



February 25, 2013

Via email: Anouk.Desaulniers@justice.gc.ca

Anouk Desaulniers
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Department of Justice Canada
284 Wellington Street
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Dear Ms. Desaulniers:

Re: Draft Report on the Use of Technology in the Criminal Justice System

The Canadian Bar Association National Criminal Justice Section (CBA Section) welcomes the opportunity to comment to the Steering Committee on Justice Efficiencies and Access to Justice on the Draft Report of the Sub-committee on the Use of Technology in the Criminal Justice System.

David Porter represents the CBA Section on this committee and will speak to our comments at the upcoming meeting of the Steering Committee on February 5, 2013.

The CBA is a national association representing 37,000 jurists across Canada. Among the Association's primary objectives are seeking improvement in the law and the administration of justice. The CBA Section consists of criminal law experts, including a balance of prosecutors and defence lawyers, from across Canada.

The Draft Report has been circulated to the CBA Section executive. Generally, we support the recommendations. It is in the interests of justice, wherever possible, to facilitate the use of technology to promote access to justice, as long as the fair trial rights of the accused are not impaired.

Below are comments pertaining to each of the six draft recommendations:

RECOMMENDATION - DEFINITIONS

- 1. Definitions of "video conference" and "audio conference" (or any similar expressions identified by legislative drafters) should be included in the *Criminal Code*.**

Video conference should be defined as a technological means that permits a remote appearance and allows audiovisual communications between the court, accused persons, witnesses, victims, counsel, or any other person as ordered by the court.

Similarly, audio conference should be defined as a technological means that permits a remote appearance and allows simultaneous oral communication between the court, accused persons, witnesses, victims, counsel, or any other person as ordered by the court.

***Criminal Code* provisions relating to the use of video conference and audio conference should be amended and simplified to reflect the creation of those definitions.**

The CBA Section has no comment on the definitions.

RECOMMENDATION – JUDICIAL DISCRETION

- 2. The decision of whether or not to use audio or video technology should continue to ultimately rest with the judge or justice.**

The CBA Section agrees with the recommendation. It is our view that the judge or justice will be in the best position to assess the appropriateness of the use of audio or video technology.

RECOMMENDATION – AMENDMENT OF SECTION 848

- 3. Section 848 of the *Criminal Code* should be amended to specify that it applies to all forms of remote appearance, including appearances by audio conference.**

The CBA Section agrees with the recommendation.

RECOMMENDATION – GENERAL REGIME GOVERNING REMOTE APPEARANCE

- 4. The *Criminal Code* should be amended to create a general regime governing remote appearance by which the court may order the use of audio or videoconference where, in its opinion, it would serve the proper administration of justice by, among other things, ensuring a fair and efficient hearing or enhancing access to justice for the accused, the victim and any witness.**

The CBA Section suggests an amendment to the wording. Rather than “*where, in its opinion, it would serve the proper administration of justice by, among other things, ensuring a fair and efficient hearing or enhancing access to justice for the accused, the victim and any witness*” we suggest a non-exhaustive list of factors for the court to consider when making an order for the use of audio or video-conference technology. The list would include the interests of the accused in receiving a fair trial, costs, the purpose of the appearance, and whether the parties consent to the proposed order.

RECOMMENDATION – JUSTICE PRESIDING REMOTELY PRIOR TO TRIAL

- 5. The *Criminal Code* should be amended to allow a justice, where necessary for the proper administration of justice, to conduct an interim release hearing or preliminary inquiry**
 - by audio or video conference where no witness evidence is taken,
 - by video conference where witness evidence is taken.

The *Criminal Code* should also be amended to provide that, where the justice conducts the interim release hearing or preliminary inquiry by audio or video

conference, the hearing is deemed to take place in the jurisdiction where the Information was sworn and filed.

Permitting a justice to preside remotely prior to trial, on the basis set out in the recommendation, is reasonable.

RECOMMENDATION – APPEARANCE BY AUDIO OR VIDEO CONFERENCE OF PRESIDING JUDGE IN A TRIAL-RELATED HEARING

- 6. In-person appearance of the judge should remain the norm at the trial stage. However, the *Criminal Code* should be amended to provide that a judge exercising case management powers such as those listed at paragraphs 551.3(1)(a), (b), (c), (d), or (f), or provided at section 625.1 of the *Criminal Code* should have full latitude to do so by video conference where necessary for the proper administration of justice.**

The use of audio conferencing for the purpose of exercising case management powers should also be permitted where necessary for the proper administration of justice and both parties consent.

Where the judge is exercising any other power in trial-related hearings, including where evidence is presented, he or she may preside by video conference where necessary for the proper administration of justice and both parties consent.

The *Criminal Code* should also provide that, where a judge conducts a trial hearing by audio or video conference, the hearing is deemed to take place in the jurisdiction where the information was sworn and filed.

The recommendation should remain in its current form requiring consent of both parties to the use of video-conference technology in trial-related hearings. The court should not be empowered to order the remote appearance of the accused without consent for guilty pleas and sentencing. An accused should not be required to forego the right to appear in person for such a significant legal proceeding without consenting to this procedure.

Additionally, the CBA Section has been asked to respond to three specific questions.

1. Should the proposed general regime provide a non-exhaustive list of factors (e.g., costs, consent of the parties, purpose of the appearance) for the court's consideration in determining whether to order a person's remote appearance by a means of technology? Or should the general regime refer, as proposed in the report, to the need to ensure "a fair and efficient hearing or to enhance access to justice for the accused, the victim and any witness"?

We support the inclusion of the non-exhaustive list of factors in exercising discretion to order a person to appear remotely rather than the wording proposed in the report.

2. Should the court be empowered to order the remote appearance of the accused at the trial stage, without consent, for guilty pleas and sentencing?

Persons should not be ordered to make a guilty plea or be sentenced remotely, unless they consent. This process is too important for the accused and could adversely affect them in the sentencing process. It could be prejudicial to the accused to be forced to be sentenced from inside a custodial facility. Additionally, a personal appearance is beneficial as it facilitates contact and communication with counsel.

3. What are your organization's views on the proposal to allow the trial judge, including the Case Management Judge, to appear remotely, without the parties' consent, for the purpose of exercising case management powers?

It is appropriate that case management be conducted remotely by the case management judge, or the trial judge, *only* with the parties' consent. Counsel can be trusted to act reasonably in this regard, in our view.

Finally, the draft report refers to a document prepared by the CBA titled "Guide to Courtroom Technology in Canada". Please note that the document cited was a news article written by a CBA member for the CBA National magazine and is not intended to reflect CBA policy on the topic.

We applaud the work of the Sub-committee on the Use of Technology in the Criminal Justice system and look forward to further progress toward making criminal courts more efficient.

Yours truly,

(original signed by Marilou Reeve for Daniel MacRury)

Daniel MacRury
Chair
National Criminal Justice Section