the years, Aboriginal oral history has led judges to label Indigenous peoples as, among other things, ignorant, primitive, untutored, savage, crude, simple, uninformed, and inferior people.

Against these biases, in recent years the oral traditions of First Nations have played an increasingly significant role in the litigation of Aboriginal rights.[179] In her examination of these biases, Delia Opekokew explains it this way: "there is an overwhelming gulf between the Indian and the Anglo-Canadian culture on which the court process is based. The two cultures operate from very separate and different beliefs and history…and unfortunately, only Anglo-Canadian laws, based on customs, values and practices foreign to Indian people, continue to be applied when interpreting Indian treaties. The mistakes that arise from such a practice are overwhelming."[180]

Delgamuukw and Tsilquot'in: An Increasing Recognition of the Validity of Aboriginal Oral Traditions and their Significance in Aboriginal Societies and Cultures

Oral history is the only way the Indigenous claimants can bring their history, perspective, and the context of the times into the legal arena. In numerous cases, oral histories have been brought before the courts in an attempt to "prove" long-standing relationships between Indigenous peoples and their environments.[181]

Erin Hanson, writing as part of the UBC *Indigenous Foundations* website project referenced above, describes it as follows:

> The use of oral histories as evidence in court has become a topic of much discussion and debate in Canada. Perhaps the most famous example of oral history within a legal context is *Delgamuukw v. British Columbia. Delgamuukw* was the first case in which the court accepted oral history as evidence, although the evidence was ultimately dismissed as unreliable.[182]
>
> In that case, the Gitxsan and Wet'suwet'en peoples argued that they had Aboriginal Title to the lands in British Columbia that make up their traditional territories. In order to prove their title, they had to provide evidence that they had occupied their territories for thousands of years. Without written documents to make their case, Gitxsan and Wet'suwet'en hereditary chiefs presented their oral histories in the form of narratives, dances, speeches, and songs: a "performance tradition".[183]
>
> The struggle of the trial judge to address this evidence is palpable: he accepted the oral history as evidence, but ultimately

concluded that the Gitxsan and Wet'suwet'en's ancestors were a "people without culture," who had "no written language, no horses or wheeled vehicles."[184] The trial judge went so far as to cite seventeenth century philosopher Thomas Hobbes to support his views, calling the lives of the Gitxsan and Wet'suwet'en's ancestors "nasty, brutish, and short."[185]

The case proceeded through the appellant courts and ultimately, the Gitxsan and Wet'suwet'en won a precedent-setting victory for oral history to be given weight as legal evidence in a Canadian court. Chief Justice Lamer of the Supreme Court of Canada concluded:

> The laws of evidence must be adapted in order that [oral] evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. . . . To quote Dickson C.J., given that most aboriginal societies "did not keep written records," the failure to do so would "impose an impossible burden of proof" on aboriginal peoples, and "render nugatory" any rights that they have (Simon v. The Queen, [1985] 2 S.C.R. 387, at p. 408). This process must be undertaken on a case-by-case basis.[186]

After *Delgamuukw*, a number of cases have further considered how oral histories should be interpreted and accepted as evidence in court. In *Squamish Indian Band v. Canada* (2001 FCT 480) and *R. v. Ironeagle* (2000 2 CNLR 163), the court accepted oral histories as evidence but stipulated that the weight given to oral histories must be determined in relation to how they are regarded within their own societies.[187] In her ruling in *Squamish*, Justice Simpson also noted that she might not have given the oral histories that were presented before her much weight if she had found written records that held the same information which she could use instead. Justice Simpson further noted that the oral histories were "sometimes contradictory."[188]

Legal scholar Drew Mildon uses Justice Simpson's ruling as an example of how a judge's "doubt and skepticism" challenges the very nature of oral history: "[Oral] evidence may be deemed inadmissible. . . . simply because there is other evidence available [to use instead]. Lastly, it is characterized as contradictory (which one assumes never happens in written history.)" [189]

In 2002, the Tsilhqot'in initiated land claims proceedings in the British Columbia Supreme Court to assert title to their lands. Justice David Vickers found that the oral histories presented to him by members of the Tsilhqot'in Nation were sufficient to prove their Aboriginal title. He also rejected the Crown's claims that oral tradition was unreliable or should be measured against written documents, as it was equally impossible to determine the accuracy of historic fieldnotes or, more specifically in the Tsilhqot'in case, a 1900 ethnography on the "Chilcotin Indians."[190] More broadly, Justice Vickers observed that "disrespect for Aboriginal people is a consistent theme in the historical documents."[191]

These cases have compelled western legal systems to reconsider the validity of Aboriginal oral traditions and their continued significance and relevance in Aboriginal societies and cultures. The Canadian legal system has begun to make adjustments to incorporate this reality, though courts still struggle to fairly consider evidence that is from a different cultural context without forcing it into a western framework.[192]

In some ways ironically, the development of Canadian common law of contract, for example, has struggled at the same time with oral evidence in a different context: oral agreements, pre-contractual representations, parol evidence and what courts broadly refer to as "the factual matrix" surrounding the contract, or evidence of the intention of the parties, are still issues being debated by our Supreme Court.[193]

As Erica Hansen observes, reception to oral history in mainstream Canadian society has begun to grow too. As law professor John Borrows suggests in the title to his article on the subject, perhaps the courts as well as mainstream society are now "listening for a change."[194]

As the Supreme Court of Canada held in *R. v. Marshall*,[195] the interpretation of facts and law which have an impact upon treaty and aboriginal rights must be approached in a manner that maintains the honour of the Crown. Reconciliation requires that all parties involved in the litigation process adopt practices supporting the Crown's duty of honourable dealing in its relationships with Indigenous peoples. Practices that would operate to limit the introduction of Indigenous perspectives could impede the project of reconciliation.

Adjudicative Processes and the Resolution of Disputes are Inherently Relational

Adjudicative processes and the resolution of disputes are inherently relational and therefore must be open, transparent, and inclusive to maintain or restore the confidence of the parties.

In the cross-cultural context of a Canadian court, an inherently adversarial system, permitting a judge to rely entirely on the written text/argument is antithetical to reconciliation. The existence of oral histories and oral traditions must be considered in the analysis of whether a matter or category of matters can equitably and appropriately be determined on a written record, without an oral hearing.

The Court's modified test for Aboriginal evidence must still be received and evaluated by people within a structure and institution that often has a very different ideological and cultural orientation from most Aboriginal peoples' traditions. This requirement creates problems for the courts in evaluating what is factual across cultures and raises a host of issues.[196]

As Professor Borrows puts it,

> [T]here are enormous risks for non-apprehension and misinterpretation when Aboriginal peoples submit their "facts" to the judiciary for interpretation. This problem is especially poignant in litigation as factual determinations are presented in an adversarial environment, and interpretations made by judges with a different language, cultural orientation, and experiential background than Indigenous people. The potential for misunderstandings exists because each culture has somewhat different perceptions of space, time, historical truth, and causality… judges who evaluate the meaning, relevance and weight of the oral tradition evidence must appreciate the potential cultural differences in the implicit meanings behind explicit messages if they are going to draw appropriate inferences and conclusions."[197]

This difficulty of interpretation requires a consideration of the need, when hearing such evidence, to have the assistance of Indigenous Elders, judges, *amicus curiae*, or skilled counsel knowledgeable in the traditions, laws, and cultures of Canadian and Indigenous legal systems. Unless this happens, Aboriginal oral history runs the risk of being "undervalued" because the perspective on their practices,

customs, and traditions and on their relationship with the land may not be given due weight.[198]

Indigenous peoples "need to continue, as they have done for millennia, to be involved in the creation, control and change of their worlds through the power of language, stories and songs. It is vital that they participate in the interpretation of their traditions if they are going to bring them before the courts. The engagement is important because the courts' words "do not merely represent meaning but possess the power to change reality itself as judicial consideration of Indigenous history will shape aboriginal peoples' legal, economic, political and socio-cultural relationships. Unless Indigenous peoples more strongly participate in the future interpretation of these narratives in the Canadian judicial system, the process and purpose of oral history may not be appropriately accommodated, despite best efforts of the judiciary."[199]

As the court said in *R. v. Marshall*, common law judges cannot turn away from their duty to provide reasons about how and what they determined were factual conclusions in any given case involving oral tradition. They do not have the luxury that others might have in deferring judgment until there is a "stable academic consensus on the question."[200] Judges must evaluate how they came to regard a particular point of knowledge as a "fact" and articulate their findings for others' evaluation and response.[201] The same is true for Québec judges.

Conclusion

It can fairly be said that the right to be heard has its roots in Indigenous traditions and particularly the history of oral storytelling, as much as it does in the common law and civil law traditions. There is growing recognition of this fact both in Canadian courts and in Canadian society at large.

To truly achieve reconciliation with Indigenous peoples, however, the Canadian legal system must include processes which are open, transparent and inclusive, recognize and validate oral traditions, and encourage the engagement and participation of Indigenous peoples.

This means at a minimum that in cases involving Indigenous peoples and Indigenous rights, legal processes must respect the centrality and significance of oral traditions and expressly provide for the reception of oral histories, through oral testimony, tendered in a culturally appropriate manner. It may also require the assistance of elders, judges, *amicus curiae*, or skilled counsel knowledgeable in the traditions, laws, and cultures of Canadian and Indigenous legal systems.

A deeper understanding of Indigenous oral traditions and oral histories can also inform our approach to building a more responsive and accessible legal system. The recognition that there may be multiple meanings or interpretations of a particular narrative depending on how it is told, in what context, and through which methods, should cause us to think deeply about the value of oral communications for increasing our understanding and resolving disputes in a just and equitable manner.

PART III
Learning from the Past, Moving to the Future

III.1 Learning and Persuasion: An Examination of Other Disciplines and the Legal Experience

Overview

A key purpose of oral advocacy is to provide an opportunity for decision-makers to learn about a case and the factual, legal, and policy issues that are raised. Research about human learning can therefore shed light on the importance of oral advocacy. While both oral and written advocacy engage the decision-maker, oral hearings provide an additional opportunity for decision-makers to ask questions and work collaboratively with colleagues and advocates to build an understanding of the case.

This section begins with an overview of research and theory about the role of oral presentation in human learning. It then turns to the impact of oral advocacy in litigation, summarizing perspectives from the Bench and from advocates, empirical research and theory about judicial reasoning, and effects on other stakeholders in the legal system. The section ends with an examination of research and commentary about the impacts of different formats of oral advocacy, primarily comparing in-person and remote hearings.

Discussion

Learning Through Oral Presentation

Psychology and education researchers have found that people learn most effectively through experiences that involve active engagement, rather than the passive transmission of information.

The importance of learner engagement is supported by constructivism, a prominent theory in education science which posits that,

rather than passively receiving knowledge, individuals "construct" their own knowledge by interpreting their experiences through their internal models of the world, and using those experiences to amend and build new models.[202] Therefore, individuals learn better through experiences that facilitate knowledge construction, and in particular, experiences that engage the learner, or involve social processes that allow individuals to "build" knowledge together.[203] Studies have shown that constructivist approaches in the classroom have positive impacts on students' academic success.[204] Particularly relevant to the oral hearing context are studies related to discussion and question-asking (questioning). For example, one study found that undergraduate science students were more likely to arrive at the correct answer to a question through peer discussion, even if no individual in the group knew the correct answer initially.[205]

Studies on oral presentation in educational settings may also provide insight into the role of oral advocacy to assist decision-makers' understanding of a case. Empirical research has established that oral presentation can be an effective teaching method for listeners (i.e., judges and decision-makers) due to the potential for active engagement. Research suggests that passive listening is not particularly effective, but presentations that foster active engagement by the listener are beneficial.[206] Researchers have found that "non-presenting students also benefit from class presentations, including learning course material, learning to listen for the key points of presentations, and bringing different perspectives to the discussion."[207] Responding to and engaging with an oral presentation creates a high-involvement learning environment, which increases the cognitive involvement of the listener.[208] Listeners who simply receive information in oral presentations, however, may not experience significant benefits when compared to reading written materials. Studies have found that the same parts of the brain are engaged in reading and listening, [209] and that adults experience no significant differences in comprehension when reading a book as opposed to listening to an audiobook.[210]

For speakers, oral presentation also contributes to deeper and stronger learning outcomes. Oral presentations effectively force individuals to deeply engage with the material they are presenting.[211] One study found that case scenario-based oral presentations facilitated deeper understanding and knowledge of the subject matter.[212] Similarly, another study found that oral poster presentations helped increase the students' knowledge and understanding of the subjects they presented on.[213] Learning strategies that involve interaction and collaboration have been found to result in better learning outcomes.[214] In line with this, one study found that preparing for oral presentations allowed students to share ideas with one another which helped refine their knowledge structures.[215] Further, oral presentations foster learning that is considered authentic, holistic and challenging and helps enhance critical-thinking skills through debate.[216]

The literature indicates that there are benefits to pairing oral and written presentations. Education research indicates that writing provides more opportunities for student presenters to carefully reflect on their thoughts.[217] Further, in reading and revising written work, students may be more inclined to "identify essential concepts, establish links between concepts, and thoroughly organize the subject-matter according to the underlying rhetorical structure."[218] Additionally, when compared to oral explanations, written explanations fostered stronger organization of information which in turn assisted the students in acquiring deeper conceptual knowledge.[219] On the other hand, oral presentation generally incites greater social involvement than writing does and as such, students may provide more "authentic examples or analogies to illustrate the subject matter for a particular audience."[220] As a result, students are able to more effectively transfer knowledge via oral as opposed to written explanations,[221] although oral presentations can often be more unorganized than written presentations.[222] In addition, coupling oral and written presentation allows for more inclusivity. For example, students with dyslexia or who otherwise face greater challenges producing and digesting written materials may benefit considerably from using both oral and written work.[223] In the context of the legal profession, pairing oral and written advocacy may similarly hold benefits for diversity and inclusion among decision-makers, advocates, and litigants.

Further, pairing oral and written advocacy may help facilitate better learning among a Bench or Bar with varied learning styles. A prominent theory among educators is that individuals have different preferences of learning modalities — the primary learning styles being visual, aural (or heard information), reading and writing, and kinesthetic.[224] Therefore, pairing oral and written advocacy may accommodate both aural and reading learning preferences. However, it should be noted that theories about learning styles have been routinely criticized as lacking scientific support, although it appears that many educators continue to hold these perspectives.[225]

Research and theories in education and psychology have pointed to the benefits of learner engagement in improving comprehension. This suggests that, in the legal context, decision-makers' understanding of a case and the issues at hand benefits from processes such as oral hearings, which permit decision-makers to ask questions and engage in discussion with their colleagues. This conclusion is supported by research on peer discussion and the impacts of oral presentation in classroom settings. The research also suggests that advocates may also benefit from preparing and delivering oral submissions. Finally, coupling oral and written advocacy may improve the inclusivity of the litigation process for participants who may have certain difficulties with one modality (for example, individuals with dyslexia).

The Impact of Oral Advocacy on Judges

Within the legal community, opinions about the importance of oral advocacy vary widely. Jurists' comments have been put forward and canvassed extensively throughout the years, especially as most courts have moved toward increased reliance on written materials. Similarly, social science researchers have also studied judicial reasoning and the factors contributing to legal decisions.

As identified by Chief Judge Spencer D. Levine of the Florida Fourth District Court of Appeal, opinions about the importance of oral advocacy (in appellate settings) generally fall into three schools of thought: (i) the traditionalist view that oral argument is almost always necessary or helpful to judges; (ii) the more recent opposing view that oral argument has little effect on the outcome of a case; and (iii) the moderate view that oral argument has an impact "that cannot be overstated", but only in very close cases.[226] Within this spectrum, some judges have expressed the view that oral advocacy can change their provisional opinions in a significant minority of cases,[227] while others (including at the Supreme Court of Canada) have commented that oral argument adds "little value".[228]

Empirical research, however, suggests that oral advocacy may be more important than skeptics believe. Professor Timothy Johnson conducted a unique study examining the notes of United States Supreme Court Justice Harry Blackmun found a considerable correlation between judicial votes and the quality of oral argument (according Justice Blackmun's contemporaneous assessments).[229] A Canadian study also found that decision-making at the Supreme Court of Canada is affected by factors including the experience of the litigation teams, which the researchers considered to be a measure of lawyers' capability and of the quality of oral advocacy.[230]

Despite mixed opinions about the importance of oral advocacy to case outcomes, judges and advocates tend to agree that oral argument is important for shaping reasoning and how an opinion is written (and therefore the law).[231] In addition, judges have expressed the value of oral advocacy in focusing the discussion or "crystallizing the issues",[232] and in resolving uncertainties and misconceptions arising from written materials.[233]

Judges and other decision-makers also benefit from oral advocacy in other ways. In the U.K. tribunal study, over 75% of tribunal decision-makers "agreed strongly" that it was difficult to make determinations based on paper applications only. Other metrics in the study also indicated that decision-makers were less certain of their decisions without an oral hearing, even when presented with all the same information on paper.[234]

Similarly, appellate judges in the United States and South Africa agreed that oral argument is generally important for resolving any doubts about the issues, confirming provisional opinions formed based on written materials, and providing a sounding board to the Bench, even if results do not change.[235] Oral argument provides an opportunity for judges and counsel to engage in dialogue about the issues, which not only allows judges to obtain relevant information not fully canvassed in the written materials,[236] but may also improve judges' "learning" about a case, as discussed above.

Appellate judges have also noted that oral hearings present a valuable opportunity to indirectly communicate with colleagues about their opinions on the issues, and to understand how their colleagues are likely to vote.[237] Professor Johnson suggests that oral hearings assist judges with predicting and navigating the coalitions that will form in chambers when it comes time to determining the decision on the appeal.[238] In the United States, Supreme Court judges have even been observed to have used the oral hearing to persuade one another of their merits.[239]

Furthermore, oral argument may present an important opportunity to correct or mitigate unconscious reasoning errors among judges. Judges, like all humans, are often subject to implicit biases or employ faulty cognitive heuristics such as "anchoring" (where an individual's decision about a figure, such as a damages quantum or length of a sentence, can vary significantly based on the figures they are presented with, even if those proposed figures have no basis in fact or reason).[240]

Oral argument may present an important opportunity for advocates to detect and address judicial biases, and to reframe their arguments accordingly. Experts have theorized that judges are more motivated to consciously check their biases and employ more data-based (as opposed to ideology-based) reasoning processes when, among other things, they feel that they must justify their decisions to others, and they are exposed to strong and influential arguments.[241] In addition, the research indicates that judges may be more capable of counteracting their own biases by, among other things, recognizing that other members of society may hold views or interpret facts in different ways[242] — something that can come to the fore during oral argument.

Despite differing schools of thought about the impact of oral advocacy on case outcomes, decision-makers and empirical research findings tend to arrive at the same conclusion that oral advocacy has value. Oral argument allows judges and decision-makers to obtain any additional information needed to clarify uncertainties and misconceptions arising from the written materials; to focus on and develop the most salient issues in a case; to resolve doubts and confirm opinions formed based on written materials; and to communicate, understand, and attempt to influence their colleagues' opinions. Empirical research also suggests that the quality of oral advocacy may have an impact on case outcomes.

An important note is that the perspectives and research canvassed in this section arose mainly from advocates and judges practicing at the highest appellate levels. Decision-makers at lower-level courts or administrative tribunals may have different comments about the importance of oral advocacy. One study examining a particular social benefits tribunal in the United Kingdom found that an oral hearing's impact on case outcomes arose mainly from the information arising in the hearing — an effect that was significantly reduced when the same information was incorporated into a written application.[243]

The Impact of Oral Advocacy on Advocates, Litigants, and Others

Oral advocacy has impacts not only for decision-makers but also for advocates and litigants. Compared to the impact of oral advocacy on judges, the benefits and costs of oral advocacy for other stakeholders in the justice system may be under-studied. However, the existing research and commentary have identified important impacts for advocates, litigants, and the public at large.

For advocates, oral hearings provide opportunities to receive judicial perspectives about a case. Experts have noted that judges' questions can sometimes identify new or overlooked angles to an argument that were not fully developed in the written materials.[244] Capable advocates may be able to seize on these opportunities to improve the persuasive power of their arguments. In addition, preparing for oral argument forces conscientious advocates to understand their cases at a new depth. As discussed above, social science research indicates that preparing and delivering an oral presentation significantly increases the presenter's comprehension of the subject matter.

Commentators have also pointed out that oral hearings are often an important part of the litigation process for litigants.[245] Generally, oral hearings represent the only opportunity that a litigant has to observe the attention and consideration being given to their case. Therefore, parties may be more likely to feel heard and fairly treated if they receive the benefit of an oral hearing, as opposed to a written hearing, and if they know that they (or their representative) have had the opportunity to speak directly to the decision-maker. Oral

advocacy may therefore play an important role in maintaining public confidence in the administration of justice.

On the other hand, oral advocacy often comes at an increased cost to litigants and the justice system at large, and may even exacerbate access to justice concerns. Those who are skeptical of the importance of oral argument have pointed to the significant resources required (e.g., preparation and court time), in light of the relatively few cases in which oral argument has a real impact on the result.[246]

In addition, observed correlations between judicial votes, litigation team size, and lawyer experience — and particularly experience at appellate courts — suggest that litigants who are able to afford more experienced lawyers and more legal resources may be at an additional advantage in oral argument.[247] Therefore, oral advocacy and its associated costs may actually present a barrier to full engagement with the legal system for less-resourced litigants.

In-Person and Remote Proceedings: Does the Format of the Oral Hearing Matter?

The Impact of Video Hearings on Substantive Outcomes

As courts increasingly make use of modern communications technology — particularly as the COVID pandemic prevents the resumption of regular in-court proceedings — researchers have examined the impacts of video and telephone proceedings on litigation. While these technologies have allowed courts to avoid a complete standstill during the pandemic, the literature raises concerns about remote as opposed to in-person appearances. Holding proceedings by video has been found to affect case outcomes, credibility determinations, and engagement with and perceptions of the legal process by litigants.

Research conducted on video as opposed to live hearings suggest that the hearing format has a significant impact on the outcomes of a case. For example, a 2008 analysis of Cook County, Illinois bail hearings found that the average felony bond amounts rose by 51% - and even as much as 90% for certain offences – in video bail hearings, while experiencing no statistically significant increase in live hearings.[248] Following a class action lawsuit challenging the video bail hearing practice, the county ceased the use of video bail hearings.[249]

Similarly, a 2010 evaluation of a United Kingdom virtual hearing pilot, in which defendants against criminal charges had their first hearing conducted from the police station with a video link to court, found that defendants were more likely to plead guilty and to receive longer prison sentences.[250] In asylum proceedings in 2005 and 2006, asylum was granted at roughly double the rate in live hearings than in video hearings.[251] More general psychology research on the impact of videoconferencing technologies has led some commentators to suggest that decision-makers who interact with and perceive litigants over video may be less sensitive to the impact of negative decisions on the individual.[252]

Researchers generally attribute outcome differences between video and live proceedings to two factors. First, video formats may affect decision-makers' assessments of credibility. In the Cook County bail hearing study, researchers noted that the video set up made it appear that the defendant was not making eye contact, and that the video format may have affected judges' opinions about the defendant's believability.[253] Studies examining the impact of video testimony by children in sexual abuse cases have repeatedly found that jurors found video testimony to be less convincing and believable.[254] In addition, immigration judges have reported incidents where they made credibility assessments during a video hearing, but then changed those assessments after a subsequent in-person hearing.[255]

The idea that triers of fact are less likely to believe video as opposed to live testimony is supported by psychology research about the "vividness effect"; Professor Sara Landstrom posits that "it can be argued that live testimonies, due to face-to-face immediacy, are perceived [by jurors] as more vivid than, for example, video-based testimonies, and in turn are perceived more favourably, considered more credible, and are more memorable."[256] Experts in non-verbal communication have also called for courts to be cautious about adopting remote proceedings, highlighting that video technologies such as Skype and Zoom may focus the viewer on behavioural information in a different way than live proceedings — for example, by focusing on the face at a close distance. This can be significant given existing research that facial characteristics can adversely influence the assessment of evidence and sentencing in criminal cases.[257]

On the other hand, a simulated study conducted in Australia found that it was not the technology that affected perceptions of a defendant's guilt, but rather their location and framing within the jurors' field of view: defendants were more likely to be considered guilty when they sat alone in the courtroom dock, as opposed to sitting beside counsel, where they were perceived to be more honest.[258] These findings suggest that video testimony may be an adequate replacement for in-person testimony if the design and setup of the space are adequate. The same study did find, however, that prosecutors were less likely to be considered credible when appearing on a screen than when they were physically in the courtroom.[259]

Second, researchers have found that litigants may be less likely to engage fully in the legal process when they are subject to video as opposed to live proceedings. Professor Ingrid Eagly's review of U.S. video immigration hearings involving detained individuals found that they were more likely to be deported, not because decision-makers were more likely to deny claims, but because the respondents were less likely to take advantage of potentially helpful procedures. That is, respondents were considerably less likely to retain counsel (35% lower rate than in-person respondents), apply for permission to remain lawfully (90% lower rate than in-person respondents), or apply only for the right to return voluntarily (6% lower rate than in-person respondents).[260]

Eagly's interviews and court observations suggested that the lower engagement in video proceedings resulted from factors such as the need for increased logistical preparation (e.g., having to mail application materials to court rather than simply bringing a copy to the live hearing), difficulties in lawyer-client communications, difficulty understanding what was happening, and the perception among respondents that a video hearing was "unfair and not a 'real day in court'".[261]

In conclusion, research has indicated that the format of a hearing, whether in-person or by video-conferencing technology, has an impact on the substantive outcomes. Generally, studies have found that video hearings tend to lead to less favourable outcomes for individuals in criminal or immigration proceedings. In particular, holding hearings by video may result in more negative credibility

determination. Additionally, challenges caused by video proceedings may decrease the likelihood that individuals will engage fully with the legal process.

The Impact of Remote Hearings on Access to Justice

The introduction of video and phone conferencing as a regular substitute for in-court hearings has both positive and detrimental impacts on access to justice. The widespread shift to remote hearings in the wake of the COVID pandemic have served to highlight these impacts and have sparked considerable commentary and study that should continue to be monitored as the pandemic continues.

Holding hearings remotely may significantly 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.[262] However, the technological requirements can impose serious barriers for those without regular access to and competence with these technologies. These barriers often manifest along existing lines of inequality, as litigants who live in rural and remote areas, and those with lower income levels, tend to experience more difficulty accessing reliable and adequate internet connections.[263] In Canada, Indigenous and Northern communities are particularly affected by disparities in connectivity.[264] Individuals with disabilities who require special technologies in order to access and engage in online activities may also experience unique challenges in accessing remote hearings.[265]

Further, litigants who require interpretation and translation services may also suffer from the shift to remote hearings. In telephone conferencing, interpretation services suffer from the interpreter's inability to perceive non-verbal communication, which is an important part of accurate interpretation.[266] Video interpretation may also be less than ideal, as a 2005 study of video immigration proceedings in Chicago found that videoconferencing may have exacerbated interpretation issues; in addition, respondents who relied on interpreters were also more likely to have technical issues.[267]

Therefore, the impacts of remote hearings on access to justice is not clear-cut. While remote hearings tend to reduce the costs of participating in legal proceedings, the requirement of adequate internet connections, technological competence, and video interpretation can pose barriers to segments of the population that may already face systemic difficulties in accessing the legal system.

Conclusion

Despite the costs and other burdens of oral advocacy in a physical courtroom, there remain compelling reasons for preserving in-person proceedings and oral argument in litigation. Social science and education research indicates that oral presentation and the discussion engendered in oral hearings are particularly effective learning methods for both speakers (advocates and lawyers) and listeners (decision-makers and judges), especially when involving a high degree of engagement and social dialogue. The research also suggests that coupling oral and written presentation, rather than replacing one with the other, is the most effective and inclusive method as it accommodates individual learning styles and strengths.

Likewise, the importance of oral advocacy in litigation is supported by research findings and commentary from various stakeholders in the legal system, including judges, advocates, and litigants. While opinions about the ultimate effect that oral argument has on the outcome of a case vary widely, some studies find that the quality of oral advocacy can have a real impact on judicial votes. Additionally, judges have identified a number of benefits of oral advocacy other than impacting the ultimate result. Advocates and litigants may also benefit from oral argument.

The advantages of oral advocacy may be most prominent in in-person hearings, as compared to remote hearings. Research on video hearings has identified a number of concerns about the impact of a video hearing on substantive outcomes, credibility assessments, and litigant engagement. While remote hearings can increase the accessibility of the courts to some litigants, the emphasis on technology and connectivity also raises serious access to justice concerns for others, particularly in Indigenous communities, remote and rural areas, for those from lower income levels, and for those requiring translation and interpretation services.

III.2 Modes of Hearing in Canada and Beyond

Overview

Prior to COVID, there appeared to be a general trend towards wider judicial discretion and broader application of rules to allow matters to be heard in writing, or by telephone or videoconference. As court dockets expand, remote conferencing technologies advance, and the COVID pandemic continues, courts and tribunals have by necessity, widely adopted new ways of holding hearings that would previously have occurred in physical courtrooms. Where argument was once conducted orally and in-person, there is now an increased focus on written, video, and telephone hearings.

This section outlines the current and pre-pandemic roles and prevalence of written advocacy, remote or virtual advocacy and in-person oral advocacy across Canada, as well as in foreign jurisdictions such as the United Kingdom and the United States. It also addresses the impact of COVID on hearing formats and advocacy and considers how COVID has changed how litigants and adjudicators approach advocacy.[268]

Discussion

Canada

General Themes

There is a general presumption in favour of in-person hearings in all provinces and territories. Decisions made in the absence of any oral hearing remain the exception in Canada. However, this presumption has been revised in light of the exigent circumstances of the COVID pandemic. To accommodate public health restrictions, many matters have been conducted either by telephone or video-conference. During periods when public health restrictions were relaxed somewhat, these alternative forms of hearing have been made available in addition to in-person hearings.

At the time that this Report was written, the hearing of matters by electronic means is generally contingent on the availability of technology (for videoconferences) and the requirement that the lack of an in-person hearing should not compromise the fairness of the proceeding (Newfoundland,[269] Manitoba,[270] British Columbia,[271] Québec,[272] Nova Scotia[273]).

Appellate Courts

In most provinces, and across civil, family and criminal practice, appellate courts may hear cases based on written submissions only, on agreement of the parties (British Columbia,[274] Saskatchewan, Manitoba,[275] Alberta,[276] New Brunswick,[277] Prince Edward Island,[278] Québec, Ontario). Most appellate courts also have rules in place to allow hearings by video and telephone, either on the application of the parties or at the court's own initiative, but in any case, at the discretion of the court (Québec,[279] British Columbia,[280] Alberta,[281] Manitoba[282] and, in exceptional circumstances, New Brunswick[283] and Newfoundland[284]).

Federal Courts

The Federal Court and the Federal Court of Appeal, on request and with the consent of the parties, may proceed on the basis of written representations.[285] These courts can also order the proceedings to be conducted by electronic means.[286]

At the Supreme Court, there is a presumption of a hearing based on written materials only on motion for a re-hearing. All motions made before a judge or the Registrar are heard by writing without oral argument, unless ordered otherwise.[287]

Criminal Proceedings

The vast majority of criminal hearings across Canada are in-person oral hearings. Remote or virtual hearings or hearings in writing are the exception and have only recently gained more prevalence during the COVID pandemic. For example, the delivery of the Dafonte Miller judgment in June 2020 was broadcast live over YouTube by Justice Joseph Di Luca of the Ontario Superior Court. Counsel appeared virtually and could be viewed by the public alongside Justice Di Luca. In the normal course, this decision would have been given in person in open court. Notably, over 19,000 viewers tuned in to watch the YouTube decision, a figure that dwarfs the number of members of the public that typically attend judicial decisions.

The discretion of courts to proceed without an in-person hearing varies among provinces and territories. There is wide discretion in some courts (for example, the Court of Queen's Bench of Alberta has discretion to hear cases in writing[288]), but in others, this discretion is limited (British Columbia,[289] Court of Queen's Bench in Saskatchewan,[290] Québec,[291] Ontario[292]) The federal *Criminal Code* also provides for limited instances in which a hearing may be conducted, in whole or in part, in writing (for example, *ex parte* orders for search warrants and restraining orders[293]; election and re-election of mode of trial[294] and attendance to appeal proceedings[295]).

Generally, a hearing by telephone or video conference is available by application of the parties or on a court's own initiative, but remains at the discretion of the court (Alberta,[296] British Columbia,[297] Northwest Territories[298]). In pre-trial matters, particularly dispositions, bail applications and scheduling matters, telephone and videoconference hearings are more common (British Columbia,[299] Alberta,[300] Saskatchewan,[301] Nova Scotia,[302] Newfoundland,[303] Ontario[304]). In Manitoba, with some exceptions, accused must appear by video for in-custody dispositions, but in-person appearances can be ordered by the judge or are prescribed by law when entering a guilty plea for a sentence of over two years.[305] The *Criminal Code* provides for limited instances in which a hearing may be conducted remotely, in whole or in part, by telephone or videoconference (for example, remote attendance by certain persons[306] and presiding by telephone or videoconference.)[307]

Family Law Proceedings

In-person hearings are also the default in family law proceedings in all Canadian jurisdictions. In some cases, hearings may be heard in writing when the matters are on consent, procedural unopposed or without notice. In Saskatchewan and Prince Edward Island, for example, the option of a written hearing is extended to matters where the issues of fact and law are not complex.

A handful of provinces direct certain types of hearings to proceed electronically. However, the general trend is that family law hearings may proceed electronically only if the parties consent, the court permits, and the court has sufficient resources to facilitate the hearing. The rules in Newfoundland & Labrador go further, listing certain factors for the court to consider when determining whether to conduct a hearing via electronic means, including the availability of resources, whether it will save time and expense, the location of the parties, lawyers and witnesses and the nature of the hearing.

Hearings in writing may be available when the matter is uncontested (for example, uncontested divorce orders in British Columbia,[308] Saskatchewan,[309] uncontested petitions in Manitoba[310] and Prince Edward Island,[311] and consent applications in Newfoundland[312]). The courts also retain a general discretion to order that certain hearings proceed in writing (for example, procedural matters in family law

hearings in the Supreme Court of British Columbia,[313] any matter by the Court of Queen's Bench of Alberta,[314] and when court finds it to be "just" in New Brunswick[315]).

Courts retain the discretion to decide on the method of hearing, and, with the exception of the Northwest Territories, can order the proceedings to be conducted by telephone or video conference (British Columbia,[316] Prince Edward Island,[317] Alberta,[318] in certain Saskatchewan family law proceedings, such as those under *The International Child Abduction Act, 1996*,[319] Yukon,[320] Manitoba for case conferences and assessment hearings,[321] New Brunswick "where just and convenient",[322] Nova Scotia,[323] Newfoundland,[324] where "appropriate facilities" are available, Ontario[325]). The rules in the Northwest Territories do not provide this explicit power to the courts.[326]

Civil and Commercial Matters

In-person hearings are the norm in civil and commercial matters in all Canadian jurisdictions, with some exceptions.

Some courts have broad discretion to hear matters in writing (Alberta,[327] New Brunswick[328]), while others have more limited discretion. For example, in British Columbia, the discretion to proceed based on written materials only covers the procedural aspects of the hearing.[329] In Ontario, contested motions are typically heard in person, however, contested motions for leave to appeal proceed based on a written record.[330] Proceedings in writing often involve uncontested matters or those for which notice is not required (for example, desk matters in British Columbia,[331] unopposed motions in Prince Edward Island[332] and Ontario[333]). Proceedings in writing are also available in Small Claims courts in Saskatchewan,[334] Manitoba,[335] and Québec[336]).

Telephone and videoconferences are generally available at the discretion of the court, with the consent of the parties, either on court's own initiative or on the parties' application (Alberta,[337] Saskatchewan,[338] British Columbia,[339] Yukon,[340] Manitoba,[341] Québec,[342] New Brunswick,[343] Prince Edward Island,[344] Newfoundland,[345] Ontario[346] for motions). Witnesses can also testify by video or by telephone at the court's discretion (Saskatchewan,[347] Québec[348]). In some cases, there is no option for an in-person hearing (for example, in Saskatchewan, appearance day applications are heard exclusively by telephone[349]). Again, the exception to this trend toward telephone and videoconferencing is the Northwest Territories, where the rules do not provide this explicit power to the courts.[350]

The Civil Resolution Tribunal

British Columbia's Civil Resolution Tribunal (CRT) is Canada's first online administrative tribunal. Established in 2016 to deal exclusively with strata (condominium) disputes of any amount, its mandate has since expanded and it now provides end-to-end dispute resolution services for small claims up to $5,000, motor vehicle personal injury disputes under $50,000 and disputes involving incorporated entities and cooperative associations. Its guiding principle is that dispute resolution services must be "timely, flexible, accessible, affordable and efficient."

The CRT provides free legal information and self-help resources to the public, and provides an online platform, overseen by a case manager, for the parties to exchange information and conduct negotiations. Parties are encouraged to reach a collaborative agreement, but may request that the CRT issue a binding decision, using the online portal for uploading evidence and submitting argument. Either party may opt to have a CRT decision set aside and pursue dispute resolution in the BC Provincial Court, and parties may also pursue judicial review of a CRT decision.

Earlier this year, the Province of British Columbia announced proposed changes which, if enacted, will give the CRT jurisdiction over most motor vehicle personal injury disputes over $50,000, effective May 1, 2021.

The Impact of COVID on Advocacy in Canada

The COVID pandemic has led to a significant shift in the way that Canadian courts conduct their hearings and procedures. Broadly speaking, COVID has required that, where possible, courts adapt to the use of telephone and videoconference procedures in order to safely and efficiently maintain their operations. In some cases, the courts have also shifted towards allowing greater use of written submissions in place of oral submissions. However, while courts have continued to adapt to this new reality, they have generally re-established in-person hearings and procedures wherever possible.

In March 2020, all courts across the country were forced to adjourn most hearings without a fixed return date in various criminal, family, and civil matters in order to protect the health and safety of court participants.[351] In some provinces, hearings were restricted to emergency or urgent matters, which included cases such as criminal matters where the accused was in custody and urgent family law matters involving child protection proceedings.[352] With uncertainty about the resumption of normal operations, courts across the country issued notices encouraging parties to access alternative dispute resolution mechanism, including mediation and arbitration, in order to reduce delays in resolving their disputes.[353]

Adapted procedures are now largely in place in all Canadian courts, enabling them to reopen their doors and for adjourned hearings to resume. Provincial courts and superior courts were particularly challenged by the pandemic as courts of first instance. In many cases this led to delays in resuming and rescheduling hearings, which has resulted in significant and ongoing backlogs. In contrast, appellate courts appear to have shifted relatively seamlessly toward telephone and videoconference hearings for most matters. Indeed, some appeals have proceeded entirely in writing.[354]

Despite these general trends, the shift in the litigation landscape has played out slightly differently in the different regions.[355]

International Jurisdictions

In considering the future of oral advocacy, it is instructive to also consider advocacy practices in comparable and international jurisdictions.

Of note, in response to COVID, there is a significant international project underway, being spearheaded by Professor Richard Susskind, to create a database for the global community of justice workers – judges, lawyers, court officials, litigants, court technologists – to share their experiences of "remote" alternatives to traditional court hearings.[356] The "Remote Courts Worldwide" project also examines the issue of oral advocacy, which advocates for more online hearings at a lower cost.[357] The project is ongoing and regularly publishes updates about the use of remote courts. It builds on the First International Forum on Online Courts, held in London in December 2018, when 300 people from 26 countries came together to talk about using technology to transform the work of courts. The COVID pandemic has certainly expedited this transformation.

The United Kingdom

Prior to COVID, oral hearings remained the norm in the United Kingdom for most matters. In some instances, a decision will/can be made "on the papers," but this is the exception.[358]

Underscoring the prevalence of oral hearings, the U.K. Supreme Court did not hold its first remote hearing until March 24, 2020, after the onset of the COVID pandemic.

Public Hearing and Judgment

The right to a fair hearing is guaranteed under Article 6 of *The Human Rights Act 1998*, as is the right to a public hearing.[359] However, exceptions may be justified in certain circumstances.[360] A party may waive the right to a public hearing, but the waiver must be unequivocal.[361] While Article 6 does not allow any express limitation on the requirement that judgment should be pronounced publicly, the European Court of Human Rights (ECtHR) has held that this requirement can be satisfied by making judgment available to the public in ways other than public pronouncement in court.[362]

In-person hearings are usually required in the High Court of England and Wales.[363] For applications, interim motions, or interlocutory steps, unless the parties agree on the issue, the final determination of a claim will require an in-person hearing. These types of matters cannot be brought on paper alone.[364]

For interlocutory matters, if an oral hearing is requested but the other party does not agree, the judge will rule on the issue after submissions.[365] Oral hearings are generally preferred, even though they can be more costly, as it is believed that counsel can better engage the judge in this manner.

"On the Papers"

For certain procedural matters, such as "directions," it is expected that parties will agree on terms without the need to appear before a judge. If agreement is not possible, a judge will determine how the matter will proceed and issue a simple direction. For example, for a summary judgment motion without the full file, bundles (the equivalent of an affidavit of documents in Ontario) will be required for the hearing and the parties are expected to agree on certain matters prior to the hearing.

Prior to the COVID outbreak, motions and applications were heard in person only. All matters were generally heard in writing, using paper (not electronic) filings, including bail hearings, pre-trial hearings, and case management meetings. For criminal matters, preliminary hearings to set a date for plea hearings were heard in person.

All other matters in criminal court are heard in person with paper filings. Of note is the fact that civil courts have access to more funding than criminal courts, and are therefore are more able to adapt and accommodate trials and hearings by video. Technologically speaking, civil courts are far ahead of the criminal and lower courts, with press rooms, live streams and infrastructure that is compatible with wireless systems.

In family and criminal courts, prior to COVID, overseas witnesses could be examined by videoconference, and children could provide evidence by video from another room (with a police officer in attendance). It is now anticipated that these types of methods of giving evidence will be tolerated at a higher level, in light of the COVID experience.

There is also a shift at the Bar toward eliminating oral evidence in chief, and a move toward the use of written witness statements in civil proceedings, though cross-examinations continue to take place in person. This method of testimony is already mandated in criminal cases where sexual assault is alleged to have occurred. In those cases, and for child witnesses, video-recorded witness statements are used.

There is often a time limit on oral evidence before the court, and a shift towards video in order to assist witnesses.[366]

European Union Administrative Court

In March 2019, a seminar hosted by ACA Europe[367] and the Supreme Court of Ireland featured a report on a survey conducted on the court processes followed by the national Supreme Administrative Courts, Councils of State and other institutions with supreme jurisdiction in administrative law in the 28 (as there then were) European Union member countries.[368]

The report noted that among the 28 countries studied, the practice in respect of "oral hearings"[369] varied significantly. Only nine of the 28 countries[370] conducted oral hearings in all or almost all cases, though a further four countries[371] held oral hearings in 80-90% of cases.[372] In France, 50% of cases were conducted by oral hearing, and 11 countries surveyed had very few or no oral hearings, including Austria, the Slovak Republic, the Netherlands and Spain.[373] However, a majority of the countries in which oral hearings are not the usual procedure provide a mechanism for parties to request an oral hearing, and contain guidelines on when such hearings shall be held.[374] A majority of countries surveyed have no formal time limits in place for the conduct of oral hearings.[375]

Ten countries described the oral hearing as being "important, vital or influential to the outcome" of the proceeding. Interestingly only half of those countries are countries in which oral hearings are most frequent,[376] and in the other half that described them in the same

manner[377], oral hearings were not conducted in most cases.[378]

The report found significant variation among countries in terms of the degree of importance attached to oral submissions versus written submissions. While some countries, like the Czech Republic and Spain, said that they are equally important, the Slovak Republic said that oral hearings are of low importance. Still other countries, including Croatia and Poland, said that it depends entirely on the case.[379]

Of note, the report found that very few countries imposed word limits on written submissions.[380] The report also observed, in a handful of countries, an inverse relationship between the number of oral hearings and the perception of their importance to the outcome of the case; several jurisdictions that hold oral hearings regularly do not necessarily regard them as highly influential in most cases, and several that hold oral hearings only rarely regarded them as very important when they do occur.[381]

Australia

In Australia, the divided barrister-solicitor system continues to inform the path of oral advocacy in litigation. Barristers generally do not prepare written submissions and even uncontested matters are heard orally.[382] Pre-COVID, there was no noted shift from in-person oral advocacy. While there has recently been a move towards filing documents online, other than for the state courts, all appearances remain in-person.

For high value civil and white-collar crimes, 97% of matters were heard in person prior to COVID.[383] Parties were obliged to make applications to appear by video, and video appearances were very rare. Similarly, applications on the merits are heard in person in the normal course.

In light of the COVID pandemic, there was a shift towards remote and "on the papers" hearings. For example, the Federal Court of Australia published several Special Measures Information Notes ("SMINs") to allow the continued operation of the Federal Court. The SMINs encouraged, to the extent possible, alternative arrangements to in-person hearings such as hearing matters on the papers, by telephone or by other remote access technology.[384] Presently, directions hearings (direction hearings typically involve timetabling of pre-trial steps and the resolution of interlocutory disputes) and case management appearances are happening by video conference as a result of COVID and may continue to be heard on platforms such as Teams or WebEx.[385] Most Australia lawyers seem to prefer a return to the courtroom, and there appears to be a general expectation that matters currently being heard by video will revert to in-person hearings.

With respect to appellate advocacy, the SMIN that addressed appeals and Full Court (the appeal division of the federal court) hearings mandated that all matters before the Full Court shall be conducted as electronic appeals and all hearings will proceed with the use of video conferencing technology or by telephone conferencing. Additionally, the Federal Court pronounced that some matters may be considered appropriate to be determined on the papers, with the possibility of the Full Court giving leave to the parties to provide short oral addresses by video-conference. In-person hearings were restricted to exceptional circumstances and required prior approval of the Chief Justice.[386]

The United States

A complete scan of the status of oral advocacy in all United States jurisdictions is beyond the scope of this project. In addition, the right to an oral hearing varies significantly from state to state, and between state courts and federal appellate courts, and indeed procedures vary "appropriate to the nature of the case."[387]

As summarized in section II.1 of this Report, the experience in the United States contrasts with that in Canada and even more starkly with that in the United Kingdom.

In the U.K., the introduction, let alone requirement, of written briefs in appellate courts is relatively recent, and the presumption in favour of oral argument continues. In federal appellate courts in the United States, by contrast, there is a long-standing history of very significant limits on the duration and scope of oral argument, and in many cases, the matters are determined without oral submissions at all.

As observed by Judge Kravitz, the courts of the United States had rejected early on the oral tradition of the English legal system both in advocacy and in judicial opinions.[388]

However, the shift in the United States towards a more written-centred legal process is not to be confused with the constitutional rights to due process.

The Fifth Amendment creates a number of rights and applies to both criminal and civil proceedings. Among other things, it requires that "due process of law" be part of any proceeding that denies a citizen "life, liberty or property". The Fourteenth Amendment, introduced in 1868, uses the same language and is often referred to as the Due Process Clause.

The Sixth Amendment guarantees the rights of criminal defendants, including the right to a public trial (implicitly excluding a criminal trial based on a written record alone), the right to a lawyer and an impartial jury.

While the scope of the Due Process Clause has been the subject of extensive jurisprudence, the Supreme Court of the United States has generally interpreted it broadly to include procedural due process in both criminal and civil proceeding and substantive due process.

The doctrine of procedural due process requires that fair procedures be followed before a person can be deprived of life, liberty or property. At a minimum, notice of the deprivation, an opportunity to be heard in a decision made by a neutral decision-maker are required. Historically, the elemental due process rights included a right to present evidence and call witnesses, know the opposing evidence, cross-examine adverse witnesses and be represented by counsel, among other things. However, recognition of all of these rights is not required in every instance of proposed deprivation of life liberty or property.

For example, Rule 34 of the Federal Rules of Appellate Procedure provides that a party may file, or a court may require, a statement explaining why oral argument should or need not be permitted.

Rule 34 provides that oral argument must be allowed unless a panel of three judges, who have examined the briefs and the record,

unanimously agree that oral argument is unnecessary for any of three enumerated reasons: the appeal is frivolous; the dispositive issue or issues have been authoritatively decided; or the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

The procedures for determining the mode of hearing vary greatly among and between courts in the United States. Indeed, the range of different practices and procedures has expanded with the with the introduction of temporary rules and procedures to facilitate the continued administration of justice during the COVID pandemic. The extent to which these temporary measures continue in the United States, as here, very much remains to be seen.

Conclusion

It appears that the COVID pandemic has forced changes to the procedures and operations of all Canadian courts that will likely persist after the pandemic has passed. Similar trends and impacts are being seen in other jurisdictions. At least in Canada, the selective expansion of remote hearings seems unlikely to be jettisoned in future. However, despite this shift, it is also clear that the courts have sought to maintain and restore in-person hearings as much as safely possible throughout this pandemic. This is indicative of the importance of in-person oral advocacy to the fabric of the Canadian court system.

III.3 Perspectives from Canadian Justice System Stakeholders

Overview

The Modern Advocacy Task Force acknowledges that the role of oral advocacy in our justice system cannot be studied from historical and cultural lenses alone. The views and experiences of stakeholders within the justice system are fundamental to the analysis. For this reason, a significant component of the Task Force's mandate was to survey and consult judges, lawyers, litigants, victims' rights advocates, experts, and other participants in and observers of the justice system.

This section begins with an outline of the objectives and methodology of the Task Force's Stakeholder Perspectives sub-committee. It then turns to a discussion of the issues raised in the stakeholder consultations, including the impact of COVID-related adaptations on access to justice, the administration of justice and the practice of law, and the role of oral advocacy in a post-pandemic justice system.

Objectives

In light of the COVID pandemic, a main focus of the stakeholder consultations was on the impact of the recent COVID-related changes the justice system. The Task Force considered:

- how adaptations to the traditional in-person oral advocacy model (such as adjudication in writing, by telephone or by video) have impacted civil and criminal justice in Canada and the ability of litigants to obtain a fair and accessible resolution of their disputes; and
- to what extent these adaptations should continue post-pandemic.

Stakeholders shared their experiences during the COVID pandemic and views on the role of oral advocacy in our justice system more generally, weighing in on many topics, including:

- the benefits and drawbacks of various forms of advocacy (written only, in person, or by phone or video);
- the circumstances calling for in-person advocacy versus advocacy by video, phone or in writing;
- the relationship between various forms of advocacy and perceptions of justice;
- access to justice and barriers related to different forms of hearings;
- the experiences of diverse communities, including self-represented and unrepresented litigants, Indigenous, Black and racialized persons, women suffering from violence, individuals with low income or living in remote areas, and other participants in the justice system that have been historically disadvantaged; and
- opportunities arising from technology and limits of technology.

The observations shared by stakeholders were nuanced and diverse. It was not uncommon for an individual stakeholder to identify some positive features and some negative features of each form of advocacy – nothing is all good or all bad.

Nonetheless, some key themes emerged from the consultation, across all categories of stakeholders:

The open court principle. In order to maintain confidence in the justice system, justice must not only be done, but it must be seen to be done, by participants and the public. In-person hearings allow human connectivity in working toward a *common purpose of justice*, enhance the ability to communicate effectively, and foster a climate of dialogue, settlement and mentorship.

The need to promote access to justice. The mode of hearing must take into account access to justice considerations, including accessibility, proportionality, access to reliable technology and internet bandwidth, timing, cost, and the needs of diverse participants

including self-represented and unrepresented litigants. There must be a balance between the reality that resources are finite and must be allocated reasonably, and the understanding that efficiency cannot be the driving force behind the administration of justice.

The importance of the integrity of the court process. The security, solemnity and ceremony of in-person hearings are critical in establishing trust and respect for the justice system. The safety and security of participants and the integrity of oral evidence are of paramount concern.

The stakeholder inputs animating these themes are summarized later in this section, under the heading "Results of Stakeholder Consultations".

The Task Force has developed these themes into four core principles informing the mode of hearing, as discussed in Part IV: "The Work of the Task Force and Core Principles Informing the Recommendations".

Methodology

The methodology of the Task Force's stakeholder review took the form of an exploratory consultation process rather than a scientific inquiry. Stakeholder perspectives were obtained through four main channels:

- the MATF's September 2020 Symposium, and related interviews and consultations;
- one-on-one and group interviews by members of the Task Force with a diverse range of stakeholders from across Canada;
- a survey sent by The Advocates' Society to all of its members; and
- a series of virtual Town Halls held with stakeholders across the country.

Symposium

In September 2020, the Task Force held a symposium called The Right to be Heard: The Future of Advocacy in Post-Pandemic Canada.

During the summer of 2020, in creating the Symposium agenda and program, members of the Task Force researched and read numerous articles, publications and studies on topics related to modern advocacy, and they consulted and interviewed numerous thought leaders from across Canada, the United Kingdom and the United States.

These experts came from a diversity of fields, communities and backgrounds, drawing from the judiciary, the Bar, academia, justice advocates and the media. They shared insights and experiences on topics as broad as psychology, education, Indigenous oral traditions, Black and racialized communities, journalism, social justice activism and the impact of oral submissions on judicial decision-making.

The Symposium itself drew approximately 600 participants across Canada, all of whom were invited to participate in upcoming Town Halls or otherwise submit views and experiences to the Task Force.

Interviews

The Task Force conducted interviews by telephone and videoconference from August 2020 to April 2021 with a wide range of justice system professionals, including:

- members at all levels of the judiciary in most jurisdictions across Canada, including retired judges and representatives of the Superior Court Judges Association;
- advocates working in private practice across the country, including in remote or northern communities, at various levels of seniority, from sole practitioners to those at large national firms, in a wide range of practice areas;
- advocates who work in the public sector, including those who work on behalf of vulnerable litigants as well as equity-seeking groups; and
- representatives of various national and regional legal associations, including The Criminal Lawyers' Association, the Superior Court Judges Association and Legal Aid Ontario.

During these interviews, the Task Force discussed the topics summarized in the Overview section, above, anchored around four specific themes:

- the key considerations as to when a matter should be addressed orally in person, orally by video conference, orally by telephone, or only in writing;
- how the COVID pandemic has impacted access to justice;
- The benefits and drawbacks of different models of advocacy for litigants both represented and self-represented; and
- What COVID-related adaptations to advocacy they would like to see carried forward into the post-COVID era.

The MATF conducted close to one hundred such interviews formally, and many more informally.

Task Force members followed a two-page questionnaire to guide the discussions, but with topics that overlapped and allowed for open dialogue. This format allowed the interviewers to ask probing, open-ended questions, and also ensured that interviewees had the opportunity to communicate the points they felt were most important.

Interviewers were able to hear from participants about advocacy during the pre-COVID, COVID and post-COVID eras; gain insight into what should influence the mode of hearing for each of the steps in a proceeding; consider the opportunities afforded by evolving technology; and examine previously uncharted territory by evaluating COVID policies and practices employed by the courts. The use of both one-on-one and group interviews permitted a candid, confidential and open discussion about the participants' personal and professional experiences.

Task Force members received further input through the review of written commentary by members of the judiciary and lawyers,

postings shared on social media platforms for the legal community, and articles in the legal and mainstream media.

TAS Survey

The Task Force circulated a survey to TAS members, yielding approximately 325 completed responses. The survey asked eighteen questions and was circulated via email to the entire national TAS membership. The survey was live for a period of two weeks between December 4, 2020 and December 21, 2020.

Of the completed surveys, 42% were from participants practicing 21 years or more, and 57.5% were from respondents of less than 21 years of practice. Survey respondents hailed from diverse practice areas including criminal, family, aboriginal, civil, tax and securities law, and diverse practice settings from large firms to solo practice, in-house and legal aid.

Although survey participants reflected a diverse cross-section of TAS members, the Task Force notes that The Advocates' Society's membership itself is not reflective of the Canadian "advocate population". This is due to several factors, including that TAS members disproportionately live and work in Canada's largest population centres, with the largest concentration of members in Toronto; TAS members are disproportionately comprised of lawyers from larger firm settings; TAS members are likely better resourced and supported as a group than the general advocate population; and online survey respondents likely have greater knowledge of and access to internet technology than the general advocate population.

Overall, the survey results provided a helpful, high-level view of opinions from members of the profession throughout the country.

Town Halls

The Task Force held seven virtual Town Halls in the following locations:

- British Columbia;
- Alberta;
- Ontario (Ottawa/Toronto);
- Ontario (London/Windsor);
- Ontario (Thunder Bay/Northern Ontario)
- Québec; and
- Atlantic Canada.

The Town Halls were open to all justice system stakeholders, irrespective of TAS membership, and they were free of charge. The Advocates' Society and various regional law associations shared the Town Hall invitations and virtual meeting links broadly.

Each Town Hall began with brief remarks from local hosts and members of the judiciary in that region, usually including Chief Justices from three levels of court, who spoke about their perspectives as senior judges, based on their own experiences and input from their respective courts. The judges also invited feedback from the participants. TAS President Guy Pratte then outlined the background of the Task Force and the key elements of its work, including research and consultation on the nature of advocacy, the continued importance of oral advocacy and the willingness to incorporate the best lessons learned from the pandemic into our evolving justice system.

Town Hall participants then broke into small group discussions facilitated by TAS leaders in virtual breakout rooms. The breakout groups had one-hour discussions in which they discussed a series of questions regarding oral advocacy and how it has evolved and continues to evolve, including in light of their recent pandemic experiences.

Results of Stakeholder Consultations

TAS did not create the Task Force in response to the COVID pandemic. The questions investigated by the Task Force precede the pandemic and cannot be limited in focus to the pandemic.

Nevertheless, the COVID pandemic has been a life-changing experience in many respects. The justice system was forced to pivot quickly and dramatically in order to administer justice in the new and temporary reality of the pandemic. For example, following the onset of the COVID pandemic and the immediate need for physical distancing, virtually all judicial and administrative systems across Canada introduced restrictions on in-person attendances. Almost overnight, many jurisdictions introduced some form of remote hearing technology for adjudicative proceedings, and justice system participants were forced to adapt quickly to these changes.

Given that the stakeholder consultations occurred during this period of rapid and extreme change, it is inevitable and appropriate that the topics and themes that emerged were often coloured by and exemplified by reference to these changes and the participants' experiences within the COVID-era justice system. Stakeholders addressed a number of issues that arose from the shift to "remote advocacy", and observed many ways in which the justice system has been both enhanced and undermined. For better and for worse, the impact of these changes has been profound.

Still, as set out in the Overview, key themes emerged from the stakeholder consultations that have applicability not only during the pandemic era but more broadly:

i. The Open Court Principle
ii. The Need to Promote Access to Justice
iii. The Importance of the Integrity of the Court Process

The Task Force submits that these themes underlie the core values of our justice system and must inform the analysis of the role of oral advocacy in our justice system in the post-pandemic period and beyond.

A summary of the main stakeholder inputs giving rise to these themes follows, including contributions arising from the Symposium, the survey, the interviews and the national Town Halls.

i. The Open Court Principle

Stakeholders consistently invoked the open court principle and its importance to the justice system in Canada.

The open court principle has many aspects, all supporting the central tenet that justice is best served in open court, in full view of the participants, the counsel, the media, and the public. An open court allows participants to witness firsthand the *process of justice*, with as much transparency as the system allows. This enhances not only trust in a given judicial decision but also in the system as a whole.

All but routine matters should have the opportunity for oral submissions

Stakeholders shared that parties benefit from attending in court before a judge, watching the judge listen and ask questions, and having the opportunity to "make their case".

This is, of course, true when parties have the benefit of counsel. This is perhaps even more true when parties are self-represented or unrepresented. At the Symposium, Dr. Rachel Birnbaum shared how self-represented and unrepresented parties are less likely to be able to communicate their case effectively in writing. They are more likely to need the probing questions or general guidance of the judge to help get the factual and legal points of their argument across.

Even parties with counsel may find it difficult to read or understand their own written court record. Stakeholders shared that parties often express satisfaction at the conclusion of oral submissions because they see that their counsel truly "gets it" and was able to explain the case to the judge effectively. Stakeholders expressed that this engagement also increases the likelihood that parties will accept the result in a given hearing — they may not like the result, but they can respect it, having observed the judge listen and ask questions.

Stakeholders identified a particular need for Indigenous parties to have the opportunity to participate in hearings orally. At the Symposium, Donald Worme, Q.C. emphasized oral tradition and its importance to narrative and justice for Indigenous persons. Worme's remarks harmonized with many of the findings and conclusions of the Ontario Superior Court of Justice in *Restoule v. Canada (Attorney General)*.[389] In that case, Justice P.C. Hennessy expressly recognized, in the context of an analysis of the principle of the honour of the Crown and the doctrine of fiduciary duty imposed upon the Crown – as applied to an interpretation of the relevant treaties – expert evidence in areas including Anishinaabe linguistic and cultural practices and forms.[390]

Stakeholders also identified that matters that are of significant importance to a party, or to the development of the law, or to the public, must have an oral hearing, whether in person (preferably) or by videoconference (in some cases, including where the parties consent).

There is a keen sense that matters that impact on the liberty or similar substantial interest of a litigant (for example, a motion for contempt, a motion to remove children from a parent), or matters that are dispositive, must proceed by way of in-person hearing.

Stakeholders also repeatedly mentioned the complexity of a matter as a key factor in assessing the type of hearing, with cases with complex factual or legal issues, or material credibility issues, meriting in-person hearings.

In addition to the above, stakeholders expressed concern about substantive matters proceeding in writing for many reasons including:

- Parties need to "see" justice being done so they feel truly heard, and know that someone was in fact listening. Some counsel expressed concern that justice cannot be seen to be an opaque box, into which one inserts papers in one end and a decision later pops out the other end.
- Counsel hone argument for oral submissions — and it is sometimes by that process that the true crux of the argument emerges.
- Despite best efforts by counsel (and particularly for self-represented and unrepresented parties), a judge may not understand the significance of a fact or the main issue of the case through written submissions alone — especially where there is a voluminous or complicated factual record.
- Judges — and their decisions — frequently benefit from the opportunity to ask questions of counsel or self-represented and unrepresented parties. Interestingly, many judges shared that they could not readily predict, in advance, which cases would in fact most benefit from this.
- Written submissions take longer and are much more costly. Not all parties and not all cases can bear these costs. Some stakeholders noted that in-person attendances are necessary for many small firm and solo lawyers, as they cannot afford the written advocacy; it is more efficient to go to court and make their points to the judge.
- A racialized lawyer shared that she disliked written submissions because she is concerned that when someone sees her non-Anglo-normative name on a written piece, there may be unconscious bias, whereas when she attends in person she feels she can "overcome her name and race".

In general, stakeholders expressed that a court should not order a written hearing over the objection of one of the parties (except for matters traditionally addressed in writing — for example, costs, motions to settle the form of an order, or leave to appeal). Matters on consent, however, will be dealt with in writing.

The public has an interest in the administration of justice

One area of common interest among stakeholders was the sudden and unprecedented introduction of readily accessible proceedings in most trial and appellate courtrooms in Canada. This created an opportunity not only for greater public access, but also for the abuse of that access. Stakeholders raised a wide range of concerns about the viability of the open court principle in the technological evolution of the justice system.

Stakeholders were generally optimistic that the open court principle could be preserved and even enhanced through virtual hearings

Nearly 70% of TAS survey respondents "strongly agree" or "agree" that the open court principle can be preserved in virtual hearings. Many interviewees felt that virtual hearings accessible via the internet provide convenient and democratic access to the public, free from barriers such as travel and mobility concerns. Stakeholders identified drastically improved media access to adjudicative hearings as an unexpected boon for the open court principle.

This improved access was noted in a range of practice areas. For example, interviewees remarked that upholding the open court principle was particularly helpful for specialized tribunals conducting public hearings like the Ontario Securities Commission (OSC). Interviewees commented that OSC hearings were more accessible now than in the past; the segment of the public that has a unique interest in these matters is, however, typically more comfortable with technology.

Similarly, some interviewees from the criminal Bar remarked how high-profile criminal cases were displayed in large convention centre rooms to ensure the public's access to the proceedings.[391] Improved access was also noted in the class action context, where, in one Québec matter, a link to a hearing was shared with all class members, which meant they could attend and observe the hearing without having to travel.

Panel members at the Symposium also pointed to the benefits of broader accessibility to adjudicative proceedings. For example, Karyn Pugliese described how the Aboriginal Peoples Television Network streamed a Canadian Human Rights Tribunal matter involving alleged discrimination against Indigenous peoples and the child welfare system, which allowed those most affected by the outcome to view the proceedings. Thereafter, a documentary was produced, which provided education on how the federal human rights complaint system operates. In *Restoule*, Justice Hennessy made an interlocutor reorder permitting live webcasting of the hearing for the first time in Ontario, and well in advance of the COVID pandemic. That order was made expressly to facilitate access for the 29 affected First Nations each of which was a treaty signatory to the Robinson Huron and Robinson Superior treaties that were the subject of the hearing.

Stakeholders noted that the pandemic has also shown us that enhancing public access in this way need not result in a binary choice. The potential for video hearings to make courts proceedings more widely accessible to members of the public does not require the abandonment of the physical courtroom.

Public accessibility is still challenged by virtual hearings

Despite optimism about greater accessibility, more than 52% of TAS survey respondents were concerned that parties may not have the ability to access the required technology for virtual hearings. Stakeholders from under-resourced and less populated areas of Canada noted that public access to and familiarity with internet-based videoconferencing systems is not as widespread as in urban centers. Socioeconomic factors were also cited as creating barriers to open access to public observers in remote proceedings — for example, a lack of hardware, data plan capacity and/or internet bandwidth (both generally across the country in rural communities, and specifically though not limited to, Indigenous communities).

Stakeholders noted that the courts were often inconsistent as to whether and how to give notice of and make available links to virtual broadcasts. Many advocates reported the belief that no attempt was made at all to offer public or media access to many proceedings. Others reported and urged innovations such as publicizing video links or YouTube live broadcasts on court websites. There were multiple comments calling for the publication on court websites of the lists of daily hearings, with links, to increase public access. It was observed that from the perspective of members of the public or the media, there is no uniform method providing access to virtual hearings.

The type of access granted also varied across the country. Some counsel in Québec reported that the public could only telephone and listen to a proceeding and were not able to view it live. For hearings, viewing links are only provided to the parties rather than being available to the public.

Public access to court files is another concern of stakeholders. Several interviewees suggested that a link to unsealed filings should be made available by similar means to the hearing itself.

Finally, there were many comments about the fact that in some courts, members of the public are asked to identify themselves in order to attend virtual hearings, which means that they lose the anonymity they would previously have enjoyed when walking into a court room and observing from the gallery. At the Ontario Court of Appeal, for example, members of the public have been required to email the Court and ask for a link to a given hearing, providing not only their name but also their email address.

Virtual hearings raise concerns about privacy and abuse

Over 42% of TAS survey respondents cited "security, privacy or confidentiality" as an area of concern in the delivery of remote hearings. One of the most common concerns was the unauthorized use of recorded video or still images from remote proceedings by justice participants and the public.

Many stakeholders, both trial judges and counsel, reported concerns about the potential misuse of public video access to courtroom proceedings:

- Criminal counsel and victim support workers identified the potential for recorded images and video to be used to intimidate, embarrass or otherwise harass complainants, witnesses and accused.
- Particularly concerns were raised about technology that allows the sophisticated doctoring of images and audio. For example:
  - a witness could be turned into a "meme" that goes viral;
  - a witness's testimony could be changed to impact public opinion or undermine public acceptance of a judicial decision.
- A witness's evidence could be broadcast to associates of accused persons or even their peers, fostering embarrassment or even danger.
- Vulnerable witnesses or those having to present private or sensitive evidence to an unknown video audience. Other comments

included concerns about the reliability of witness exclusion orders.

All of this could have a chilling effect on parties proceeding with litigations or criminal charges — particularly in cases that are already sensitive, dangerous or subject to power imbalance, such as cases dealing with sexual assault, domestic violence or organized crime.

Town Hall participants also emphasized that receiving testimony by video — particularly where the evidence is sensitive and the witness emotional — is not nearly as effective as in a traditional courtroom setting.

Town Hall participants also commented on the importance of having an injured litigant *present and visible* at all times in a trial setting so that the trier of fact does not lose sight of the impact of the conduct at issue, which is not possible to the same extent when a trial is conducted by video.

Many interviewees lamented the lack of clear court direction to ensure that members of the public do not record or otherwise publish or transmit the hearing. Some suggested that a registration process could assist and/or a code of conduct, disclaimer, or other direction from the court at the time of the hearing would assist in managing this risk. Some courts have adopted a generic statement at the outset of the hearing, reminding participants and observers that they cannot record the proceedings in any form. However, unlike in open court, participants and observers can do anything on the "other side of the screen" without anyone having the opportunity to see or notice. Further, computer devices themselves have the technology to record or "screen capture" with the press of a button.

Many stakeholders also expressed concern about "mass viewing" of the trial process in notorious or high-interest cases. One stakeholder pointed out that the usual barriers to physical attendance in court — taking time off work, traveling, passing security, navigating the courthouse, and subjecting oneself to observation by parties and court staff — limited the public to only those most determined to attend. This created a natural "equilibrium" in which most cases could proceed in relative obscurity. Such a balance could be lost in what amounts to "televised" trials. This could be a new and troubling form of reality television, especially when online bullying and trolling is widespread on the internet.

The open court fosters human connection

Stakeholders shared that while some aspects of oral advocacy translate well to video hearings, other aspects are lost, including:

- the opportunity for professional development, mentorship and collegiality;
- the opportunity to meet and connect with the other parties and opposing counsel; and
- the opportunity to settle "in the hall".

This impact is far-reaching on access to justice, timelines for settlement and related costs, and the development of the Bar, especially for sole or small firm practitioners and junior lawyers.

The open court enhances professional development and collegiality

Many lawyers acknowledged that a significant benefit of in-person hearings is the ability to develop contacts and build rapport among their peers. Junior members of the bar, in particular, noted that remote advocacy has made building relationships with other lawyers more challenging. Moreover, in-person discussions prior to or following a hearing promote a culture of congeniality that is diminished or lost entirely in the remote environment.

Some BIPOC stakeholders observed that opportunities for informal conversations and collegiality primarily benefitted those more established in the profession such that remote hearings did not impact rapport-building for them in the same way, while others noted that remote hearings quelled their own opportunities to build relationships and rapport with others in the profession, which they had need of developing.

There was general agreement among stakeholders that the move to remote hearings has had a detrimental impact on the kind of mentoring and other learning opportunities that take place in the courtroom, in the hallways and during other in-person activities. Just as the opportunity to connect with opposing counsel informally has been lessened, so too has the opportunity for junior counsel to ask questions and discuss legal strategy with more senior counsel on the files. Indeed, newer calls to the Bar felt that an element of their professional development has been lost by not being able to observe other hearings proceeding in court, including while they wait their turn, for example, in open motions court or on speak-to dates.

More senior counsel identified this problem too, with some recalling that they learned a lot — both substantively but more importantly stylistically — watching other counsel make submissions (with varying degrees of success) and handle criticism or tough questions from the judiciary, in open court. Counsel also noted learning a lot from the Bench during these open court sessions, as they had the opportunities to observe judges in action and hear how they address various legal, procedural and administrative issues.

In theory, remote hearings could provide younger lawyers and students with a wider range of judicial proceedings from which to learn. In reality, however, it is not clear that publication or dissemination of links to such opportunities are readily available or widely utilized.

The open court enhances informal resolution of disputes

Recognizing that there are many benefits to proceeding by way of videoconference or teleconference, including saving hours ordinarily spent on appearances in court for scheduling matters, many advocates also observed that the efficiency of proceeding remotely comes at a cost of reduced opportunity to speak to opposing counsel informally prior to being heard in court (or during breaks) in order to resolve differences and explore the possibility of settlement in an impromptu manner.

Some stakeholders identified ways in which such discussions can be encouraged in remote hearings, such as requesting calls immediately preceding the attendance, or asking the court to set up an online waiting or breakout room for counsel only, and separate rooms for room for counsel to join their clients. However, this would require a degree of ongoing court administration to facilitate, especially

since many times these fruitful discussions take place *after* the judge has had the opportunity to speak with the parties. Counsel shared that, during in-person attendances, they would sometimes go back and forth between counsel, their client, and the judge (in open court and/or in chambers) multiple times to get to a settlement.

Further, stakeholders who have had the opportunity to participate in a court-hosted breakout room shared they felt it continued to be less effective than being in the "crucible" of the courtroom and hallway. Advocates shared the experience that reluctant participants can simply press a "Leave" button and then be in the comfort of their home; the sense of timeliness or urgency appearing to be lost. Some stakeholders felt that even their ability to achieve consent orders on procedural matters was undermined by the video format.

Conversely, some newer members of the Bar felt that remote appearances put them on more equal footing with their senior colleagues when discussing matters of settlement.

Some judges felt that remote settlement discussions with counsel were less effective than in-person chambers appointments because the latter permitted greater candour. While judges can be reasonably certain they can speak freely to counsel in chambers, remote appearances raise concern about who may be listening or recording the discussion. Members of the judiciary also felt that it was more difficult to send counsel "into the hall" to work out a resolution during a remote session.

ii. The Need to Consider Access to Justice

Stakeholders almost unanimously expressed interest in the significant impact of the COVID restrictions and use of technology on access to justice. Stakeholders shared that many of the innovations have had some positive effects — for example, increasing the ease of participating in judicial proceedings without travel time or wait time (creating modest some cost savings) and enhancing choice of counsel across jurisdictions.

However, self-represented and other vulnerable litigants have not fared as well. Despite some clear benefits, ensuring that judicial proceedings are inclusive, accessible and culturally sensitive may be more difficult when hearings are conducted remotely. This may have disproportionate effects on low income, remote, Indigenous, Black, racialized and other marginalized communities.

Access to "Remote Justice" Requires Access to Technology

The Task Force heard a great deal from stakeholders about the quality and availability of the technology used to conduct remote hearings. As noted above, this was true in all jurisdictions across Canada, more commonly in rural communities and again, with a particular emphasis on Aboriginal communities. The barriers were both physical in remote areas that lacked coverage or bandwidth (or both) and economic.

Videoconference technology varies from jurisdiction to jurisdiction. For example, Cisco WebEx is the standard platform for the courts in Alberta; Zoom is preferred technology in Ontario; Microsoft Teams is most commonly used in British Columbia. Some of these platforms are more user-friendly and have better functionality than others.

The pervasive adoption of "mainstream" videoconferencing technology like Zoom by the courts and arbitrators in Ontario as opposed to "home-grown" technologies previously employed in some jurisdictions was seen as a vast improvement from a technology perspective. In Alberta, where WebEx is used, the response was less satisfactory, likely due to the specific platform or technology issues. In Calgary, respondents reported that certain courtroom cameras were placed high and at a distance from the front of the court, making it hard to see the judge. In addition, layers of plexiglass created further problems. Similar issues were encountered in Montreal courts.

Overall, judges and counsel expressed general satisfaction with the functionality, reliability, and ease of use of remote hearing technology such as WebEx, Zoom, Teams, and other mainstream platforms. Sixty-three percent of TAS survey respondents, however, believed that videoconferencing technology "could be improved".

Integrated trial document management software such as Thomson Reuters' CaseLines, where available, was seen to provide major efficiencies in remote hearing management. Such software is, however, not widely available. For instance, CaseLines was reported to be used primarily in Ontario courts, but only certain courts in Ontario are running the pilot program. In addition, CaseLines provides access to court materials to parties, but does not allow for filing with the court; additional steps and significant additional expense can be required. This is especially difficult to navigate for self-represented litigants, particularly when there is no ability to attend at the court for coaching and guidance from staff or duty counsel.

Even aside from the use of specialized case management software, stakeholders shared that not all parties or witnesses could readily access videoconference hearings, including due to:

- lack of hardware,
- employer restrictions on hardware used for or provided by employers,
- lack of internet or lack of internet bandwidth, and
- lack of privacy.

Stakeholders were clear that access to internet bandwidth is an access to justice issue. They expressed that there are significant disparities between those who can afford the best technology (and who can therefore be seen and heard on a screen more effectively), and those who cannot. Over 75% of survey respondents expressed concerns about connectivity and bandwidth issues. These concerns were particularly acute in northern and rural communities, where internet access may be unreliable. In these areas, remote oral advocacy may be more reliably deployed through teleconferencing rather than videoconferencing technology.

Concerns were also raised by judicial stakeholders and counsel about the common experience of delays caused by dropped connections, microphone issues, and other glitches. In such cases, issues with even just one hearing participant could delay an entire proceeding. Some stakeholders expressed optimism that such technological issues would resolve over time, for example with the introduction of 5G technology, satellite internet capabilities, and improved videoconferencing software. However, this again is highly dependent

upon the location and resources of the participant; 5G technology may further create disparity between participants in remote areas and those in more populated centres.

Access to justice concerns also relate to access to hardware. Stakeholders noted that remote hearings are best accommodated by at least two screens and modern devices (which have more memory and can stream data more quickly). Many stakeholders observed that participants in the system – including parties, witnesses, and even counsel and judges – did not have access to this type of equipment. For example:

- It is not uncommon for parties or witnesses to access the hearing only on a phone. This creates "wobble" problems (unless the phone is propped securely). It also means that the participant is looking at a much smaller screen and may not be able to read shared documents — or facial expressions or social cues — as well as those using a bigger screen or multiple screens.
- Judicial stakeholders shared that they are not being provided adequate hardware and have resorted to buying their own supplies. For judges who have not been outfitted with appropriate hardware, it may significantly impact the ability to review documents or submissions, particularly if a witness is also giving evidence. There is also a lack of training for judiciary.
- This issue affects counsel too. Counsel from solo or small firms may not have the same resources to purchase hardware and set up a "virtual court" from home. Stakeholders identified that this disproportionately affects Indigenous, Black and racialized lawyers, as well as lawyers from other marginalized communities, who are less likely to work with a "big firm".
- Stakeholders identified a similar problem with the virtual court "extras" such as proper lighting (e.g., a ring light), camera, speakers and microphone, as well as background (a digital background requiring significantly more internet data).
    - The lack of this supporting technology directly impacts how one presents to the court.
    - For example, stakeholders raised concern that certain personal spaces in the background (e.g., messy or cluttered spaces) may detract from credibility, whether for a witness, party or counsel, as a result of unconscious bias. To resolve this one advocate commented that the courts need a standard, uniform virtual background so as to "level the optics" if virtual attendances continue post-pandemic. Of course, as noted above, some participants may not have the bandwidth to partake of that, which could create its own distraction and inequity.
    - At the Symposium, several speakers commented on the impact to credibility when participants' faces are well lit versus in shadow. They noted that this problem disproportionately affects Indigenous, Black and racialized lawyers, whose faces and facial expressions may be at greater risk to being lost to shadows.

Remote hearings can improve access to justice for remote communities and persons with disabilities

The lack of proximity of courthouses to those living in rural or remote communities has been a long-standing challenge for Canadian advocates of access to justice. The adoption of video and teleconferencing technology by courts and tribunals as a response to the COVID lockdowns has benefited many stakeholders living in remote areas.

The most obvious and commonly cited benefit for remote litigants and counsel was the reduction in the time, cost, and risk associated with travel to attend in-person court hearings. This was especially true in appellate proceedings in which litigants from all across the province would ordinarily be required to fly or drive great distances to attend appeal hearings. Similarly, eliminating the need for travelling courts to physically attend remote courthouse locations was viewed as improving the efficiency of the courts and increasing their capacity. This was expressly recognized in *Restoule,* prior to the COVID pandemic, when this was in fact implemented for litigants and affected parties.

Similar obvious benefits were thought to accrue to justice system participants with mobility issues and other disabilities. The ability to testify in the comfort and with the supports available in a home or other familiar setting was seen as facilitating easier and more comfortable participation by persons with disabilities in court proceedings.

However, stakeholders emphasized that remote hearings are not a panacea. The above benefits are contingent on adequate access to technology and internet bandwidth, which is often a problem in remote regions as discussed above.

Stakeholders also noted the benefit of an increased choice of counsel. This benefit was seen as greater in smaller communities, where business and legal conflicts are harder to avoid than in larger centres, and where there may be fewer counsel with particular expertise or specialization.

For example, participants in the Alberta Town Hall noted that in smaller, more remote communities, litigants would typically hire local counsel, who may not have the required expertise, in order to avoid travel disbursements. With remote hearings, litigants may instead be able to hire a more specialized expert in a location that may be geographically far away, as travel costs may no longer pose a barrier.

Participants in the Ontario Town Halls pointed to the increased competition amongst counsel as those in smaller communities with lower hourly rates could conduct cases in Toronto without having to factor in travel time and expense.

Access to justice for self-represented litigants and vulnerable participants may be best served in person

Stakeholders repeatedly raised concerns about the impact of remote proceedings on under-resourced and vulnerable justice system participants. The panoply of resources available in the courthouse — administrative staff, trial coordinators, mental health workers, victim/witness support staff, legal aid and duty counsel, probation officers, courtroom staff and even the informal assistance of lawyers and judges — is unavailable or radically less accessible in virtual court settings. Stakeholders reported particular concerns for three groups thought to be disproportionately affected by remote justice: self-represented and unrepresented parties, vulnerable parties and witnesses, and Indigenous peoples.

Stakeholders noted that, in some instances, a remote hearing may be more convenient and better for some vulnerable persons. For example:

- A remote hearing may save significant commuting time and costs (especially for those in remote areas who lack access to vehicle).
- A remote hearing may require less time off work.
- A remote hearing may be easier for a party or witness with childcare responsibilities.

Unfortunately, stakeholders identified many other instances where remote hearings were a barrier to access to justice. For example:

- Many participants lack a private, safe space from which to attend a remote hearing.
  - Stakeholders shared stories of parties logging into court from cars, from bed and from bathrooms, and in the presence of children.
  - One lawyer shared that a client cancelled an important family law attendance only one hour before the start time because the client was so terrified that her child would overhear and because her abusive spouse was residing under the same roof. From a stairwell in her apartment building, the client related being unable to sleep all night because of her fear about how she could possibly manage attending this hearing.
- Many parties lack technology or data plans.
  - One judge recalled that during a telephone appearance, a litigant advised the court that he only had five more minutes of cellular access on his phone card and would have to leave the hearing after that.
- Many vulnerable participants benefit from being in the physical presence of their counsel or other support individual at a hearing.
  - Participants with language barriers may benefit from attending in person, with a translator in the same physical space.
  - Participants may feel more fortified being beside an ally, especially in matters where a party's liberty is at stake, or where there are serious power imbalance or domestic violence issues.
  - Participants benefit from informal communication with counsel, including comforting body language such as meeting eyes if the other lawyer is making triggering submissions — which is impossible in a remote hearing. Even something as simple as passing a note to counsel could be key if a new issue rises; trying to substitute this with a text message or other digital communications may be unworkable, including where parties have only one device (being the device from which they are logged in to the court videoconference).

Self-represented and unrepresented parties benefit from in-person justice

Stakeholders expressed serious concern that the technological knowledge and resources gap between represented and unrepresented litigants is even more pronounced in remote hearings than when in person.

Judicial stakeholders reported that they were less able to assist self-represented parties by video or telephone than when present in court. The closure of physical courtrooms across Canada provided new appreciation for the range of formal and informal assistance provided to self-represented litigants in the courthouse setting. This included, where appropriate, asking opposing counsel, court staff, or other bystanders to intervene to assist.

Stakeholders from across the spectrum noted that self-represented parties tended to be both underprivileged and outside of the legal aid system, in a "vacuum" of support. Such persons may be both unable to access the technology required to participate in remote hearings and lack the support to learn how to use such technology, even if it is available. Stakeholders noted the paradox of attempting to explain videoconferencing technology to an uninitiated litigant by communicating using that very same technology.

Stakeholders noted that navigating the ever-changing online filing protocols, the myriad court rules and practice directions, and software rollouts like CaseLines is challenging even for well-resourced counsel. They shared concern that this would be a significant barrier to self-represented and unrepresented litigants, especially where there are no in-person "filing desks" or duty counsel for questions.

- A stakeholder shared a story about an unrepresented party who attended at a pro bono law clinic for support in a family law case. The party had been waiting for a motion date for many months, but it was adjourned due to the fact that the judge did not have a full record before him. The client did not know she had to email the previously filed parts of the record to the court staff, and she had limited ability to scan her voluminous hard copies and exhibits. Without the benefit of a filing desk and the ability to access the record, the client was unable to obtain the full court record for the judge and lost her chance to be heard.

Stakeholders raised additional concerns in interviews in Québec and Northern Ontario about presumed literacy and language proficiency. Stakeholders raised language barrier and English literacy concerns for immigrant and refugee populations too.

On the other hand, some stakeholders noted that lawyers or participants with heavily accented English may prefer written advocacy. One lawyer shared: "Sometimes written only can help foreign clients because their broken English". The lawyer raised concerns about such a client possibly coming across as less trustworthy due to unconscious bias.

Additionally, it was noted that difficulty comprehending accents is sometimes exacerbated virtually.

Some stakeholders expressed concern about the ability of courts to effectively control the behaviour of self-represented litigants during remote hearings. As discussed below in this section, respondents noted the court's reduced flexibility in controlling its process without the ability to observe all participants at once and to draw upon all of the court's resources.

More generally, numerous stakeholders reported that increased access to remote hearings did not assist meaningfully in addressing the core of the challenge posed by self-represented and unrepresented litigants: access to affordable legal services. Town Hall participants noted that they feared little thought has been given to providing technological assistance for self-represented and unrepresented persons, for those who are in low-income brackets, disabled persons, homeless persons or facing some other form of disability — whether or not they have access to a digital device.

The real impact on self-represented and unrepresented litigants may not be fully understood for some time. However, early

indications suggest some litigants may be turning away from the legal system altogether. For example:

- A Regional Senior Justice of the Ontario Superior Court of Justice reported that he was not seeing the same rates of self-represented and unrepresented litigants coming to family law court. He believed that this was because they likely had no access to computers.
- In Cornwall, approximately 70% of litigants are self-represented. As one judge commented: "from a family law perspective, we don't want to leave them behind" — yet that is what appears may be happening, to a greater degree even than pre-COVID.

Vulnerable participants and witnesses require further supports

The absence of in-court resources was a key theme for those supporting and advocating for vulnerable witnesses. Criminal and family courts, for example, may provide mental health services, legal assistance, referrals to social services, secure waiting spaces, and testimonial supports such as screens and closed-circuit video with or without the presence of live support persons.

Stakeholders working with vulnerable witnesses noted several serious challenges with remote testimony of vulnerable witnesses. These included:

- the court's inability to ensure that witnesses were free of coercion, intimidation, embarrassment or coaching by persons off-screen;
- the absence of safeguards and security planning supports for witnesses providing testimony against dangerous or violent parties;
- the lack of privacy and security for those witnesses testifying from precarious or crowded living circumstances;
- the lack of mental health counselling and support for witnesses providing traumatic or sensitive testimony;
- the inability of support workers to fully assess challenges such as disabilities, language barriers, and cultural barriers; and
- greatly reduced opportunity for vulnerable witnesses to be adequately prepared by counsel and supported by court staff and judges.

Many questioned whether some vulnerable witnesses — such as those without stable internet access, children testifying from home, or witnesses giving evidence about historical trauma — could ever be expected to testify by Zoom without substantial home-based supports.

As discussed above, stakeholders also raised concerns about unauthorized recordings and photos of sensitive testimony, and possible dissemination, bullying and intimidation.

Several stakeholders noted the particular difficulty in supporting reluctant witnesses to appear by subpoena or summons by internet rather than by attending at a courthouse, causing delays and the inability to obtain evidence at all.

A recurring theme from various stakeholders was that matters involving children as witnesses, such as child protection or criminal law matters, should proceed in person so that the child has all the necessary resources and protection.

Some stakeholders expressed a contrary view: that digital proceedings may lead to some vulnerable witnesses feeling more relaxed and communicating more candidly on videoconference because they are unable to see the alleged perpetrator live. Some wondered if remote testimony could counteract witness intimidation, especially if another participant's image was able to be "pinned", thereby taking up the entire field of view on the witness's screen.

Access to justice for Indigenous parties requires special consideration

Town Hall participants in Ontario's North noted that certain cultural practices relevant to preparation for and attendance at court in Indigenous communities were far more challenging when conducted virtually.

Panelists at the Symposium commented that incorporating Indigenous perspectives and legal traditions through experts and elders, such as igniting and tending to a sacred fire, or performing sweat lodge ceremonies, cannot be facilitated as readily where a hearing is conducted remotely. That is not to say that it cannot be done, as was demonstrated by Justice Hennessy in *Restoule*, where evidence was heard orally and in-person, including evidence from elders and chiefs, both fact and opinion, and the hearing was webcast in real time to the affected First Nations. This is not to say that different laws need to be applied. Rather, as the judge in that case expressly noted, the court there heard from numerous experts as well as fact witnesses which included elders and chiefs.

Justice Hennessy observed that there were very few disputes concerning the admissibility of evidence. There was no disagreement that all types of evidence, if relevant and depending on cogency, had value, ought to be admitted and evidence was not excluded because it came from an unusual source. While it was understood that the plaintiffs in the case had the burden, as always, on the basis of persuasive evidence to establish their claim on a balance of probabilities, the evidence of both the Anishinaabe perspective and the euro Canadian perspective "came before the court on equal footing."[392]

Age a factor in comfort with remote hearing technology

Stakeholders shared that older litigants may experience more challenges with participating in remote hearings. Comfort with the technology was, to some extent, dependent on age – on average, virtually all younger advocates reported "some comfort" with virtual platforms (over 98%) whereas fewer senior advocates did (72%).

Younger advocates were, prior to the pandemic, already less reliant on paper than their older peers and thus adapted more readily to computer-based videoconferencing technology like Zoom. Younger advocates were also less likely to require external assistance with functions such as screen sharing and breakout rooms. Older advocates were more likely to seek the assistance of assistants or colleagues as compared to younger advocates.

There is, however, no one size fits all – despite technology challenges, one counsel reported that some of her elderly clients were more comfortable proceeding by videoconference given their vulnerability to COVID.

Younger advocates reported that virtual court appearances provided a modest advantage over more senior counsel by "levelling the playing field" in oral hearings. They praised the enhanced ability to respond to queries from the court by calling electronic documents to the adjudicator's laptop screen rather than having to locate paper files in court.

Access to justice is facilitated by time and cost savings

Numerous stakeholders lauded the savings in time and cost that have come with the greater use of remote advocacy, mainly in connection with the lack of commuting and "waiting time" in court.

This was particularly true in remote areas or for practitioners not located within close proximity to the courts.

Justices in remote areas noted that more matters could be handled in less time without the need to travel to various circuit courts.

Counsel and judges saw particular utility in videoconference appearances for administrative proceedings such as:

- set date court,
- chambers appointments,
- scheduling appointments,
- procedural motions, and
- judicial pre-trials.

Stakeholders participating in Toronto's Commercial List courts commented that a chambers (9:30) appointment that might ordinarily take 1-2 hours of travel and waiting time could now be accomplished in 30 minutes or less. Similar comments were made by Québec counsel in considering their calling of the roll procedure.

Ontario lawyers noted that pre-COVID, it was not unusual for a judge to have multiple regular motions on the list (in some courts 10-15 matters per judge or more), to be triaged when court began session. Some counsel and parties would be forced to wait all day to be heard — and even then not always be reached. In contrast, remote motions are now set at a specific hour and generally proceed punctually, which is a significant cost savings on the date for parties.

The drawback identified by stakeholders is that fewer motions are accommodated each day, given the strict hour-by-hour scheduling, so delays to get motion dates have increased dramatically in some courts. This increases month-to-month costs and undermines access to justice (given further time for conflict, additional legal time and cost, lack of relief for parties, and so on).

Another drawback raised by stakeholders is that due to the reduced court "wait time", fewer matters are settling, as discussed above.

Stakeholders from all corners of the justice system seem to agree that for simple, non-contentious or non-complex proceedings, remote hearing technology is efficient and effective.

Access to justice depends on proportionality

Stakeholders repeatedly came back to the principle of proportionality when considering the future roles for remote and in-person oral advocacy. The method and type of hearing must be proportional to the issues at stake.

Stakeholders acknowledged that proportionality is not tied to specific monetary amounts, or to specific categories of cases. It is more of a "smell test" and the consensus among stakeholders was that it must be left to judges and other judicial decision-makers.

This said, stakeholders raised concerns about these determinations being relatively predictable, simple to determine and not allowed to become another extensively contested step. Stakeholders expressed that the determination of the method of hearing should be guided by principles or factors such as:

- the significance of the matters at stake,
- the complexity of the factual and legal issues,
- the extent to which oral evidence and credibility is key,
- access to justice considerations — ranging from systemic considerations to the consideration of the needs of and accommodations for specific individuals.

Overall, the consultations indicated that remote advocacy by videoconference is well accepted in routine, procedural matters, or in simple matters in which credibility is not in issue.

The predominant view of respondents and participants in the stakeholder consultations was that remote communications technologies such as Zoom and WebEx are an insufficient substitute for in-person oral advocacy, particularly in matters which are legally or practically dispositive of a material issue, affect a litigant's liberty or other substantial interest; involve complex or important factual or legal issues; require the determination of credibility or are otherwise matters of public interest.

At the Symposium, El Jones drove the point home that efficiency is not and cannot be the defining feature of the justice system. Efficiency is an important factor and correlates with time, costs, resources and access to justice. However, it cannot be allowed to trump other considerations without the loss of what make the justice system *just*.

Stakeholders repeatedly made the same point: we cannot lose sight of the values underlying the justice system and we must prioritize public confidence in the integrity of the system. In placing an emphasis on proportionality, courts must guard against the risk of sacrificing high quality adjudication.

As Professor Jeff Hancock shared at the Symposium, in determining how and when to incorporate remote hearings versus in-person hearings, the key is to incorporate technology *in furtherance of* the goals and principles the justice system embodies. We can — and should — engage those elements of technology that meet the needs of the justice system and its stakeholders, while remaining focused on the core values informing the system.

iii. The Integrity of the Court Process

Stakeholders were consistent about the need to maintain the integrity of justice system. The security, solemnity and ceremony of in-person hearings were viewed as critical in establishing trust and respect for the justice system. Stakeholders also expressed that the safety and security of participants and the integrity of oral evidence are of paramount concern.

Solemnity and decorum are integral to confidence in the justice system

Many stakeholders highlighted that for most litigants, having a matter before the court is a very important event in their lives. They are putting their trust in the system, and the solemnity and ceremony of the system instills an aura of respect and trust. This atmosphere impacts not only the parties, but all witnesses giving evidence, as well as the public watching the case.

It is imperative that the Court be in a position to control that atmosphere, particularly in cases with sensitive or conflictual evidence. The need for solemnity and decorum extends to considerations around the conduct of those watching and concerns about online recording or "trolling".

Advocacy is often more effective in person

The view that while remote hearings have enabled the system to continue to function, they are not as effective as in person hearings was commonly held.

Participants in the Atlantic Town Hall felt that although remote or virtual advocacy is sometimes appropriate, "virtual is not reality". Just as people are unlikely to continue to host virtual dinner parties once the pandemic is over, in-person court appearances should resume for many matters. Other Town Hall participants made the point that receiving testimony by video, particularly where the evidence is sensitive and the witness emotional, is not nearly as effective as in a traditional courtroom setting.

These concerns may come into sharper relief in certain contexts. For example, personal injury lawyers commented on the importance of having an injured litigant present and visible at all times in a trial setting so that the trier of fact does not lose sight of the impact of the conduct at issue, which is not possible when a trial is conducted by video.

In the appellate context, it was felt that an advocate's ability to observe cues from the Bench and to respond effectively was more difficult in remote hearings. The inability to make eye contact, to detect concern or hesitation, and to enter into a free dialogue with the judges were all noted as potentially affecting an advocate's ability to persuade the court of their client's position.

Fairness may also be compromised if not all parties are participating through the same mode. For example, one counsel mentioned a hearing he participated in where some parties were present in the courtroom, others were on a video link, and others were participating by telephone. In his view, the parties on the telephone were clearly at a disadvantage in presenting their position.

In-person observation of witnesses is critical

Generally, both judges and counsel were satisfied with the ability to see and hear witnesses and counsel during testimony and submissions. In fact, some judges commented that their ability to observe a witness closely was enhanced by video, in that the judge can now look directly at the witness, as opposed to the side view an Ontario judge would typically have during a trial.[393]

However, in contentious examinations in which a witness's credibility was challenged, both counsel and judges expressed concern about the reduced ability to observe a witness's body language and demeanor in the truth-seeking process. Of particular concern was the inability to detect nuances such as whether a witness looked to his or her counsel for assistance during tough questioning, whether a witness became intemperate or agitated by a particular line of cross-examination, or whether a witness appeared anxious or nervous when confronted with contradictory information. Although many stakeholders acknowledged that demeanour had limited value in the assessment of credibility, the inability to see a witness in the context of the courtroom in the presence of all parties and counsel was seen to diminish the truth-seeking function of cross-examination and the trial process.

Although most stakeholders thought the ability to observe witnesses' non-verbal cues was diminished when using video-conferencing technology, one counsel participating in a Town Hall reported that because witnesses' faces are particularly visible on a virtual platform, the judge and others could see the perspiration on the witnesses' brows and hear sounds that would not otherwise be heard in a courtroom. Similarly, in a recent hearing to determine if an accused was not criminally responsible which involved the cross-examination of a forensic psychiatrist, counsel reported feeling confident that the virtual platform permitted all parties to adequately examine the witness's demeanour and responses.

In general, stakeholders viewed in-person examination of witnesses as preferable to examinations conducted by videoconference technology. Several reasons were provided for this preference, including:

- that the witness's non-verbal cues and gestures could not be observed using remote technology;
- witnesses' and parties' demeanour could not be observed when outside of the witness box;
- the reduced ability to monitor and control coaching and assistance from individuals off-screen;
- reduced control of the witness during cross-examination;
- difficulty with documents, including controlling when the witness sees each specific document if provided in hard copy and/or potentially obscuring the view of the witness if a document is shared via screensharing.

Inability to observe conduct of parties and witnesses before, during and after their testimony, or during testimony of others

Several trial judges lamented their inability to observe all courtroom participants during a proceeding. This included non-verbal (and sometimes verbal) interactions between witnesses and parties upon entering the courtroom and approaching the witness box, the reactions of parties (and sometimes other witnesses) to the evidence of the testifying witness, the interactions between counsel and client, and the demeanour and attitude of a witness upon departing the witness box.

Some stakeholders in criminal justice and family law remarked on the inability to detect power dynamics between trial participants, such as for child witnesses in a divorce proceeding or intimate partners in cases of sexual or partner violence.

Reduced ability to ensure witnesses' testimony is free of interference or coaching

Several trial lawyers expressed concern about the potential for abuse of remote technology by testifying witnesses. Unlike in a courtroom, where witnesses are openly observable by the judge, court staff, counsel and the public, in remote proceedings the circumstances and location of a witness's testimony are unknown. Witnesses may be subject to coaching by individuals off-camera or by notes on the computer screen in locations out of the camera's frame.

Witnesses may also be subject to unknown distractions or even intimidation in the location in which they give evidence. Additional concerns arise in ensuring subpoenaed witnesses will "attend" court, particularly if doing so requires the production of evidence.

Judges and counsel have had to find creative solutions to some of these concerns. For example, concerns were raised about how to confirm the identity of sureties appearing at bail hearings. One solution identified was to require sureties to provide a real-time photo of themselves holding a piece of identification.

Reduced ability to control a witness in cross-examination

A common concern among trial lawyers was that cross-examinations were less effective when conducted by videoconference technology. One senior trial counsel lamented the loss of the ability to "see the whites of the witness's eyes" when being impeached.

A concern expressed by both counsel and trial judges was that cross-examined witnesses did not feel the weight of a full courtroom when being challenged on sensitive evidence. Several counsel and judges commented in different consultations that the energy of a courtroom – including at pivotal moments during evidence or argument when "the room shifts" – is wholly lost on video.

Remote advocacy may undermine the solemnity and gravity of the judicial process, affecting the quality of evidence and civility of counsel

Court closures brought a new appreciation for many respondents of the role that the formal traditions of the court process – as well as the design and symbolism of the courthouse itself –plays in the effective delivery of justice in Canada. The ritual and architecture of the courts serve to emphasize the gravity and solemnity of the truth-seeking process, reminding every participant of the importance of their part in its production.

The sudden shift to judicial proceedings conducted remotely, in which every participant shares the same platform, and in which many long-standing traditions have been temporarily suspended, has created a unique study in the importance of these aspects of our system. Most stakeholders have lamented their absence.

Stakeholders expressed the view that such rituals are not merely about decorum or etiquette; rather, they are among the formalities that make counsel, litigants, witnesses and members of the public alike understand the seriousness of the legal system and act accordingly. Put another way, these matters are important to public confidence in and respect for the justice system, and its ability to adjudicate disputes fairly and effectively.

Judicial stakeholders did not generally note a decline in civility among counsel or parties in remote proceedings. They did, however, reflect on a decline in the solemnity and decorum in which parties approached their roles. One trial judge contrasted Zoom testimony with the significance — and often awe and intimidation — felt by witnesses as they enter a courtroom, walk past the gallery, parties, and counsel, and step into the wood-paneled witness box to be sworn in by a gowned registrar or clerk of the court. Many stakeholders questioned whether testimony given in the absence of these features of the courtroom could be taken as seriously by the witness, undermining credibility and frankness. Other stakeholders pointed to the absence of these factors as providing a greater sense of comfort and safety, and instead promoting credibility and frankness.

Counsel in Ontario Town Halls cited some stark examples of an absence of decorum:

- a video hearing in which it appeared that one of the parties was sitting in a recliner, drinking a beer;
- a self-represented litigant participating in a hearing while in the car at a drive-through restaurant; and
- an expert witness stepping away from a virtual hearing to take a phone call.

Technical glitches and challenges contributed to the perceived loss of decorum for respondents. Many stakeholders noted the loss of the formality of the courtroom when technology interferes: participants cutting out, losing connections, leaving microphones on when they should be muted, background noise and interference, odd background images, and other mishaps.

This was particularly troubling if it happened at sensitive moments in the evidence, as there was then mistrust about the genesis of the technical "mishap" and what happened when the witness was offline.

Other dramatic examples were cited in Ontario, including where one hearing in a multi-party class action was "Zoom-bombed" by "intruders" who joined the video link and screen-shared a video depiction of a stabbing and began yelling obscenities and threats before the court disconnected the video link. Other such incidents have apparently been reported.

Stakeholders also expressed concern for clients who had imagined that they would literally have their "day in court". Many clients expected to have the opportunity to be seen and heard in court by the decision-maker after many months or years of expense, preparation and anticipation. Personal injury lawyers noted the sobering and humanizing effect on all participants in a court proceeding in observing the affected party firsthand, particularly in cases of catastrophic injury. Many noted the impact of being face-to-face with an accused or victim on the trier of fact's sense of gravity and responsibility.

A large number of stakeholders commented on specific practices or habits that contributed to a sense of informality in court proceedings:

- not standing when a judge enters the "room";
- not standing when delivering submissions;
- not being properly attired (recognizing that courts in some jurisdictions have maintained a robing requirement, while others either

permit counsel to robe if they so choose or prohibit robing for remote hearings);
- not having the oath administered while standing, and without the ability to give an oath on a religious text; and
- participating in remote hearings from inappropriate or non-ideal locations (recognizing that even lawyers may not have access to a large boardroom or other formal areas in which a "virtual courtroom" can be set up).

These concerns may be driven at least in part by the lack of consistent rules and expectations across various courts in different jurisdictions.

Conclusion

Broadly speaking, the stakeholders consulted saw great opportunity in the new technologies deployed in response to the pandemic, especially for procedural and routine matters.

Remote hearings were generally seen as a complement to, and not a replacement for, in-person oral advocacy in a courtroom setting. Stakeholders generally sought to strike a balance between preserving the benefits of the physical courtroom where the nature of the case and the parties require it, and adopting the efficiency and accessibility of remote technology where it does not.

Stakeholders did not see remote hearings as a panacea for all access to justice issues. While stakeholders saw cost savings in reduced travel time and wait time, the actual hearings themselves remained the same length, or even longer due to technical bugs or "zoom fatigue". Because some courts are also scheduling fewer matters, delays are increasing in some jurisdictions, creating further access to justice problems.

Stakeholders felt strongly that the mode of hearing must take into account access to justice considerations, including accessibility, proportionality, access to reliable technology and internet bandwidth, timing, cost, and the needs of diverse participants including self-represented and unrepresented litigants. There must be balance between the reality that resources are finite and must be allocated reasonably, with the understanding that efficiency cannot be the main driving force behind the administration of justice.

Stakeholders also expressed that a significant investment in technology is a prerequisite for continuing remote hearings post-COVID — both for judges and staff, and for participants.

The challenge for the future, in the years beyond the exigencies created by COVID, will be to create the optimal combination between remote technology and in-person court settings to ensure the most reliable, accessible, and accountable system of justice possible.

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.

Endnotes

1. The 10+ Standing Committee is composed of mid-career advocates from across Canada who have been in practice for about ten to 17 years.
2. The Young Advocates' Standing Committee is composed of advocates from across Canada who have been in practice for up to ten years.
3. Indigenous legal traditions and the central role of oral history in Indigenous cultures and systems of justice are addressed in Section II.2.
4. Stephanie A. Vaughan, "Experiential Learning: Moving Forward in Teaching Oral Advocacy Skills by Looking Back at the Origins of Rhetoric" (2017) 59:1 S Tex L Rev 121 at 123.
5. Lawrence W. Pierce, "Appellate Advocacy: Some Reflections From the Bench" (1993) 61 Fordham L Rev 829 at 829-830.
6. Vaughan, *supra* note 4 at 124.
7. Michael Frost, "Ethos, Pathos & (and) Legal Audience" (1994) 99:1 Dick L Rev 85 at 86.
8. Vaughan, *supra* note 4 at 125-126.
9. Frost, *supra* note 7 at 87.
10. *Ibid*.
11. Anton-Hermann Chroust, "Legal Profession in Ancient Athens" (1954) 29:3 Notre Dame L Rev 339 at 342-344.
12. *Ibid* at 344.
13. *Ibid* at 375-384; Frost, *supra* note 7 at 89.
14. Chroust, *supra* note 11 at 347.
15. Mark R. Kravitz, "Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on Their History, Function, and Future" (2009) 10:2 J App Pr & Pro 247 at 248.
16. Jay Tidmarsh, "The Future of Oral Arguments" (2016) 48:2 Loy U Chi LJ 475 at 476-477. The author questions why – aside from tradition – oral advocacy has survived in modern times in the United States, given that Americans are a literate people.
17. Robert J. Martineau, "The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom" (1986) 72:1 Iowa L Rev 1 at 5.
18. Adolf Homburger, "Functions of Orality in Austrian and American Civil Procedure" (1970) 20:1 Buff L Rev 9 at 9.
19. J.E. Côté, "The Oral Judgment Practice in the Canadian Appellate Courts" (2003) 5:2 J App Pr & Pro 435 at 435.
20. "History of the Court", Superior Court of Justice, online: <https://www.ontariocourts.ca/scj/about/history/>.
21. John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: OUP, 2003) at 1.
22. *Ibid* at 7-9.

23. J.H. Baker, *An Introduction to English Legal History*, 4th ed (Oxford: OUP, 2007) at 76-81.
24. *Ibid* at 81-90.
25. For e.g., eliminating demurrer and permitting parties to plead law: R.S.C. 1883, Ord. 25 (U.K.).
26. Baker, *supra* note 23 at 90-91.
27. *Ibid* at 91.
28. Langbein, *supra* note 21 at 8, 112.
29. *Evidence Act* 1843, 6 & 7 Vict., c. 85 (1843) (U.K.).
30. *Evidence Act* 1851, 14 & 15 Vict., c. 99 (1851) (U.K.).
31. Ronald D. Noble, "The Struggle to Make the Accused Competent in England and in Canada" (1970) 8:2 Osgoode Hall LJ 249 at 267-273; Walter S. Johnson, "Sources of the Quebec Law of Evidence in Civil and Commercial Matters" (1953) 31 Can Bar Rev 1000. For e.g., see art 1231 and particularly art 1232 of *The Civil Code of Lower Canada*, 29 Vict., c. 41 (1865), the latter of which stated: "Testimony given by a party in a suit cannot avail in his favour." In 1891, the following words were added immediately after: "Notwithstanding that which precedes, any party to a suit may give testimony on his own behalf in every matter of a commercial nature; but his credibility may be affected thereby." In 1897, art 1232 was repealed.
32. Baker, *supra* note 23 at 155.
33. This section relies extensively on the ground-breaking work of Langbein, *supra* note 21.
34. *Ibid* at 2.
35. Baker, *supra* note 23 at 507-509; F.W. Maitland, *The Constitutional History of England* (New Jersey: The Lawbook Exchange, 2001) at 211-213.
36. Langbein, *supra* note 21 at 319.
37. *Criminal Evidence Act 1898*, 61 & 62 Vict., c. 36 (1898) (U.K.).
38. Noble, *supra* note 31 at 272; *Canada Evidence Act* (1893). It was held in *R v D'Auost* (1902), 3 OLR 653 that the accused was not compellable by the prosecution. As a result, the *Canada Evidence Act* was amended in 1906 to specify that the accused was competent for the defence.
39. Langbein, *supra* note 21 at 2.
40. Baker, *supra* note 23 at 510.
41. The Popish Plot was an alleged conspiracy by Catholics to murder Charles, set fire to London, and incite a foreign invasion.
42. The Rye House Plot was an alleged conspiracy among Whig extremists determined to prevent James II from acceding to the throne.
43. Following Charles II's death in 1685, Charles' illegitimate son, the Duke of Monmouth, mounted a rebellion to prevent the accession of James II. The rebellion was quelled and around 1,400 rebels were charged with treason. Over 200 were hanged, drawn and quartered following the "Bloody Assizes". After execution, their bodies were boiled, tarred, and hung from trees and lampposts for a year as a gruesome warning: Langbein *supra* note 21 at 77.
44. Langbein, *supra* note 21 at 78-86.
45. *An Act for Regulating of Trials in Cases of Treason and Misprision of Treason*, 7 Wil. 3, (1696) (U.K.).
46. Langbein, *supra* note 21 at 90.
47. *Ibid* at 86-97.
48. *Ibid* at 109-110, 148-158.
49. *Ibid* at 109-110, 158-165.
50. *Ibid* at 3-4, 109-110.
51. *Ibid* at 110.
52. *Prisoner's Counsel Act*, 6 & 7 Wil. 4, c. 114, preamble, s. 1 (1836) (U.K.); Langbein, *supra* note 21 at 111.
53. Langbein, *supra* note 21 at 253.
54. Rosalie Jukier, "The Impact of Legal Traditions on Quebec Procedural Law: Lessons from Quebec's New Code of Civil Procedure" (2015) 93 Can Bar Rev 211 at 212.
55. *Ibid* at 216.
56. *Ibid*.
57. *Ibid* at 219-220. Professor Jukier cites the following example to illustrate this point: "See e.g., *Laflamme v Groupe TDL ltée*, 2014 QCCS 312, [2014] QJ No 683 (QL) where very simple facts (a woman ingesting a spoonful of excessively hot soup at Tim Hortons sued for $2 million in damages) resulted in a 10-day trial, oral testimony of 9 experts (with other experts submitting written reports) and a 77-page (426 paragraphs) decision giving judgment for the plaintiff for $69,000, $33,000 of which was to reimburse the cost of expert witnesses."
58. Yves-Marie Morissette, "Aspects historiques et analytiques de l'appel en matière civile" (2014) 59:3 McGill LJ 481 at 555.

59. *Ibid*.
60. *Ibid*.
61. *Ibid*. By way of example, Justice Morissette points to the tendency in common law jurisdictions to restrict access to the appeal process, which he observes has been the case in Québec.
62. *Ibid* at 549, 555.
63. *Legal Profession Act*, SBC 1998, c 9, s 15(1).
64. *Legal Profession Act*, RSA 1980, c L-9, s 102(1)(2).
65. *Act respecting the Barreau du Québec*, CQLR, c B-1, s 128(2)(a).
66. Martineau, *supra* note 17 at 5-6.
67. *Ibid* at 7.
68. Roger Kerridge & Gwynn Davis, "Reform of the Legal Profession: An Alternative Way Ahead" (1999) 62:6 Mod L Rev 807 at 808; Martineau, *supra* note 17 at 7.
69. David Mackie, "Rights of Audience in the Higher Courts" (1996) 1996:1 Inter Alia: U of Durham Student LJ 1 at 1.
70. Baker Mackenzie, "Dispute Resolution Around the World: Canada" (2013) at 5, online (pdf): <https://www.bakermckenzie.com/-/media/files/insight/publications/2016/10/dratw/dratw_canada_2013.pdf?la=en>; Research Office: Legislative Council Secretariat, "Fact Sheet: Practice of the legal profession in selected places" (2018) at 11, online (pdf): <https://www.legco.gov.hk/research-publications/english/1718fs06-practice-of-the-legal-profession-in-selected-places-20180322-e.pdf>.
71. See for e.g., art 23 CCP and *Legal Profession Act*, SBC 1998, c 9, s 15(1)(a). More generally, see Samaneh Hosseini & Zev Smith, "Litigation and Enforcement in Canada: Overview" (1 April 2020), online: *Thomson Reuters Practical Law* <https://uk.practicallaw.thomsonreuters.com/7-502-0711?transitionType=Default&contextData=(sc.Default)>
72. *Bagg's Case,* (1615) 11 Co Rep 93b (per Coke C.J.); *R v Chancellor of the University of Cambridge,* (1723) 1 Str 557; *Osgood v Nelson,* (1872) LR 5 HL 636; *Fischer v. Jackson,* (1891) 2 Ch 824.
73. Paul P. Craig, *Administrative Law*, 7th ed (London: Sweet & Maxwell, 2012) at 367.
74. Gus Van Harten, Gerald Heckman & David J. Mullan, *Administrative Law: Cases, Text, and Materials*, 6th ed (Toronto: Edmond Montgomery Publishing, 2010) at 315-316.
75. *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311.
76. David Mullan, *Administrative Law* (Toronto: Irwin Law Inc, 2001) at 246; see for e.g., *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*].
77. *Baker, supra* note 76 at paras 23-27.
78. *Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779 (Ministerial decision on the surrender phase of extradition proceedings); *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3 (a refugee facing deportation to torture).
79. *Khan v University of Ottawa* (1997), 34 OR (3d) 535 (CA).
80. The statutory and regulatory provisions that provide guarantees of in-person hearings are set out in Section III.2.
81. Section 650(1) of the *Criminal Code*.
82. See for e.g., the order of closing addresses established by s. 651(3) of the *Criminal Code* as to whether the Crown or accused has the last word.
83. *Hryniak v Mauldin*, 2014 SCC 7 at para 43 [*Hryniak*].
84. *Housen v Nikolaisen*, 2002 SCC 33.
85. *Combined Air Mechanical Services Inc v Flesch*, 2011 ONCA 764 at paras 46-47 [*Combined Air*]. Although the Supreme Court of Canada overturned the Court of Appeal in its interpretation of the availability of summary judgment under the rule, it did not disagree with these observations regarding the value of a trial.
86. We put aside special procedures to take the evidence of witnesses before trial.
87. *R v Lyttle*, 2004 SCC 5 at para 2; see also *R v Osolin*, [1993] 4 SCR 595 at 663.
88. *Lyttle, ibid* at para 1.
89. *R v NS*, [2012] 3 SCR 726 at para 27 [*NS*].
90. *R v Rose*, [1998] 3 SCR 262 at para 106.
91. *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para 22.
92. *Green v Law Society of Manitoba*, 2017 SCC 20 at para 53.
93. *Baker, supra* note 76 at para 21.
94. *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214 at para 26 [*BCGEU*].
95. *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at para 32.
96. Section 10(b) of the *Charter* guarantees a right to counsel to "everyone" upon "arrest or detention" and section 11(d) guarantees every person charged with an offence a right to "a fair and public hearing by an independent and impartial tribunal".
97. *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at paras 73-75.

98. *British Columbia (Attorney General) v Christie*, 2007 SCC 21 at paras 23, 27.
99. *Ibid* at para 27.
100. *BCGEU*, *supra* note 94.
101. "The jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution" (*MacMillan Bloedel Ltd v Simpson,* [1995] 4 SCR 725 at para 15). In this way, the Canadian Constitution "confers a special and inalienable status on what have come to be called the 'section 96 courts'" (*MacMillan Bloedel* at para 52).
102. *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at para 59.
103. *NS, supra* note 89 at para 27.
104. See generally Alec Samuels, "A Right to an Oral Hearing in Quasi-Judicial Proceedings?" (2005) 64:3 Cambridge LJ 523.
105. *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 at 683.
106. Homburger, *supra* note 18 at 9.
107. *Ibid* at 9, 24.
108. *Ibid* at 24.
109. Jessica Fullerton & Suzanne Dunn, "Hryniak: Two years later: The multiple applications of "that summary judgment case" from the Supreme Court of Canada" (Paper delivered at the 35th Annual Civil Litigation Conference, 20-21 November 2015), County of Carleton Law Association.
110. *Hryniak, supra* note 83 at para 2.
111. See especially art 158(1) CCP.
112. Kravitz, *supra* note 15 at 255.
113. Stephen M. Shapiro, "Oral Argument in the Supreme Court: The Felt Necessities of the Time" (Paper delivered at the Supreme Court Historical, 5 July 1999), Mayer Brown at 2.
114. *Ibid*.
115. Kravitz, *supra* note 15 at 250, 255.
116. Shapiro, *supra* note 113 at 4.
117. Spencer D. Levine, "Differing Schools of Thought: Changing Perceptions of Oral Argument" (2019) 31:2 St Thomas L Rev 133 at 136.
118. Joe Cecil & Donna Stienstra, "Deciding Cases Without Argument: A Description of Procedures in the Courts of Appeals" (1985) Federal Judicial Center 1 at 1.
119. Shapiro, *supra* note 113 at 7.
120. Kravitz, *supra* note 15 at 252, 256.
121. Martineau, *supra* note 17 at 9.
122. Kravitz, *supra* note 15 at 255-256.
123. Côté, *supra* note 19 at 435.
124. Thomas W Wakeling, "Reflections on Oral Advocacy" (1981) 46:1 Sask L Rev 163 at 166.
125. Earl Cherniak, "Oral Advocacy is Under Attack," Canadian Lawyer (26 May 2020), online: <https://www.canadianlawyermag.com/news/opinion/oral-advocacy-is-under-attack/329935>.
126. (1983) 1 WLR 1055; (1989) 1 WLR 281; (1995) 1 WLR 1188; (1997) 1 WLR 1913; (1999) 1 WLR 2.
127. The Honourable Justice Yves-Marie Morissette, Cour d'appel du Québec.
128. William M. Richman & William L. Reynolds, *Injustice on Appeal: The United States Courts of Appeals in Crisis (*New York: OUP, 2013) at chapters 7 and 8.
129. "Judicial Administration: Individual Courts," online: *United States Courts* <https://www.uscourts.gov/about-federal-courts/judicial-administration>.
130. The Honourable Justice Yves-Marie Morissette, Cour d'appel du Québec.
131. Kravitz, *supra* note 15 at 257.
132. *Ibid*.
133. *Ibid* at 263.
134. *Ibid*.
135. Martineau, *supra* note 17 at 10.
136. Levine, *supra* note 117 at 135.
137. Martineau, *supra* note 17 at 11.
138. *Supreme Court Act*, RSC 1985, c S-26, s 43(1).
139. RRO 1990, Reg 194, s 61.03.1(1).
140. Wakeling, *supra* note 124 at 167; See also Martineau, *supra* note 17 at 15.
141. Wakeling, *supra* note 124 at 166.

142. Frost, *supra* note 7 at 114-115.
143. The term "Indigenous" is used inclusive of First Nations, Inuit and Metis peoples in Canada: Canada, Royal Commission on Aboriginal Peoples by *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back,* vol. 1 (Ottawa: Communication Group, 1996) (Georges Erasmus and René Dussault) at iii [Royal Commission, vol. 1].
144. *Ibid* at 38.
145. Val Napoleon, "Delgamuukw: A Legal Straitjacket for Oral Histories?" (2005) 20:2 Canadian JL & Soc'y 123 at 123.
146. Donald E. Worme, "The Oral Tradition in Indigenous Justice" (information delivered at the Right to Be Heard Symposium, Online, 29 September 2020) [unpublished].
147. Napoleon, *supra* note 145 at 124.
148. Angela M. Haas, "Wampum as Hypertext: An American Indian Intellectual Tradition of Multimedia Theory and Practice" (2007) 19:4 Studies in American Indian Literatures 77 at 77.
149. Tomson Highway, *Oral to Written*: *A Celebration of Indigenous Literation in Canada, 1980-2010*, (Vancouver: Talon Books, 2017).
150. See Leanne Simpson, "Looking after Gdoo-naaganinaa: Precolonial Nishnaabeg Diplomatic and Treaty Relationships" (2008) 23:2 Wicazo Sa Rev. 29 for an examination of Indigenous treaty making prior to colonization to demonstrate the intricacies of these configurations.
151. John Borrows, "Listening for a Change: The Courts and Oral Tradition" (2001) 39:1 Osgoode Hall Law Journal 1 at 8.
152. Royal Commission, vol. 1, *supra* note 143 at 38.
153. Royal Commission, vol. 1, s*upra* note 143; Indigenous oral tradition is well documented and described by the Royal Commission on Aboriginal People.
154. Bradley Bryan, "Legality Against Orality" (2013) 9:2 Law, Culture and the Humanities 261 at 265 referring to Professor John Borrows' analysis in "Listening for a Change, The Courts and Oral Tradition", *supra* note 151.
155. Joy Harjo, Leanne Howe & Jennifer Elise Foerster, eds., *When the Light of the World was Subdued, Our Songs Came Through*: *A Norton Anthology of Native Nations Poetry* (New York: W.W. Norton & Company, 2020) at 31.
156. Borrows, *supra* note 151 at 5.
157. *Ibid* at 8.
158. Haas, s*upra* note 148; Simpson, *supra* note 150.
159. Susan Gingell, "Teaching the Talk that Walks on Paper: Oral Traditions and Textualized Orature in the Canadian Literature Classroom", (Ottawa: University of Ottawa Press, 2004) 285 at 286.
160. *Ibid.*
161. *Ibid*.
162. Borrows, *supra* note 151 at 11.
163. *Ibid* at 17.
164. See Royal Commission, vol. 1, *supra* note 143; Canada, Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: Reconciliation: The Final Report of the Truth and Reconciliation Commission of Canada,* Vol. 6. (Montreal; Kingston; London; Chicago: McGill-Queen's University Press, 2015).
165. Borrows, *supra* note 151 at 25.
166. Delia Opekokew, "A Review of Ethnocentric Bias Facing Indian Witnesses" in Richard Gosse, James Youngblood Henderson, and Roger Carter, eds., *Continuing Poundmaker and Riel's Quest: Presentations made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing Ltd, 1994) 192 at 194.
167. The term "Aboriginal" is specifically intended to reference s. 35 of the *Constitution Act*, 1982.
168. Royal Commission, vol. 1, *supra* note 143 at 37.
169. *Ibid* at 36-46.
170. *Ibid* at 37-38.
171. Bruce Granville Miller, *Oral History on Trial,* (Vancouver: UBC Press, 2011) at 87.
172. *Ibid.*
173. Worme, *supra* note 146; *Restoule v Canada (Attorney General),* 2018 ONSC 7701 [*Restoule*].
174. Bruce Granville Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in Courts,* (Vancouver: UBC Press, 2011) at preface.
175. Erin Hanson, "Oral Traditions" online: *Indigenous Foundations UBC* <indigenousfoundations.arts.ubc.ca/oral traditions>.
176. Opekokew, s*upra* note 166 at 193.
177. *Evidence Act, S.B.C.,*1888, c 41. s 11, as rep. by *S.B.C.*, 1968, c 16, s.2. cited by J. Borrows as he also explains that while this statute was presumably considered liberal and generous in that it permitted the reception of their evidence, "it is anything but liberal when one realizes that it was premised on a racist view of Aboriginal spirituality and cultural development", *supra* note 151 at 21.
178. See note 145 at 130 wherein Val Napoleon explains: Essentially, the person who made the originating statement is

not under oath, cannot be observed by the court and is not subject to cross-examination. Therefore, the retelling of what was communicated is only admissible as evidence that the statement was made by the first person, it is not evidence as to the truth of the statement.

179. Fraser Harland, "Taking the Aboriginal Perspective Seriously: The (Mis)use of Indigenous Law in *Tsilhquot'in Nation v. British Columbia*" (2018) 16 Indigenous LJ 21 at 22-23.
180. Opekokew, s*upra* note 166 at 202-204.
181. Borrows, *supra* note 151 at 22.
182. Napoleon, *supra* note 145.
183. *Ibid.*
184. *Delgamuukw v British Columbia,* [1991] B.C.J. No. 525 (B.C. Sup. Ct.) at para 111.
185. *Ibid.*
186. *Delgamuukw v British Columbia*, [1997] 3 S.C.R. 101 at para 87.
187. *Squamish Indian Band v R*, 2001 FCT 480 at paras 38-39; *R v Ironeagle*, [2000] 2 C.N.L.R. 163 at para 10.
188. *Squamish Indian Band v R*, 2001 FCT 480 at para 36.
189. Drew Mildon, "A Bad Connection: First Nations' Oral Evidence and the Listening Ear of the Courts," (Aboriginal Oral Traditions: Theory, Practice, Ethics delivered at St. Mary's University, 21-23 April 2005) at 90.
190. Tsilhqot'*in Natio*n *v British Columbia*, 2007 BCSC 1700 at para 177.
191. *Tsilhqot'in Nation v British Columbia,* 2007 BCSC 1700 at para 194.
192. Erin Hanson, "Oral Traditions" online: *Indigenous Foundations UBC* <indigenousfoundations.arts.ubc.ca/oral traditions> at 1.
193. See for example, *Sattva Capital Corp. v Creston Moly Corp*., [2014] 2 S.C.R. 633.
194. Borrows, *supra* note 151.
195. [1999] 3 S.C.R. 456 at para 110 [*Marshall*].
196. Borrows, *supra* note 151 at 28.
197. *Ibid* at 29-30.
198. *Ibid* at 31 citing *Delgamuukw v British Columbia*, [1997] 3 S.C.R. 1010 at paras 84, 98.
199. *Ibid* at 37.
200. *Marshall, supra* note 195 at para 37.
201. Borrows, *supra* note 151 at 36.
202. Peter E. Doolittle, "Complex Constructivism: A Theoretical Model of Complexity and Cognition" (2014) 26:3 International Journal of Teaching and Learning in Higher Education at 485-486.
203. Center for Educational Innovation, "Constructivism", online: *University at Buffalo* <http://www.buffalo.edu/ubcei/enhance/learning/constructivism.html>.
204. Çetin Semerci and Veli Batdi, "A Meta-Analysis of Constructivist Learning Approach on Learners' Academic Achievements, Retention and Attitudes" (2015) 3:2 Journal of Education and Training Studies at 176-177.
205. M. K. Smith et al., "Why Peer Discussion Improves Student Performance on In-Class Concept Questions" (2009) *Science* 323:5910 at 122-124.
206. Tulay Girard, Mulsa Pinar and Paul Trapp, "An Exploratory Study of Class Presentations and Peer Evaluations: Do Students Perceive the Benefits?" (2011) 15:1 Academy of Educational Leadership Journal at 78.
207. *Ibid* at 79.
208. *Ibid.*
209. Fatma Deniz, Anwar Nunez-Elizalde, Alexander Huth and Jack Gallant. "The Representation of Semantic Information Across Human Cerebral Cortex During Listening Versus Reading is Invariant to Stimlus Modality" (2019) 39:39 The Journal of Neuroscience at 7722.
210. Beth A. Rogowsky, Barbara M. Calhoun and Paula Tallal. "Does Modality Matter? The Effects of Reading, Listening, and Dual Modality on Comprehension" (2016) SAGE Open at 7.
211. Zoia Hristova, "Using Peers to Assess Oral Presentations to Foster Learning" (2014) 22:3 International Journal of Innovation in Science and Mathematics Education at 75.
212. Jyothi Thalluri and Joy Penman, "Case Scenario Oral Presentations as a Learning and Assessment Tool" (2013) 5:3 The Journal of the World Universities Forum at 57.
213. Nor, Hajah Norkhakimah Hj Mohd and Masitah Shahrill, "Incorporating the Use of Poster and Oral Presentations as an Alternative Assessment in the Teaching of Secondary Mathematics" delivered at the Proceeding of the Social Sciences Research, Kota Kinabalu, Sabah, Malaysia, 9-10 June 2014 at 377.
214. Thalluri, *supra* note 212 at 53.
215. Slađana Živković, "The Importance Of Oral Presentations for University Students" (2014) 5:19 Mediterranean Journal of Social Sciences at 472.
216. *Ibid.*

217. Andreas Lachner, Kim-Tek Ly and Mattias Nückles. "Providing Written or Oral Explanations? Differential Effects of the Modality of Explaining on Students' Conceptual Learning and Transfer" (2018) 86:3 The Journal of Experimental Education at 346.
218. *Ibid*.
219. *Ibid* at 355.
220. *Ibid* at 346.
221. *Ibid* at 355-356.
222. *Ibid* at 346.
223. Hristova, *supra* note 211 at 75.
224. Vanessa Marcy, "Adult Learning Styles: How the VARK Learning Style Inventory Can Be Used to Improve Student Learning" (2001) 12:2 Perspective on Physician Assistant Education at 116.
225. See for example, Olga Khazan, "The Myth of 'Learning Styles'" *The Atlantic* (April 11, 2018) online: <https://www.theatlantic.com/science/archive/2018/04/the-myth-of-learning-styles/557687/>.
226. Spencer D. Levine, "Differing Schools of Thought: Changing Perceptions of Oral Argument" (2019) 31:2 St. Thomas L. Rev. 133 at 135; Michael Duvall, "When Is Oral Argument Important? A Judicial Clerk's View of the Debate" (2007) 9:1 The Journal of Appellate Practice and Process 121 at 125.
227. Levine, *ibid* at 138.
228. John Szmer, Susan W. Johnson, and Tammy A. Sarver, "Does *the* Lawyer Matter? Influencing Outcomes on the Supreme Court of Canada" (2007) 41:2 Law & Soc'y Rev. 279 at 283.
229. Timothy R. Johnson, James F. Spriggs II, and Paul J. Wahlbeck, "Oral Advocacy before the United States Supreme Court: Does It Affect the Justices' Decisions?" (2007) 85:3 Wash U L Rev 457.
230. Szmer, *supra* note 228 at 279.
231. Stacia Haynie, "Oral Advocacy and Judicial Decision-Making in the South African Appellate Courts" (2005) South African Journal of Human Rights at 482; Szmer *supra* note 228 at 283.
232. Haynie, *ibid* at 473-474; Levine, *supra* note 226 at 135.
233. Johnson, *supra* note 229 at 462-463.
234. Cheryl Thomas and Dame Hazel Genn, "Understanding tribunal decision-making: A foundational empirical study" (Nuffield Foundation, 2013) at 8-10.
235. Haynie, *supra* note 231 at 481-482; Johnson, *supra* note 229 at 462.
236. Johnson, *supra* note 229 at 463.
237. *Ibid* at 464; Haynie, *supra* note 231 at 482.
238. Johnson, *supra* note 229 at 516.
239. *Ibid* at 506; Duvall, *supra* note 226 at 125.
240. Pamela Casey, Kevin Burke and Steve Leben, "Minding the Court: Enhancing the Decision-Making Process" (2013) 5:1 Intl J for Court Administration 45 at 46-48; Kylie Burns, "Judges, 'common sense' and judicial cognition" (2016) 25:3 *Griffith L. Rev.* 319.
241. Brandon L. Bartels, "Top-Down and Bottom-Up Models of Judicial Reasoning" in David E. Klein and Gregory Mitchell, eds. *The Psychology of Judicial Decision-Making* (2010) 41.
242. Burns, *supra* note 240 at 26.
243. Thomas, *supra* note 234 at 8-9.
244. Duvall, *supra* note 226 at 124.
245. Haynie, *supra* note 231 at 480.
246. Levine, *supra* note 226 at 140.
247. Johnson, *supra* note 229 at 457; Szmer, *supra* note 228 at 279; Andrea McAtee and Kevin T. McGuire, "Lawyers, Justices and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?" (2007) 41:2 Law & Soc'y Rev. 259 at 272.
248. Shari Seidman Diamond et al., "Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions" (2010) 100:3 J of Crim L and Criminology 869 at 877-878, 900.
249. Alicia Bannon and Janna Adelstein, "The Impact of Video Proceedings on Fairness and Access to Justice in Court" (lecture delivered at Brennan Center for Justice at New York University School of Law, September 10, 2020) at 4.
250. Ministry of Justice, V*irtual Court pilot: Outcome evaluation*, by Matthew Terry, Dr. Steve Johnson, Peter Thompson, Ministry of Justice Research Series 21/10 (London, United Kingdom, December 2010) at 21-26. Notably, the authors state that the increased rate of guilty pleas and increased sentences may have been related to the lower rate of legal representation among defendants appearing by video.
251. Frank M. Walsh and Edward M. Walsh, "Effective Processing or Assembly-Line Justice – The Use of Teleconferencing

in Asylum Removal Hearings," (2008) 22:2 Georgetown Immigration LJ 259 at 271-272; Bannon, *supra* note 249 at 13-14.

252. Bannon, *supra* note 249 at 7.
253. Diamond, *supra* note 248 at 898-900.
254. Bannon, *supra* note 249 at 5-6.
255. *Ibid* at 6-7.
256. *Ibid* at 7, citing Sara Landstrom, "Children's Live and Videotaped Testimonies: How Presentation Mode Affects Observers' Perception, Assessment and Memory" (2007) 12 Legal and Criminological Psychology 344-345.
257. Vincent Denault and Miles L. Patterson, "Justice and Nonverbal Communication in a Post-pandemic World: An Evidence-Based Commentary and Cautionary Statement for Lawyers and Judges" (2020) Journal of Nonverbal Behavior.
258. David Tait et al., "Towards a Distributed Courtroom" (2017) at 68, online (pdf) *Western Sydney University*, <https://courtofthefuture.org/wp-content/uploads/2017/07/170710_TowardsADistributedCourtroom_Compressed.pdf>
259. *Ibid* at 69.
260. Ingrid V. Eagly, "Remote Adjudication in Immigration" (2015) 109:4 Northwestern University L. Rev. 933 at 938.
261. Bannon, *supra* note 249 at 5.
262. *Ibid* at 9.
263. Kate Puddister and Tamara Small, "Trial by Zoom? The Response to COVID-19 by Canada's Courts" (2020) 53:2 Canadian Journal of Political Science 373 at 375; Bannon, *supra* note 249 at 10.
264. Internet Society, "Ensuring every Canadian has access to the Internet" (2020) online (pdf), *Internet Society* <https://www.internetsociety.org/wp-content/uploads/2020/06/Ensuring-every-Canadian-has-access-to-the-Internet.pdf>
265. Bannon, *supra* note 249 at 10.
266. Charles M. Grabau and Llewellyn Joseph Gibbons, "Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation" (1996) 30:2 New Eng. L. Rev. 227 at 262-263.
267. The Legal Assistance Foundation of Metropolitan Chicago and the Chicago Appleseed Fund for Justice, "Videoconferencing in Removal Hearings: A Case Study of the Chicago Immigration Court" (2005) online (pdf) <http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport_080205.pdf> at 40-42.
268. For the purpose of this chapter, "hearing" is considered to be an appearance before a judicial decision-maker (i.e., judge, master, justice of the peace, etc.), and includes non-binding and procedural appearances such as settlement conferences, judicial pre-trials, and scheduling or remand court. This chapter discusses general advocacy themes and does not reflect an exhaustive review of every type of hearing format. It predominantly reports on hearings in the criminal, family and civil/commercial context.
269. *Rules of the Supreme Court, 1986,* S.N.L., c. 42, Sch. D, r. 47A.04.
270. M.B. Notice, *Provincial Court of Manitoba Notice: Video Conferencing Connection*, online: <http://www.manitobacourts.mb.ca/site/assets/files/1175/notice_-_brandon_video_court_announcement_aug_29_2017_-_e.pdf>
271. B.C., Provincial Court of British Columbia, *Practice Direction: Hearing of Bail Applications*, online: <https://www.provincialcourt.bc.ca/downloads/Practice%20Directions/CRIM%2005%20Hearing%20of%20Bail%20Applications.pdf >
272. *Rules of practice of the Québec Superior Court in Penal Matters*, c-25.1, r. 5, s. 14.
273. *Nova Scotia Civil Procedure Rules*, Roy. Gaz. Nov 19, 2008, r. 56.02(2); N.S., *Practice Direction – Applications For Appearance of Witness Via Video Conferencing*, online: <https://courts.ns.ca/Provincial_Court/documents/NSPC_PD_Witness_Video_Appearance_17_12.pdf>
274. B.C., British Columbia Court of Appeal, *Practice Direction - Chambers Applications by Telephone or Videoconference* (September 19, 2011), online: <https://www.bccourts.ca/Court_of_Appeal/practice_and_procedure/civil_and_criminal_practice_directives/PDF/(CandC)Chambers_Applications_by_Telephone_or_Videoconference.pdf>
275. *Court of Appeal Rules*, M.B. Reg. 555/88 R, r. 37.3.
276. *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 6.9(1); *IntelliView Technologies Inc v. Badawy*, 2019 ABCA 66 at para 10.
277. *Rules of Court of New Brunswick*, N.B. Reg. 82-73, rr. 37.13, 62.03.1, 63.11(1).
278. P.E.I., *Rules of Civil Procedure,* r. 82.08.
279. *Code of Civil Procedure*, C.Q.L.R., C-25.01, article 384; *Regulation of the Court of Appeal in Quebec in penal matters,* C.L.Q.R., c. 25.1, r.0.1, s. 67.
280. *Court of Appeal Rules*, B.C. Reg. 297/2001, amended by B.C. Reg. 99/2018, May 18, 2018, r. 44; B.C., British Columbia Court of Appeal, *Practice Direction: Chambers Applications by Telephone or Videoconference* (September 19, 2011), online: <https://www.bccourts.ca/Court_of_Appeal/practice_and_procedure/civil_and_criminal_practice_directives/PDF/(CandC)Chambers_Applications_by_Telephone_or_Videoconference.pdf>
281. *Alberta Rules of Court,* Alta. Reg. 124/2010, r. 6.10.

282. *Court of Appeal Rules*, M.B. Reg. 555/88 R, r. 37.2.
283. *Rules of Court of New Brunswick*, N.B. Reg. 82-73, rr. 37.09, 62.02.1.
284. *Court of Appeal Rules,* N.L. Reg. 38/16, r. 21.
285. *Federal Courts Rules*, S.O.R./98-106, s. 369.
286. *Ibid*, s. 32.
287. *Rules of the Supreme Court of Canada,* S.O.R./2002-156, ss. 47(3), 76(4).
288. *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 6.9(1).
289. *Criminal Rules of the Supreme Court of British Columbia*, S.I./97-140.
290. *The Queen's Bench Rules*, Sask. Gaz. December 27, 2013, 2684.
291. *Quebec Rules of Practice Respecting Reduction in the Number of Years of Imprisonment without Eligibility for Parole,* S.O.R./2002-75, s. 5; *Rules of practice of the Québec Superior Court in Penal Matters*, c-25.1, r. 5, s. 9.
292. *Criminal Proceedings Rules for the Superior Court of Justice (Ontari*o) – S.I./2012-7, r, 40.15 (1).
293. *Criminal Code*, R.S.C., 1985, c. C-46, ss. 462.32(2), 462.33(2).
294. *Ibid,* s. 536.2.
295. *Ibid,* s. 688(3).
296. Although Alberta Criminal Procedure Rules do not set out a procedure for conducting electronic hearings, the Alberta Rules of Court Rule 6.10 applies to criminal proceedings.
297. *Criminal Rules of the Supreme Court of British Columbia*, S.I./97-140.
298. *Criminal Procedure Rules of the Supreme Court of the Northwest Territories,* N.W.T. Reg. 098-78, s. 24.
299. British Columbia Law Institute, "Technology-Assisted and Remote Evidence Presentation: A Practice Resource for B.C. Lawyers" (September 2014) at 29, online: <https://www.bcli.org/wordpress/wp-content/uploads/2014/11/technology-assisted-and-remote-evidence-presentation-practice-resource_study-paper-7-+-cover.pdf>
300. Provincial Court of Alberta, "Remote Courtroom Scheduling", online: <https://www.albertacourts.ca/pc/about-the-court/innovation/rcs>
301. *The Queen's Bench Rules*, Sask. Gaz. December 27, 2013, 2684, r. 9-20(1).
302. Criminal Justice Transformation Group, Video Conferencing Working Group, P*rotocol: Use of Video Conferencing by the Defence* (21 June 2017), online: <https://courts.ns.ca/Provincial_Court/documents/nspc_Protocol_Video_Conferencing_Defence_17_06.pdf>
303. *Criminal Proceedings Rules of the Supreme Court of Newfoundland and Labrador*, S.I./2018-43, r. 11.13
304. *Criminal Rules of the Ontario Court of Justice*, S.I./2012-30, r. 4.2(6).
305. M.B. Notice, *Provincial Court of Manitoba Notice: Video Conferencing Connection*, online: <http://www.manitobacourts.mb.ca/site/assets/files/1175/notice_-_brandon_video_court_announcement_aug_29_2017_-_e.pdf >
306. *Criminal Code*, R.S.C., 1985, c. C-46, ss. 715.22, 715.23(1), 487.053(1).
307. *Ibid*, s. 715.26.
308. *Supreme Court Family Rules*, B.C. Reg. 169/2009.
309. *The Queen's Bench Rules*, Sask. Gaz. December 27, 2013, 2684, r. 6-18(1).
310. *Manitoba Court of Queen's Bench Rules*, Man. Reg. 553/88, r. 70.12.
311. P.E.I. *Rules of Civil Procedure*, r. 37.11(1).
312. *Provincial Court Family Rules, 2007*, N.L.R. 28/07, r. 19.03.
313. *Supreme Court Family Rules*, B.C. Reg. 169/2009, r. 14-7(73).
314. *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 6.9(1).
315. *Rules of Court,* N.B. Reg. 82-73, r. 37.13.
316. *Supreme Court Family Rules*, B.C. Reg. 169/2009, rr. 22-6(3) to 22-6(5).
317. P.E.I. *Rules of Civil Procedure*, rr. 50.08, 38.13.
318. *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 6.9(1).
319. *The Queen's Bench Rules*, Sask. Gaz. December 27, 2013, 2684, r. 6-17(2)(a)(b).
320. *Rules of Court*, Y.O.I.C. 2009/65, r. 62.
321. *Manitoba Court of Queen's Bench Rules*, Man. Reg. 553/88, r. 71.07(a).
322. *Rules of Court,* N.B. Reg. 82-73, r. 4.1.02(1).
323. *Family Court Rules*, N.S. Reg. 20/93, r. 15.01(3).
324. Newfoundland Family Law Rules apply but Rules of the Supreme Court, 1986, Rule 47A.03.
325. *Family Law Rules*, O. Reg. 114/99, rr. 2(5)(g), 17(16), 25(5).
326. *Rules of the Supreme Court of the Northwest Territories,* R-010-96.
327. *IntelliView Technologies Inc v Badawy,* 2019 ABCA 66.
328. *Rules of Court,* N.B. Reg. 82-73, r. 37.13.
329. *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 12-5(73).

330. *Rules of Civil Procedure*, R.R.O. Reg. 194, rr. 12.06 (1.1), 61.03.1 (1).
331. *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 8-3.
332. P.E.I., *Rules of Civil Procedure*, r. 37.11(1).
333. *Rules of Civil Procedure*, R.R.O. Reg. 194, r. 37.12.1(1).
334. *The Small Claims Act*, 2016, S.S. 2016, c. S-50.12, s. 26(1).
335. *Court of Queen's Bench Rules*, Man. Reg. 553/88, r. 76.06.1(1).
336. *Code of Civil Procedure*, C.Q.L.R., C-25.01, articles 545, 550.
337. *Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta*, 2020 ABQB 359.
338. *The Queen's Bench Rules*, Sask. Gaz. December 27, 2013, 2684.
339. *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 23-5.
340. *Rules of Court*, Y.O.I.C. 2009/65, r. 62.
341. *Court of Queen's Bench Rules*, Man. Reg. 553/88, r. 38.08(1).
342. *Code of Civil Procedure*, C.Q.L.R., C-25.01, r. 0.2.1, ss. 68-70.
343. *Rules of Court of New Brunswick*, N.B. Reg. 82-73, r. 37.13.
344. P.E.I., Rules of Civil Procedure, rr. 50.08, 38.13.
345. *Rules of the Supreme Court, 1986*, S.N.L., c. 42, Sch. D, r. 39.07.
346. *Rules of Civil Procedure*, R.R.O. Reg. 194, rr. 76.05(3)(b), 77.07(4)(b).
347. *The Queen's Bench Rules*, Sask. Gaz. December 27, 2013, 2684, r. 9-20(1).
348. *Code of Civil Procedure*, C.Q.L.R., C-25.01, r. 0.2.3, ss, 25 to 27, 49.
349. *The Queen's Bench Rules*, Sask. Gaz. December 27, 2013, 2684, r. 6-25(1).
350. *Rules of the Supreme Court of the Northwest Territories*, R-010-96.
351. See for example, the Federal Court of Canada, *Consolidated COVID-19 Practice Direction* (June 25, 2020), online: <https://www.fct-cf.gc.ca/content/assets/pdf/base/Consolidated%20Covid-19%20%20Practice%20Direction%20and%20Order%20(June%2025th%20-%20Final).pdf>; Supreme Court of British Columbia, *COVID-19 Notice No. 14 - Applications by Written Submission* (April 27, 2020, Revised July 20, 2020) at p. 2, online: <https://www.bccourts.ca/supreme_court/documents/COVID-19_Notice_No.14_Applications_by_Written_Submissions.pdf>
352. See for example, Manitoba Court of Queen's Bench, *Notice to the Profession* (May 4, 2020), online: http://www.manitobacourts.mb.ca/site/assets/files/1966/notice_to_profession_-_may_4_20.pdf.; Provincial Court of Saskatchewan, *Notice to Court Users and the Public* (May 22, 2020), online: https://sasklawcourts.ca/images/COVID_Update_5_22.pdf; and Court of Appeal of Quebec, *Postponement of hearings for the weeks of April 6 to 9, April 14 to 17, April 20 to 24 and April 27 to May 1, 2020* (March 25, 2020), online: https://courdappelduquebec.ca/en/news/details/postponement-of-hearings-for-the-weeks-of-april-6-to-9-april-14-to-17-april-20-to-24-and-april-27/
353. For example, Nova Scotia and Alberta.
354. See Court of Appeal of British Columbia, *Notice to the Public Regarding the Court of Appeal for British Columbia's Response to COVID-19* (August 19, 2020), online: https://www.bccourts.ca/Court_of_Appeal/documents/Notice_to_Public_re_Response_to_COVID-19.pdf; and Court of Appeal of Quebec, *COVID-19 Pandemic – Update Appeal decided without a hearing* (October 29, 2020), online: https://courdappelduquebec.ca/en/covid-19-pandemic-update/#c5822
355. Current COVID-related practices in each jurisdiction are regularly updated online. See The Advocates' Society website for links to each jurisdiction's COVID updates: https://www.advocates.ca/TAS/COVID-19/TAS/COVID-19/COVID-19.aspx?hkey=2db1a309-1226-4603-9805-d650b89f51e7
356. Thomas Connelly, "Remote hearings resource hub launches in wake of virus pandemic" March 31, 2020, online: *Legal Cheek*, <https://www.legalcheek.com/2020/03/remote-hearings-resource-hub-launches-in-wake-of-virus-pandemic/>.
357. Richard Susskind, *Online Courts and the Future of Social Justice* (Oxford: Oxford University Press, 2019). See also "Remote Courts Worldwide": <https://remotecourts.org >.
358. Email, DLA Piper UK, (August 25, 2020).
359. Thomas Reuters Practical Law Public Sector, "Article 6 of the ECHR: right to a fair hearing" (2021), online: https://uk.practicallaw.thomsonreuters.com/2-385-8106?transitionType=Default&contextData=%28sc.Default%29
360. See *Campbell and Fell v The United Kingdom*, (1985) 7 EHHR 165, [1984] ECHR 8; *Ibid,* Thomas Reuters Practical Law Public Sector.
361. *Hakansson v Sweden* (1990) 13 EHRR 1); *Ibid,* Thomas Reuters Practical Law Public Sector.
362. Pretto v Italy (1983) 6 EHRR 182; *Ibid,* Thomas Reuters Practical Law Public Sector.
363. Interview with DLA Piper (UK), August 25, 2020.
364. *Ibid;* HM Courts & Tribunals Service, *Form N244: Make an Application to A Court* (June 1, 2016), online: <https://www.gov.uk/government/publications/form-n244-application-notice>
365. *Ibid*, DLA Piper (UK) Interview.

366. Similarly, there is an expectation in the UK that the parties agree between them on a single expert. Many cases include dozens of pages of written admissions, distilled from tens of thousands of documents. DLA Piper (UK) Interview, *supra* note 363.
367. ACA Europe is a European association composed of the Court of Justice of the European Union and the councils of State or the Supreme administrative jurisdictions of each of the members of the EU.
368. Frank Clarke, "How our Courts Decide: The Decision-making Processes of Supreme Administrative Courts" (General report delivered at the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union seminar, Dublin, 25 - 26 March 2019), online: <http://www.aca-europe.eu/images/media_kit/seminars/2019_Dublin/2019_DUB_General-Report_EN.pdf>.
369. The term "oral hearing" is not defined in the report but it is presumed that this refers to in-person hearings alone and does not include hearings by telephone.
370. Ireland, Italy, the U.K., Malta, Luxembourg, Cyprus, Bulgaria, Poland and Germany
371. Belgium, Greece, Hungary and Serbia
372. Clarke, *supra* note 368 at 5.1.1.
373. *Ibid* at 5.1.2, 5.1.3.
374. *Ibid* at 5.2.1.
375. *Ibid* at 5.3.1.
376. Ireland, the U.K., Cyprus, Bulgaria and Norway
377. Austria, France, the Netherlands, Slovenia and Sweden
378. Clarke, *supra* note 368 at 5.1.4.
379. *Ibid* at 5.1.5.
380. *Ibid* at 6.1.2.
381. *Ibid* at 5.1.6.
382. Interview with DLA Piper (Canada), August 28, 2020.
383. Interview DLA Piper (Australia), August 27, 2020.
384. Federal Court of Australia, *Special Measures in Reponses to COVID-19 (SMIN-1) Special Measures Information Note*, updated March 31, 2020, online: <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/SMIN-1-31-March-2020.pdf>
385. DLA Piper (Australia) Interview, *supra* note 383.
386. Federal Court of Australia, *Special Measures in Reponses to COVID-19, Special Measures Information Note: Appeals and Full Court Hearings (SMIN-3)*, article 2, online: <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/smin-3.pdf>
387. *Mullane v Central Hanover Bank & Trust Co*., 339 U.S. 306, 313 (1950).
388. Kravitz, *supra* note 15.
389. *Restoule, supra* note 173; Donald Worme was plaintiff's counsel in that matter.
390. *Ibid* at paras 8, 10.
391. See for e.g., the Minassian trial in Toronto, which was streamed at Toronto's Metro Convention Centre: *R v Minassian*, 2021 ONSC 1258.
392. *Restoule, supra* note 173 at paras 10-12.
393. Consideration could perhaps be given to changing the layout of courtrooms to facilitate a better view of the witness for the judge.
394. *Hryniak, supra* note 83 at para 1.
395. Geraldine Fauville, Mufan Luo, Anna C.M. Queiroz, Jeremy N. Bailenson & Jeffrey Hancock, "Nonverbal Mechanisms Predict Zoom Fatigue and Explain Why Women Experience Higher Levels than Men (14 April 2021), online: *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3820035>. See also, Jeremy N. Bailenson, "Nonverbal Overload: A Theoretical Argument for the Causes of Zoom Fatigue" (2021) 2:1 Technology, Mind, and Behavior 1.
396. While an examination of administrative tribunals is beyond the mandate of the Task Force, the Framework could also be adapted for administrative and regulatory proceedings.
397. Where a party requests an in-person hearing and another party does not wish to participate in person, then, subject to the court's direction, the hearing may proceed as a hybrid hearing with parties participating by different modes.
398. "Open court" traditionally means participation in a physical courtroom. The Task Force recognizes that the open court principle may be adequately addressed in appropriate cases by conducting a hearing by video.
399. The Task Force considered both whether to recommend that such determination be made based only on written

submissions and that there be no right of appeal from the determination regarding the mode of hearing. The Task Force concluded that the court should decide how to receive submissions regarding the mode of hearing, and that the usual appeal rules (which vary by jurisdiction) in respect of such matters should apply (recognizing that this means that appellate review of such determinations would be rare). A determination of the appropriate mode of hearing may be important, but should not result in another substantive, lengthy and expensive step in a proceeding.

400. https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/Best_Practices_for_Remote_Hearings_oct30.pdf.

401. Any necessary additional legislative and regulatory amendments to allow for electronic signatures, virtual commissioning of affidavits, and other similar matters should be implemented as quickly as practicable.

402. This will also require the development of protocols to standardize documents and naming conventions.

403. An example of access concerns brought to the Task Force's attention relates to the format of documents for use with electronic reader technology for the visually impaired.

404. This should include consideration of whether public resources should support physical facilities for participation in video hearings or for the taking of evidence via video, with a particular emphasis on remote areas and areas lacking internet availability and stability or in circumstances where the witness lacks such access.

405. The adaptations required as a result of COVID have been substantial. Where such adaptations remain post-COVID and with the benefit of greater experience with new modes of hearing, it is important that there be a meaningful review of the impact of those changes and any further changes required.

406. The use of pilot projects as a means of reviewing potential changes may be an effective way to introduce further refinements and learn from the experience.

407. The collection of data must be done in a way that does not interfere with the independence of the judiciary.

408. In its Budget 2021, the federal government announced the revival of and a funding commitment to the Law Commission of Canada (LCC). The original mandate and objectives of the LCC lend themselves well to an examination and recommendations in respect of many of these issues.

Appendix A

Please click here to link to The Advocates' Society's Modern Advocacy webpage and view a recording of the Modern Advocacy Task Force's Symposium, The Right to be Heard: The Future of Advocacy in Post-Pandemic Canada.

The Symposium agenda and the results of a live poll taken during the Symposium follow.

The Right To Be Heard: The Future of Advocacy in Post-Pandemic Canada

Afternoon

September 29, 2020

1:00 p.m. to 4:30 p.m. ET

Live Webcast

Chairs:

Peter J. Osborne, *Lenczner Slaght,* Task Force Chair

Scott C. Hutchison, *Henein Hutchison LLP,* Task Force Vice-Chair

Katherine L. Kay, *Stikeman Elliott LLP,* Task Force Vice-Chair

Sheila Gibb, *Epstein Cole LLP*, Symposium Chair

The Right To Be Heard: The Future of Advocacy in Post-Pandemic Canada	
01:00 pm – 01:05 pm	**Welcome and Introductory Remarks** Peter J. Osborne, *Lenczner Slaght*
01:05 pm – 01:25 pm	**The Impact of Oral Advocacy: Empirical Analysis from the USA** Professor Timothy R. Johnson, *University of Minnesota*
01:25 pm – 01:40 pm	**The Oral Tradition in Indigenous Justice** Donald E. Worme, Q.C., I.P.C., *Semaganis Worme Lombard*
01:40 pm – 02:15 pm	**In-person, Zoom or Written Hearings: Access to Justice Considerations** Dr. Rachel Birnbaum, *King's University College at Western* El Jones, *University of King's College* Karyn S. Pugliese, *Ryerson University* Moderator: Scott C. Hutchison, *Henein Hutchison LLP*

02:15 pm – 02:40 pm	**The Human Psychology of Live versus Written Hearings** Dr. Jeff Hancock, *Stanford University* Dr. Steve Joordens, *University of Toronto* Moderator: Sheila Gibb, *Epstein Cole LLP*
02:40 pm – 02:55 pm	Break
02:55 pm – 03:15 pm	**The Role of Oral Hearings in a Digital World** Professor Dame Hazel Genn, *University College London*
03:15 pm – 03:50 pm	**Perspectives from the Bench** The Hon. Judge Elizabeth A. Buckle, *Provincial Court of Nova Scotia* The Hon. Chief Justice Christopher E. Hinkson, *Supreme Court of British Columbia* The Hon. Justice Benjamin Zarnett*, Court of Appeal for Ontario* Moderator: Katherine L. Kay, *Stikeman Elliott LLP*
03:50 pm – 04:25 pm	**Debate: Is Oral Advocacy Central to the Administration of Justice in Canada?** The Hon. Justice David M. Brown, *Court of Appeal for Ontario* Guy J. Pratte, *Borden Ladner Gervais LLP,* President of The Advocates' Society Moderator: Katherine L. Kay, *Stikeman Elliott LLP*
04:25 pm – 04:30 pm	**Concluding Remarks** Peter J. Osborne, *Lenczner Slaght*
Finale	**Spoken Word by El Jones**

The Right To Be Heard: The Future of Advocacy in Post-Pandemic Canada

29 Sep - 30 Sep 2020

Poll results

slido

Table of contents

slido

Multiple-choice poll

Do you believe oral arguments have an impact on the outcome of hearings?

119

Yes

93 %

No

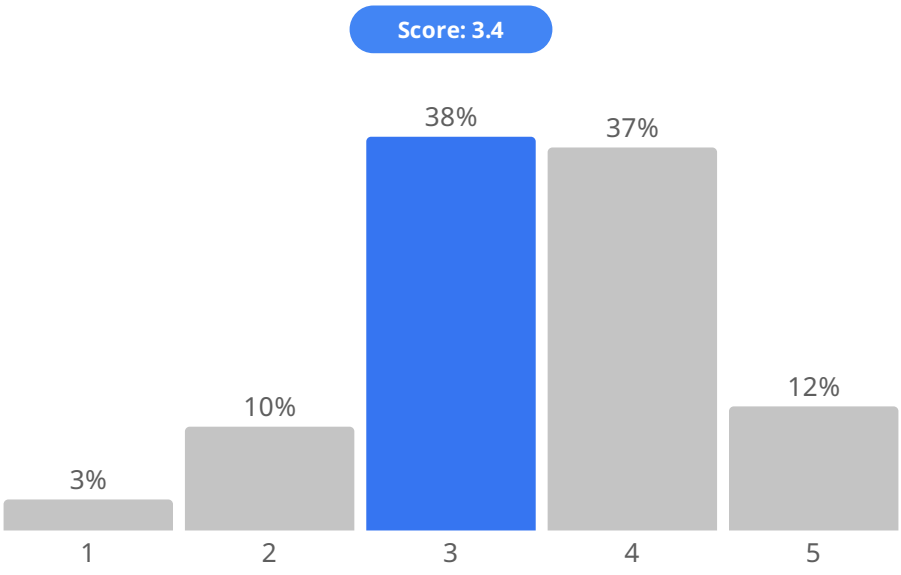
7 %

slido

Rating poll

On a scale of 1 to 5, how important is efficiency as a value for the justice system?

128



slido

Wordcloud poll

At this point in the symposium, what factor are you considering in assessing the role of oral advocacy in a modern justice system?

0 8 7

slido

Wordcloud poll

Based on what you have heard here today, what do you see as the most important factors in determining whether or not there should be an opportunity for an oral hearing?

0 7 5

slido

www.advocates.ca