

PRACTICE DIRECTION

COURT OF QUEEN'S BENCH OF MANITOBA

RE: REMOTE AND OFFSITE CIVIL TRIALS

As a result of the evolving seriousness of the COVID-19 pandemic in Manitoba, specifically, the recent Code Red designation, there are now increasing obstacles and limitations that affect the Court of Queen's Bench's ability to reliably proceed with scheduled civil trials "in person" at the Law Courts Complex. Given the resulting and regrettable interruptions in that part of the Court of Queen's Bench's judicial service, and in order to pre-empt the uncertainty flowing from the spectre of future interruptions, the Court will be now, more than ever, open to endorsing and presiding over hearings or trials involving *viva voce* evidence occurring offsite or by video conference. The institutional role of the Court (as an essential service) and its inherent jurisdiction and responsibility to ensure the proper administration of justice, require nothing less than the operational flexibility that comes from at least considering the use of such video technology, particularly in the context of a pandemic. Accordingly, where a Court notice does not otherwise advise, it should be presumed that trials will proceed as scheduled "in person" at the Law Courts Complex. However, where the parties have been advised by the Court (by notice or otherwise) that a trial is being adjourned because of concerns grounded in the COVID-19 pandemic, the parties may now proceed with either of the following options:

1. move the location of the trial to an acceptable alternative physical space that will ensure the governing public health protocols are respected; or

2. a virtual hearing that allows the judge, counsel, the parties and the witnesses to participate by video conference.

In either of scenarios (1) or (2), the trial will proceed on the already scheduled dates and it is the parties' responsibility to make the necessary arrangements. These arrangements must be approved by the Chief Justice or his designate. Where all parties are in agreement to pursue either scenario (1) or (2), the request for approval must be made jointly by the parties to the Chief Justice in writing no later than the Wednesday preceding the week of the hearing and ideally several weeks before the hearing. These arrangements must at a minimum include:

- the ability for all participants to see and hear each other and the evidence;
- the ability for the parties to privately communicate with their counsel as needed throughout the proceeding;
- reliable technology, including with respect to Wi-Fi and any remote video conference platform. It is expected that whatever remote video conference platform is to be used, it will be in place and tested for reliability well in advance of the trial commencement. This may include engaging the presiding trial judge. The technology must permit recording and playback by the judge as he or she chooses;
- a qualified court reporter to transcribe the proceeding and, if requested, provide a timely transcript of some or all of the proceeding;

- at the conclusion of the hearing, the Registrar must be provided with an electronic copy of the transcription of the proceeding in a manner that it may be kept and accessed by the public as the Court record;
- where proceeding offsite, the space must account for security issues; and
- all costs related to arrangements will be incurred by the parties, including, without limitation, the costs of any physical space outside of the Law Courts Complex, any remote video conference platform, any related Wi-Fi, and the court reporter. These costs will be deemed by the Court to be professional undertakings by counsel. Unless otherwise agreed between the parties, these costs will be equally shared. Costs will be recoverable as part of any award as to costs. In the event a party requests a transcript of some or all of the proceeding, the party who makes this request is solely responsible for this transcript cost.

In the event the parties disagree as to whether the trial can or should proceed offsite (scenario (1)) or by video conference (scenario (2)), an application will be made at the earliest opportunity (no later than the Wednesday preceding the week of the hearing and ideally several weeks before the hearing) to the Chief Justice. This application will be limited to two (2) pages from each party. Unless otherwise directed, the Chief Justice or his designate will determine the matter without oral submissions. While the consent of a party may be a relevant consideration, in the context of the pandemic, given the

need to ensure the proper administration of justice and the Court's inherent jurisdiction and responsibility to do so, such consent will only be one factor amongst others, and will not be required or determinative. Even if a party is opposed to proceeding offsite or by video conference, it remains open to the Court to make an order that such a video trial so proceed where the integrity and fairness of the trial will be otherwise preserved. Ultimately, the parties will be advised whether the trial will be adjourned, will proceed offsite (scenario (1)) or proceed by video conference (scenario (2)).

Where a matter proceeds virtually, it is anticipated that, typically, witnesses called by a party will be present in the room with the lawyer questioning them for the purpose of direct examination. The Court and the cross-examining party will rely on the lawyer present with the witness to ensure the appropriate documents are put in front of him or her and the witness comports himself or herself in a manner consistent with a witness in the Court of Queen's Bench. In advance of the trial, counsel will be expected to provide the trial judge with the documents that are expected to be referred to in direct or cross-examination.

In the event an in-person trial has commenced and a party, witness or counsel is required to self-isolate by reason of the COVID-19 virus, but is otherwise able to still participate in the trial, the trial may proceed with the affected individual participating remotely. This contingency should be anticipated well in advance of the trial with all the necessary arrangements having been put in place.

In light of the peculiarities, challenges, responsibilities and undertakings relating to offsite and virtual trials, the options of proceeding offsite (scenario (1)) or proceeding by video conference (scenario (2)) are only available where all parties are represented by counsel.

ISSUED BY:

“Original signed by Chief Justice Joyal”

**The Honourable Chief Justice Glenn D. Joyal
Court of Queen’s Bench (Manitoba)**

DATE: November 20, 2020