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Technology, Remoteness, Disability and Evidence Project
Backgrounder

The aims of this project, funded by the Law Foundation of British Columbia, are twofold:

(a) to create practice support materials for the use of the legal community about assistive technology and communications systems that can be used to overcome geographical, physical, and attitudinal barriers to full and effective participation in legal proceedings by persons in remote locations or who have disabilities;

(b) to identify remaining legal barriers to the beneficial and effective use of assistive and other technology in court and tribunal proceedings and recommend ways to remove them.

Reasons for this Project

In civil and criminal courts and in administrative tribunal hearings, the standard way of providing evidence is still by means of oral testimony from witnesses who are personally present. By contrast, documentary and demonstrative evidence (such as exhibits, charts, graphs and diagrams) is increasingly being introduced in electronic form.

Persons who live in rural or remote areas and those with disabilities sometimes face significant physical, mental, and economic hardship when required to attend court and tribunal proceedings in person, whether they are parties to the proceedings or witnesses. Those with disabilities may be at a severe disadvantage in participating in a court or tribunal hearing in any role without the benefit of technological aids and hearing venues that accommodate their use. These disadvantages can amount to barriers to access to justice, but they are ones that can be removed in many cases through the effective use of technology.

Lawyers and others involved with conducting trials and hearings need to become more familiar with the availability and capabilities of technological systems that will allow them to present or hear evidence from clients and other witnesses who are unable to testify conventionally. Increasing the level of knowledge within the legal community about the technologies that are adaptable to formal legal proceedings and how they can be deployed

will be a significant step towards dismantling barriers faced by these clients and witnesses as participants in the proceedings.

While some notable changes in legislation and practice have been made in recent years to allow greater use of technology by courts and tribunals, remaining legal and procedural barriers to the most effective use of technology in legal proceedings should be brought to light wherever they exist and ways found to overcome them. The guarantee of equal protection and equal benefit of the law without discrimination in section 15(1) of the *Canadian Charter of Rights and Freedoms* requires no less.

Examples of Overcoming Distance and Access Barriers Through Communications and Assistive Technology

British Columbia was one of the first jurisdictions to introduce videoconferencing into court proceedings.[1] Videoconferencing by means of a closed-circuit television network is now a well-established feature of the British Columbia court system, used both in pre-trial and trial procedures.

Not as well-known to the legal community is the array of assistive technology available to allow effective participation in court and tribunal proceedings by persons with disabilities.[2] Following are some examples of how assistive and communications technology can be employed in a court or administrative tribunal setting, either alone or in combination with more standard courtroom technology:

- a witness who is deaf and whose speech is not easily understood may testify through an ASL (American Sign Language) interpreter working offsite by means of an audiovisual link between the hearing venue and the interpreter's remote location. The audiovisual link could be established through closed circuit television if the interpreter is also at a videoconferencing site, or otherwise through a mobile computer-based communications platform.

- a witness who is non-verbal (lacking speech) or has a severe speech impediment can give evidence by means of text-to-speech software, typing the answers into a computer program that converts them to audible speech. Alternatively, the witness might simply type answers using an ordinary word processing program. A digital

1. Nils B. Jensen, "A Brief Introduction to Videoconferencing" (2000), 58 *The Advocate* 841.

2. "Assistive technology" is an umbrella term referring to devices and systems that allow someone with a disability to perform a task that the person could not otherwise perform, or that make it easier or safer for the person to perform the task: Andrews and Faulkner, *Glossary Of Terms For Community Health Care and Services For Older Persons* (Geneva: World Health Organization, 2004) at 10. Compare the definition contained in the U.S. *Assistive Technology Act of 1998,* (P.L. 105-394), § 2432: "'assistive technology device' means any item, piece of equipment, or product system, whether acquired commercially, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities."

projector linked to the computer would display the answers on a large screen visible to anyone in the hearing room.

- a witness, juror, or tribunal member who is hard of hearing may employ a personal microphone system that is either independent of, or interconnects with, the sound system in the courtroom or hearing venue. The personal microphone transmits an audio signal to the person's hearing aid. Alternatively, realtime digital transcription could be used to allow the witness to read counsel's questions virtually as they are being asked, and then respond orally.

- a witness with cerebral palsy may be unable to speak clearly enough to be understood and may have insufficient coordination to use a regular computer keyboard. This witness may be able to communicate adequately through software that allows the witness to select and assemble words on a touch-screen computer which the program converts to audible speech or displays on a screen.

- visually impaired witnesses can be aided by a table-top ultrahigh-magnification document reader to examine documents, diagrams, photographs or other exhibits.

Mobile alternative platforms for simultaneous audiovisual communication can be employed on an exceptional basis in situations where it is impossible or impractical to transport a witness to an official or commercial videoconferencing site and the evidence does not involve exhibits demanding high definition imaging. For example, a witness may need to testify from a hospital bed, or be too frail to leave a long-term care facility to attend a distant trial or hearing. Employing a suitable computer-based mobile audiovisual platform in such a case would avoid adjournments and possibly allow testimony to be heard that could not be heard otherwise.

Legal and Procedural Issues Surrounding Technology and Evidence-giving

The *Canada Evidence Act*,[3] the provincial *Evidence Act*,[4] and the *Criminal Code*[5] have all been amended to accommodate technology-assisted presentation of testimony. While these amendments give broad discretion to allow evidence to be given with technological aids, they may not have removed all legal obstacles to the most effective use of technology. Procedural rules of various decision-making bodies that appear neutral on their face may be insufficiently flexible to allow for practical applications of newer technology. In addition, some means by which persons with severe disabilities prefer to, or must, communicate may themselves raise specific evidentiary issues. This project will explore these questions.

3. R.S.C. 1985, c. C-5.

4. R.S.B.C. 1996, c.

5. R.S.C. 1985, c. C-46.

A different problem in this area is that technological innovation introduced on a system-wide basis without sufficient regard to inclusiveness in its design may have the unforeseen side-effect of reducing accessibility for sectors of the public. The 2006 report of the Ontario Courts Disabilities Committee refers to an example of this type of "one step forward, two steps back" situation. The Committee found that online court materials intended for public use in Ontario were inaccessible to blind, vision-impaired, and dyslexic persons because the particular electronic format that had been selected for the materials was incompatible with the most commonly used text-to-voice systems used by them to read digital text.[6] The project will also examine and recommend ways of avoiding the inadvertent creation of new barriers to access to justice through expansion of technology.

The UN Convention on the Rights of Persons with Disabilities

On 11 March 2010, Canada ratified the *United Nations Convention on the Rights of Persons with Disabilities* (Disabilities Convention).[7] This Convention requires positive action on the part of signatory countries to provide access to the support that persons with disabilities may need to enable them to exercise their legal capacity on an equal basis with others.[8] Article 13 of the Disabilities Convention imposes an explicit obligation on signatories, including Canada, to facilitate effective participation in legal proceedings by those with disabilities, and also to supplement this positive action with appropriate training for those engaged in the administration of justice:

> Article 13 – Access to justice
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> 1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
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> 2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

The need for dissemination of knowledge about assistive technology throughout the legal community and removing legal, physical, environmental, and attitudinal barriers to its effective use is made more imperative as a result of Canada's ratification of the Disabilities Convention.

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6. Ontario Courts Disabilities Committee, *Making Ontario Courts Fully Accessible to Persons with Disabilities*, 2006, online at http://www.ontariocourts.on.ca/accessible_courts/en/report_courts_disabilities.htm, p. 6.

7. 2515 UNTS 3, online at http://www.un.org/disabilities/convention/conventionfull.shtml. See also Canada Treaty Series 2010 /8.

8. *Ibid.*, Article 12, paras. 2 and 3.

Conclusion

The outputs of this project will increase the level of knowledge amongst legal practitioners about the technologies available to support clients and witnesses who face practical barriers due to distance or disability in their involvement in legal procedures. They will also indicate ways to remove remaining legal and procedural barriers to the effective use of those technologies. In so doing, the project outputs will help to increase access to justice, contribute to the implementation of the Disabilities Convention in British Columbia, and further the Charter values of non-discrimination and the right to equal protection and benefit of the law.