

## ALBERTA PROTOCOL FOR REMOTE QUESTIONING

### Preface

The Alberta Protocol for Remote Questioning was developed during the COVID-19 pandemic to allow court matters to progress despite various “physical distancing” measures which preclude in-person questioning. A consistent and widely adopted Protocol for use of videoconferencing will give the parties confidence that questioning will proceed in an organized way while minimizing disputes about procedures and technology and reducing uncertainty about what may be admitted as evidence by a court. It is expected that the Protocol will primarily be used by litigants and their lawyers in civil and family matters. However, the Protocol is also available to self-represented litigants who wish to use it.

It is suggested that use of the Protocol will be by agreement unless its use is directed by court order. Parties may choose to amend portions of the Protocol by agreement to meet their needs, where necessary. The Protocol may be used for any questioning contemplated by the *Alberta Rules of Court*, including under Parts 3 and 6 (questioning on affidavits and questioning of witnesses), Part 5 (questioning for discovery and questioning of experts), Part 9 (questioning in aid of enforcement), and Part 12 (questioning in family law matters). Parties may also find parts of the Protocol useful in remote mediation or arbitration. It is expected that the Protocol will endure beyond the COVID-19 pandemic to facilitate questioning of parties living or working remotely or unable to attend questioning in person for any reason.

The Protocol is the product of the efforts of a working group of lawyers consisting of Angela Saccomani, Q.C., Patrick Heinsen, Grant Watson, Sam Leung, Julia Ibanescu, and Donna Purcell, Q.C. The working group received thoughtful input from several stakeholder organizations, including the Canadian Bar Association Alberta Branch, the Alberta Civil Trial Lawyers Association, the Advocates Society-Alberta Regional Committee, the Alberta Shorthand Reporters Association, and Pro Bono Law Alberta. Members of the Alberta Court of Queen’s Bench reviewed a draft of the Protocol and provided helpful feedback which has been incorporated, although it should be noted that the Court has not, nor can it, officially endorse the Protocol.

Suggestions for future revisions to the Protocol may be sent to Grant Watson at [grant@watsonconstructionlaw.ca](mailto:grant@watsonconstructionlaw.ca).

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### Purpose and Objectives

On March 11, 2020 the World Health Organization (WHO) declared COVID-19 a global pandemic following which the Government of Alberta declared a state of Public Health Emergency on March 17, 2020. As a result, this Protocol has been developed by a group of Alberta lawyers working collaboratively to address challenges created by the pandemic that has resulted in various mandatory and recommended “physical distancing” measures which make in-person questioning impossible or impractical. This Protocol may be used to address other challenges, including to secure the evidence of witnesses in remote areas. It is expected that this Protocol will be adopted by agreement of parties and lawyers prior to its use. In some cases, a court may direct the use of this Protocol, or a variation of it, where agreement cannot be reached by the parties.

Nothing in this Protocol is intended to supersede or vary any rule, right, obligation, or procedure set out in the *Alberta Rules of Court* or the *Law Society of Alberta Code of Conduct* except where a variation of such rule, right, obligation, or procedure by consent of the parties is expressly permitted.

The purpose of this Protocol is to provide a means to secure the evidence of parties to litigation and other persons subject to Questioning under the *Alberta Rules of Court*, with priority given to the following objectives:

- **Public Health:** Wherever possible, physical contact between individuals and items they may contact, such as documents, should be reduced or eliminated.
- **Access to Justice:** Court matters should proceed in a timely way to give resolution to the parties.
- **Efficient Conduct of Litigation:** Legal costs should be kept to the necessary minimum, and the most efficient possible use should be made of limited court resources.
- **Integrity of Process and Evidence:** Parties and their lawyers should have confidence that the process is fair and predictable, and that it isn't being abused by another party. Evidence should be subject to rigorous scrutiny without creating unnecessary barriers to the admission of evidence in court proceedings.
- **Confidentiality:** Questioning under this Protocol should be treated with the same concern for confidentiality and any privilege that may apply as is in-person questioning.

## The Protocol

### Prior to the Questioning

#### 1. Selection of Technology Platform

The parties will agree on a technology platform by which to conduct questioning. There are many options such as Skype, Cisco Webex Meetings, Google Hangouts, Microsoft Teams and Zoom. These platforms are listed as examples only and the parties shall satisfy themselves as to the appropriateness of any proposed platform for their purposes including acceptable security measures. At minimum, the platform should meet the following criteria:

- Free to Use – Participants other than the host should not be required to pay for an account or the service (the ability to sign in using just e-mail or a conference code is preferable).
- Multi-User – The platform must accommodate the expected number of participants, including the parties, their lawyers, the Court Reporter, and any other parties entitled to attend questioning (collectively, “**Participants**”), whether or not they are participating.
- Audio/Video Quality - Video and audio streams should be reliable and of good quality.
- Screen Sharing – All Participants should be able to share their screens.
- Muting – The host should be able to mute any Participant to limit unintentional background noise as necessary, and each Participant should be able to self-mute and self-un-mute as necessary.
- Waiting Room/Separate Chat Room- Upon request, the host should be able to provide a separate room for Participants to go for a temporary private conversation or if not available on the platform, a means by which Participants can go off record and return.
- Secure – the platform should be encrypted and use access protocols to prevent interference or access to any part of the conference by third parties. Access to the virtual room should be controlled by the meeting host to prevent unauthorized access.
- Length of Session – The session should not be limited in duration by the platform but should remain active until terminated by the host.

Lawyers should advise their clients of any known or potential security risk related to the use of the platform selected. Parties or their lawyers should confirm with the Court Reporter that the chosen platform is acceptable when booking the Court Reporter.

The Court Reporter, as meeting host, will send to all Participants any necessary instructions for downloading and installing the platform software, and guidance on its use, if necessary.

## 2. Scheduling

The parties and their lawyers will schedule the questioning at an agreed time, as they would for in-person questioning. The meeting should be hosted by the Court Reporter, who will ensure that the virtual meeting room is available for the duration of the agreed time and send invitations to each Participant with instructions on how to enter the virtual meeting.

All Participants shall provide the Court Reporter with contact information including an email address and phone number for access in the event there are problems with the session and a connection is lost.

## 3. Equipment and Setting

Each Participant will secure for that Participant's own use during the questioning, the following:

- A desktop, laptop, or tablet computer (not a mobile phone) with a webcam, microphone, and speakers (headsets are recommended for sound quality and reduction of echo).
  - Participants should use a wall outlet to avoid a laptop battery failure and adjust power settings as required to prevent the questioning being interrupted by any auto-sleep or other power-saving settings.
- A secure and stable internet connection (i.e. *not* public WiFi).
- A quiet room with a door that can be closed to exclude third parties.
  - Participants should avoid back-lit environments (e.g. a window behind the Participant) and any sources of external noise.
- The table or desk and surroundings should be clear of distractions and unnecessary items and should reasonably replicate a setting in which a Questioning would normally occur.

## 4. Records

The parties and their lawyers will establish and share a secure online records depository such as Google Docs, DropBox, Microsoft OneDrive or Sharepoint, to which will be uploaded the following, in PDF format where possible:

- A copy of this Protocol, with any amendments agreed to by the parties
- Copies of all relevant pleadings and affidavits of records in the action
- A complete set of each party's producible records, organized by bundles and with pages numbered for ease of reference in accordance with the requirements of the *Alberta Rules of Court*

All parties and lawyers will be provided with secure access to the records depository. The parties agree that the online version of each record will be treated as authentic within the meaning of r. 5.15 of the *Alberta Rules of Court*, subject to that rule's provisos, unless an objection to that authenticity is raised immediately upon reference to the record in question.

In the alternative, the parties may choose not to establish a secure online records depository and rather shall ensure that they each have access to the records/documents listed using other agreed delivery methods and the examining party shall use a "share screen" function to put records to the witness.

The parties and their lawyers will use their best efforts to provide full disclosure of records throughout the disclosure process to avoid the need to mark exhibits during questioning. Records will be referred to by production numbers. In consultation with the Court Reporter, the parties will agree on a process for marking exhibits where it is unavoidable.

If a party or other witness wishes to print a copy of one or more produced records for reference during questioning, that is permissible, however there should be no notes, comments, memoranda, or annotations added to any records that are before that party or witness during questioning. Any party and any lawyer may refer to, and display to others through screen-sharing, any record produced by any party.

#### 5. Test Meeting

The Participants will schedule a short test meeting to be held before the questioning, which each Participant will attend and in which any technical problems with the platform or the records depository can be addressed.

### **During the Questioning**

#### 6. General Rules of Virtual Meeting

Each Participant will:

- keep virtual meeting links and login passwords confidential to prevent unauthorized access by any person
- not use any virtual background or blurring function of the software platform
- not use any instant messaging features of the platform during questioning
- with the exception of the Court Reporter, not record the virtual meeting, and the transcripts prepared by the Court Reporter will be the only official record of these proceedings
- in the event of an interruption in the video or audio feed, immediately contact the Court Reporter by telephone at the number or email provided, to conclude or adjourn the virtual meeting

- not discuss with any person the matters in issue in this litigation while that person is under questioning and before that questioning has been officially concluded
- take steps to prevent anyone other than the Participants in the virtual meeting from seeing or hearing the contents of the meeting, other than any other parties identified as being present at the commencement of the meeting
- if another person comes within earshot of the virtual meeting, immediately advise the Court Reporter to that effect
- if the platform provides for private chats or private conversations within the main meeting, immediately advise the Court Reporter if the Participant is able to hear or observe communications between other Participants that can reasonably be assumed to be intended to be confined to a private chat or private conversation

Each lawyer and each self-represented party, as the case may be, will immediately suspend questioning if there is an interruption in the video or audio stream of any Participant. If the videoconference technology results in Participants speaking over one another, steps should be immediately taken by the Court Reporter to resolve the problem and, in the interim, all Participants should cede the floor to the lawyer for the party being questioned in case there is an objection to a question.

The Participants will respect any requests made and directions given by the Court Reporter in the interest in generating a clear transcript of the proceedings.

Parties and their lawyers may confer while the questioning is adjourned, either by private virtual meeting, in person (if the lawyer is physically with the client), or by telephone, but always subject to the usual ethical constraints on the communications between lawyer and client during questioning.

#### 7. Adoption of This Protocol by Agreement

Prior to the commencement of Questioning, the parties and their lawyers shall agree to the terms of this Protocol or adopt such amendments to this Protocol as mutually agreed and endorse such agreement on the record at the outset of the Questioning.

#### 8. Oath/Affirmation and Undertakings

After confirming the virtual attendance of all Participants, the Court Reporter will take the oath or affirmation of the witness in the normal way. If the witness wishes to swear an oath but doesn't have a Bible at hand, a Scottish oath may be used in accordance with s. 16 of the *Alberta Evidence Act*.

The questioning party or questioning lawyer, as the case may be, will include in the preliminary questions of the witness the questions set out in Appendix "A" to this Protocol. If any of those questions are answered in the negative, agreement should be reached on the issue in question before proceeding with further questioning. If agreement cannot be

reached, the questioning should be adjourned and rescheduled, with the guidance of the court if necessary.

All Participants will also agree on the record to not record (with the exception of the Court Reporter) or broadcast the proceedings.

9. Rules of Evidence and Admissibility

By proceeding under this Protocol, each party and their respective lawyers agree that:

- The party being questioned shall be deemed to be present in Alberta for the purposes of the questioning, regardless of that person's actual location
- If requested by a party, all parties will consent to an order under r. 6.22 of the *Alberta Rules of Court* that a party may be questioned by virtual meeting while located outside of Alberta
- Provided that this Protocol is substantially complied with, no party will object to the admission of transcripts of questioning or portions thereof that would normally be admitted in court proceedings if the questioning took place in person

**After the Questioning**

10. Court Reporter's Certificate

The Court Reporter will, as part of any certificate prepared pursuant to r. 6.20(4)(c) of the *Alberta Rules of Court*, indicate that the questioning was conducted in accordance with this Protocol and noting the municipality and province that the witness claimed to be in at the time of the questioning and any deviations from this Protocol.

## Appendix "A"

### Preliminary Questions (after oath/affirmation)

Do you, \_\_\_\_\_ [name of witness], certify, confirm, and undertake that:

1. you have agreed to be questioned by way of videoconference and the evidence that you give in these proceedings may be used by any party in accordance with the *Alberta Rules of Court* and any other applicable laws of evidence?
2. you have reviewed the Alberta Protocol for Remote Questioning revised May 5, 2020 [update as necessary] and you agree to comply with all parts of that Protocol [as modified on the record, if applicable] and to be bound by it?
3. you will not record or broadcast these proceedings in any manner, and you understand that if you breach this promise and undertaking you may be subject to legal sanction, including proceedings for civil contempt of court?
4. you have a secure and stable internet connection and you can hear and see me and the Court Reporter?
5. you will not mute or turn off your microphone, camera, or speakers, or move out of view of the camera during these proceedings unless directed to do so by me, your lawyer, or by the Court Reporter?
6. you will not view during these proceedings, any device, documents, apps, or information other than those presented to you in the virtual meeting or available in the online records depository created for these proceedings?
7. you have closed, and will not reopen, any other windows on your computer during these proceedings?
8. you have taken steps to disable any pop-up notifications that you expect would interrupt these proceedings and will immediately close any that may appear?
9. except for your lawyer [if lawyer is present in physical location], you will not communicate in any way with any party outside of the virtual meeting during these proceedings?