Virtual Court Hearings: Judicial Perspective from Ontario Judgments



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Abstract

The circumstances of the past two and a half years have sparked a phenomenal rise in virtual hearings in Ontario (Canada), much like in many other jurisdictions around the world. While video court participation has been available for decades, hearings have, until recently, remained courtroom-centric events and the possibility of dematerialized courts had seemed far off, if not far-fetched. Inspired by the latest evolution of justice delivery, this thesis explores the views of Ontario judges on the implications of virtual justice. What judges have to say about video-enabled testimony and adjudication matters enormously given their role in the administration of justice. Through a systematic content analysis of reported judicial decisions from the superior trial court and appellate court in Ontario between 16 March 2017 and 17 December 2021, this thesis tackles the question: To what extent do reported decisions by Ontario judges confirm or challenge concerns about virtual hearings expressed in scholarly debates about the topic? The analysis suggests that judges share many of the concerns articulated by scholars about proceeding virtually, such as the loss of solemnity and the expanded opportunity it lends to remote participants to behave in ways that undermine the integrity of the trial. At the same time, judges agree that proceeding virtually can be effective, fair, and in some cases, a more efficient alternative to the in-person format. The findings further reveal how judges have adapted their hearing management practices to accommodate the virtual court environment and assert control over remote sites. Overall, judicial conceptions of the modern trial appear to have evolved to the point that it is no longer seen as inevitably a courtroom affair.

In Memory of Catherine Sheldrick Ross

who was always gentle and generous

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Abbreviations

OCA	Court of Appeal (Ontario)
CJR	Civil Justice Review (Ontario)
CCTV	Closed Circuit Television
COJ	Ontario Court of Justice
MAG	Ministry of Attorney General (Ontario)
SCJ	Superior Court of Justice (Ontario)
UK	United Kingdom
US	United States

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Introduction

This thesis explores a centrepiece in the digital evolution of justice: virtual hearings. The technologies needed for judges to hear testimonies and arguments from witnesses and counsel appearing remotely have existed for years. Yet video participation had been the exception, not the rule, until the Covid-19 pandemic swept the world in early 2020. Within an incredibly short time, many courts shifted to a new model of justice delivery featuring fully-video hearings (Krans and Nylund, 2021). Questions about what this mode of hearing means for the administration of justice suddenly gathered urgency. The new reality, one that seemed unthinkable to most just a few months earlier, provoked the liveliest debate yet about the value and future of traditional courtroom-centric adjudication.

An important voice in the discourse on virtual hearings is that of the judiciary. What judges have said about video participation and how they have grappled with the issues raised in the literature on virtual hearings matter not least because judges have the final say over how participants are to appear in court. Their 'buy-in' is thus critical for technology implementation (Bailey and Burkell, 2013, p. 278). Despite this, and while judicial views have been investigated alongside that of other participants in largescale studies (e.g., Rossner and McCurdy, 2018), the perspective of judges has seldom been an exclusive focus of researchers. In particular, published judgments—the official

instrument through which judges express their views—have yet to be systematically analysed to see what we can learn about virtual justice from what judges have opined in the context of actual cases. This study seeks to redress this lacuna by presenting an analysis of decisions from trial and appellate judges in Ontario, Canada, tackling the question: To what extent do reported decisions by Ontario judges confirm or challenge the concerns about virtual hearings expressed in scholarly debates about the topic?

The development of virtual justice in Ontario, being neither pioneering nor notable for any other reason, has not been a focal point of research. Court technologists and researchers abroad who have shown an interest in Canada are more likely to be familiar with Quebec, where the Cyberjustice Laboratory is based, and British Columbia, home of the Civil Resolution Tribunal, the first online dispute resolution system in the world (Susskind, 2019; Salter, 2017). Despite its relative obscurity internationally—or rather because of it—the rise of virtual adjudication in Ontario makes for interesting study. Ontario courts have had a long and complicated relationship with technology, one marked by promise, resistance, and then apparent acceptance. Blessed with vast geography—at 1,076,395 km^2, it is 8.25 times the size of England—Ontario is made up of urban centres and rural communities, some of which are hundreds of kilometres away from the nearest courthouse (Bode and Kamm, 2013). In this environment, use of videoconferencing for court hearings has tremendous potential from an access-to-justice and efficiency perspective.

Yet despite legislative reforms that gradually expanded the categories of participants who can appear virtually, public adjudication continued to be courtroom-based, as it has for generations. As the Chief Justice of Ontario candidly acknowledged, Ontario courts were still locked in a 'fusty 19th or 20th century existence' at the start of 2020 (Strathy, 2021). The reluctance to break with tradition seemingly evaporated when the pandemic struck, forcing all courthouses in the province to shut their doors. Like their counterparts elsewhere, Ontario courts leveraged technology to keep operating, and the once-distant prospect of dematerialized courts suddenly became a reality. Between March 2020 and

February 2022, over 3.2 million virtual hearings were held at the trial-court level alone (Attorney General, 2022).

This thesis explores the question posed above in hopes of extending our understanding of this latest turn in the evolution of justice. Notwithstanding the flurry of writings in the form of journal articles (e.g., Rossner, 2021; Heinsch et al, 2021; Lederer, 2021; Karim, 2021; Tomlinson, 2021; Atwood, 2021; Bannon and Keith, 2021), reports (E.g., Mulcahy, Rowden and Teeder, April and June 2020; Nuffield, 2020; McDonald, 2020; The Advocates' Society, 2021; Hutchinson, 2021; PEW, 2021) and blog posts about virtual justice seen recently, published judgments remain an underexplored source of data for assessing judicial views on the subject. Through a theory-driven content analysis of Ontario trial and appellate decisions from March 2017 to December 2021, I sought to chart how judges have dealt with issues related to videoconferencing use and their perspective on the pandemic's impact on the justice system. The pandemic is worthy of investigation for various reasons; for the purposes of this study, its significance lies in the conditions it created for judges to accumulate considerable experience with virtual hearings in a short period of time. Whether that experience has changed judges' attitudes towards proceeding virtually is a fundamental question that will be addressed to a certain extent.

1.1 Terminology

A word on terminology is required to preface the discussions that follow. In this thesis, the term *virtual hearing* is used to refer to a technology-enabled hearing where one or more participants appear via videoconferencing. By this definition, two types of hearing fall under its rubric: (1) fully-remote hearings where all parties join by audio-video link, and (2) hybrid hearings where one or some participants appear by video while others are physically together. These two formats are not equivalent; notably, the former affords 'a "flatter" form of interaction' (Rossner, 2021, p. 342). Where the distinction is significant to the discussion, I will specify the type. *Video hearing*, *technology-enabled hearing*, and *online hearing* are meant to convey the same meaning I have assigned to *virtual hearing* and will be used interchangeably.

A term that has gained recent prominence is *remote hearing*. *Remote hearing* casts a wider net than *virtual hearing* as I have defined the term. It encompasses not just virtual hearing but also audial hearing where participants can only hear each other and paper hearing that proceeds on the basis of written submissions and evidence alone. Insofar as the term *remote hearing* is used in this thesis, it should be understood as referring to the video variety only. Another term that appears in the academic literature, though less commonly, is *distributed court* (Licoppe and Dumoulin, 2010; Rowden, 2013). Authors who use this terminology are critical of the connotations of *virtual*—that it is manipulated and somehow less real. Without discounting such criticism, *virtual hearing* remains apt to describe the mode of hearing being referred to and makes clear, in a way that *distributed court* does not, that the hearing takes place on monitors and nowadays, virtual platforms.

1.2 Outline

The rest of this thesis is divided into four chapters.

To contextualize the empirical analysis, Chapter 2 provides a historical overview of videoconferencing use in civil and criminal proceedings in Ontario, and outlines the changes precipitated by pandemic circumstances. The policy discourse and the legislative framework for video court appearances are discussed. As I argue, underpinning the policy discourse is an instrumentalist view of technology as a means for realizing sought-after improvements to efficiency and access to justice. Despite the express policy support, videoconferencing appears to have been infrequently deployed in proceedings until the pandemic.

Chapter 3 orients the reader to the existing literature on virtual hearings and identifies the themes that frame my analysis. It discusses the key issues raised by scholars in this interdisciplinary field, issues that are developed into the variables used to analyse published judgments by Ontario judges in the next chapter. While research on video-link testimony dates back to the 1980s, when testimony by closed-circuit television (CCTV) was introduced in many jurisdictions for child witnesses, it is only in the last decade or so that serious attention has been turned to the role of judicial architecture and rituals in

shaping court events (e.g., Mulcahy, 2011; Resnik and Curtis, 2011; Licoppe and Dumoulin 2010; Gélinas et al, 2015). A robust albeit small body of research has since emerged, underscoring the transformative potential of videoconferencing use.

Chapter 4 presents the empirical work. It explains my research process, as well as the suitability and limitations of sourcing reported decisions as data. A discussion of the findings follows. As my analysis of reported decisions suggests, judges had mixed feelings about the shift to virtual adjudication. While proceeding virtually could create efficiencies as judges highlighted in the civil context, concerns were voiced about the heightened risk of participant misbehaviour and potential curtailment of open justice. The virtual court environment appears to have challenged how judges manage proceedings, engendering new practices. Concluding remarks and possible future research directions are presented in chapter 5.

The purpose of this study is to better understand the benefits and challenges associated with video participation from the judicial perspective as captured in published decisions. The absence of an analysis of this sort, about how or even whether judges have grappled with the concerns raised by scholars, seems especially consequential at a time when important changes are being made to the adjudicative landscape. Judges are key justice stakeholders, and their understanding and expectations warrant scrutiny. As will become clear, Ontario judges have coped rather well with the recent sweeping move to virtual justice, dispelling some of reservations expressed in earlier literature.

2

Evolution of Videoconferencing Use in Ontario Courts

2.1 Introduction

This chapter sketches the legal and policy landscape of virtual-hearing use—the context within which judges work—in Ontario. It discusses the key reform efforts starting in the late-1980s which introduced and then expanded the availability of video participation in court proceedings. The impact of the pandemic on the administration of justice in the province will also be addressed. As I demonstrate, judges' exposure to video participation has historically been modest, rendering the changes brought on by the pandemic all the more dramatic.

The surge of cases heard virtually following the pandemic's onset, and the pandemic itself or some like catastrophe, would not have surprised one particular judge in Ontario—Justice Brown. Years earlier, he posed a thought experiment in a keynote address to a roomful of lawyers: *What if some extra-ordinary event occurred that shuttered all of our courthouses overnight, how will we adapt?* He offered an answer:

> That, I suspect, would prompt folks to ask whether we even need courtrooms for all hearings—would the default be some sort of on-line hearing, with attendance in a physical courtroom required only for exceptional circumstances? (2014)

His thought experiment effectively came true in 2020 when Covid-19 precipitated a 'new normal' of virtual hearings in Ontario. Leading up to this, however, no other member of the judiciary had openly questioned how dematerialized courts would function. The legal

landscape was such that having parties physically present in the same place for trial was seen as the gold standard and presumed preferrable to video attendance.

The discussion below begins by surveying the policy discourse on court technology implementation which, it is suggested, subscribes to an instrumentalist view of technology, regarding it as a neutral tool to be used to improve efficiency and access to justice (section 2.2). Little apparent attention has been given to whether, and to what extent, technology affects justice imperatives besides efficiency and access, or the symbolic aspects of court hearings. Section 2.3 follows with an overview of the legal framework that judges are bound by in permitting or not permitting video testimony. The history of videoconferencing use is discussed in relation to the criminal and civil context separately, as video participation was made available in civil and criminal proceedings at different times through different legislative reforms animated by different considerations. In section 2.4, the impact of the Covid-19 pandemic on court operations is addressed. Where appropriate, or due to lack of publicly available information specific to Ontario, the situation in Canada more generally is considered.

2.2 Instrumentalist View of Technology Pervades Policy Discourse

In Ontario, responsibility for the administration of justice is shared between the judiciary and the Ministry of Attorney General (MAG). While judges maintain control over the conduct of individual proceedings, including how witnesses are to appear, all matters connected with court operations are within MAG's purview (Memorandum of Understanding, 2008). The success or failure of technology initiatives thus hinges not only on its acceptance by judges but on the endorsement of policymakers and court administrators. A review of the key policy documents shows clear support for expanding use of courtroom technologies to tackle the perennial justice problems of delay, inaccessibility and high cost.

The official discourse surrounding the adoption of courtroom technologies has a strong instrumentalist orientation (Salyzyn, 2012). The instrumentalist view has been described as 'the most widely accepted view of technology' (Feenberg, 2002, p. 5; Carr, 2010). To

instrumentalize technology is to see it as a transparent means to an end. Instrumentalism holds that 'technology is completely neutral, solely serving the intended purposes held for it by its users' (Cockfield and Pridmore, 2007, p. 480; Winner, 1978). Technology is simply a 'technological thing' (Tranter, 2011) without any inherent moral or other value. The common refrain 'guns don't kill people, people do' perfectly illustrates the instrumentalist position that it is up to people to choose what uses to make of available tools and to use them for their desired end (Pitt, 2014). Those who espouse the instrumentalist perspective are often optimistic about the capacity of technology to improve the status quo and they tend equate technological change with progress (Cockfield and Pridmore, 2007). Given the emphasis on human agency, technology adoption within this framework is considered a matter of purposeful action whose consequences could be foreseen (Cockfield, 2010).

As articulated in the official discourse, technology is a tool to be utilized to increase the efficiency of a justice system hampered by an entrenched culture of delay. On the criminal side, in the late 1990s, the Criminal Justice Review Committee, upon finding that cases were taking much too long to be judicially resolved, recommended that courts leverage technology to expedite proceedings (Locke, Evans and Segal, 1999). In the Committee's view, 'use of modern information technology will increase efficiency and reduce delay at each stage of the criminal process.' Technological integration was not fully achieved, however, in part because of limited resources to equip courtrooms (Watt and Durno, 2006). As delays continued to plague the criminal justice system, a similar recommendation to replace routine in-person practices with virtual ones was made by a federal Senate Committee nearly two decades later (Runciman and Baker, 2017). The Committee's report noted: 'efficiencies could be achieved by making videoconferencing technology available to avoid unnecessary in-person appearances' (p. 7). It thus called for 'increased installation of videoconferencing in courthouses and detention facilities' (p. 133). As is evident, improving criminal processes is analogized to improving efficiency, and greater efficiency is portrayed as an end that can be achieved by applying

technological tools. Conspicuously absent is a discussion of the broader implications of technology use for the quality, experience and perception of justice interactions.

On the civil side, instrumentalist assumptions about technology are discernable in the push for its increased use, framed as a step forward in expediting court processes and reducing cost. The report of the Civil Justice Reform Project, commonly known as the Osborne Report after its lead author, emphasized embracing 'technological solutions' to make Ontario's civil justice system speedier and more accessible (Osborne, 2007). Technology is depicted as a mere means with no embedded politics or values. 'Technology is a tool to make the system work more effectively', the 2007 report stated, '[i]t is a means to an end.' It went on to recommend its use when 'cost or time savings can be achieved', such as in cases where significant travel by counsel or parties would be required (p. 121). Arguments in favour of technology use couched in the rhetoric of efficiency have become more prominent in recent years. Shortly after the pandemic began, a judicial working group of the SCJ proposed rule reforms to encourage greater use of video-enabled hearings by removing the presumption in favour of the in-person mode. As the working group explained, '[t]he default should be the mode that is most expeditious and affordable, having regard to the nature of the case' (Myers and Cavanagh, 2020). The premise here is an assumption that videoconferencing is a neutral insertion that does not affect the nature of judicial adjudication. By taking such a narrow view of technology's impact, one can focus on the practical objectives of speed and cost in choosing between the virtual and in-person mode.

An optimistic and straightforward account of technology as just a means to realize certain goals has resonated with officials who control court resources. Almost every Attorney General of Ontario in the last decade has endorsed digital transformation of the courts on the view that it is both inevitable and necessary for enhancing efficiency and access. As Meilleur stated in 2014, 'We need to think of innovation as a means to improve. New processes and technology changes have the power to significantly increase access for […] thousands of people.' In 2016, then-Attorney General Naqvi highlighted the need for

'more technology solutions' to be implemented (The Canadian Press, 2016). '[T]echnology is a way of living', he stated, invoking a sense of inevitability about technological change in the justice system. Optimistic about what technology can achieve, the current Attorney General urged: 'We must use technology to make the system more efficient and affordable' (Downey, 2019). Recently, in announcing the government's investment of $28.5 million for a digital case-management system, Bethlenfalvy, Minister of Finance and Minister Responsible for Digital and Data Transformation, stated: 'By strengthening our digital justice infrastructure we're ensuring swift, safe and secure access to critical justice services' (MAG, 2021). The overall attitude towards technology is positive, its adoption portrayed as key to addressing challenges related to access, cost and court congestion.

The policy emphasis on efficiency and access is reflected in operational objectives. According to the Annual Report 2016-17 and 2017-18 of MAG's Court Services Division, modernizing the administration of justice through further technological integration has been one of its main priorities. The time and cost savings from leveraging distance-mediating technology are all the more substantial and relevant for a province with a vast geography. Videoconferencing is perceived as an effective tool to eliminate the need for unnecessary travel. As the report states, '[t]he regions continue to use video conferencing to enhance access to justice and provide other options to attend court proceedings when travel is prohibitive.' Not only do court users benefit but the state does as well. Remanding in-custody defendants via videoconference or telephone relieves the state of the responsibility to transport inmates from jail to courthouse and back again. Moreover, videoconferencing enables courts to serve remote communities accessible only by air or by ice road during the winter from base courthouses remotely, without having to convene 'fly-in' courts (Bode and Kamm, 2013; Goldbach, 2018). In this operational environment, it is unsurprising that technology solutions feature prominently on the policy agenda.

Overall, the policy discourse reflects a narrow view of technology, one that is fixated on its capacity to deliver cost and time savings. Besides efficiency and access, no other justice

value is factored into the calculus in considering technology's impact. There is no apparent inclination to problematize the insertion of technology into court processes or to consider what unintended consequences might flow. The underlying assumption seems to be that technology can be integrated into the justice system without materially affecting the experience of court or perceptions of procedural fairness. No notice is taken of the effects of technology mediation on the ritual dynamics and interactional ecology of court as broached in the academic literature discussed in chapter 2. Instead, our relationship with technology is regarded as straightforward and its integration is presented as a positive development towards court modernization.

2.3 Pre-Pandemic Legal Framework

Having considered the policy discourse, this section provides an historical overview of the legislative provisions allowing participation in court proceedings by videoconferencing. It addresses the legislative reforms that have been enacted to introduce and subsequently expand the availability of videoconferencing use in criminal and civil proceedings. An understanding of the historical landscape is necessary to put into perspective the changes triggered by the Covid-19 pandemic, which will be the focus of section 2.4.

In Ontario, a common-law jurisdiction, criminal and civil procedures are codified. Procedural rules are fixed by federal statute in the criminal context (*Criminal Code*), and provincial regulation in the civil context (*Rules of Civil Procedure*). In both contexts, the chief justice of each court can issue practice directions, a form of soft law or quasi-legislation, to supplement the hard legislation for the purposes of governing the practice of proceedings before that court. Judges are bound by these rules in deciding whether to allow a participant to attend by video. The rules do not prescribe precise requirements for videoconferencing use, but rather enumerate factors for judges to consider in making their decision. Until the Covid-19 pandemic triggered a largescale adoption of virtual hearings, video participation was considered on a case-by-case basis, and as will become obvious, was seldom allowed.

2.3.1 Use of Videoconferencing in Criminal Proceedings

The current policy focus on technology as a means to improve efficiency obscures the reason videoconferencing was first introduced into courtrooms: to shield children from the trauma of testifying in criminal courts. Increased awareness and prosecution of child abuse starting in the 1970s led to more children appearing in court which, in turn, drew attention to the insensitivity of the justice system to children's capacities (Bala, Lee and McNamara, 2001). As a result of mounting pressures for reform, in 1988, the *Criminal Code* was amended to authorize a judge to permit a witness under 18 to give evidence from another room by CCTV in sex abuse cases (section 486.2). The new provision was not an open invitation to use CCTV, however. It required the prosecutor to prove to the judge that it is 'necessary to obtain a full and candid account of the acts complained of.'[1] In other words, it must be shown that the sight of the accused would cause the child to fall silent or somehow unable to tell their whole story.

Despite research showing that it reduces stress for the child and helps preserve the quality of their evidence (e.g., Libai, 1969; Bala, Lindsay and McNamara, 2001), the provision for CCTV testimony was rarely used. This has been attributed to the reluctance of prosecutors to apply for it out of concern that a child on screen appears less credible (Schmolka, 1992), and of judges to allow it because of the legislative requirement that it be 'necessary' (Castel, 1992). Some judges prefer to take the 'let's see how the child does in open court' approach (Bala, Lee and McNamara, 2001, p. 52). There is also the practical difficulty of securing the needed facilities and support staff (Bala, Lee and McNamara, 2001). Overall, the lesson learned from early experience with CCTV is that statutory reform, while a necessary first step, can only go so far in encouraging use of video participation. Professional attitudes and the availability of facilities play an equally

[1] Section 486(2.1) reads in its entirety: 'Notwithstanding section 650, where an accused is charged with an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3), or section 170, 171, 172, 173, 271, 272 or 273 and the complainant is, at the time of the trial or preliminary inquiry, under the age of eighteen years, the presiding judge or justice, as the case may be, may order that the complainant testify outside the court room or behind a screen or other device that would allow the complainant not to see the accused, if the judge or justice is of the opinion that the exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant.'

important role. In particular, judges' active support is critical for technological innovation to be fully implemented since they have the last say regarding technology use in the proceedings they preside over.

In 2006, amendments to the *Criminal Code* expanded the availability of CCTV testimony (Bill C-2). Any adult witness could testify by CCTV if a judge is convinced it is 'necessary to obtain a full and candid account' of what happened, having regard to factors such as the relationship of the witness to the accused, the nature of the offence, the witness's age, etc. (*Criminal Code*, ss. 482.2(2) and 482.2(3)). CCTV *must* be used if it is requested for a child witness or a witness with a disability, unless doing so 'would interfere with the proper administration of justice' (s. 486.2(1)). The presumptive availability of the technology for vulnerable witnesses reflected an increased awareness that use of CCTV, along with other testimonial aids, can facilitate their participation and prevent revictimization. Nonetheless, lack of access to appropriate facilities remained 'the biggest obstacle' to widespread adoption (Bala, 2018, p. 33). Facilities were often unavailable in northern communities, and even some urban courthouses were lacking (Hurley, 2013). In a survey of judges from four Canadian jurisdictions, half of them reported disappointing experiences due to poor lighting and sound, and logistic problems (Bala et al, 2011). Ontario prosecutors and victim services workers (Hickey, 2016) as well as child witnesses (Hurley, 2015) likewise reported problems with audio and video quality, hard-to-use equipment, and awkwardly located CCTV rooms (e.g., next to a waiting area accessible to the accused and their supporters) (Hickey, 2016). Furthermore, applications for adult witnesses to testify through CCTV were infrequently made, and inconsistently granted by judges (Bala et al, 2011; Hurley 2013).

Witnesses facing significant geographical barriers was the next category of witnesses for whom videoconferencing was available. In 1999, *Criminal Code* reforms were introduced to allow witnesses outside Canada and elsewhere in Canada to testify remotely. A witness outside Canada was entitled to testify by videoconferencing unless a judge believes doing so would be 'contrary to the principles of fundamental justice' (s. 714.2).

For witnesses in Canada, it is largely a matter of judicial discretion. Videoconferencing is permitted if the judge considers it 'appropriate in all the circumstances' given the location and personal circumstances of the witness, the costs of in-person attendance, and the nature of the witness's evidence (s. 714.1). This provision has been invoked to allow witnesses residing far away from the trial venue, are ill, whose safety is at risk, or whose personal situation make it difficult to travel to testify remotely (Steering Committee Report, 2013). That said, since 'appropriate' is a flexible concept, judges have applied the provision unevenly (2017 NSCA 58, para 23; Gluzman, 2018). Some judges welcomed the use of videoconferencing as a way to enhance access and ensure participation. Others were of the view that it should be limited to the 'rarest of cases' (2012 ONSC 145, para. 26) as physical testimony was 'the preferred method for receiving testimony' (2008 ABQB 658, para. 39).

In 2019, significant reforms were enacted to extend the possibility of video attendance to *all* actors, including judges. These changes were part of wider efforts to modernize the criminal justice system, improve its efficiency and alleviate long delays (Legislative Background, 2019). The impetus for reform was a Supreme Court of Canada decision, *R v Jordan,* in which the Court set hard deadlines for criminal matters to be tried in order to address the 'culture of delay and complacency' (2016 SCC 27) that has persisted since the same court remarked in 1990 that 'something is terribly wrong' ([1990] 2 SCR 1199). Numerous cases were stayed for delay as a result of *Jordan*, leading to public criticism and the above-noted Senate Committee report which underscored the need for 'all courts and courthouses [to] be using videoconferencing' (p. 75). The report specifically called for increasing use 'so that court appearances such as bail hearings and interlocutory applications can be conducted remotely and without the need for an accused person to be removed from his or her community' (p. 191). It is important to stress that the legislative amendments implemented in response did not give blanket permission for participants to use the technology, but left the final decision to judges to make subject to different criteria depending on the stage of the proceeding. The general rule remained

that all participants, save for witnesses outside Canada, appear in person for trials—the culminating event in the criminal justice process.

2.3.2 Use of Videoconferencing in Civil Proceedings

Unlike in the criminal context, where protection of vulnerable witnesses was the initial driving force, modernization has been the stated policy goal, with efficiency as the guiding principle, for integrating technology into the civil justice system for the past quarter-century. In 1995, the Ontario Civil Justice Review (CJR), a joint taskforce between MAG and the courts, released its first report outlining proposals for a 'speedier, more streamlined and more efficient' system. It specifically recommended introducing videoconferencing into civil proceedings as a way to reduce cost and improve accessibility. Videoconferencing, the report states, 'opens up the capacity to deal with remote testimony' and 'eliminates a great deal of travel by parties, witnesses and lawyers, in particular, and saves the time and costs attendant upon such travel' (First Report of CJR, 1995). In response to this report, pilot projects were set up in North Bay, Ottawa, London and Sudbury to test the utility of videoconferencing (Final Report of CJR, 1996). The results were overwhelmingly positive, leading the CJR to conclude in its final report: 'The potential benefits of this form of technology are only now being realized' (Final Report of CJR, 1996).

Even before the CJR issued its final report, the Chief Justice of Ontario, who is the president of the Court of Appeal (OCA), indicated his openness to lawyers appearing by video in civil appeals. As stated in a December 1995 Practice Direction issued by the Chief Justice, 'Upon installation of the required equipment counsel may make arrangements through the Registrar's Office to argue an appeal by video conference' (25 OR (3d) 485). Civil appeals are fairly straightforward from a procedural standpoint; they do not involve any evidence being taken (and substantively speaking, no liberty interest is at stake). Accordingly, it may be argued that they are well-suited to be heard by video. It should be noted that the OCA was not the first Canadian court to permit appearance by videoconferencing. The Supreme Court of Canada has long permitted counsel not based

in Ottawa, where it sits, to argue both civil and criminal matters by video (Botting and Trenchard, 1997) and formalized that practice in a Practice Direction in 1991. While Ontario was still studying the issue, the British Columbia Supreme Court had moved forward to join Australia and the US in using videoconferencing for witness testimony and to conduct a range of non-trial proceedings (Jensen, 2000).

In 1999, four years after the CJR first made the recommendation, legislative reform came into effect to permit use of videoconferencing at the trial level. Rule 1.08 was added to Ontario's *Rules of Civil Procedure* to allow all or part of a proceeding to be heard by video on two conditions: (1) the technology is available at the court or is provided by a party, and (2) the parties consent or absent consent, the court orders it on a motion. In deciding whether to permit use of videoconferencing when it is contested, the legislation requires the court to take into account factors including 'the general principle that evidence and argument should be presented orally in open court', suggesting that the in-person mode remains the preference (r.1.08(5)). Another factor refers to the importance of 'observing the demeanour of a witness.' It appears that the preferred mode remains in-person attendance. On a practical note, it soon became apparent that the justice system could not count on the parties to furnish the necessary equipment if it wanted to encourage videoconferencing use. Consequently, in 2001, MAG launched a multi-year initiative to install videoconferencing equipment in courthouses (Osborne Report, 2010). By 2007, 51 court locations had been outfitted and a model electronic courtroom was set up in Toronto specifically for commercial litigation, which could be document-intensive (Osborne Report, 2010). A year later, rule 1.08 was amended to allow judges to order video participation on their own initiative.

Leading up to the pandemic, Rule 1.08 appears to have been underused. As Salyzyn observed in 2012, in the only academic article that has given the provision some analysis, '[t]here have only been a handful of reported cases interpreting Rule 1.08, and the rule has not yet been subject to review by the Court of Appeal for Ontario' (p. 434). This trend seems to have continued up until the pandemic. A search on Westlaw shows that from

the time of its enactment to 16 March 2020, there are only 17 Ontario decisions that referenced the rule, none of which is at the appellate level. While there is no empirical research on the use of Rule 1.08, the small number of reported decisions suggesting that it is seldom applied, meaning video participation in civil proceedings is a rare occurrence. It appears that judges, by and large, have hewed to the conventional rule that evidence be given by a witness, in person, in court ([2001] OJ No 5882). The reasons for this are likely twofold. First is the preference for in-person testimony embedded in the language of rule 1.08. Considering that judges have to work within the parameters set by legislative language, their reluctance to grant motions for testimony via videoconferencing is not unexpected (Salyzyn, 2012).

Second, the technological tools required for video participation were not uniformly available across the province. Salyzyn, writing in 2016, noted that the equipment available varied greatly among courtrooms. The blame for such inconsistent availability has generally been placed on MAG, which is responsible for the courts' technological infrastructure. Despite MAG's stated intentions to modernize the courts, it has shown 'a consistent track record of institutional malaise' in implementing reform projects (Chiodo, 2020, p. 814). Until the pandemic, its approach has been to develop bespoke technological solutions rather than to consider off-the-shelf software, which tends to take longer, cost more, and may not be any better. Of MAG's failed projects, the costliest was the Integrated Justice Project launched in 1996 to build an online centralized document-management system. After significant delays and cost overruns, the project was abandoned in 2002 at a cost of $265 million (Makin, 2005). Furthermore, digital initiatives that are broad in scope ran into difficulty when end users are not closely consulted and local needs are not taken into account (Bailey and Burkell, 2013). As the province's Auditor General observed, MAG has drawn 'ongoing, consistent criticism from [justice] sector stakeholders regarding the pace of modernization' (Annual Report 2019, p. 104). Those levelling criticism included judicial leaders such as the Associate Chief Justice of the SCJ, who have decried MAG's failure over the years to provide 'a modest, prudently

managed investment in technology' (Marrocco, 2019). The Chief Justice of Ontario echoed: '[technology] resources have long been requested but have eluded us for decades' (Strathy, 2020).

Taken together, the implementation of videoconferencing in Ontario's civil courts progressed at a languorous pace prior to the pandemic. As Puddister and Small put it, it is 'at best, a story of slow adaptation' (2020, p. 374). In addition to having the necessary infrastructure, a critical component to successful procedural reforms is the active support of judges. As Bailey and Burkell learned through interviews with members of court technology implementation committees, 'judicial support can make or break a technological innovation' (2013, p. 278). Judicial champions of technological change have historically been outnumbered by those who are complacent in the status quo. One of the few who has spoken out in favour of greater use of technology is Justice Brown, whose thought experiment opened the chapter. He stated extrajudicially: 'We judges need to change' (2019). In his view, for the civil justice system to join the technology-driven revolution taking place in the private sector, 'the starting point must be a radical change in our judicial mind-set' (2019). The key role of the judiciary is only beginning to be appreciated by researchers, it seems, as Canadian literature on courtroom technologies has not paid any attention to judicial needs and perspectives when it comes to digitalizing justice.

2.4 Changes Prompted by Covid-19 Pandemic

Against the backdrop of a slow and cautious approach to technology integration, the impact of the pandemic on the justice system seems all the more seismic. On 17 March 2020, the Ontario government declared a state of emergency under the *Emergency Management and Civil Protection Act* following the outbreak of Covid-19. Courthouses across the province shut their doors on the same day, which presented an existential challenge to court operations. At the time, courts operated in a paper-based, brick-and-mortar environment. The system relied heavily on in-person interactions, requiring parties to make trips to the courthouse to file documents, schedule certain hearings, and

have their case heard. As Chief Justice Strathy explained, '[p]rior to the arrival of the coronavirus, our courts had functioned in ways unchanged for generations' (2021). The courts' antiquated ways, exacerbated by woefully inadequate emergency plans (Haigh and Preston, 2020), made for a lack of pandemic preparedness.

With courthouses closed, the administration of justice was forced into an abrupt stop. In notices to the public in March 2020, the OCA, Superior Court of Justice (SCJ) and Ontario Court of Justice (OCJ) advised that all scheduled hearings were adjourned, save for emergency matters, which could be heard in writing or remotely. Limitation periods and procedural deadlines were suspended for as long as the emergency proclamation was in effect to limit the legal consequences of disrupted court operations (O Reg 73/20). From the perspective of court users, courts essentially ceased providing adjudicative services (Bildy, 2020; Spratt, 2020). Since the judiciary has a constitutional responsibility to enforce legal rights and obligations, plans were quickly developed for courts to resume the business of judging within the constraints of pandemic health-and-safety measures (Matyas, Wills and Dewitt, 2022). The prospect of a massive backlog, already growing by 23% annually before the pandemic (Auditor General's Report, 2019), provided further impetus to resume operations as soon as possible.

The operational standstill was soon replaced by a new model of virtual justice delivery featuring fully-remote hearings. By early April 2020, courts expanded the scope of cases they would hear by videoconference without the need to apply for a court order, as required by the *Criminal Code* and *Rules of Civil Procedure*, by exercising their soft law-making powers to issue practice directions, guidance and notices. On 2 April 2020, the Chief Justice of the SCJ announced in a Notice that 'the Court is expanding operations to matters beyond the most urgent matters. All matters will be heard remotely by way of telephone or video conference.' Several days later, on 6 April, the Chief Justice of Ontario made a similar declaration in a Practice Direction applicable to the OCA. The transition to fully-remote hearings was thus underway, triggering what must be a steep learning curve for judges unused to presiding virtually.

2.4.1 '25 years in 25 days': Shift to Virtual Justice

Since April 2020, all manner of proceedings, including bench trials, have been held virtually. Because courthouse videoconferencing facilities were inaccessible due to building closures, the OCA and SCJ turned to Zoom, an off-the-shelf videoconferencing platform that runs on standard laptops. By early June 2020, MAG provided over 600 laptops and Virtual Private Network tokens, and 600 new teleconference lines for court use (Recovery Secretariat, 2020). The shift to virtual hearings was accompanied by a move to electronic filing, which was initially done by email. By August 2020, the SCJ replaced email with a new online portal for document submission and began implementing CaseLines, a document-sharing platform for sharing electronic documents during hearings (SCJ Memorandum). Rather than to buckle, the legal system proved resilient. As Attorney General Downey remarked, 'I like to say we've modernized the justice system 25 years in 25 days' (Canadian Press, 2020). Between March and September 2020, the SCJ alone heard over 50,000 virtual proceedings, with that figure jumping to 180,000 a year later (Morawetz, 2020, 2021).

The widespread embrace of virtual adjudication came with one exception: jury matters. The SCJ resisted moving jury selections and jury trials online out of fear that the integrity of the processes would be compromised—more specifically, that sensitive digital evidence and jury deliberations could be recorded, and non-jurors could overhear deliberations without the court's detection (Bertrand et al, 2021). Thus, jury matters were put over when courthouses were closed. Between March and September 2020, between 800 and 900 scheduled jury trials were cancelled (Powell, 2020). That said, the SCJ was open to hold jury trials in a hybrid format, with witnesses appearing by Zoom on a large screen set up in the middle of the courtroom facing the counsel table and visible to the jury (Graham, Ostler and Watkins, 2020).

2.4.2 Virtual Trials During the Pandemic

The official discourse, as articulated in MAG and court announcements, has tended to focus on the scale and speed of the transition to virtual hearings, reflecting as before an

instrumentalist view of technology. Technology is treated as something to be utilized—a means to deliver 'contact-free' justice. Considering that the goal was simply for courts 'to keep operating' as close to previous capacity as possible (Jerome, 2020), that the focus was on how to apply technology to solve the operational problems presented by Covid-19 is not surprising. Consequently, officials seem to be only concerned with the technology's performance and effectiveness as measured by how many virtual hearings it has facilitated. Other implications of technology integration, particularly those which are not easily quantifiable, such as its role in shaping court experience and user satisfaction, are left unaddressed. Nonetheless, one can get a sense of what moving hearings online means for those involved from anecdotal evidence reported in the press.

The first Zoom trial, held in June 2020 before the SCJ, reveals important differences between the virtual and the traditional mode. As Robitaille, defence counsel in the trial, recounted, the usual pomp of courtroom affairs was missing on Zoom (2020). There were no spatial markers such as the witness box and judicial dais to signal roles and hierarchy. Counsel were not dressed in their usual black waistcoats and robes, nor was the judge in judicial attire. Running shoes, unthinkable in a physical court, were Robitaille's chosen footwear. Material differences aside, the human dimension of the process seems to have been lost. Robitaille explains:

> The registrar can't pass a tissue to a weeping witness. There is no buzz flowing through the courtroom when a particular point is established in cross-examination. I am unable to stand tall, side by side, with my client as he faces the accusation that he broke the law.

Because the full spectrum of human sensory experience could not be replicated on Zoom, a trial held on the platform felt dispassionate, like a 'stripped-down model of justice.' But what was lacking was made up for in efficiency akin to 'a business-like attack on the task at hand.' This stripped-down form proved preferrable, too, for the complainant in another trial. Having testified in the same sexual-assault case twice—once in-person, the other on Zoom—she described the difference: 'Court online is less of a drama, more of a meeting[…]Courtrooms are cold and uncomfortable; at home, I

wrapped myself in a blanket and sat on my couch' (Watson and Schreiber, 2021). In the courtroom, the accused's presence was impossible to ignore; on Zoom, a strategically placed sticky note on her screen meant she never had to see his face. Notwithstanding the diminished solemnity and human element, both the lawyer in the first case and the complainant in the second perceived the new mode of hearing to be procedurally fair.

These two accounts, albeit selective, draw attention to the transformative potential of videoconferencing technology. While a Zoom trial may be legally equivalent to a physical trial, the environmental conditions in which remote participation occurs can alter the experience of court. Video-mediated encounters of justice can be at once disruptive and empowering. From one perspective, a Zoom trial is 'more intense' since there is 'no time wasted and nowhere to hide' (Robitaille, 2020); from another, it affords a 'more comfortable space' (Watson and Schreiber, 2021). The conflicting experiences on display bring to the fore the double-edged nature of technology.

2.5 Conclusion

As this chapter illustrates, videoconferencing technology has long been viewed by policymakers as a tool to alleviate delay, increase efficiency, and improve access to courts for vulnerable and out-of-jurisdiction witnesses. However, a confluence of factors, including an underdeveloped technology infrastructure and legislative provisions with an embedded preference for courtroom attendance, has suppressed its use for decades. Consequently, judges' exposure to virtual hearings has been limited, and in the case of the fully remote format, non-existent or nearly so. The pandemic broke the trend by removing the option to proceed in-person. Rather than to fiddle while Rome burns as some feared given MAG and the judiciary's track record for innovation, the courts successfully fast-tracked digitalization efforts. The Chief Justice of the SCJ candidly stated: 'we have been forced, and the Ministry has been forced, to accelerate its plans on moving to electronic hearings' (Jerome, 2020).

There is no doubt that judges are key players in the justice system and their support is critical to the implementation of court technology. Yet their perspective has been

somewhat neglected in the discourse on the development of virtual justice in Ontario. No one has yet to examine how judges have reacted to the changes propelled by the pandemic to the business of judging, the learning curve that was required of them, and whether their attitudes towards video participation have changed as a result. Furthermore, what they have said about the subject in their judgments is under-scrutinized.

3

What We Know about the Implications of Virtual Hearings

3.1 Introduction

This chapter critically engages with the existing scholarship on the implications of video participation for the administration of justice. In scrutinizing the literature, I identify issues and concerns raised by others which I expect would also attract the attention of Ontario judges and warrant commentary in their reported judgments. As such, this chapter serves as the theoretical foundation, or guiding framework, for the empirical analysis presented in the chapter following.

Research on virtual hearings has grown in tandem with the deepening penetration of technology into society in general and the justice sector in particular. Videoconferencing is among the technologies that have played an increasing role in judicial adjudication. Since it debuted in an Illinois court in 1972 (Eliot, 1977), it has been used by courts around the world to enable participants, notably jailed defendants and vulnerable witnesses, to participate without having to step foot in a courtroom. The advances in audio-video technologies were accelerating at such pace that by the late 1990s, Lederer was convinced 'we are unintentionally on the road to the capability for, if not the actuality of, virtual trials, virtual courtrooms, and virtual courthouses.' (1999, p. 802).

The discussion that follows delves into the implications of videoconferencing use for access to justice (section 3.2.1); procedural fairness and other justice values (section 3.2.2); court rituals (section 3.2.3); the topography of adjudication (section 3.2.4); and the

experience of court (section 3.2.5). It should be noted that the issues addressed here transcend any particular legal system. They have been raised and debated, to different extents, in Australia, United Kingdom (UK), United States (US), Canada, and France, among other places, as each jurisdiction experimented with technology. The general tenor of the literature from these jurisdictions is that a virtual hearing is not a transplant of the traditional hearing on a virtual platform, but a dynamically different way of proceeding.

3.2 What We Know about Virtual Hearings

Use of technology has dominated contemporary debates about the future of justice. The utility of distance-mediating technology is hard to argue with, yet scholars have insisted on putting utility—and relatedly, efficiency—into perspective. Instead of measuring impact in terms of costs, delays and backlogs as policymakers tend to do (Gélinas and Camion, 2015), they have drawn our attention to the web of values, rituals, and interactional norms at play in court hearings disrupted by the mediation of technology. Scholars have also problematized the common claim that technology use improves access to justice, arguing instead for a more critical examination of the relationship. Taken together, the literature reveals something of a paradox: videoconferencing in courts can be seen as positive or negative, as democratizing or dehumanizing, depending on the context of their use and the circumstances of the users.

Issues emerging from the literature are discussed in the next sections, grouped under five broad themes: access to justice; procedural fairness and other justice values; justice rituals; court setting; and court interactions. The discussion considers research on hybrid hearings as well as that on full-remote hearings. To date, the majority of the research on the use of videoconferencing is in the context of hybrid hearings which is set up very differently from the full-remote variety, and in turn have a different dynamic and feel. Thus, observations made in relation to hybrid hearings may not necessarily apply to full-remote hearings (Rossner, 2021). The difference between the two is particularly salient in the discussion of the adjudicative environment and court rituals below.

3.2.1 Access to Justice

Access to justice means, at minimum, access to the courts, the institutions responsible for administering the law. It is widely acknowledged that for many legal systems, access is systematically unequal (Weinstock, 2016; Benyekhlef, Amar and Callipel, 2015). Courts are generally too slow and cost too much to access. They operate out of courthouses which tend to be located in cities and are not geographically accessible to all court users. Traditional hearings, with their requirement for all parties to physically be in the courtroom, pose a challenge to individuals who have difficulties attending in person. This disproportionately affects the poor and the disadvantaged, leaving their legal needs under-addressed (Horowitz, 2016).

Against this backdrop, videoconferencing is seen as a tool with significant potential for expanding access to justice (Wallace, 2008; Lederer, 2021), a view shared by Ontario policymakers as detailed in the last chapter. The technology can reduce the time and expenses associated with going to court, including the costs of transportation and missed work (Bailey, Burkell and Reynolds, 2013). Use of the technology to overcome geographical remoteness has particular relevance for large jurisdictions such as Canada, Australia and the US. Literature from these jurisdictions[2] has underscored the attendant benefits, with improved access for rural residents topping the list. Providing access to experts who would otherwise be unavailable, connecting linguistic minorities with interpreters, expanding access to more affordable lawyers (Zorza, 2007; Cabral et al, 2012; Lederer, 2021)—all have been put forward to cast videoconferencing use in a positive light.

For litigants and witnesses unable to travel or too overwhelmed by the courtroom environment to testify, videoconferencing may be the only means to participate (e.g., Mayson, Marley and Dunn, 2012). For children, for example, numerous studies have shown that the process of giving evidence is less intimidating and thus more accessible

[2] For Canada: Aylwin and Moore, 2015; Skinnider and Montgomery, 2019; Bailey, 2012. For Australia: Legal Aid Queensland, 2003; Wallace, 2008. For US, see Cabral et al, 2012.

when it takes place over video (Davies and Noon, 1991; Davies and Noon, 1993; Bala, Lindsay and McNamara, 2001; Orcutt et al, 2001; Eaton, Ball and O'Callaghan, 2001). Interviews with young witnesses who have testified this way indicate that they felt safer testifying in the absence of the accused and strangers in the courtroom (Hurley, 2015). By lending a less agonizing experience, videoconferencing facilitates the giving of clearer, more accurate responses to questioning (Goodman et al, 1998) and conceivably improves access to substantively just outcomes, ones that reflect the 'true' facts.

Leaving aside the needs of any particular participant, general use of video technology has been championed by some court reformers as a panacea for enhancing efficiency, participation and accessibility (Donoghue, 2017; Rowden, 2013). Those who privilege efficiency often suggest that technology has the additional benefit of making court participation more accessible to court users. This view seems to be popular with government officials (Mulcahy, 2007; Rowden, 2011), for whom the promise of cost savings justifies investment in technology infrastructure. Access to justice and efficiency are conflated to a degree, treated as 'related dimensions' of justice system performance (Dandurand, Kittayarak and MacPhail, 2015, p. 24). It is assumed that '[w]hen procedure is made more efficient, it becomes more accessible by decreasing the time and cost involved' (Piché, 2021, p. 40). In turn, technology adoption is equated with process improvements. Much publicly funded scholarship seems to have taken this as the starting point and is mainly concerned with what successful implementation looks like (Longe, 2021; Donoghue, 2017). There is no consideration of whether videoconferencing use might affect the performance of justice in a manner that is contrary to the values essential to a functioning legal system.

The view just canvassed has been challenged by scholars wary of techno-utopianism. It is naïve, they argue, to regard technology as inevitably a step in the direction of more efficient utilization of adjudicative resources (Bailey, Burkell and Reynolds, 2013; Bailey, 2016; Weinstock, 2016). As with the introduction of any technology (Winner, 1997, 1978), bringing videoconferencing into courts is not certain to produce desired outcomes. Thus,

greater use of virtual hearings does not necessarily translate into greater accessibility for all court users. The relationship between technology use and access to justice is more complex; appreciating its complexity requires an account of the vulnerabilities exacerbated by a shift to virtual hearings which could prevent access or meaningful participation.

a) Vulnerabilities Accentuated by a Shift to Virtual Hearings

Research has shown that the efficiencies and conveniences associated with virtual hearings are not universally enjoyed. The literature on the 'digital divide', a term used to denote unequal opportunities and abilities to translate digital engagement into benefits, lends support to this contention (Compaine, 2001; Helsper, 2021). Given that the most vulnerable segments of the population tend to be most susceptible to digital exclusion, defaulting to the virtual mode of hearing could amplify existing economic, social and cultural inequalities. Immigrants and ethnic minorities, the poor, the elderly and the less educated, all of whom have historically been underserved by courts, will simply face new barriers to access (Horowitz, 2016). It is thus a false narrative, as Burkell points out, to claim that 'there is a necessary or a necessarily positive relationship between court technologies and access to justice' (2016, p. 157).

Technical issues, often considered small matters, can have a 'substantial impact on the ability of a party or decision-maker to fully understand and fully participate in proceedings' (Sossin and Yetnikoff, 2007, p. 249). The impact is especially serious for individuals with autism spectrum disorders and learning disabilities that compromise their ability to communicate in a virtual environment (Laird, 2021; Tidball, 2016; UK Equality and Human Rights Commission, 2020). It has been reported that defendants with disabilities are less able to engage actively in virtual proceedings, in part because the spatial features of a courtroom that help signal what is happening are not available to remote participants (Tidball, 2016; Gibb, 2017). Compounding the situation, there is evidence that adjudicators have a harder time identifying over video whether a person has a disability (Byrom, 2020; Blake, 2019) or is struggling to understand (Magistrates

Association, 2018; Hynes, Gill and Tomlinson, 2020). Moreover, technical issues can offset the efficiencies gained from not having to attend court in person. A recent analysis of cases heard in Texas state courts found that virtual hearings took on average a third longer than traditional hearings because of technical challenges (Ostrom et al, 2021).

Technology's potential to eliminate geographical barriers to access looks less promising when one considers the digital inequality facing residents of remote communities. Compared with urban dwellers, they are less likely to have access to reliable high-speed Internet (MacLennan, 2017). In Canada, for example, Internet broadband services are available to only 40.8% of rural households and 31.3% of Indigenous reserves (CRTC, 2020). Access through computers in libraries and other public sites is viable in regions without Internet connectivity (MacLennan, 2017). Given the limited access, it is small wonder that rural residents tend to be less skilled and comfortable with using technology (Cohl and Thomson, 2008). Accordingly, unless measures are taken to bridge the digital divide, the time and cost savings that can be achieved by shifting to video court attendance will not universally accrue, and full implementation of virtual hearings will only exacerbate existing inequalities.

That said, there is no consensus among scholars regarding the extent to which the digital divide actually limits access to justice. It has been suggested that the rapid uptake of mobile technologies seen at every socioeconomic level could democratize access to digital justice (Benyekhlef, Amar and Callipel, 2015). As more people have mobile devices which they could use to join hearings, the number of court users disadvantaged by a shift to virtual justice should decline. Moreover, those who remain technologically disenfranchised may not actually be excluded from the justice system. Susskind explains:

> [M]any of those that are least likely to afford new technology will, by definition, be eligible for legal aid…which means that they do not themselves sit down and put finger to keyboard but have someone else sit in the driving seat on their behalf (2010, p. 245).

In sum, existing research shows that expanded use of virtual hearings enhances access for some while posing challenges for others. A *requirement* to attend by videoconferencing

can affect differently situated court users differently, with the differential impact likely to reflect existing resource imbalances. The differential accessibility of virtual hearings has led to calls for courts looking to increase videoconferencing use to ensure that judges maintain some discretion to accommodate the circumstances of different participants (Easton, 2018). More time and resources may need to be allocated in some cases, and it is likely that certain categories of court users, such as those with cognitive disabilities, will still require face-to-face contact in the near future.

3.2.2 Procedural Fairness and Other Justice Values Besides Efficiency

Notwithstanding its prominence in the access-to-justice literature, efficiency is not the only value important to the administration of justice. Fairness, judicial impartiality, accountability, transparency, and legitimacy are among other core values that courts are expected to uphold (Shetreet, 1979; Camion, 2016; Lupo, 2016). Efficiency arguments advanced by technology proponents often obscure the fact that efficient court processes may not be the fairest or most transparent. Absent careful deliberation, the pursuit of greater efficiency risks compromising other justice values (Weinstock, 2016). As Gélinas and Camion have argued, 'focusing solely on efficiency is methodologically problematic because efficiency is not an appropriate means to account for the incidental promotion of other values' (2014, p. 205). Accordingly, when evaluating the impact of videoconferencing use, it is important to widen the scope of inquiry beyond efficiency-based considerations of costs, time and backlogs (Lupo, 2016).

Next to efficiency, procedural fairness is fairly well-discussed. According to Tyler's influential procedural justice theory, people's satisfaction with the justice system is shaped more by how fair they perceive the process to be than by outcome favourability (Tyler, 1990; Sunshine and Tyler, 2003). Judgments about procedural fairness are made on the basis of four criteria: voice, neutrality, respect, and trustworthiness (Tyler, 2007; Blader and Tyler, 2003; Tyler, 2003). When people are heard (voice), treated with courtesy (respect) and feel that their views have been considered in an unbiased manner (impartiality) by judges trying to what is right (trustworthiness), they are more likely to

feel they have been treated fairly (Tyler, 2003). Observing these criteria does not require courts to offer opportunities for in-person confrontation with witnesses or adhere to any particular hearing format. In legal terms, the content of procedural fairness is not 'immutably fixed' (Legg and Song, 2021, p. 137) and virtual hearings can in principle be fair.

Nonetheless, skepticism has been voiced over whether procedural fairness can be maintained when court participation is virtual (Hillman, 2007; Ward, 2015, Legg, 2021). As Legg points out, 'the quality of the image and sound impacts procedural fairness' (2021, p. 179). If the parties cannot see or hear each other properly, they are unlikely to judge the procedure as fair. Even without major technical distractions, some may not be able to present and contest evidence and arguments as effectively in a virtual setting, which could undermine their opportunity to be heard. Moreover, since the perceived legitimacy of courts and law-abiding behaviour are strongly predicted by procedural fairness judgments (Tyler, 2003), it stands to reason that parties who consider their participation in virtual court to be less than effective and fair are less likely to accept and comply with the decisions rendered. Whether this is really the case has yet to be investigated empirically.

Another question left largely unanswered in the literature is the extent to which widespread adoption of virtual hearings impacts the realization of other justice values. Court digitalization initiatives in the past have tended to put a premium on efficiency, with 'delays and dockets' being the metrics by which success and failure are gauged (Camion, 2016, p. 322; Bailey, 2016; Lupo, 2016). Given the fixation on efficiency, research focusing on other values is in short supply. The meagre evidence available suggests that defaulting to virtual hearings could have unintended and potentially perverse effects on values such as transparency and privacy which are essential to a well-functioning justice system. In a recent study that examined judicial policies on public access to online hearings in several common-law jurisdictions, the recent move to virtual operations was found to have conflicting effects on the transparency of court proceedings and the privacy

of individuals involved (Boulanger-Bonnelly, 2022). In principle, virtual hearings offer new opportunities for the public to attend, yet most of the courts examined lack information transparency in that case schedules and procedures for gaining access were not readily available. Moreover, it has been argued that the anonymity afforded to remote participants can facilitate abusive behaviour (Bailey and Burkell, 2017), exposing witnesses to harm and in turn jeopardizing people's confidence in the courts. The effects of virtual adjudication on the delicate balance of values at stake deserve more attention than has been given to date.

3.2.3 Court Rituals

The next two sections of this chapter move away from looking at the trial as a mechanism for dispute resolution to focus on its symbolic aspects, starting with court rituals. Only a few scholars to date have turned their minds to the effects of technology mediation on a trial's ritual dynamics (Rossner, 2021; Rowden, 2018; Licoppe and Dumoulin, 2010; Mulcahy, 2008), which is quite surprising in light of the vast literature on rituals generally and the recognition therein of court hearings as ritualized events.

Broadly speaking, a ritual is a sequence of formalized acts performed primarily for its symbolic value (Turner, 1986; Bell, 2009; Graham, 2003). It is '"acted" like a part in a play' (Moore and Myerhoff, 1977, p. 7) and standardized through repetition (Turner and Turner, 1978; Platvoet, 1995). According to Tambiah, ritual is analogous to 'a culturally constructed system of symbolic communication' (1979, p. 119; Grimes, 1992). That ritual is unique to time, place, and culture sets it apart from quotidian activity (Turner 1980). Ritual can be used, argue Goffman and others, to 'frame' a social situation in order to orient people's experiences, telling them how to understand what is going, and in turn controlling their impressions (1974; Seligman et al, 2008). Appearing to be sanctified by tradition, it can lend legitimacy to the occasion at hand and validate the status and power of certain individuals (Moore and Myerhoff, 1977; Bloch, 1992).

A trial is in essence a group-performed ritual (e.g., Moore and Myerhoff, 1977; Merry, 1994; Leader, 2020; Jacobson, Hunter and Kirby, 2015; Tait, 2018). It involves an array of

highly formalized acts—among them, the choreographed entrance of the judge and the taking of oaths—and 'ritualized use of words' (Pyle, 1984, p. 386) to give the occasion its form and special aura. Rock's description is apt: 'Trials are ceremonial, disciplined and staged, and they unfold in a set order. Participants come forward at their proper times to perform their stylised parts' (1993, p. 27). Adding to the theatricality are the traditional garbs that judges and barristers wear, which also serve to signal the hierarchy between participants and 'the solemnity, authority, and prestige of court proceedings' (Bell, 2009, p. 146). Several authors have argued that the ritualized event conditions participants' behaviour and perceptions of authority and power (Gélinas, Camion and Bates, 2015; Rowden 2011; Gochnauer, 1983). Other formalities, such as standing to address the court and bowing to the judge at the start and end of every session, are ritualized expressions of respect for the judicial authority. Their sum effect is to trigger submission from its participants (Leader, 2020).

The advent of virtual court fundamentally alters a trial's performative dimensions. Certain acts, particularly those involving the full body, are ill-suited to the virtual environment where movement is constrained to keep participants from disappearing off the screen (Arminen, Licoppe and Spagnolli, 2016). Thus, the judge does not strut in upon the clerk calling for order and all to rise; participants never stand; the lawyers do not bow; nor does the witness walk up to a witness stand to testify. Moreover, technical issues such as audio and video misalignment and latency pose a threat to 'ritual entrainment', or the bodily, linguistic and emotional synchronization key to creating a shared emotional/cognitive experience (Rossner, 2021, p. 355). Based on interviews with justice stakeholders and ethnographic data, Rowden concludes that video-links engendered 'fundamental disturbances to court interactions and rituals' (2018, p. 272). Similarly, Rossner draws on findings from two virtual-hearing pilots to posit that the trial is evolving from being a ritual heavy with symbolism to one that is 'experimental, spartan, and technocratic' (2021, p. 343).

There is evidence that the ritual elements of trial are being reconfigured spontaneously, without deliberation on the part of court actors. In their ethnography of virtual hearings in France (2010), Licoppe and Dumoulin noted that the conventional opening ritual—with the judge uttering to participants on their feet, 'This hearing is now open. You may be seated'—was foregone in virtual court. In their view, the omission was concerning because of the function it serves of prompting a collective orientation towards what is about to occur and to mark the formal start of the hearing. The two judges and one lawyer interviewed did not share the concern, however—indeed, they failed to even notice the omission until prompted by the researchers.

Overall, while early commentary is emphatic about the importance of face-to-face contact for imbuing interactions with meaning (Mulcahy, 2008), recent works are less certain. As Rossner argues, virtual court allows for 'new ways of interacting, new symbols, and new meanings' (2021, p. 343). With proper planning, court rituals can be reconfigured for virtual spaces without jeopardizing their flow and function (Rossner, 2021; Rowden, 2018). In place of the usual opening sequence, for example, judges hearing cases virtually could begin with an expanded introduction that identifies each participant and their role (Rowden, Wallace and Goodman-Delahunty, 2010). Expanded introductions can serve the same orientation function as the conventional opening, with the added advantage of promoting greater inclusion (Rossner, Tait and McCurdy, 2021). To ensure that parties know who could speak when, judges could more explicitly communicate turn-taking conventions. In an UK virtual-hearing pilot, judges were observed to have adjusted their communication strategies—speaking more slowly, addressing parties by name, and clearly signposting each stage of the proceeding—to provide remote participants with the extra orientation they needed to participate effectively (Rossner, 2021).

Such observation is squarely at odds with the long-standing belief, one increasingly called into question, that the physical trial is the ideal enactment of justice. Several studies have highlighted the theatricality and degradation rituals practiced in physical court which serve to alienate its most vulnerable participants (Carlen, 1976a, 1976b; Rock, 1993).

In Jacobson, Hunter and Kirby's account of English Crown court proceedings, the ritual and formality of the courtroom baffled many lay participants and exacerbated their anxieties (2015). They were often made to feel like outsiders in a process of enormous personal importance. Virtual hearings, by contrast, have the potential to be a more inclusive and egalitarian ritual with the use of neutral backgrounds, a redesigned journey into court and other innovations (Rossner, 2021).

3.2.4 Topography of Adjudication

Until the advent of virtual court, the ritual of trial has always unfolded someplace discrete, be it a courthouse or ancient stone circle (Mulcahy, 2011). The role of place and space in the staging of justice has sparked important discussions in recent years (Robson, Branco and Rodger, 2019; Resnik and Curtis, 2011; Brigham, 2009; Evans, 1999; Wolfe, 1995; Haldar, 1994). The main thrust of the emerging discourse is that adjudicative spaces and their built forms are not neutral in design or effect. Rather, the architecture of courthouses and courtrooms serves to undergird judicial authority and to cue desired behaviour, 'providing the material pre-conditions for patterns of movement, encounter and avoidance' (Mulcahy and Rowden, 2019, p. 18).

The building in which justice is enacted shapes what we think it means (Spaulding, 2012). Courthouses and courtrooms are designed to *simultaneously conjure up 'expectations of the uncommon' (Ball, 1975, p. 83) and inspire fear and respect (Mulcahy, 2011). The positioning of walls, windows and stairwells, the height of partitions within, the iconography displayed, the fixtures (judicial benches, jury boxes, witness stands), and the choice of materials and finishes are all used to prepare people for the drama of the trial (Mulcahy, 2008; Chase, 2005)*. These architectural constructs are what distinguishes the courthouse as *the* authorized setting for state-sponsored adjudication. They also help reinforce detachment from everyday reality. Stepping inside a courthouse, participants get the sense that they have entered a special place and are about to take part in *one of society's most important public events (Mulcahy, 2011).* As Haldar asserts, '[a]rchitecture marks off and signifies that authority-

to-judge which can only be found inside a court of law and nowhere else; it assigns legal discourse to a proper place' (1994, p. 189).

Court architecture also serves to communicate the social and political values of the society in question. In Western democratic societies, courts function as both 'artefacts of democracy' and 'contributors *to* democracy' (Resnik and Curtis, 2011, p. 17; Resnik, 2008). The openness of state-sponsored adjudication, that it be transparent and accessible to the public, is an entrenched goal of democracy (Moran, 2014). Through their spatial organization, facilities, state of maintenance, and accessibility, courthouses strive to engender the kinds of experiences that citizens expect from the justice system in a democracy. The vision of democratic justice is also reflected in the use of undecorated lines, flatter and less ornate interiors (Mulcahy, 2016, 2013) as well as glass for exterior walls and in the atriums of contemporary courthouses (Resnik, Curtis and Tait, 2013).

Considering the integral role that architecture plays in framing the administration of justice, a shift to fully-remote hearings compels us to ask: What does dematerialization of the courtroom mean for the messages encoded in its design? Can a court which lacks its material properties still fully fulfil its function? Commentators who have explored these questions have sounded worry while also highlighting the opportunity presented to reshape articulations of justice.

a) Virtual Court as More Mundane, Less Intimidating

A hearing on Zoom or Teams does not immediately evoke expectations of the uncommon. One joins it as one would any other Zoom or Teams call with work colleagues, friends or family. It vanishes with the click of the 'Leave Meeting' button. As Bandes and Feigenson remark, '[t]he virtual court is entirely ephemeral, called into being for each hearing and disappearing at its end with a tap on a keypad' (2020, p. 1317). Compared with the out-of-everyday proportions and décor of courtrooms, remote court spaces seem 'bland, ordinary, and mundane' (Rowden, 2018, p. 269). When parties and witnesses participate

from their homes or offices, their homes and offices form part of the virtual court scene.[3] The appearance of the virtual courtroom is variable, capable of changing from one hearing to the next, if not from one hearing day to another. It may be argued that the instability of the distributed scene, coupled with its impermanence, challenges the court's image as an enduring institution. Reporting on two virtual jury trial experiments, Mulcahy, Rowden and Teeder remark:

> The background environment and appearance of faces on screen varied considerably [….] many of the jurors appeared from rooms with a lot of clutter in the background which was distracting and tended to create an undignified setting for justice to be administered in (2020a).

McKay made similar observations about the visual impact of defendants appearing by video from prison in hybrid hearings (2018). She argues that the remote location—the prison, with its aesthetics of incarceration—is effectively conflated with the courtroom as the site for the administration of justice. The disjunctive topography, compounded by prison noises that pass through the video-link, undermines not only the court's dignity, but that of the defendants and the presumption of innocence.

The spatial conflation McKay observed points to the permeability of the virtual court environment. Operating simultaneously over a number of sites, a virtual court is without fixed boundaries to signal what is in and what is out, what is part of a court event and what is not. Instead, it is porous to the outside world (Radul, 2011; McKay, 2018). Since 'authority relies on clear boundaries' (Dovey, 2010, p. 128), participants may well regard the distributed court as less authoritative, its processes less legitimate. Concerns have been expressed that remote environments that are mundane and unimpressive, such as the rooms full of clutter noted in the above excerpt, would fail to convey the solemnity of the occasion and would perceptually '"*defeat*" the purpose of the court event' (Rowden, 2011, p. 292). Participants physically present in the courtroom in hybrid proceedings are not unaffected. As Radul contends, a courtroom full of cameras and monitors displaying

[3] This is assuming that witnesses do not use virtual backgrounds. Even if they do, at the moment most courts do not prescribe the virtual backgrounds can be used.

a remote participant evokes a 'boardroom of a not very creative (and perhaps not very successful) corporation' (2007). A trial that unfolds in a banal space—a space that does not accord with the stereotypical image of the highly ornamented courtroom of apex courts—could be seen as a less potent kind of courtroom drama.

A court divorced from its built form furnishes a very different set of behavioural cues. A large body of research in environmental psychology has highlighted the link between environment and behaviour, particularly the role of built environment in signaling the appropriate way to behave in a particular setting (e.g., Baker, 1989; Schoggen, 1989; Gibson, 1977; Scott, 2005). As Hillier and Hanson state, 'the physical structure of the environment dominates the thought patterns of individuals, and to a considerable extent provides the organising model for behaviour' (1984, p. 39). Spatial change, then, could prompt a behavioural one. With virtual hearings, the setting of adjudication is no longer a discrete space, a specially designed room with hierarchical subdivisions and symbolic markers of authority. There is no raised dais and separate entrance for the judge, for instance, to facilitate their exercise of judicial power and guide others to behave in ways indicating deference and respect. Moreover, in physical court, '*where* you are is *who* you are' (Radul, 2011 p. 119). The same cannot be said of virtual court where participants' physical location is largely immaterial.

There is evidence to suggest that remote participation can impede some participants' ability to appreciate the seriousness of the occasion (Rowden and Wallace, 2018; Rowden, Wallace and Goodman-Delahunty, 2010; Wallace, Anleu and Mack, 2019). An image on a flat screen does not have same coercive power as a physical courtroom to prompt participants to behave appropriately (Rowden, 2018). The potential for disinhibited behaviour is a key finding of an Australian study involving interviews with stakeholders in the judicial process who have experience with videoconferencing in court (Rowden, Wallace and Goodman-Delahunty, 2010). Several interviewees noted that defendants appearing by video were more likely to laugh, joke around or otherwise act out of place. This observation finds echoes in a subsequent study on fully-video hearings in England

(Rossner and McCurdy, 2018, 2020) in which some officials voiced concerns over changes in behaviour they attribute to the apparent informality of remote participation. One judge offered this example: 'There was a bit when he scooted off from the chair…– you wouldn't have that in a physical hearing, they would be conscious ... they would engage before they turned their back to the judge' (Rossner and McCurdy, 2018, p. 24). Implied here is that a physical court constrains the behaviour of those interacting within it in ways that cannot be perfectly replicated virtually. As another judge stated, it felt 'not like a court' (Rossner and McCurdy, 2020, p. 43).

The lay participants whose views were canvassed offer an alternative view. For them, a virtual hearing does not appear any less *appropriately* formal. Even without the aesthetic elements and spatial syntax of a court building, they reported that it was still 'like a court' (Rossner and McCurdy, 2018, p. 25) and 'professional' (Rossner and McCurdy, 2020, p. 36). This is buttressed by observations of in-person hearings and virtual hearings by the researchers, which did not reveal any differences in terms of disruptive behaviour (Rossner, 2021). It appears, then, that different types of participants respond differently to the virtual environment (Rowden and Wallace, 2018); not all are less able to register the court setting and concomitant behavioural norms. For instance, it has been observed that lawyers familiar with the flow of court encounters were able to adapt quickly to proceeding virtually (Rossner, 2021), and children and vulnerable witnesses had no trouble understanding the significance of the occasion (Rowden and Wallace, 2018). Another point to bear in mind is that not all courthouses are stately edifices (Resnik, Curtis and Tait, 2013). Inferior courts that are inexpensively built and harshly lit emit different behavioural cues than apex courts constructed to evoke Greek temples and marble palaces. This has led Susskind and others to caution against overextending the significance of the physicality of courts and the supposed rich meaning that it conveys (2019).

As with court rituals, it is important not to unduly revere traditional court settings and as a corollary, categorically reject virtual court. A virtual environment need not entail

diminished judicial authority. In place of the usual affordances of physical courtrooms, appropriate cues can be communicated by positioning the judge's image at the top of the screen and having it larger than everyone else's (Mulcahy, Wallace and Teeder, 2020); incorporating wide shots of the courtroom (Licoppe, 2015); and making symbolic markers such as the coat of arms visible (Rossner and McCurdy, 2020). Moreover, courthouses may claim to reflect democratic values through their design, but they do not always facilitate democratic participation. An architectural feature that has been shown to disadvantage defendants and hinder their participation is the courtroom dock. Study upon study has demonstrated that placing a defendant in a glass or wood-fenced enclosure runs counter to their entitlement to be presumed innocent, to defend themselves, and to consult counsel—all of which are fundamental liberties that democracy underwrites (Rossner et al, 2017; Tait et al, 2017; Mulcahy, 2013). A recent experimental study on the perceptual impact of different configurations revealed that mock-jurors were more likely to find a defendant isolated in the dock guilty than one appearing by video (Rossner and Tait, 2021).

In addition to prejudicing the accused, it is widely acknowledged that courthouses and courtrooms can be alienating to lay users and discourage engagement (Wallace, Anleu and Mack, 2019; Jacobson, Hunter and Kirby, 2015; Genn and Beinart, 1999). Scholars have noted that the design of court interiors has been trending towards greater segregation, containment, and hierarchical ordering (Mulcahy, 2011; Resnik, Curtis and Tait, 2013). Separate circulation routes and entrances are prescribed for different categories of participants (Mulcahy and Rowden, 2019). Each is allocated their own zone inside the courtroom, with movement between the zones either prohibited or tightly controlled (Mulcahy 2007). As Leader puts it, '[t]here is nothing natural for laypersons about courtrooms' (2008, p. 17). The atmosphere compels them to 'lower their voice, duck their heads, and tiptoe around once they enter' (Scheffer, Hannken-Illjes and Kozin, 2010, p. 141)—not the kind of behaviour indicative of empowered democratic participation.

Thus, the contention that courthouses are architectural embodiments of democratic ideals of equality, openness and inclusion loses much of its cogency upon closer examination.

3.2.5 Experiencing Technology-mediated Court

Moving away from the staging of justice, this section considers how videoconferencing use impacts the experience of being a participant in the justice process. Successful enactment of the trial as a multi-party interactive ritual depends on participants being able to register verbal and non-verbal feedback from each other in order to properly carry out their prescribed role. The literature identifies various ways in which videoconferencing affects how participants are presented and their ability to interact and form emotional connections. This has potentially serious implications for credibility assessments and in turn case outcomes.

a) Interactional Challenges in the Fractured Ecology of Virtual Court

Communications research on the interplay between technology and human-social experience suggests that technology fundamentally alters court interactions. Like all media of communication, videoconferencing is not a neutral conduit (Arminen, Licoppe and Spagnolli, 2016). In creating a medium through which we can connect, it shapes how we connect with one another and how we conduct ourselves. For McLuhan, technology shapes the user, their relations with others, and transforms their environment. He writes: 'it is the medium that shapes and controls the scale and form of human association and action' (1994, p. 9). Winner similarly points out that 'technologies are not merely aids to human activity, but also powerful forces acting to reshape that activity and its meaning' (2004, p. 105).

A worry consistently articulated in the literature, especially in earlier works, is that videoconferencing use interferes with effective communication (e.g., Surette and Terry, 1986). It is well-known that human interaction relies on both verbal and non-verbal cues to signal recognition, understanding, and other interpersonal affects (e.g., Dickerson, Gerhardstein and Moser, 2016). Although videoconferencing is designed to simulate copresence by allowing distant parties to see one another as they talk, the technology

currently used in courts is not immersive. Instead, it omits important non-verbal cues such as posture, gestures, and body movement (Doherty-Sneddon et al, 1997; Poulin, 2004; Braun, 2020). Participants' visual access to each other is limited to the two-dimensional displays of camera images shown on their screen. To stress what may be obvious: 'As viewers, we may think we are getting the whole picture, but every camera frames its own point of view' (Sherwin, 2012, p. 14). Because only part of an individual and their immediate environment is visible, participants do not have congruent views on each other. In communications parlance, this makes video-mediated interactions highly 'asymmetric' (Heath and Luff, 1993; Luff et al, 2003). Such asymmetries 'fracture the relation between conduct and the environment in which it is produced and understood,' creating a fractured environment of action (Luff et al, 2003, p. 73). Simple gestures, like pointing to an object for reference, are rendered problematic in this environment (Luff et al, 2016).

When video technology is integrated into court hearings, the participatory ecology of the hearing is transformed into a 'microcosm of talking heads', to borrow Licoppe and Morel's phrase (2012). Non-verbal communications such as standing up, sitting down, gestures, posture and shifts in posture, all amply used in the courtroom (Remland, 1994), are limited in a virtual court. Some are filtered out by the camera's limited field of view; others are difficult to interpret because of the technology's distorting effects (Doherty-Sneddon et al, 1997; Fullwood and Finn, 2010). Research shows that communicative actions can lose their illocutionary force when they are mediated by audio-visual technology, which can interfere with the development of trust between participants (e.g., Wilson, Straus and McEvily, 2006).[4] Licoppe and his colleagues, through their work analysing courtroom interactions, found that a ritual gesture may not be intelligible in a virtual setting where it is not performed in full view (Licoppe and Dumoulin, 2015). In a separate study, they found that judges needed to take more active steps to maintain control over the proceedings in a video-mediated environment because 'the embodied

[4] Note the existence of some inconsistent research findings: Cataldo et al, 2021.

actions the presiding judge usually performs to prevent "interruptions" [are made] less effective' (Licoppe and Verdier, 2013, p. 250). Rowden and Wallace reached a similar conclusion based on surveys, interviews, field and experimental work (2018). Virtual hearings, they argue, compel judges to outsource some of their courtroom management responsibilities to staff operating the technology and lawyers at the remote location to ensure that nothing untoward is taking place.

Direct eye contact, which plays a crucial role in human interaction (Rossano, Brown and Levinson, 2009; Bohannon et al, 2013; Simmel, 1969), cannot be genuinely established over videoconferencing. In the typical configuration, the camera is mounted or built-in atop of the screen (Kimura et al, 2021). Since the camera and the screen are not aligned, mutual gaze is elusive. Participants appear to one another to be looking down when they are actually looking at each other's on-screen images. Even if a participant were to look directly at the camera to create the illusion of eye contact, the result may not be entirely realistic because two-dimensional displays cannot perfectly convey gaze direction (Ruhland et al, 2015; de Wolf and Li, 2020). Should a participant decide, consciously or unconsciously, to take the middle course of shifting their gaze back and forth from the camera to the screen, they risk looking evasive.

The impression of gaze aversion could deal a blow to remote litigants' and witnesses' perceived credibility (Poulin, 2004; Feldman and Chesley, 1984). People are sensitive to the absence of gaze when it is expected (Adams, Nelson and Purring, 2012; Knapp and Svetieva, 2015), and the absence of gaze is, in Western cultures, associated with deception (Vrij, 2008). Lack of eye contact has been extensively investigated in studies showing that it can lead to a remote participant being perceived as less likeable (Fullwood, 2007) and less trustworthy (Bayliss and Tipper, 2006; Bohannon et al, 2013) compared with a physically collocated participant. This has important implications for criminal defendants appearing by video as research indicates that less trustworthy-looking faces are perceived to be more culpable-looking (Flowe, 2012; Porter, ten Brinke and Gustaw, 2010). Furthermore, people tend to be more self-conscious on camera, especially when

they are able to see their own image on screen, and therefore behave more unnaturally when videoconferencing is used (Fullwood and Finn, 2010; Bohannon et al, 2013). To the extent that videoconferencing alters behaviour and might colour the judge's assessment of the defendant's culpability, it is a serious cause for concern. Poulin explains: 'If either the perception of the defendant or the defendant's demeanor changes because of the use of video or because of the off-site location, videoconferencing undermines the fairness of the system' (2004, p. 1114).

Other evidence has emerged to buttress the contention that videoconferencing has a detrimental impact on the remote defendant. A study of English magistrates' court cases shows that video-linked defendants are more likely to be unrepresented than those appearing in person, and they tend to eschew legal advice even when it is free (Terry, Johnson and Thompson, 2010). The study found a higher rate of guilty pleas and custodial sentences when the accused appeared at their first hearing by videoconferencing from the police station (Terry, Johnson and Thompson, 2010).[5] It has been suggested that virtual proceedings have the potential to exacerbate pressures on defendants to plead guilty (Helm, 2021). The 12-percentage point increase in guilty-plea rate at the Crown Court from Q2 2019 to Q2 2020, when virtual hearings proliferated (Ministry of Justice, 2020), seems to lend weight to the suggestion. While correlation does not necessarily imply causality, evidence of correlation between videoconferencing use and what may be construed as adverse outcomes for defendants underscores the need for further investigation.

b) Dehumanization and Emotional Connectivity

Concerns have been raised that videoconferencing blunts participants' ability to forge emotional connections. The technology makes it harder to sense others' feelings as expressed through non-verbal and acoustic cues which are not accurately transmitted

[5] But see Rossner and Tait's experimental study (2021), which did not find any connection between video appearance and guilty verdict. Note, however, the experiment involved robust internet connection and high-quality video technology. As the authors state, "[t]his is not the current experience of video technology in court" (p. 17).

over videoconferencing (Johnson and Wiggins, 2006; Doherty-Sneddon et al, 1997; Poulin, 2004). Consider, for instance, vocal pitch, of which the subtlest change can speak volume emotionally (Sobin and Alpert, 1999; Pell et al, 2009). Information about a speaker's emotional state is often carried in the higher frequencies; yet high frequencies, as with low frequencies, are cut off by the middle bandwidth filter that is used for audio transmission (Wiggins, 2004). In truncating vocal emotion expression, remote witnesses may make less of an impact in their presentation.

A related set of challenges posed by videoconferencing stems from its impact on social relatedness. Research on its use outside the judicial context suggests that it can dehumanize users (Barnard, 2001; Haslam, 2006). By restricting social context cues and socio-emotional communication (Rice and Love, 1987), the technology reduces people's awareness of others' feelings and emotions (Alnuaimi, Robert and Maruping, 2010; Leach et al, 2021). Compounding the diminished socio-emotional engagement is the physical dispersion of participants in virtual hearings, which can further depersonalize interactions. Remote participation by videoconferencing entails much greater distances between participants than what is involved in traditional courtroom hearings. An extensive body of research has demonstrated that physical proximity between people activates a sense of connection, mutuality and shared understandings, in turn promoting perceptions of credibility, trust, and influence (Burgoon et al, 2002). Physical dispersion has the opposite effect: it 'creates detachment and promotes perceived dissimilarity' (Alnuaimi, Robert and Maruping, 2010, p. 212). While it is hard to generalize this to the courtroom setting, a recent evaluation of video-enabled justice in England notes that defendants who appeared at remand hearings by video found the process to be more 'impersonal' (Fielding, Braun and Hieke, 2020, p. 10).

The talking heads arrangement that is the default layout also contributes to the dehumanization of court participants. When the camera is trained on the face of a remote witness, facial expressions are overemphasized while hand gestures and body language are partially—in some cases wholly—excluded from view. It may be harder for a judge

to decipher a witness's emotion, to feel their energy and sync with their mood. People in each other's physical company may take in emotional cues arising from gaze direction and gestures that are only registered in peripheral vision, whereas people communicating via videoconferencing may completely neglect to pick up these signals (Marinetti, 2011). Camera angles (Lassiter et al, 2001), lighting (Mulcahy, Rowden and Teeder, 2000b), and the flattening of a three-dimensional face to a two-dimensional image can altogether disrupt access to the remote witness as a living, sentient being, and in turn, the viewer's ability to connect with the witness.

A witness's affective presentation can affect the emotion and mood of the judge and the jurors, with consequences for the latter's processing of information and decision-making (Semmler and Neil Brewer, 2002; Heath, Grannemann and Peacock, 2004; Fishfader et al, 1996). One study found that witnesses who testified live are perceived more positively and as being more truthful than witnesses on video (Landstrom, Granhag and Hartwig, 2005).[6] The size of the screen off of which the judge views the witness matters. The larger the viewing screen and the video image, the more arousing it is, and the more attention is paid (Reeves et al, 1999; Heath and Bruce D Grannemann, 2014). Thus, unless the judge has a screen that projects the witness in true-to-life size, it may be harder to tune into the rhythm of the witness's emotion.

Considering that much of the power of testimony derives from the emotions it evokes, diminished emotional connectivity could have a cascading effect on judicial outcomes. Though existing research is not definitive, there is some evidence to suggest that video participation may lead to harsher results. A statistical analysis of the outcome of over 500,000 refugee hearings in the US shows that in-person litigants fared considerably better than those who appeared on camera, enjoying a success rate that was roughly double (Walsh and Walsh, 2008). This echoes the findings of two UK studies on immigration bail hearings: bail was denied more often in hearings that proceeded

[6] This study also found, interestingly, that mock jurors performed no better than chance in assessing a witness's veracity regardless of whether the witness testified live or on video.

virtually (Bail Observation Project, 2011, 2013). The medium seems to dictate a similar fate for defendants in criminal cases. According to a survey of 645,117 bail hearings in Illinois, the average bail amount increased by 51% when the defendant participated by video (Diamond et al, 2010). For indigent defendants, who are no less innocent by legal presumption than affluent defendants, when the bail amount increases and the funds for it cannot be found, pretrial liberty becomes out of reach. Their troubles do not stop at incarceration before trial. Research shows that those detained in jail while awaiting trial plead guilty, are convicted, and are sentenced to prison more often and receive harsher prison sentences than those who are released during the pretrial period (Cimino, Makar and Novak, 2014).

Despite the concerns raised with video-mediated interaction, it cannot be assumed that co-location is essential for attentional and emotional synchrony. With the proper set up, equipment and internet connectivity, technical issues that stand in the way could be overcome, and video-mediated experiences need not be somehow impoverished. In fact, videoconferencing can offer a more satisfactory experience. As Rossner and Tait observed in a recent study, 'the video condition was better than the in-person condition for the jurors in that they reported being able to see and hear the accused better on video' (2021, p. 15). This is because the visual hierarchy of conventional courtrooms does not give all participants a clear view of each other and of all that goes on in the room. In some English courtrooms, members of the public sitting behind counsel have restricted sightlines, with their view of the accused and the jury deliberately obscured (Mulcahy and Rowden, 2019). Courtroom acoustics, especially in older structures with irregular ceiling or wall shapes and second-rate or non-existent microphones and sound systems, can distort speech, inhibiting communication (Carlen, 1976a, 1976b).

Finally, it bears underscoring that audio-visual technology is advancing at an ever-accelerating rate such that some of the interactional issues associated with existing videoconferencing systems may be resolved as technology advances. It is foreseeable that in the years to come physical monitors will be replaced by immersive telepresence that

allows participants to feel as if they are all gathered together. As Susskind, writing in 2019, predicts, 'In a decade or so, we are likely, at the least, to be using augmented reality systems or even three-dimensional holographic services' (p. 59). Just as we should resist denying the potential of future technology on the basis of current capabilities, we should not treat existing research findings about videoconferencing's dehumanizing impact as immutable. The findings and observations discussed above are predicated on the technological capabilities available at a certain point in time in the past and may not be generalizable to future generations of more advanced systems.

3.3 Concluding Remarks and Predictions

As the literature discussed above suggests, conducting hearings by videoconference has implications beyond what is recognized in the policy discourse canvassed in the last chapter. A move to virtual hearings can improve efficiency and accessibility to be sure, but it also entails risks in relation to access to justice, fairness and other values which underpin justice delivery. As a mediating technology, videoconferencing may unintentionally impede the formation of emotional connections between participants, which can impact credibility assessments and possibly hearing outcomes. It changes the ritual dynamics and participatory ecology of the hearing, and in turn, may diminish the court's authority and legitimacy in the eyes of its users. There are also positive effects. Emerging research suggests that videoconferencing use could reshape the experience of justice in a manner which is better aligned with our democratic values.

The scholarship on virtual hearings provide a foundation upon which to interpret and compare the perspective of Ontario judges as expressed in reported decisions. Recall the question this thesis poses: To what extent do Ontario judges' reported decisions confirm or challenge concerns about virtual hearings articulated in scholarly debates? It is expected that some of the concerns articulated by scholars and the benefits they have highlighted would capture the attention of Ontario judges and prompt discussion in their judgments. Based on the existing scholarship and the policy discourse discussed in the preceding chapter, we can make a few specific predictions.

First, the potential of virtual justice to improve accessibility and efficiency, two dimensions of access to justice, will no doubt attract judicial attention and commentary. Ontario judges have historically viewed themselves as having a role to play in facilitating access to justice. Given the province's vast geography, judges will likely agree that videoconferencing is a viable means to address barriers posed by physical distance and costs associated with in-person court attendance. This is especially likely considering the fact that using technology to reduce costs and enhance accessibility has long been championed by policymakers and judicial leaders. Maximizing efficiency is expected to be more of a priority in civil cases where liberty rights are not at stake and costs can effectively prohibit access to the courts.

Second, it is expected that judges will agree that videoconferencing technology can, though not always, be effective in enabling participation in court hearings. In situations where a party does not have the necessary technological competence or internet bandwidth to interact without being stymied by technical difficulties, or a quiet space from which to join, judges will likely find proceeding virtually to be ineffective. In such cases, it is expected that judges will not require a party to participate virtually over their objection, or they might settle on an alternative such as allowing attendance by phone or a hybrid format.

Third, procedural fairness, a much cherished value in common-law systems like Ontario's, will likely be a key consideration for judges in deciding whether or not to proceed virtually. Based on the literature and the legislative framework discussed in chapter 2, it is unlikely that judges will insist on face-to-face confrontation between accused and accuser, or with an adverse witness, as essential to a fair trial. They are likely to accept virtual hearings as procedurally fair processes with one exception: when one or more of the parties lack the digital tools or literacy to effectively participate in a virtual medium. Put another way, procedural fairness hinges on effectiveness.

Fourth, given the asymmetric nature of video-mediated interactions, it is anticipated that judges will have a harder time observing the demeanour of remote participants. This can

in turn affect witness assessments, warranting commentary in trial decisions. Historically, a witness's demeanour was regarded by courts as indicative of their credibility such that it was crucial for a witness to testify in person so their demeanour could be observed (Wong, 2020). While research has since discredited demeanour as a reliable indicator of credibility, it is nonetheless expected that some trial judges, particularly those who hew closely to the old way of thinking, will regard technology mediation as an impediment. The omission of certain non-verbal cues like gestures and body movement, coupled with the distortion of other cues like intonation, may be viewed as hindering their ability to evaluate demeanor and thus credibility.

Fifth, it is anticipated that in common with the literature, judges will regard the use of videoconferencing as having a considerable impact on the solemnity of proceedings. The 'talking heads' arrangement of fully remote hearings—a dramatic change from the visuality of courtrooms which would be near impossible for judges to miss—would not lend the same degree of formality and gravitas to the occasion. Relatedly, the dehumanizing effects of video attendance as observed by some scholars, which reduces participants to talking heads on a screen, may draw notice by trial judges as such effects could influence witness assessments.

Sixth, it is expected that judges will share the concerns articulated by scholars regarding their diminished ability to monitor and control the behaviour of remote participants whom they cannot see in full. The practical difficulties of exerting control over the remote part of the distributed setting will be especially pertinent for trial judges who, unlike appellate judges, must oversee witnesses in addition to litigants and lawyers. In line with existing research, it is expected that judges will be sensitive to misbehaviour enabled or encouraged by the informality of virtual court. How judges deal with disruptive behaviour in the context of actual proceedings is little discussed in the literature, and is something on which judicial decisions can shed valuable insight.

Seventh, it is anticipated that judges will modify some of their courtroom practices to accommodate what has been noted in the literature as the unique ritual dynamics of

virtual hearings. Certain rituals, such as having participants rise upon the judge's entrance, will not be practical in the full-virtual environment. Judges may replace such ritual with an expanded introduction, as has been suggested in the literature. It is anticipated that reported decisions addressing justice rituals will not be many. This is because, generally speaking, judicial pronouncements tend to be restricted to matters that have been raised by the parties, or are otherwise necessary for a judge to decide to resolve the case. Futhermore, considering the subjects in Licoppe and Dumoulin's study who were largely oblivious to the change made to the opening act, Ontario judges might similarly modify their hearing management practices spontaneously, without necessarily documenting what they did differently in their judgments.

4

Judicial Perspectives on Virtual Hearings

4.1 Introduction

The analysis presented in this chapter tests the predictions laid out at the end of the last chapter and in so doing, sheds light on what Ontario judges have to say about virtual hearings. Although there are different ways to explore the judicial perspective, I focused solely on what is revealed in reported decisions. Court decisions constitute a rich repository of data for socio-legal scholars interested in mapping trends and identifying issues judges consider important. As Oliphant remarked nearly a century ago, jurisprudence is 'a gold mine for scientific work' (1928, p. 161). In exploiting this gold mine to advance our understanding of judicial attitudes towards virtual hearings, this research seeks to make an original, albeit modest, contribution to the field.

This chapter has two main sections. Section 4.2 discusses my methodology and method. To chart the evolution of judicial views on virtual hearings and test the hypotheses, I analyzed the content of SCJ and OCA decisions over two time periods: 16 March 2017-16 March 2020 and 17 March 2020-17 December 2021. The time frame was chosen to capture both pre-pandemic and pandemic discussions. Advantages and limitations related to using reported decisions as data are discussed (section 4.2.1). Section 4.3 presents the results of the study over several subsections, beginning with some general observations before delving into a discussion of specific issues.

4.2 Methodology and Method: Content Analysis of Reported Judicial Decisions

I analyzed the content of judicial decisions to determine what they tell us about judges' views regarding the concerns expressed in the scholarly debates. Content analysis is a popular method used in the social sciences to systematically evaluate texts (Holsti, 1969; Mayring, 2000; Hsieh and Shannon, 2005)—specifically, to 'transform a large amount of text into a highly organised and concise summary of key results' (Erlingsson and Brysiewicz, 2017, p. 94). Content analysis can be quantitative or qualitative (Mason, 2002; Kalof, Dan and Dietz, 2008), with qualitative-quantitative content analysis being increasingly recognized as a valuable technique (Tashakkori and Creswell, 2007). Unlike traditional doctrinal analysis, which tends to focus on precedent-setting appellate decisions, content analysis treats each decision in the dataset with equal interest (Hall and Wright, 2008). For this study, the research process involved my collecting a set of judicial decisions; reading them; recording pertinent information about each decision; systematically coding the decisions for emerging themes; tabulating the coded variables; and quantifying the qualitative results. The process was iterative to some extent as I shifted between coding and analysis. The steps taken are described in more detail in the method section (4.2.3).

4.2.1 Sample Frame: Court of Appeal and Superior Court of Justice

Choosing a study sample is an important step in any research project (Marshall, 1996). Because it was impractical to study the full population of Ontario court decisions within a one-year timeframe, I focused on decisions from the SCJ and OCA—the province's two 'generalist' courts as they are authorized to hear the full plethora of cases whatever their nature or subject area. Sampling decisions from these courts allowed me to maximize the diversity of the sample around areas of law. Those from the OCJ were left out because the OCJ is not a generalist court. Moreover, including the OCJ would have necessitated reviewing and analysing another 381 decisions, which would be difficult given time constraints.

To understand the significance of my choice of courts, it is necessary to situate them within Ontario's judicial hierarchy. As depicted in Figure 1, there are three levels of court in Ontario, which are, in order of increasing authority: the OCJ, SCJ, and OCA. The OCJ is a specialty trial court which hears select family and criminal cases (ones that are considered less serious in nature); it is therefore not included in this study. The OCA, a purely appellate court, is the highest court of the province. It has 22 full-time judges, in addition to judges who sit supernumerary. Typically sitting in panels of three, its judges decide all appeals from the SCJ and a narrow range of criminal appeals from the OCJ.

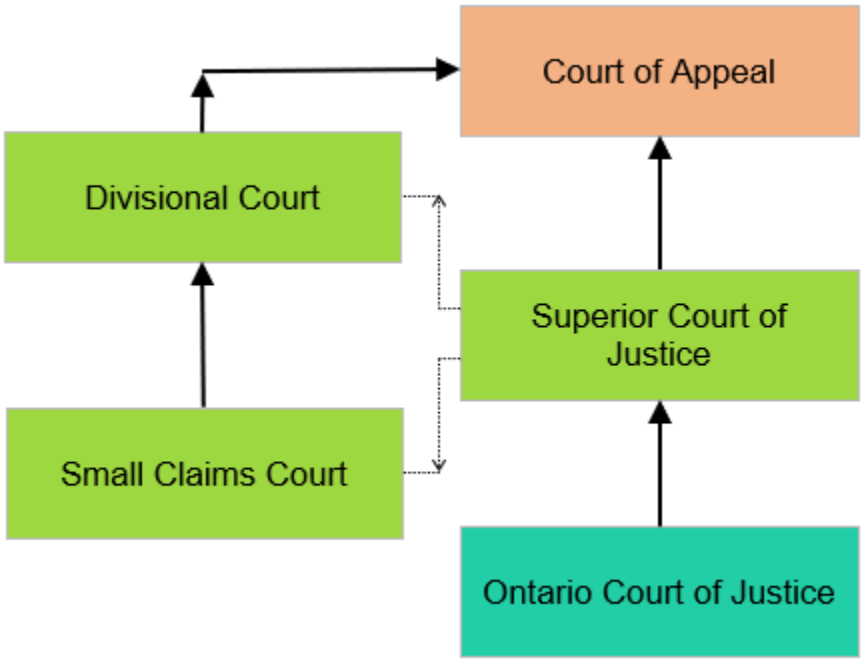


Figure 1: Structure of the courts in Ontario

Most of the decisions in the sample come from the SCJ, the superior trial court in Ontario and the largest in Canada both in terms of the volume of cases it hears and the number of sitting judges. The court has over 300 judges who try essentially everything. All civil matters, family disputes involving divorce and property division, the most serious criminal charges, and appeals from decisions of the OCJ are dealt with by this court. A branch of the SCJ known as the Divisional Court is a strictly appellate body. It hears judicial review of government action, statutory appeals of administrative tribunals, and

appeals from certain civil decisions made by their judicial colleagues on the SCJ. Another branch of the SCJ, called the Small Claims Court, hears civil claims for up to $35,000 CDN in damages. Judges of the SCJ are assigned to serve on the Divisional Court, hearing substantive matters in three-member panels; they do not sit on the Small Claims Court whose proceedings are presided over by senior barristers.

4.2.2 Reported Decisions as Data: Suitability and Limitations

Judicial decisions represent statements that judges make in their official capacity and have long been the preoccupation of legal scholars. From a socio-legal perspective, analysing their content can elucidate trends and patterns across a broad universe of cases and bring out noteworthy themes that would not otherwise be apparent. Judges' decisions open a window, albeit a partial one, onto their minds. Analysing them for this study, then, could yield insights into what judges think with respect to the dynamics of virtual hearings and their implications for access to justice, procedural fairness, solemnity and so forth.

I chose to base my analysis on reported decisions—ones published in authorized legal reports. Two features are characteristic of reported decisions: they (1) bear a reporter citation—a unique identifier which, as a bonus to the researcher, renders tracking easy—and (2) are accessible to lawyers and the public, with or without a fee depending on the specific legal database. The accessibility of reported decisions makes them convenient data to use for a one-year research project. Westlaw, the database I used, is electronic and accessible from anywhere with internet connection.[7] This eliminated the need for me to physically locate, copy and store volumes of reported cases in paper form, further economizing the exercise of the data collection.

Relying on reported decisions comes with limitations. Since not all decisions are reported, what is reported provides only a snapshot of the total decisions made by judges. Published decisions differ substantially from those that go unpublished (Siegelman and

[7] I consider cases published on Westlaw as 'reported' cases, parting company with those who argue that what is published exclusively online is not technically 'reported'. See Young, 2017, p. 595.

Donohoe, 1990; Diamond, 1995; Edwards and Livermore, 2009). The latter tend to be short, offering only brief explanation of the judge's reasoning. It is also the case that certain types of decisions are generally not reported. Chief among them are oral decisions from the bench; decisions arising from jury trials; and uncontentious decisions where the parties agreed to the outcome.

In Canada, whether to have a decision reported is a question for the presiding judge and the court in which they sit. There is no official statistics on the percentage of decisions captured by reporting services, nor are the criteria used to select decisions for reporting clear to the outside observer. The widely accepted rule of thumb is that decisions are reported if they are 'noteworthy in some respect' (Roberts, Doob and Marinos, 2000, p. 1; Tate, 1983). With this in mind, reported decisions conceivably constitute but a small portion of the entire universe of decisions. By one academic account, only one-sixth (16.67%) of Canadian appellate court decisions are reported (McCormick, 1994). The figure for superior trial courts is likely smaller since trial decisions are generally considered to be less precedential and noteworthy. As I discovered from my dataset, it is not unusual for an OCA decision to be reported but not the SCJ decision being appealed. Even when the underlying decision is reported, it may not be captured in the dataset, due to considerable time elapsed between trial and appeal.

Moreover, it is acknowledged among empirical scholars working with court decisions that systemic biases in the selection of cases for publication can produce a biased dataset (Atkins, 1992; Edwards and Livermore, 2009; Keele et al, 2009; Fischman, 2015; Ringquist and Emmert, 1999). Publication effects can limit the conclusions that can be drawn because patterns found in reported decisions cannot be generalised to what is occurring in all cases without controlling for publication bias (Carlson, Livermore and Rockmore, 2020). Still, the limitation is typically considered to be a reasonable one in the field. Moreover, depending on the research question, it may be appropriate to consider only reported decisions.

Since the present study is exploratory in nature, reliance on reported decisions, I would argue, is acceptable. That said, reported decisions can only tell us so much about what judges think about virtual justice. What a judge records in their judgment is unlikely to reflect everything that transpired in a hearing. As noted at the end of the last chapter, judgments tend to focus on matters raised by the parties, or are otherwise necessary for a judge to decide to resolve the case. Issues beyond these, like those related to the rituals practised during a hearing, may not receive much coverage. It follows then that analysing reported decisions is not suited to illuminate judicial views on such issues.

To examine judicial perspectives, I could have interviewed judges. Interviews have long been used by researchers seeking to understand people's attitudes and experiences (Hammersley, 2013; Seidman, 2019). However, interviewing judges was not realistic for a one-year MPhil project. To interview judges, permission must be granted by the Office of the Chief Justice and it is not readily given at the SCJ level (Kennedy, 2020). Had interviewing been my first choice, I likely would have encountered difficulty getting approval and completing interviews in a timely manner in the midst of the pandemic when judges are conceivably preoccupied with other pressing challenges.

Another option would be to observe actual court hearings. In-court observation provides a multifaceted form of data collection (Anleu et al, 2016). It could lend more insight than what judges could—and would—describe in their own words. Even so, observation *alone* would not shine a direct light on the point of view of judges and answer the research question. Moreover, the fact that this project was undertaken during the pandemic added complications. At the time, both the OCA and the SCJ were conducting hearings on Zoom almost exclusively; any courtroom hearing that took place was modified to require participants to be spaced out and masked up. There was no opportunity to observe physical hearings in the traditional form as a baseline comparator.

All things considered, analysing reported decisions is a suitable method for the research question. Published decisions are the main communications device judges use to express their opinions (Feeley and Rubin, 2000), which is why political scientists have long

considered them to be 'keys to understanding judicial attitudes' (Shapiro, 1972, p. 134). Thus, even if reported decisions do not lend a complete picture of what occurred in all cases, they can nonetheless provide valuable insights into judicial attitudes towards virtual justice.

4.2.3 Hybrid versus Full-Virtual hearings

As noted in the last chapter, hybrid and full-virtual hearings are two distinct formats. The distinction is roughly reflected in the distinction between the pre-pandemic and pandemic periods. In view of the practice directions issued in spring 2020 to implement no-contact justice delivery (see section 2.4), decisions in the pandemic period tend to concern fully remote hearings, the default mode during that time, while those in the pre-pandemic period largely dealt with the hybrid format. I have not, however, analysed decisions relating to the two separately because the total number of decisions emanating in the pre-pandemic period is small, as outlined below, making it difficult to meaningfully draw conclusions about the hypotheses from the data. On certain issues (i.e., solemnity and mischief), there is but one pre-pandemic decision that is on point, and on the issue of court rituals, none. As for the decisions in the pandemic period, it is not always clear whether a judge's comments are directed to, or made in the context of, a full-virtual or hybrid hearing. Instead, the predictions are tested on the data as a whole.

4.2.4 Steps Taken in the Research Process

To explore judicial views on virtual hearings and identify changes prompted by the pandemic, I collected, reviewed and analyzed all published decisions from the SCJ and OCA issued in the three years before and the 21 months after the onset of pandemic-related courthouse closures. Full-text decisions were pulled from Westlaw International, a subscription-based online legal database. I retrieved all published decisions dealing with videoconferencing use from the two courts using this search query: *(Zoom or virtual or online or video or videoconference or videoconferenced or videoconferencing) /5 (hear or heard or hearing or conduct! or held or proceed! or testif! or testimony)*. A date range was set to limit each search to one of the above-noted time periods. Because Westlaw treats the Divisional

Court as its own court separate from the SCJ, even though it is only a branch of the court, I added Divisional Court as a filter in addition to filters for SCJ and OCA. Table 1 shows the number of decisions retrieved from Westlaw.

Time Period	Superior Court of Justice	Divisional Court	Court of Appeal
Pre-pandemic	136	0	29
Pandemic	544	89	34

Table 1: Number of decisions generated from search queries on Westlaw

The searches produced an initial dataset of 832 decisions. The dataset was overinclusive, as anticipated. I chose to err on the side of comprehensiveness, on the view that I could always exclude cases that are not relevant as I reviewed the results, but I would not know what I had missed if the search parameters were too narrow.

Excel spreadsheets were created for each court with columns for recording case name, reporter citation, decision date, key issue(s) and the judge's name. The spreadsheets were populated as I reviewed each of the 832 decisions retrieved. Decisions that are not relevant to virtual hearings—for example, decisions containing passages about video evidence or online communication—were marked with an 'NA'. There were also decisions that noted that the hearing was via Zoom but did not say more. Altogether, numerous decisions from each court in both periods fell under the 'NA' category (553 SCJ; 27 Divisional Court; 53 OCA). Excluding the 'NA' decisions whittled the dataset by about 70%, to a total of 245 decisions (Table 2).

Time Period	Superior Court of Justice	Divisional Court	Court of Appeal
Pre-pandemic	21	0	1
Pandemic	152	62	9

Table 2: Number of decisions after initial review and filtering

To provide a systematic account of what judges thought about virtual hearings and how they grappled with issues that arose, I read the full text of each decision in the dataset and thematically coded the content. My approach to coding was a hybrid deductive-inductive one (Fereday and Muir-Cochrane, 2006). I drew on the issues discussed in existing literature to develop a list of anticipated themes while also allowing for themes to emerge directly from the data. The coding categories which I developed from the literature and refined in response to the data are:

1. Access to justice
2. Effectiveness of video
3. Impact on fairness
4. Demeanour/credibility
5. Rituals and practices[8]
6. Mischief
7. Solemnity
8. Pandemic *only for the pandemic period

I began the coding process by indexing relevant passages of judicial decisions by reference to the above coding scheme. Decisions that addressed more than one topic were multi-coded. Inductive coding was then applied to texts which spoke to virtual hearings but did not fit any of the eight predetermined categories. During the inductive phase, one theme and one subtheme emerged: technological competence and use of judicial notice during the pandemic. The findings of my analysis are presented in the following section.

[8] For this study, I embrace a broad definition of court ritual to encompass a range of practices, customs, clothing, and procedures used in judicial adjudication.

4.4 Findings

4.4.1 General Observations

As discussed in the last chapter, the pandemic transformed the procedural landscape in which judges in Ontario conduct their business by making virtual hearing the default format. Accordingly, I expected more issues related to virtual adjudication to arise during the pandemic period and in turn more decisions on such issues. The data substantiated this. Since March 2020, there has been a dramatic surge in the number of reported decisions containing commentary on virtual proceedings. This upward trend is observed across the courts. In the 21 months following the onset of the pandemic, relative to the three years before, the number of reported decisions on the subject increased sevenfold, from 21 to 152, at the SCJ; 62-fold, from zero to 62, at the Divisional Court; and eightfold, from one to eight, at the OCA. Figure 2 illustrates.

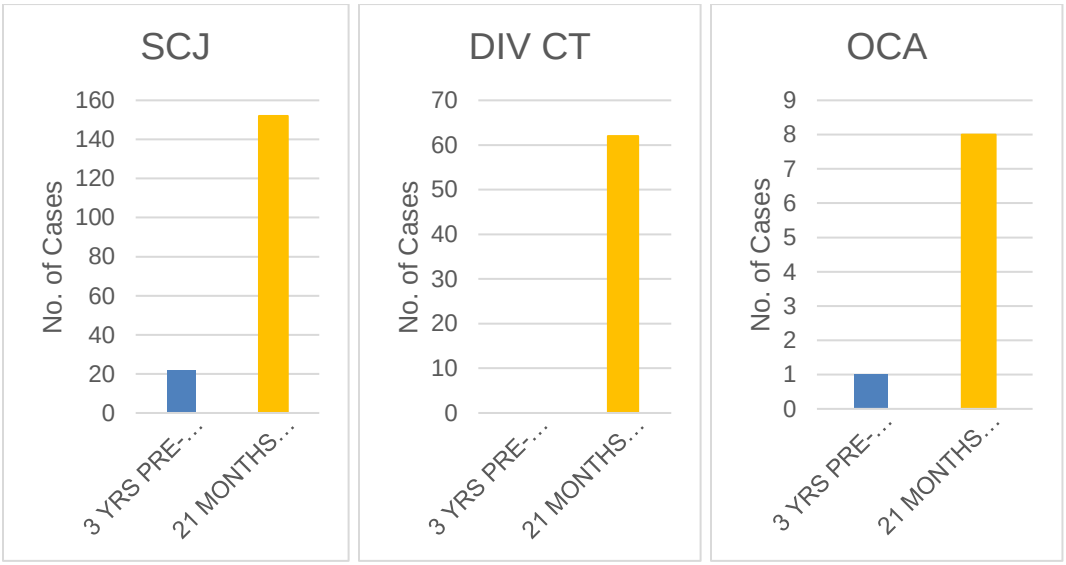


Figure 2: Number of cases dealing with virtual hearings at the Superior Court of Justice, Divisional Court, and Court of Appeal.

Notwithstanding the dramatic increase in the number of decisions since the pandemic, my analysis of decisional content suggests that judges' views had not changed as dramatically. Certain concerns voiced in relation to full-virtual hearings mirror concerns judges had before the pandemic when they dealt mainly with hybrid hearings. That said, it is clear from the judgments that Zoom court lends a very different ecology for action

than a physical one with some participants joining by video, raising unique issues for judges to grapple with.

Notably, the decisions in the dataset reflect the views of a diverse number of judges: 117 unique SCJ judges and 17 unique OCA judges altogether.[9] For the OCA, the 8 decisions in the pandemic period represent the views of 17 judges, and the single decision the pre-pandemic period represent the views of three judges, who also penned decisions in the pandemic period. For the SCJ, the 21 decisions in the pre-pandemic period are authored by 19 judges; the 152 decisions in the pandemic period represent the work of 96 unique judges. Although no SCJ judge is permanently assigned to sit on the Divisional Court, 60 of the 62 Divisional Court decisions rendered in the 21 months since the start of the pandemic stem from case management conferences held by one administrative judge. The greatest number of decisions attributed to a single judge, Justice Myers of the SCJ, is seven. This is followed by three SCJ judges who each penned of the five decisions in the dataset.

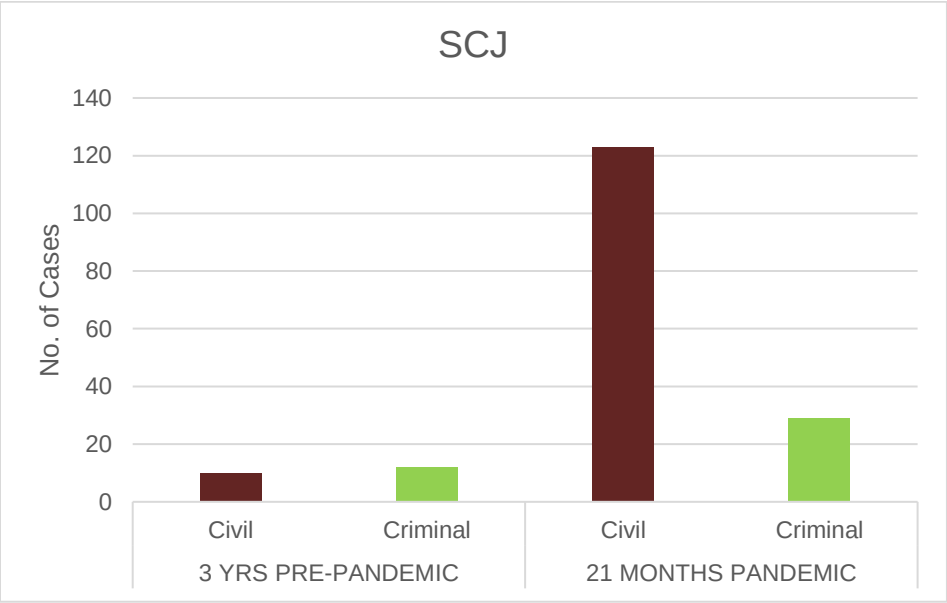
Time Period	Superior Court of Justice	Divisional Court	Court of Appeal
Pre-pandemic	19	0	3
Pandemic	96	7	17

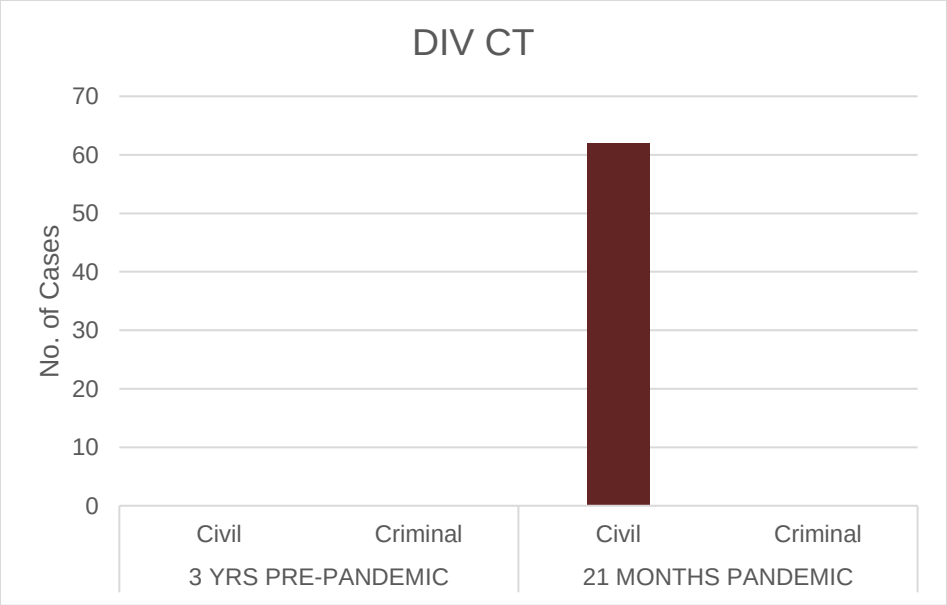
Table 3: Number of unique judges who authored decisions for each time period and court

As discussed in chapter 2, videoconferencing was introduced in civil and criminal proceedings at different times, animated by different policy considerations. While historical differences in the availability of video participation have diminished over time, civil and criminal procedures continue to be governed by separate legislative frameworks, and the interests at stake are different. Such differences may result in nuances in judicial views on certain aspects of virtual adjudication depending on whether the commentary arose in a civil or criminal case—nuances that will come through in the discussion below.

[9] Recall that SCJ judges rotate on the Div Ct. The OCA (as well as the Div Ct) hears substantive matters as three-member panels, hence the greater number of OCA judges than decisions.

In terms of the mix of civil and criminal decisions in the dataset, as Figure 3 shows, civil cases (which include family matters) dominated in the pandemic period. Criminal cases had a slight edge in the pre-pandemic period.





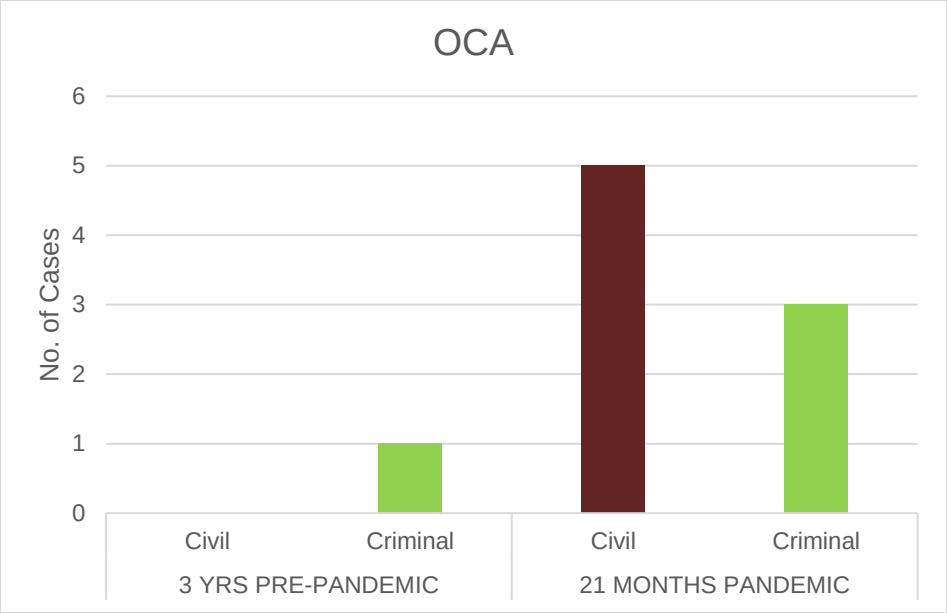


Figure 3: Split of civil and criminal cases dealing with virtual hearings at the Superior Court of Justice, Divisional Court, and Court of Appeal.

The rest of the chapter focuses on a qualitative reading of the decisions collected. I begin in section 4.3.2 with a discussion of judicial reactions to the adjudicative landscape evolved by the pandemic. Whether the hypotheses posed are borne out by the data or not is addressed in the sections following.

4.4.2 Pandemic: 'Not Business as Usual'

The increase in reported decisions during the pandemic period shown in Figure 2 is likely attributed to the state of exception the pandemic created. Based on judges' commentaries, it is clear the pandemic upended court operations in a way that few of them anticipated. The situation was described on multiple occasions by trial and appellate judges as 'unprecedented', 'exceptional', 'phenomenal', and 'a crisis.' The enormity of the pandemic's impact was likened by an SCJ judge to that of the Spanish flu in 1918 (2021 ONSC 3303). Another wrote: 'There is no doubt that the pandemic created an existential crisis in the justice system that fundamentally altered the manner in which the court's business is conducted' (2021 ONSC 7519). Measures taken to control spread of the virus meant that many standard practices, chief among them paper-based physical hearings,

were not feasible. One judge succinctly put it: 'it is not business as usual in the courts' (2021 ONSC 2749).

Some judges took to describing in detail what the pandemic has meant for justice system (e.g., 2020 ONSC 7894; 2020 ONSC 7209). With courthouses closed for unpredictable stretches of time, alternatives to physical hearings—what one SCJ judge termed 'work-arounds' (2021 ONSC 7599)—had to be found. As his judicial colleague explained, the need for courts to continue operating 'brought to the fore the availability of alternative processes and the imperative of technological competency' (2020 ONSC 2782). According to an OCA judge, it took little time for virtual hearings to become 'ubiquitous' (2021 ONCA 736). A similar observation was made by an SCJ judge: 'due to the Covid-19 pandemic, virtual proceedings and not traditional in-person hearings have become the norm' (2020 ONSC 3497). The largescale transition to virtual proceedings appears to have exacerbated pressures on a justice system that was already under strain. The added pressures did not escape judicial attention. One SCJ judge noted: 'The logistics of responding to the pandemic and switching to virtual hearings have stretched the capacity of the court to its limit' (2021 ONSC 3476). Counsel and judges alike must adapt to the new procedural reality. An SCJ judge put it pointedly:

> Once upon a time, I had to learn how to use a Gestetner (Google it) and then a fax machine. I do not accept that in person is just 'better'…. ought we to reject the printer because I liked my Gestetner (and Word Perfect for that matter)? (2021 ONSC 6493)

While some of the academic and grey literature that emerged during the pandemic was quick to observe, even celebrate, the digitalization precipitated, the data offer a more nuanced understanding of the transition to video-enabled justice. As judges alluded to in their decisions, the unexpected need to move processes online necessitated greater administrative support, yet access to court personnel became more limited with courthouses closed during the pandemic. One judge stated: 'I have no court services assistance' (2020 ONSC 2938). On occasion, this raised due process issues. In one case, a self-represented litigant missed her Zoom hearing because she was not provided with the

log-in instructions due to what the judge characterized as an 'administrative oversight by the court office', an oversight compounded by the court office's failure to answer her telephone calls on the day of the hearing (2020 ONSC 4266). Had the hearing taken place in a courthouse with staff present, such administrative oversight would likely not have resulted in a missed hearing.

On the whole, judicial reception to the sudden rise of full-remote hearings appears to be mixed. Some judges responded favourably to the shift to an online environment. Others, however, expressed a less complimentary view, with one trial judge going so far as to opine that virtual hearing 'in its very format raises due process questions' (2020 ONSC 2253). In between the two poles are judges who considered virtual adjudication to be satisfactory, even if it was not their 'first choice' (2020 ONSC 3220) or what they would 'prefer' (2020 ONSC 7460). It is possible that during the pandemic, the virtual mode seemed more attractive than it might otherwise be as the alternative that was intermittently available was not a traditional courtroom hearing but a modified version of it. As an SCJ judge remarked, 'all witnesses would be masked and separated from examining counsel by several layers of plexiglass, which strikes me as a far greater impediment than cross-examining them by video' (2021 ONSC 3706).

The quality of the judge's experience with virtual hearings appeared to be an important variable which influenced their attitude. This is unsurprising given the substantial literature on the relationship between experience and attitude formation (e.g., Fazio, 1988). Judges with harsh words to say about proceeding virtually seem to have experienced problems, notably technical challenges like lost connection and high latency. One judge who described virtual participation as 'far inferior' to in-person participation noted elsewhere in his trial decision that on average, one hour daily was lost due to technical issues (2021 ONSC 8235). Conversely, judges who have had relatively smooth hearings tend to describe use of videoconferencing technology in positive or neutral terms. One judge, in ordering a trial to proceed virtually despite a party's objection, was influenced by his own experience: 'I have been using Zoom to conduct hearings for at

least the past 6 months and have not encountered any difficulties in seeing or hearing counsel, or witnesses' (2020 ONSC 7460). Judges with similar experiences seem to enjoy the convenience of using Zoom to conduct hearings during the pandemic.

4.4.4 Frequency of Judicial Commentary on Anticipated Issues

In addition to considering what judges have to say about concerns articulated in the scholarship, this study also considered how often these concerns arose for judges in reported cases. Decisions in the dataset were reviewed for commentary on access to justice; effectiveness of video hearing; fairness; demeanour/credibility assessment; solemnity; mischief; and rituals and practices. Figures 4 and 5 show the spread of statements that addressed one of these issues in the two respective time periods under consideration (note the different unit numbering on the y-axis of the two graphs).

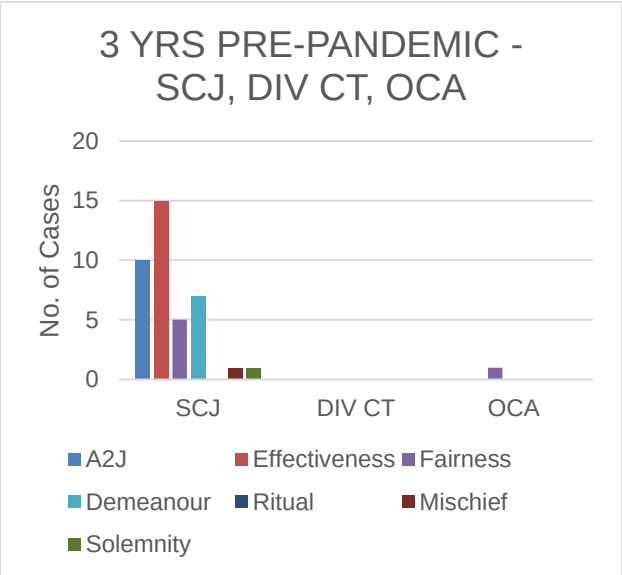


Figure 4: Cases containing statements related to access to justice, effectiveness, fairness, demeanour, ritual, mischief, and solemnity as it relates to virtual hearings between 16 March 2017 and 16 March 2020 before the Superior Court of Justice, Divisional Court, and Court of Appeal.

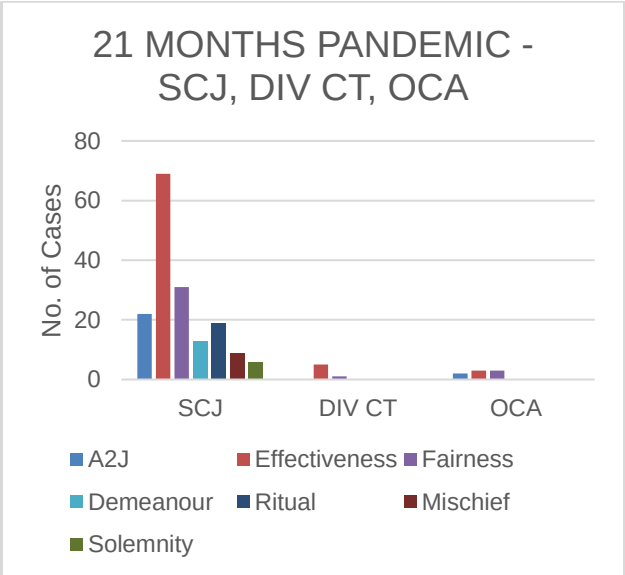


Figure 5: Cases containing statements related to access to justice, effectiveness, fairness, demeanour, ritual, mischief, and solemnity as it relates to virtual hearings between 17 March 2020 and 17 December 2021 before the Superior Court of Justice, Divisional Court, and Court of Appeal.

As Figures 4 and 5 show, the pandemic period saw many more judicial pronouncements related to the seven anticipated issues than the pre-pandemic period. Viewed in conjunction, they allow for a comparison of the different distribution of issue types. It appears that how effective it was to proceed virtually was something that occupied judges throughout the entire timeframe under study. Apart from effectiveness, judges seems to have grappled with a slightly different balance of issue types before and during the pandemic, perhaps reflecting differences between hybrid and full-remote hearings. For instance, matters concerning rituals commanded no judicial commentary before the pandemic yet garnered discussion in 18 pandemic decisions. Fairness went from being the fourth to the second most-discussed topic while demeanour dropped from third to fifth place, though in absolute numbers the quantity of decisions in both categories increased (fairness: 6 vs 35 total decisions; demeanour: 7 vs 13). It bears noting that the numbers are too small to be anything but suggestive.

For SCJ judges, the effectiveness of video participation was of foremost interest both before and during the pandemic, having attracted the most commentary as the graphs illustrate. Effectiveness is often addressed in conjunction with fairness in the same decision which is unsurprising since an ineffective hearing is likely also unfair. For the pandemic period, fairness is the second-most discussed issue, followed by access to justice. Notably, court rituals constitute the only topic to have garnered judicial discussion after the onset of the pandemic but not before. It is possible that the way videoconferencing was used before the pandemic—by select participants in hybrid courtroom-centric hearings—meant that most courtroom rituals did not have to change. The emergence of online adjudication in response to the pandemic entailed more fundamental ritual disruptions. Certain practices, such as parties being sent outside the courtroom to discuss potential resolution, which a judge described as ‘a practical mechanism that was used daily in family courts before March 17, 2020’ (2020 ONSC 2938), could not be maintained, at least not without modification.

Judges sitting on the Divisional Court, the civil appellate branch of the SCJ, have only minimally opined on issues related to virtual hearings. Of the 62 decisions rendered since the start of the pandemic which touched on the use of virtual means, the vast majority arose from case management conferences held by one specific administrative judge. These decisions are not elaborate reasons for judgment but are straightforward endorsements directing a case to be heard remotely ('The hearing will be conducted as a video conference.') and reiterating rituals already prescribed in Practice Directions (e.g., 'Neither counsel nor the court will gown for the hearing.'), without providing additional commentary. For this reason, I have not counted them as lending substantive discussions of any of the coded issues related to virtual court even though they could fit into the rituals category. What stands out about these case-management decisions is their publication on Westlaw. Ordinarily, decisions of this nature are not reported. The novelty of this court issuing directions on fully-remote hearings is perhaps noteworthy enough to warrant publication.

The pool of decisions made by OCA judges concerning virtual hearings is small. As with the SCJ and the Divisional Court, effectiveness and fairness issues were concerns that came up most frequently for OCA judges scrutinizing lower-court decisions that dealt with videoconferencing use (see Figures 4 and 5). Notably, in none of the OCA decisions did judges comment on the use of videoconferencing in the proceedings before them. This suggests that proceeding virtually at the appellate level, which was made mandatory by way of practice directions for most of the pandemic, is less contentious than it is at the trial level. One might argue that appeals are well-suited to virtual hearings since there are no live witnesses and they tend to be shorter, rarely lasting more than one day. Parties tend to be represented on appeals by counsel who are likely to have some degree of technology competence and/or access to technical support to enable them to argue a case virtually. Though virtual appeals have been held without any hiccups apparent from the face of OCA decisions, the difference between virtual and traditional hearings has not gone unnoticed. The difference could impact accused persons' exercise of their

procedural and substantial rights. As an OCA judge stated in a criminal case, with his colleagues concurring, 'I am not prepared to treat the difference between an in-person hearing and a videoconference hearing as insignificant' (2021 ONCA 190).

a) Access to Justice

Based on the academic literature and policy discourse addressed in the preceding chapters, it was predicted that judges would agree with the potential of videoconferencing to enhance efficiency and accessibility, and this would be especially pertinent in civil cases. The data supports this prediction. It shows that judges by and large agree that permitting—but not forcing—video attendance is a positive development from an access to justice standpoint. It can improve access by eliminating the need to travel to a courthouse, saving participants the associated cost and time. The proliferation of virtual hearings during the pandemic seems to have engendered even more optimistic commentary from SCJ judges. In the three years before the pandemic, six out of 13 of the decisions commenting on access to justice and video participation took a positive view of the relationship between the two. In the 21 months of the pandemic, 16 out of 22 decisions expressed optimism. After nearly two years of conducting virtual hearings, one judge was convinced that '[t]he potential benefits in terms of cost, efficiency and access to justice are huge' (2021 ONSC 8038). As another observed, there is 'no wasted travel or waiting time' (2020 ONSC 8007).

Rhetoric of efficiency pervades judicial discussion of access to civil courts. Civil access is important for a well-functioning society as it enables citizens to resolve disputes between them through a public dispute resolution system. The Supreme Court of Canada, in a 2014 appeal from Ontario, called for a 'culture shift' to 'create an environment promoting timely and affordable access to the civil justice system' (2014 SCC 7). Trial judges have cited this case in support of videoconferencing use both before and during the pandemic. They suggested that leveraging technology where appropriate is necessary to create an environment promoting timely and affordable access to justice. As one SCJ judge noted, it makes little sense to not allow an out-of-country witness to testify by video when

'[s]urgeons can remotely perform the most delicate of surgery remotely by facilities that include video' and '[a]rbitrations and other private forms of dispute resolution already routinely use video conferencing' (2019 ONSC 7118). With costs and distance being two correlated factors that can inhibit access, the general position of the bench before the pandemic was: 'the greater the distance involved, the greater the likelihood that video evidence will be permitted' (2018 ONSC 2423).

According to one judge, a practice that has the 'potential to actually improve access to civil justice for the public' is lawyers making use of videoconferencing to represent their clients remotely (2021 ONSC 6493). While virtual representation has been technically possible for some time, it was of rare occurrence and hardly ever contemplated before the pandemic. The judge explained the advantages of virtual representation:

> If a lawyer can avoid travel and waiting time because she is working at her desk until she signs-on to a virtual examination or hearing, transaction costs are decreased for clients. Avoiding paying a lawyer to come to Toronto or to go to another place is also a significant cost savings for a client through virtual proceedings. Lawyers can participate in proceedings in multiple locations on the same day virtually. The increase in efficiency in their practices is substantial.

Concerns about cost and travel time do not have the same relevance in the criminal context. As the data show, such concerns did not on their own justify allowing Crown witnesses to testify remotely. That is in large part because the costs involved are borne by the state. A judge explained in refusing to permit the complainant's mother located in a different province to testify by video: 'The cost is not one that would accrue to the witness personally as a Crown witness' (2019 ONSC 624). Similarly, efficiency is not viewed as a priority when judges are deciding whether to allow video testimony. As another judge noted, requiring a witness to travel an hour to court is a 'non-factor' since '[m]any witnesses attend from that distance or farther' (2017 ONSC 3464). Even so, videoconferencing use can improve access to justice for vulnerable parties (2021 ONSC 5204). As the scholarship canvassed in the first chapter shows and which judges seemed to endorse, testifying by video can render participation in trial less traumatizing for

vulnerable witnesses, making the process more accessible to them. In one case, the judge permitted a witness located some distance away with severe social phobia to testify by video to avoid his having to 'possibly suffer a panic attack' (2017 ONSC 2213). Another judge was swayed that,

> the Complainant's fear, stress, and anxiety would be considerably lessened by knowing that the accused are not physically in her presence while she is testifying, and furthermore, that she does not have to go by both accused each time she enters or leaves the courtroom which can be highly intimidating. (2021 CarswellOnt 20608)

It is important to note however, as judges have recognized, depending on a person's circumstances, virtual participation is not always less stressful than in-person. An OCA judge observed: 'For some NCR [*not criminally responsible* because of mental illness] accused, the forced use of videoconferencing could contribute to anxiety or paranoia relating to the use of technology' (2021 ONCA 190). Even without mental illness factoring into the equation, the virtual environment can induce its own kind of stress. One SCJ judge noted of a witness who testified remotely in a murder trial: 'She stated that testifying on the Zoom platform made her feel uncomfortable and created more anxiety for her because she worried about who was watching' (2021 ONSC 7672). That remote participation can heighten stress levels because of the risk of being watched by someone obscured by technology is a perspective not found in the literature.

i) Public Access and Open Justice

An aspect of the shift to virtual hearings that worries judges, and which has largely escaped academic attention until very recently, is the public's ability to attend. The principle of open justice requires court proceedings to be open to the public such that justice is seen to be done. Openness is regarded as of fundamental importance in a democratic society and is a central tenet of the Canadian justice system. At the start of the pandemic, judges expressed concerns similar to those identified in recent research (Boulanger-Bonnelly, 2022) that the public was effectively restricted from attending fully-remote proceedings. As one judge intimated in an April 2020 decision, there was no way for members of the public to join (2020 ONSC 2244). As a workaround, he asked the

applicant's lawyer to record the Zoom hearing and 'to send me the recording on a USB stick which in turn will be placed in the file in order to satisfy the "open court" principle.' The judge in another case from that period documented the erosion of open justice:

> The only nod to public access at the moment is a notice on the Ontario Courts website which invites members of the public who wish to view or hear a virtual hearing to contact courts administration at generic email addresses. In that case, assuming the request is received and processed in time, arrangements can be made for public monitoring of a virtual hearing. […] In this case, that could not have practically occurred because this hearing was not shown on the daily court list and in any event, it would not have been posted very long in advance. (2020 ONSC 2532)

Once these early practical difficulties were worked out, public access to hearings not only resumed but expanded in some cases, thanks to the presiding judge endorsing the use of Zoom's webinar feature. The feature allows a hearing to be broadcasted to many more view-only attendees than could be accommodated in a physical courtroom. Several trial judges have commented on the benefit, which is particularly useful in class actions and cases of public interest. The judge in a high-profile murder case noted the trial would be broadcasted on Zoom webinar 'with space for 500 participants' (2020 ONSC 7167). Similarly, in a hybrid sentencing hearing, some of the deceased's family members, friends and supporters watched in person while '[m]any others viewed the proceedings by Zoom videoconferencing' (2020 ONSC 6063). On the civil side, Zoom enabled 'over 70 people' to attend one hearing (2020 ONSC 6582), and 'over 80 attendees' joined another (2021 ONSC 4482). Such numbers are unheard of in the physical setting; rare is the courtroom that can hold this many people.

b) Effectiveness

It was predicted that judges would accept videoconferencing as an effective means to participate in court hearings except where a party does not have the technological competence, internet bandwidth or facilities to interact online. In the latter scenarios, one would expect judges to not force a party to participate virtually over their objection, or to settle on an alternative such as allowing attendance by phone or a hybrid format.

The data offers considerable evidence to support the prediction. Whether videoconferencing allows for effective participation in court hearings is a concern that has garnered considerable judicial commentary, having appeared in 84 SCJ decisions (15 in the pre-pandemic period; 69 in pandemic period) and 3 OCA decisions (all pandemic period). The overall message conveyed in decisions over the entire timeframe under consideration is that virtual hearings can be an effective way to proceed. Notably, for some pre-trial motions where no evidence is taken, judges have regarded audio-only hearings as sufficiently effective (e.g., 2021 ONSC 225).

Even before the pandemic, judges were confident that video participation can be an effective alternative to in-person attendance. The underpinning technologies have been steadily improved upon over time such that what was cutting-edge ten years ago is commonplace ten years later. The reputation that older-generation videoconferencing systems have for high latency, low-resolution images and choppy audio is largely outdated, as some judges recognized. For example, one of the reasons that a trial judge gave for not following a 14-year-old precedent which refused to accept testimony by videoconferencing was that 'video technology has experienced a remarkable expansion since, 2005' (2019 ONSC 7118). The judge adopted the following statement by his judicial colleague writing in 2015: 'Video technology has advanced such that courts have found that it is possible to make findings of fact and decisions about credibility based on videoconference evidence.' It is clear that most judges kept an open mind about videoconferencing and did not dismiss it as a viable alternative to in-person on the basis of past shortcomings.

Despite continuous improvements to the technology used in vide hearings, and in line with the prediction, judges are under no illusion that videoconferencing is viable and cost-effective for *all* court users. Instead, they seem to be alert to the fact that someone's ability to participate effectively by videoconferencing is affected by various factors. At minimum, meaningful participation requires access to internet broadband, which is not universally available in all parts of the province. The problems that flow from this came

up both in the literature discussed in chapter 3 and in the data. In one Zoom trial, the judge noted: 'From time to time, there were challenges posed by intermittent weak internet connection. The lawyers and their witnesses sometimes had to repeat their questions and/or answers' (2021 ONSC 6629). In another case, 'technical difficulties' with the Zoom connection led the judge to switch to telephone in order to proceed as scheduled (2020 ONSC 3706). An individual's physical surroundings and comfort level with technology could affect how effectively they participated. In one case, a witness was 'frequently interrupted by her two small children' and 'appeared to be distracted' (2021 ONSC 7932). This seems to have impacted the quality of her testimony, which was found to be 'vague'. In another case, the judge adjourned the criminal trial until it could take place in person because the accused had childcare issues and lived in cramped quarters ('a one-bedroom accommodation with his mother and brother') which were not conducive to effective participation (2020 ONSC 8124). In yet another case, the proposed surety in a bail hearing, who said he was not 'technologically savvy,' unwittingly disconnected the Wi-Fi on the cell phone he was using to join the hearing (2021 ONSC 7334). He ended up phoning in to participate as the judge and '[c]ounsel agreed that we did not have enough time for [him] to change the setting on his phone'.

It is also evident that the virtual format worked better for certain types of hearings than others. Appeals and judicial review applications where no evidence is received live are generally suited to be heard virtually. Judges hearing these cases tend not to remark in their decisions on the technology used, which suggests that the technology worked fine, without creating conflict between the parties. At the SCJ level, family matters appear to be least suited to be heard virtually. One judge opined: 'Virtual hearings, particularly in family law cases, are far inferior to in person attendance' (2021 ONSC 8235). Although the judge did not elaborate on why, a contributing factor may be the remarkable percentage (50-80%) of self-represented litigants in family court (Research and Statistics Division, 2016). Despite their need for assistance, many crucial services such as duty counsel and information desk support could only be accessed when the case is heard in

person (Fiske, 2021). Leaving aside baseline effectiveness, there is a debate at the SCJ level over whether virtual hearings are as, or more, convenient than in-person hearings. As a judge explained, 'any proceeding being conducted by videoconference will be more cumbersome and time-consuming than if it were to proceed in the courtroom' (2020 ONSC 3220). His colleague disagreed, stating: 'that it would be "more cumbersome" [—] I do not accept' (2020 ONSC 7460).

For some judges, cases involving copious documents are more effectively heard in person. Before 2020, judges were reluctant to try document-intensive cases virtually (2017 ONSC 3464; 2018 ONSC 2423) because there was no systematic way to manage the display of documents during the hearing. As one SCJ judge explained, the concern was that 'there may be problems in referring to documents during examination in chief and cross-examination — both in having them available for the witness, and, for the jury to follow along with' (2018 ONSC 2423). This concern was alleviated when the SCJ introduced a document-sharing system, Caselines, during the pandemic. This, according to one judge, 'streamlined' many logistical issues (2020 ONSC 8072). However, a new concern arose regarding the usability of the documents uploaded to the system by litigants. In one case, the judge postponed the hearing because of 'how the Applicant uploaded its [112,998 pages of] documents to Caselines' (2021 ONSC 6386). He continued: 'The uploading of inadequately described and unorganized material meant that the documents could not be accessed in any efficient manner.' In another case, the lack of electronic tabs and hyperlinks led the judge to chastise counsel for 'asking me to sort through an overturned bowl of spaghetti' (2021 ONSC 8038). When the documents are organized, using them in a virtual hearing could be highly effective. One trial judge stated that he found it easier to use the documentary record in electronic form than 'being burdened by seeking documents in multiple separate volumes of paper as one is obliged to do at in-person hearings' (2020 ONSC 7460).

c) Fairness

The prediction derived from the literature and the legislative framework outlined in the preceding chapters is that judges are likely to accept virtual hearings as procedurally fair processes unless one or more of the parties lack the digital tools or literacy to effectively participate in a virtual medium. Consistent with the prediction, the data suggests that the fairness of virtual hearings is intimately tied to the effectiveness of video-enabled participation. Effectiveness is often addressed in conjunction with fairness in the same decision. Altogether there were 36 SCJ decisions (5 in the pre-pandemic period; 31 in the pandemic period) and 4 OCA decisions (1 pre-pandemic; 3 pandemic) that touched on the issue of procedural fairness.

As with their views on effectiveness, judges' views on the fairness of virtual adjudication were consistent. Simply stated, a mode of proceeding that is effective for the parties is procedurally fair; but when it is not effective for either party it would not be fair. As an SCJ judge explained in refusing to direct a virtual hearing where a party had technical challenges,

> I am not satisfied the [*sic*] it is in the interest of justice to ask the plaintiff to proceed with a virtual trial in the face of his unchallenged and uncontradicted evidence of his restrictions and limitations in terms of technology…. (2021 ONSC 456)

The possible unfairness of holding trials online is more often than not raised in the criminal context where the accused's right to a fair trial is constitutionally guaranteed. Judges have made clear that this right does not include a right to face-to-face confrontation with the complainant. As one judge stated in a pre-pandemic decision, 'facing one's accuser does not necessitate confronting the accuser in the flesh' (2018 ONSC 2370). Where the accused requested a jury trial, which at the SCJ could only take place in-person, judges had to strike a balance between the accused's fair trial rights, the potential prejudice from delay, public health concerns, and the need to maintain an efficient justice system. Different judges approached this balancing exercise differently. In one case, the judge's response to the accused's objection to proceeding virtually was to give him and

his lawyer the 'liberty to participate by video-link from the courthouse', even though the judge himself and the prosecutor would not be there (2021 ONSC 359). He concluded that this hybrid format 'will be fair and public just as it would be if all participants were physically in a courtroom.' In another case, the judge held practice sessions with counsel, the defendant and witnesses on Zoom before ordering a virtual trial. He did so to confirm that everyone 'could see and hear each other simultaneously' and was convinced 'Zoom will be entirely suitable for a fair and public hearing' (2020 ONSC 3870). Another judge used the *voir dire* as a practice run and was satisfied that 'trial fairness would not be undermined by the use of the technology' (2017 ONSC 7530).

The general tenor of judicial opinions in civil cases is that unless there are known technological limitations, videoconferencing use is compatible with fair hearings. Since parties do not have a constitutional right to be tried by a jury, judges were not as worried about the possible unfairness of overriding a litigant's choice of hearing. One judge stated that while he was 'not happy ordering a virtual trial on a party against their will', he had 'to keep matters moving' (2020 ONSC 8190). In emphasising the fairness of fully-remote hearings, he stated: 'None of the parties are in any better position vis-à-vis the other where the proceedings are held by videoconference. They are all in the same position.' Moreover, in contrast with earlier research which questioned the effectiveness of client-counsel communication during virtual hearings (e.g., Bellone, 2013), judges were not concerned about videoconferencing interfering with private communication. As a judge noted, in addition to the private 'chat' function, 'Zoom technology provides for "break out rooms" to allow parties and counsel to confer separately and in private during breaks and adjournments' (2020 ONSC 7460).

d) Demeanour

It was anticipated that trial judges would find the virtual mode, which omits or distorts certain non-verbal cues, to be a handicap to their ability to assess witnesses' demeanour and in turn credibility. This was, however, contradicted by the data, consisting of 20 SCJ

decisions that addressed the issue (7 in the pre-pandemic period; 13 in the pandemic period).

SCJ judges have unfailingly rejected the argument put forward by parties, particularly criminal defendants, opposed to proceeding virtually that a fair trial requires that they be able to assess a witness's demeanour in person. One SCJ judge stated: 'Courts have rejected the notion that demeanour is determinative of credibility' (2017 ONSC 2213). Hence, according to her colleague, 'the right to full answer and defence does not entitle an accused to be in the same physical space or courtroom with a complainant, even when that witness's credibility is in issue' (2021 ONSC 2447). Another judge observed that even in the 1990s when less sophisticated technology was used, 'courts have found that testimony by CCTV allows the Court, the accused, and counsel to observe the witness, including their demeanour, while they testify, and therefore does not infringe fair trial rights' (2021 ONSC 3706).

Most judges who commented seem to think virtual hearings allow for not just effective but greater observation of demeanour than physical hearings. Such belief had currency even before the pandemic. As one judge remarked in a pre-pandemic decision, '[i]n a courtroom which is properly equipped with monitors, the opportunity to observe and hear the witness is often significantly improved for the jurors, the judge and the defendant himself' (2019 ONSC 2518). This is because, as another judge explained, 'a Zoom hearing allows a judge to look directly at the witness while testifying and not from the side or, in some courtrooms, from slightly behind the witness' (2020 ONSC 4036). His colleague echoed the point: 'videoconferencing has the benefit of allowing the judge to see the witness' face head on, rather than a slice of the side of their face' (2021 ONSC 2749). This judge then recounted his own experience with virtual trials which convinced him that 'essentially nothing is lost of the ability to observe witness demeanour in testimony by videoconference'. For another judge, virtual court is clearly better for observing demeanour: 'I was able to view the witnesses' faces and body language head-on and close-up in a way that is not available in a courtroom. (I also avoided the kink in

the neck that can come from watching witnesses beside you for several hours.)' (2020 ONSC 5060).

Overall, judges did not share the worry expressed by some scholars, especially in earlier works premised on older technology (e.g., Doherty-Sneddon et al, 1997; Poulin, 2004; Johnson and Wiggins, 2006), that videoconferencing might interfere with credibility assessments by failing to fully transmit non-verbal cues. However, several judges did acknowledge the potential attenuation of non-verbal cues. As one judge noted, 'a judge can arguably miss tell-tale signs of demeanor that may be relevant to the assessment of credibility' (2019 ONSC 7118). 'Counsel may pick up cues from mannerisms or body language that are not as perceptible on video', another judge observed (2021 ONSC 3706). A third judge spoke of 'face-to-face examinations hav[ing] modest advantages over video conference examinations' as 'there are subtle nuances in interpersonal contact that may not be noticeable in a video conference' (2020 ONSC 5683). All three judges nonetheless permitted videoconferencing use, suggesting that they did not believe the subtlety that might be lost is of consequence to a judge's ability to assess credibility, or counsel's ability to fully observe, assess and react to a witness's nonverbal communication.

e) Solemnity

It was predicted that judges will regard the use of videoconferencing as having a negative impact on the solemnity of proceedings as well as a dehumanizing effect. While there are only seven decisions on this issue (1 in the pre-pandemic period; 6 in the pandemic period), the product of five SCJ judges, they nonetheless provide some evidence with which to test the hypothesis. As predicted, judges had uniformly expressed reservations about the solemnity of court proceedings being felt when court is reduced to a screen. However, there was no consensus on whether videoconferencing use undermines the human element of trial.

As a judge remarked, the formality and solemnity of court proceedings may not fully register for some remote participants. He wrote: 'it is likely that the examinee would be more conscious of the gravity of the proceedings and the requirement to tell the truth in

a face-to-face examination' (2020 ONSC 5683). Another judge referenced 'concerns about the sanctity and decorum of the process' online before querying: 'Are witnesses less affected by the solemnity of the process than they might be if they were in a more formal setting?' (2021 ONSC 6493). The disruption to the solemnity of the proceedings could convey different behavioural expectations to participants, influencing the interactions that take place. 'The dynamic of an in-person exchange can have a different pace and energy from one on-line' was how a judge described it (2021 ONSC 3706).

According to the judge in the single pre-pandemic decision on the subject, remote testimony could result in a 'loss of gravitas' (2019 ONSC 2518). Much depended on the atmosphere of the remote space and the technological setup. In the hybrid hearing in question, the witness testifying from her living room had a limited view of the court ('She was not in a position to see the judge, the defendant or any participant in the trial apart from the counsel conducting the examination') and '[h]er dog began to bark midway through her evidence'. The environment, the judge opined, 'diminish[ed] any sense of gravitas to the occasion'. Despite the defence's request for the witness to physically attend after this unsatisfactory experience, he permitted her to appear by video—not from home but from 'a videoconferencing facility which is designed for legal proceedings.'

A judicial debate has emerged over what is characterized in the literature as the dehumanizing effects of technology. The last-quoted judge was of the view that the potency of emotions and the humanity of public trials are reduced when they are held online. He observed of a Zoom trial he presided over without a jury, where the accused was charged with murder, which ordinarily would be heard by a jury in a courtroom: 'Much of that human element was lost in this Zoom proceeding' (2021 ONSC 7615). There is no virtual substitute for the physical presence of spectators, who play a key role in the conventional staging of justice. He explained:

> As a jury files into court each day, they see the families of both the deceased and the accused, often seated in the front row of the court. The presence of family adds an important solemnity to the proceedings, providing a constant reminder to everyone in the courtroom of the human

> consequences of the trial….[The deceased's brother]'s presence in the courtroom would have been an unspoken but powerful reminder of the true loss of his brother's life. That presence was lost in this Zoom trial…

His colleague disagreed that remote proceedings are inevitably dehumanizing, stating in a civil case:

> While there is some concern in the literature about whether the video process captures the emotions of face-to-face human interaction, witnesses' emotions were very visible. The process was real enough to cause a witness to need a short break to regain composure. I was pleasantly surprised at how well the electronic, remote medium captured the true human story at play. (2020 ONSC 5060)

Notably, the same judge acknowledged in an earlier case that 'it does appear that there is some loss of solemnity and personal chemistry in remote proceedings' (2020 ONSC 2782). Nonetheless, he was optimistic that 'as familiarity with new processes grows, we will develop solutions' to offset such loss. One solution might be for judges to make explicit their expectations of decorum and engagement. A judge did precisely that, stating in his decision: 'it bears reminding everyone that virtual hearings are no less formal than in person hearings in court. They are the same thing and require the same decorum and respect for the administration of justice' (2021 ONSC 1741). It remains to be seen whether such reminders are effective in commanding deference to the authority of the court.

f) Mischief

Related to the loss of solemnity and potentially of human connection, use of videoconferencing can affect how participants behave. It was predicted that judges, trial judges especially, would be concerned that the video-mediated environment could make it easier for participants to engage in conduct that undermines the integrity of the hearing. There are 10 SCJ decisions that dealt with this issue (1 in the pre-pandemic period; 9 in the pandemic period), and in line with the prediction, they suggest that videoconferencing lends unique opportunities for remote participants to engage in prohibited activities. However, they also show that the possibility of mischief in the virtual environment is entirely manageable from the judicial perspective.

The typical videoconferencing setup, as described in chapter 3, does not give the judge and participants congruent views of each other. Since one can see only what another's camera captures, there is a 'heightened risk', as a judge observed, for participant behaviour to escape his notice (2021 ONSC 1046). Thus, '[a] Zoom hearing allows for people to record or capture a visual depiction of a witness that would have been more easily known and preventable in a courtroom.' For certain witnesses, such as the undercover officers in this case, illegal recording could have serious consequences. The difficulty noted in the literature for sufficient exercise of judicial control in virtual court was brought to the fore in two cases. In the first, the defendant tried something impossible in physical hearings: he 'testified via Zoom while he was driving his vehicle' (2020 ONSC 7388). In the other, a party's representatives engaged in 'express defiance and persistent use of the chat function' even after the judge asked them to stop (2021 ONSC 1741).

Furthermore, a remote witness could more easily receive improper assistance undetected. A judge stated: 'It would not be difficult, for example, to put a person or another computer screen outside the field of view of the camera that could enable improper prompting of the witness' (2020 ONSC 2782). This is precisely what happened during virtual cross-examination in another case (2021 ONSC 440). It was discovered after the fact that when the defendant was being questioned, members of his family were in the same room, but off screen, feeding him answers through hand and facial gestures. In finding that this constituted an 'abuse of process', the judge opined: 'This mischief could only have happened on a virtual examination. In a face-to-face examination, examining counsel has control over who is and is not present at the examination.' The potential for dishonest conduct raises the question of who is responsible for managing this risk. The judge in this case believed such responsibility laid with the judiciary as 'gatekeepers' of the legal system. Her colleague, however, thought differently: 'the onus is on *all* participants to ensure that the integrity of the proceeding is maintained' (2021 ONSC

3248). This made sense considering that not all stages of a court proceeding take place before a judge.

Notably, no judge thought that the increased risk of mischief warranted shying away from proceeding virtually. As one judge stated, the risk pales compared to the benefits in the form of 'increase in efficiency' and 'significant cost savings' (2021 ONSC 6493). Moreover, the risk could be managed. In a decision made before the pandemic, the judge suggested two measures to prevent the remote witness from reviewing notes and receiving assistance during testimony: have the witness (1) pan the room with the camera and then (2) position their camera farther away to capture more of the immediate surroundings (2019 ONSC 2518). With respect to surreptitious recording, the judge in the case of the undercover officers ordered that public access be restricted to audio-only when the officers testify. Her colleague devised a more elaborate protocol to manage a high-profile Zoom trial:

> Access to this Webinar is only granted upon application to the court. […] Each applicant for admission to the webinar is required to electronically check a box indicating their undertaking that they will abide by these terms [to not record or broadcast] and that they will not share their individualized link to the webinar with anybody else. If the application is approved, the applicant is sent an email with a unique code allowing their device to enter the webinar. That code cannot be used at the same time by any other device. I have limited access to the webinar to professional journalists who are resident in Canada, lawyers, articling students, and individuals verified by the Crown as having a direct connection to the offences… (2020 ONSC 7167)

The described measure, effective as it may be in minimizing abuse, is problematic in fundamental ways. There is an implicit assumption that the general public, unlike the professionals (journalists and lawyers), could not be trusted to refrain from recording even if they sign an undertaking. Thus, they had to be fully excluded from virtual access to the trial. Admittedly, the judge left open the possibility of the public viewing a broadcast of the trial at an offsite venue where she said the police would be present along with court staff. Such restrictive mediated access conceivably engenders a very different form of open justice than traditional hearings. The role and experience of the watching

public in a trial are reshaped, as is the experience of the main trial actors, who would not feel the public's gaze upon them.

g) Rituals and Practices

Court events are replete with rituals and symbolic practices, some of which are hard to replicate in a computerized environment. It was thus predicted that the advent of full-remote hearings would prompt judges to develop new rituals. It was also predicted that there would not be many decisions that speak to ritual changes, since it is not something that would typically attract discussion in judicial pronouncements. The latter prediction did not exactly materialize. There were in total 18 SCJ decisions on the subject, unsurprisingly all from the pandemic period; while not a huge number, it is approximately double the total commentaries on solemnity and mischief (seven and 10 respectively). In keeping with the first prediction, the decisions show that judges did indeed reconfigure certain hearing practices to accommodate virtual adjudication.

One of the symbolic practices abandoned is the formalization of court orders. In the usual course, orders must be signed, stamped with the court seal, and entered with the registry before they can take effect. Two judges explicitly dispensed with this formality, with one stating in his decision: 'This order is effective without further formality' (2020 ONSC 3232). The other described his order as being 'operative and enforceable without any need for a signed or entered, formal, typed order' (2020 ONSC 3497). While the judges did not explain why they were doing away with the ceremonial elements, it was likely driven by a desire to minimize physical interactions during the pandemic.

Another longstanding tradition that was abandoned, or partially abandoned, during the pandemic is the wearing of legal regalia by lawyers and judges. An SCJ judge described the modified dress code in his virtual courtroom: 'Counsel were not required to gown for the trial but all participants were advised that business attire was expected. The Registrar and the judge were robed as usual' (2020 ONSC 8086). At the Divisional Court, court attire was foregone altogether: 'Neither counsel nor the court will gown for the hearing. Instead, business attire is required for anyone with a speaking role in the hearing' (2020

ONSC 3001). If, as scholars have argued, legal costuming evokes solemnity and reinforces the status of legal professionals (Bell, 2009), abandoning it could alter perceptions of power distribution and facilitate more egalitarian interactions.[10] It could also render court events more mundane, less special and less removed from the everyday.

Apart from the relaxed dress code, use of the Zoom platform prompted different management practices by different judges. On Zoom, users in the 'host' role have administrative controls that allow them to manage others such as by muting or expelling them. Of the judges who documented their practice, they differed wildly in their approach. Two judges 'co-hosted' with court staff (2020 ONSC 8086, 2020 ONSC 4237). Two other judges delegated that responsibility entirely to staff (2020 ONSC 5518, 2021 ONSC 1654); as one wrote: 'The trial judge has not been logging in as a co-host and has not exercised control over any other participant's microphone'. Another judge, in a civil case, allowed a commercial arbitration facility to take over hosting the hearing, presumably at a cost to the parties (2021 ONSC 6694). Most striking is the judge who had 'Counsel for the Applicant [be] the "host" of the hearing' (2020 ONSC 2244). Given that this hearing took place early on in the pandemic, it is possible that court staff were not yet fully trained to use Zoom and hence the need to engage a non-judicial administrator. However practical it might have been, there could be implications for participants' perceptions of judicial neutrality and legitimacy, particularly if the parties were not equally enthused about proceeding virtually.

In terms of managing the visual ecology of virtual court, one judge limited the video feed during witness examination to the witness, the examining lawyer, the judge and opposing counsel so that only they would be visible (2020 ONSC 4237). Similarly, another judge encouraged the parties to each designate a 'lead counsel [who] will have a constant video screen presence' while other counsel turned their cameras off (2020 ONSC 5518). He explained the rationale for the protocol: 'This will allow for larger images on the video

[10] It is worth noting that some jurisdictions (e.g., Sweden) had abandoned judicial dress for this reason years ago for in-person court.

screen of the witness and of the Lead Counsel active at that time, which will be useful throughout but particularly helpful when the Shared Screen function is used' (2020 ONSC 5518). Rather than to have everyone 'exit' the courtroom (disconnect from Zoom) during breaks, as is the practice for physical hearings, judges explicitly asked participants to remain on Zoom but to turn off their video and mute their microphones (2020 ONSC 4237, 2021 ONSC 1654). Overall, it seems that only a few faces would be seen on screen during a hearing. The limited visible presence of participants may be seen as reducing the sense of drama and spectacle typically associated with courtroom adjudication.

The most striking ritual transformation relates to the raising of objections during trial. One judge reimagined what was a stylized speech performance—with a lawyer standing up and uttering the ritualized word, 'objection'—as a purely gestural one. As she instructed counsel appearing by video, 'objections should be indicated visually by raising the palm of your hand to the video camera' (2020 ONSC 4237). She also specified how participants were to re-enter the courtroom after breaks: 'At the appointed time, participants shall turn on their video to signal that they have returned.' Given the fractured ecology of virtual hearings (Licoppe and Dumoulin, 2015; Luff et al, 2003) in which participants might not see what others are doing even when they are in the same virtual space, it seems necessary to require participants to explicitly signal their presence.

Finally, in keeping with the suggestion in the literature (Rowden and Wallace, 2018), some judges tried to provide remote participants with extra orientation to virtual court. One judge observed that it was his practice to 'ask everyone who is on the line to identify themselves' (2021 ONSC 6193). Likewise, another judge had participants 'sign into the Zoom platform using their full name so that they can easily be identified' (2020 ONSC 4237). In terms of preparing witnesses for their experience in court, it was not uncommon for judges to expressly instruct counsel to 'ensure that all their witnesses have access to the technology necessary to testify virtually' and inform them of 'the prohibitions on recording' as well as 'best practices and etiquette for remote hearings' (2021 ONSC 4126; see also 2020 ONSC 4237). One judge, however, refused to do so, on the basis that 'those

practical arrangements are in the hands of the Plaintiffs and they own the conduct of their case. It is not up to the court to micromanage the manner in which the Plaintiffs arrange to have their witnesses available to participate in the trial' (2020 ONSC 7796).

In sum, the data suggests that the move to virtual justice has required judges to adapt the way they conduct proceedings, including the rituals they normally observe. New rituals were introduced for the virtual court environment, such as conventions around who would turn their cameras and microphones on (or off) during witness examinations and at breaks. There were some inconsistencies in judges' practices, particularly regarding delegation of Zoom host control and the degree to which they dictated preparation of witnesses for remote testimony. Such inconsistencies may be explained by individual preferences to be sure, but they may also be symptomatic of the hurried nature of the shift to virtual hearings.

4.4.5 Looking Ahead

The findings of this study substantiate the common perception that the pandemic has had an unprecedented impact on the procedural landscape in which judges operate and likely influenced their views on virtual justice. The greatest achievement of the pandemic may have been convincing those skeptical of digitalisation, such as the judge who thought the virtual format inherently raises due process questions, that it could be fair and effective to proceed virtually. An SCJ judge explained:

> The experience of this and other courts in conducting virtual proceedings using "Zoom" and other similar technologies to cope with the current pandemic has gone a long way to convincing bench and bar that virtual court proceedings are both possible and of a degree of quality and ease of use that few would have thought possible only a few years ago. (2020 ONSC 5040)

Given the timeframe of this study, it has not been possible to interrogate whether judges' increased receptiveness to hearing cases virtually was a temporary reaction to the pandemic or indicative of a lasting change in mindset. Nonetheless, the data does offer a glimpse of what they think about the future of virtual justice. Their stated sentiments appear to conflict. On the one hand were those who expected to continue conducting

virtual hearings beyond the pandemic. 'Virtual hearings are likely to retain a permanent place in the judicial toolbox,' one judge remarked (2020 ONSC 3232). His colleague similarly felt that they 'will certainly outlive the pandemic' considering the 'benefits in terms of cost, efficiency and access to justice' (2021 ONSC 8038). On the other hand were judges obviously hankering for return to full in-person operations. As one judge stated, 'we would all prefer to be living in a non-COVID world and conducting hearings in courtrooms' (2020 ONSC 7460). Another stated as if it were a foregone conclusion: 'There is no doubt that the Court will return to in-person hearings and trials' (2021 ONSC 4345).

4.5 Conclusion

It is clear from this chapter that the widespread adoption of online hearings precipitated by the pandemic has allowed for unprecedented judicial discussion of issues related to the virtual format. Far from being the 'Luddites' they are often labelled (McLachlin, 2012), some judges were manifestly comfortable with technology. In common with the literature, judges in the civil context extolled the efficiency and accessibility gains that virtual hearings can provide. At the same time, judges, particularly those presiding over criminal and family cases, were sensitive to the possible unfairness of forcing technology use on some individuals such as people with mental health challenges and those lacking access to a suitable space from which to join remotely. While on certain issues judges had different views, there appears to be consensus, for the entire period under consideration, that video participation can be effective and fair. Much like the concerns articulated by scholars, the fractured ecology for action in the full-remote setting raised concerns for judges. Rather than to let these concerns hold them back from proceeding by video, judges responded creatively and optimistically. They devised solutions to work around the difficulties of monitoring what is occurring outside the camera's field of view at the remote end. On the whole, the decisions reviewed suggest that judicial conceptions of the modern trial have evolved to the point that it is no longer viewed as synonymous with a courtroom event.

5
Conclusion

This thesis set out to explore the implications of virtual court hearings whose use exploded in many jurisdictions in the past two and a half years. While the speed and scale of the move to online operations and fully remote hearings were unprecedented, videoconferencing has been used for several decades by jailed defendants and vulnerable witnesses to appear in court. Over this time, a body of research has emerged on the disruptive and liberating potentials of video court participation.

No other actor is as central to the justice system as judges, and understanding their perspective is crucial if we want to get a full picture of virtual justice in action. Judicial reflections on the use of videoconferencing can be found in the decisions judges write, a rich source of data has yet to be exploited by socio-legal scholars in the field. With this in mind, the thesis asks: To what extent do reported decisions by Ontario judges confirm or challenge concerns expressed in scholarly debates? Through a systematic content analysis of OCA and SCJ decisions, I tested a number of hypotheses derived from the existing literature on the implications of virtual hearings for the administration of justice.

Given the enormous impact the pandemic had on the justice system, besides testing the hypotheses, this study also sought to tease out judges' reactions to it from their decisions. Predictably, judges regarded the pandemic as posing an existential challenge for the business of judging. Proceeding entirely virtually was seen as necessary in this context, even if some judges did not, particularly near the beginning of the pandemic, prefer the full-video mode. The 'radical change' in judicial mindset Justice Brown spoke off a few

years ago as a *sine qua non* for widespread technology adoption appears to have been achieved on an accelerated schedule.

The decisions in the dataset confirmed the majority of the hypotheses, yielded a couple of surprises, and provided nuance to some of the concerns articulated by other scholars. In common with the literature and in contrast to the policy discourse, Ontario judges displayed a sensitivity to the fact that technology use and access to justice are not necessarily correlative. Depending on a court user's technological competence and access to appropriate technologies, proceeding virtually might not save time or be less stressful. Unsurprisingly, judges whose own experiences with the video format had been riddled with technical problems tended to find its use less than satisfactory, while their peers whose experiences were positive or uneventful seem inclined to tout the benefits. What was most surprising was that judges did not think the virtual mode made it harder for them to observe demeanour; quite the opposite, they felt that it *facilitated* demeanour assessments. Also unexpected was the judicial debate that surface over whether video-mediation tempers the human element of trial.

Though judges did not explicitly address court rituals or use the term, their descriptions of virtual proceedings suggest that different rituals were practised in fully-video hearings. Legal attire for judges and barristers was replaced with generic business attire, while various stylized acts, such as that associated with raising objections, were reconfigured for the ecology of action that is virtual court. It is evident from trial judges' decisions that the fractured ecology made it difficult to manage what is occurring at the remote end. There was a worry about the heightened risk of mischief such as surreptitious recording and inappropriate witness assistance. Judges developed various measures to minimize the risk, such as limiting access and requiring a remote witness to pan the room with their camera at the start of their testimony.

This study reveals that judges were able to shape the layout and visuality of virtual court, historically the bailiwick of *non*-judges (architects, engineers, etc.). Segregation in courthouse design (Mulcahy, 2011) were reproduced by judges to some extent to

differentiate between remote participants with and without assigned speaking roles, and to discourage the latter from active engagement. As several judges directed, except for the witness, the examining and opposing lawyers, all had to turn off their cameras and microphones—that is, stay invisible and quiet. Moreover, where judges restricted public access to Zoom Webinar, spectators, as listen-and-view-only attendees, were left with no explicit role to play in the hearing. Unseen by the main actors in the proceeding, they did not in any conspicuous way stand in for the community nor add to the spectacle of the event.

Furthermore, the study suggests that judges' views and practices regarding open justice are evolving. Their decisions make apparent that fully-remote hearings create new opportunities but also challenges for public access. Virtual court is more open as it can accommodate more observers than could fit in a courtroom. However, people could no longer decide to join on the spur the moment and stroll into a courthouse; instead, they had to request access from the court beforehand. One judge expressed concerns over the insufficient safeguards in place to ensure information about hearings are posted sufficiently in advance for access requests to be made and responded to in time for access to be realized. Given the centrality of open court to the administration of justice, a more robust examination than what is simply flagged here is urgently needed.

5.1 What is Next?

Since the study period ended, the SCJ and OCA seem to have re-embraced some of their courtroom-centric ways. In April 2022, the courts announced in notices to the public that most matters would again be heard in-person. It appears that the return to in-person was driven by preferences within the judiciary, since no stakeholder consultation preceded the announcements (Kirschbaum, 2022) and the legal profession has subsequently protested the change (Shankar, 2022). This suggests that most judges, or those with influence within the institution, still favour the in-person format. Further research might probe whether this is the case, and extend the timeframe of analysis to chart the evolution of judicial views into the post-pandemic period. An extended timeframe would allow us

to inquire whether judges feel the same way about virtual justice when the alternative is not an in-person hearing with witnesses in masks and everyone socially distanced.

As with most research, this study raised as many questions as it answered. For instance, the data suggest that judges disagreed about the dehumanizing effects of virtual participation, but could not account for why remote participants appear less human to one judge but not to another. Does it have to do with the camera angle and lighting, or the cogency of a remote participant's performance, or is there something else? In addition, there are questions around the types of proceeding suitable for virtual adjudication. One judge, for example, opined that family disputes are not suited for virtual treatment. This begs the question, what is it about a case type that makes it more, or less, appropriate for a particular mode of hearing? What other factors might there be, besides case type, that influence suitability for virtual adjudication?

The present study can be complemented by the use of other research methods to attain a fuller understanding of what judges think. Reported decisions, as earlier noted, offer only a partial view. Interviews with judges could answer some of the questions raised by their decisions, including those just canvassed. In addition, observations of actual hearings could help ensure that the researcher has the proper context with which to interpret judicial commentaries, particularly the rituals and practices that judges have documented—and what they chose *not* to document. Moreover, by observing what transpires in court, potential inconsistencies between what judges report and what actually happened could be identified.

On a final note, these are exciting times for the justice system. The speed and scale at which technology has transformed the business of judging in the last two years are nothing short of spectacular. Yet, this transformation has taken place largely without the benefit of any analysis of judges' views, needs and expectations around virtual adjudication. Beyond considering judges' perspectives, research is needed to assess the impact of fully-video hearings on others in the process, including lawyers, court staff, the press and the public, all of whom have so far eluded academic attention. There are, as

well, attendant issues that call for further study, such as how proceeding virtually affects 'offstage' interactions—exchanges between participants in a court proceeding that do not form part of the official court record. The data hinted at a loss of built-in opportunities for lawyers to converse, which could potentially affect settlement rates. Now that the once-hazy possibility of courts becoming dematerialized has been rendered distinct, it is all the more important to explore issues like this in earnest.

Legislation

Canada

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Bill C-2, An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act, S.C. 2005, c.32, received royal assent on 20 July 2005

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