

# Virtual Hearings Circle

**REPORT 2025**

Presented by  
the Psychology Research Evidence (PRE) Project

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## Executive summary

Before the pandemic, most refugee hearings in Canada were held in person. Most are now held virtually and will be “for the foreseeable future.”<sup>1</sup> In exploring the consequences of this shift, the Virtual Hearings Circle (VHC) project did not seek a balanced perspective on the benefits and drawbacks of the virtual format. Instead, it investigated certain potential risks.

The VHC project brought together twelve participants for a day-long discussion: two former refugee claimants; three refugee lawyers; two members of refugee serving agencies; and five academics with related areas of study. The aim of this discussion was to understand whether the virtual hearing format increases the risk that a refugee claimant will be misunderstood or wrongly disbelieved, or the risk that they will have an acutely stressful experience – and if this format increases either of these risks, to understand under what circumstances, how and why.

Using a talking circle methodology, the VHC participants shared their observations about how the virtual format affects claimants’ testimony, counsel and interpreters’ work, and decision-makers’ judgments. They identified increased risks that relate broadly to six areas of concern. Claimants may be at greater risk of being misunderstood or wrongly disbelieved, or of suffering acute stress, because the virtual interface:

- **obscures or minimizes the parties’ non-verbal presentation:** the virtual interface impairs the parties’ ability to interact fluidly and limits how the other parties perceive and understand the claimant
- **overemphasizes and may distort aspects of the claimant’s appearance:** the virtual interface may lead decision-makers to monitor aspects of the claimant’s appearance for signs of deception and may cause them to misread the claimant’s expressions; claimants with darker skin may be seen less clearly
- **increases detachment and decreases the opportunity for trust-building:** the virtual interface feels ‘unreal,’ more mechanical and more disconnected; decision-makers may feel less empathy or may be less able to demonstrate it effectively; the parties share fewer ‘humanizing’ moments
- **limits counsel’s field knowledge and relationship-building**
- **increases distraction and impairs the parties’ ability to focus,** owing to technological glitches and failures, notifications and other distractions
- **increases the parties’ cognitive load,** because claimants may be anxious and hypervigilant in the virtual setting, may be testifying from a distracting location, or may be concerned about the security of their information.

Building on this project’s findings, researchers working at the intersection of law and technology may develop ways to reduce these risks.

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<sup>1</sup> Immigration and Refugee Board of Canada, “Remote-only hearings to continue until further notice” (2021), online (News Release): <<https://irb-cisr.gc.ca/en/news/2021/Pages/remote-only-hearings-continue-until-further-notice.aspx>>.

# 1. Introduction

In almost all cases, a person who makes a refugee claim in Canada will be called to a hearing before the Immigration and Refugee Board. The claimant tells their story, and a decision-maker at the Board decides whether they qualify for refugee protection. Decision-makers can deny a claim for many reasons relating to the restrictive requirements in the legal refugee definition. Yet most of the time, when decision-makers deny claims, they have concluded that they do not believe the claimant's testimony.<sup>2</sup>

Most refugee hearings in Canada are now held virtually and will be “for the foreseeable future.”<sup>3</sup> Academics have noted that virtual hearings in legal contexts have both advantages and disadvantages compared with traditional in-person hearings.<sup>4</sup> Reflecting on their experiences with virtual refugee hearings, lawyers and former claimants have likewise identified both benefits and drawbacks.<sup>5</sup>

**The Virtual Hearings Circle project did not seek a balanced perspective on the merits of holding refugee hearings virtually.** It did not seek to weigh the pros and cons. Instead, the research team was guided by an imperative to reduce two kinds of harm that a claimant may suffer in the refugee status determination process:

- being misunderstood or wrongly disbelieved
- having an acutely stressful experience.

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<sup>2</sup> Hilary Evans Cameron, “Risk and the Reasonable Refugee: Exploring a Key Credibility Inference in Canadian Refugee Status Rejections” (2023) 35:1 *International Journal of Refugee Law* 10.

<sup>3</sup> Immigration and Refugee Board of Canada, “Remote-only hearings to continue until further notice” (2021), online (News Release): <<https://irb-cisr.gc.ca/en/news/2021/Pages/remote-only-hearings-continue-until-further-notice.aspx>>.

<sup>4</sup> See Vincent Denault, Chloé Leclerc & Victoria Talwar, “The Influence of Extra-legal Factors and Nonverbal Communication in Virtual Trials” (2025) *International Criminology* 1; Elena Bild et al, “Sound and Credibility in the Virtual Court: Low Audio Quality Leads to less Favorable Evaluations of Witnesses and Lower Weighting of Evidence” (2021) 45:5 *Law & Hum Behav* 481; Carolyn McKay & Kristin Macintosh, “Digital Vulnerability: People-in-prison, Videoconferencing and the Digital Criminal Justice System” (2024) 57:3 *Journal of Criminology* 313 at 318-319; Claire Houston, Rachel Birnbaum & Nicholas Bala, “Exploring the Costs and Benefits of Virtual Family Law in Ontario: Perspectives of Professionals” (2024) 102:3 *The Canadian Bar Review* 569 at 572; Alex Lo, “Virtual Hearings and Alternative Arbitral Procedures in the COVID-19 Era: Efficiency, Due Process, and Other Considerations” (2020) 13:1 *Contemp Asia Arb J* 85; Christian Licoppe & Clair-Antoine Veyrier, “The Interpreter as a Sequential Coordinator in Courtroom Interaction: ‘Chunking’ and the Management of Turn Shifts in Extended Answers in Consecutively Interpreted Asylum Hearings with Remote Participants” (2020) 22:1 *Interpreting: International Journal of Research and Practice in Interpreting* 56; Tatiana Grieshofer, “Remote Interpreting in Immigration Tribunals” (2023) 36:2 *International Journal for the Semiotics of Law* 767.

<sup>5</sup> Canadian Council for Refugees, “RPD Virtual Hearing Monitoring Project: Report” (2021), online (report): <<https://ccrweb.ca/en/rpd-virtual-hearing-monitoring-project-report>> [Canadian Council for Refugees]; Hilary Evans Cameron et al., “‘Off-the-record’ Deception Inferences in Canadian Refugee Status Decision-making: A View from the Bar” (in progress).

This project sought to understand whether holding refugee hearings virtually may increase the risk that claimants will suffer either of these harms – and if so, under what circumstances, how and why. Building on this project’s findings, researchers working at the intersection of law and technology may develop ways to minimize these harms.

## 2. Acknowledgements

This Report was authored by the Virtual Hearings Circle project research team: Hilary Evans Cameron, Mercedes Ransome, Tyler Sparrow-Mungal, Charanija Srirajasingam, Thanu Jude Xavier, and Annie Yu.

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This project received approval from Toronto Metropolitan University’s Research Ethics Board (REB2024-462).

## 3. Methodology

Previous studies exploring the effects of the virtual format in refugee hearings have interviewed participants individually. As a next step, this project sought to bring different perspectives together. The participants in the Virtual Hearings Circle event were: two former refugee claimants, one of whom also works to support other claimants through the hearing process; three refugee lawyers; two members of service agencies who work to support claimants through the hearing process, one of whom is a psychologist; and five academics specializing in: refugee claimant psychology; deception and lie detection in courtroom settings; language interpretation in courtroom settings; law and emerging technologies; and refugee law.

The research team used a 'talking circle' methodology. This approach was inspired by the settler researchers’ understanding-in-progress of Anishinaabe research and governance principles. These methodologies centre respect, reciprocity and relationality and are particularly effective at helping people to identify and explore together areas of common understanding and disagreement.<sup>6</sup>

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<sup>6</sup> See Lynn F Lavallée, "Practical Application of an Indigenous Research Framework and Two Qualitative Indigenous Research Methods: Sharing Circles and Anishnaabe Symbol-Based Reflection" (2009) 8:1 International Journal of Qualitative Methods 21; Sarah C Hunt & Nancy L Young, "Blending Indigenous

The day of the Virtual Hearings Circle began with a shared breakfast, and over the course of the day, the participants paused several times to eat and drink together. When the work began, the participants sat in a circle and introduced themselves. The convenor, Prof. Evans Cameron, explained the project's aims and focus. She explained that the group would be considering the following four questions, as well as any others that the participants might identify:

- How does the virtual format affect how **claimants** testify?
- How does the virtual format affect how **interpreters** do their job – and what may be the consequences for claimants?
- How does the virtual format affect how **lawyers** do their job – and what may be the consequences for claimants?
- How does the virtual format affect how **decision-makers** decide cases – and, in particular, how they decide whether they believe or disbelieve a claimant's testimony?

The convenor explained that the discussion would proceed around the circle. When the discussion had completed a full round, she would either introduce the next question or remain with the discussion's current focus. Although the discussion would begin with the first question, the team anticipated that progress through the questions would not be linear. To encourage the insights that these intersections generate, when the convenor or another participant introduced a new question or theme, this new question or theme would add to, rather than end, the previous conversation. Participants could return to a previous question or theme even if the thrust of the conversation had since taken a different focus. Participants were encouraged to take their time and to reflect as broadly as they liked on any aspects that they felt were relevant, including elements that touched on other themes.

When the discussion began, participants waited until it was their turn in the circle to speak and, on each pass around the circle, said as little or as much as they chose. The discussion was not rushed. It was patient and deliberate, and each participant was given the space and time to contribute their observations.

The Virtual Hearings Circle (VHC) methodology was not directed toward seeking a consensus. The research team expected – and indeed hoped – that from their different vantage points, the participants would approach the research questions from different angles. As a result, we understood that no participant would be able to speak to or affirm each of the other participants' observations. Had any participant expressed

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Sharing Circle and Western Focus Group Methodologies for the Study of Indigenous Children's Health: A Systematic Review" (2021) 20:1 International Journal of Qualitative Methods 1; Amanda R Tachine, Eliza Yellow Bird & Nolan L Cabrera, "Sharing Circles: An Indigenous Methodological Approach for Researching With Groups of Indigenous Peoples" (2016) 9:3 International Review of Qualitative Research 277; Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts*, (Toronto: University of Toronto Press, 2009).

caution or concern about any of the propositions below, however, or suggested that it did not accord with their own experiences, we would have reported this and explained the nature of the concern. The participants expressed no concern about any of the propositions below, either during the circle or in providing their feedback on this report.<sup>7</sup>

From the outset, this project aimed to produce a report rather than an academic article. Unlike a traditional study, this report does not set out to define its contribution to an existing body of literature. Instead, it is a launching pad for the next stage of this project, where researchers at the intersection of law and technology will innovate ways to reduce the risks that the VHC participants have identified. To facilitate their work, rather than reporting the project's outcomes as a discrete set of findings and locating these within a review of an ongoing academic discussion, this report aims to orient its readers as effectively and efficiently as possible to the 'big picture' takeaways. To this end, while the report indicates when contributions have come from the VHC participants and when they have come from other sources, it integrates these comments and sources throughout and discusses them together.

Of note, in legal language, only the litigants in a proceeding are considered 'parties'; others who take part (counsel, the interpreter, and the decision-maker) are typically called 'participants.' This paper will refer to all participants in a refugee hearing as 'parties,' however, to avoid confusion, as it will refer to those who took part in the VHC discussion and other research studies as 'participants.'

## 4. Observations

VHC participants identified increased risks of harm to claimants in virtual hearings that relate broadly to six areas of concern. Claimants may be at greater risk of being misunderstood or wrongly disbelieved, or of suffering acute stress, because the virtual interface:

- obscures or minimizes the parties' non-verbal presentation
- overemphasizes and may distort aspects of the claimant's appearance
- increases detachment and decreases the opportunity for trust-building
- limits counsel's field knowledge and relationship-building
- increases distraction and impairs the parties' ability to focus
- increases the parties' cognitive load.

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<sup>7</sup> The VHC participants were invited to provide feedback on the preliminary and final drafts of this report. Two participants chose not to provide feedback.

## 4.1. The virtual interface obscures or minimizes non-verbal presentation

Judging a person's truthfulness from their "appearance, presentation and demeanour" is unreliable at the best of times, and notoriously unreliable when it comes to judging a stranger in real time.<sup>8</sup> Many legal and academic sources have therefore cautioned refugee status decision-makers to focus their attention on the content of the claimant's narrative, and to consider demeanour cautiously, if at all.<sup>9</sup>

A person's non-verbal presentation can, however, convey other crucial information: it can indicate, for example, whether they are tired, distressed, paying attention, disassociating, and it can help to clarify the meaning of their words.<sup>10</sup> VHC participants felt that virtual hearings carry the risk of obscuring or minimizing the aspects of non-verbal expression that carry this kind of information. Participants in two other interview studies likewise identified as concerning this limited ability in virtual refugee hearings to read "body language" and "non-verbal cues."<sup>11</sup>

VHC participants felt that this may increase the target risks because the virtual interface:

- impairs the parties' ability to interact fluidly with one another
- limits how the other parties perceive and understand the claimant.

### 4.1.1. The virtual interface impairs the parties' ability to interact fluidly with one another

VHC participants observed that the virtual setting does not allow the parties to make eye contact in the way that they would in person. One service agency participant explained that, indeed, knowing where to look was often a source of stress for the claimants she supports.

"Look the Board member in the eye at all times" is the advice usually given [to claimants]. But how does that translate to a virtual hearing...Where do we look? At the camera or at the boxes?

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<sup>8</sup> See discussion in 4.2.1., below.

<sup>9</sup> See discussion in Hilary Evans Cameron, Sean Rehaag & Katrina Friesen, "The Effect of an 'Appearance, Presentation and Demeanour' Instruction on Credibility and Deception Judgments in Mock Refugee Status Decisions" (2025) 37 *Journal of Law and Social Policy* 93 at 95.

<sup>10</sup> Judith A Hall, Terrence G Horgan & Nora A Murphy, "Nonverbal communication" (2019) 70 *Annual Review of Psychology* 271; Pierrich Plusquellec & Vincent Denault, "The 1000 most cited papers on visible nonverbal behavior: A bibliometric analysis" (2018) 42:3 *Journal of Nonverbal Behavior* 347; Roni Factor et al., "Videoconferencing in Legal Hearings and Procedural Justice" (2023) 18:8 *Victims & Offenders* 1557 at 1559.

<sup>11</sup> Canadian Council for Refugees, above note 5 at 16; Evans Cameron et al., above note 5.

Participants noted that when communicating face to face, speakers typically look at one another. When it is not clear where the other people on the screen are looking, the parties may be confused as to who is speaking and who is being addressed. As a result, they are more likely to speak over one another.

Researchers have highlighted this ‘sightlines’ problem on virtual platforms and explained how it affects ‘interactional competence’:

...the array of frames on Zoom and even the term “gallery” itself suggest a kind of diminishment of the individual participants by representing them as mere tiles in a larger grid, shorn of real spatial context. In the virtual courtroom, a judge cannot turn to and face the defendant, and when the judge speaks to the defendant, she appears to address everyone in the interface at the same time. These unfamiliar and counterintuitive sightlines interfere with participants’ ability to exercise interactional competence: the ability to recognize and adapt to subtle cues in body language and facial expression.<sup>12</sup>

Interfering with the parties’ ‘interactional competence’ may lead to misunderstandings and communication gaps. It also inevitably leads to interruptions, making the communication process less fluid. One lawyer participant in another interview study underlined the importance of ‘fluidity’ in the refugee hearing context, where claimants may be judged to be lying if the decision-maker concludes that their testimony is “hesitant”:<sup>13</sup>

...the more fluid the interaction is, the less likely they are to read into it in terms of whether the person is holding information back, second guessing something, or not entirely being forthright about the information they're providing.<sup>14</sup>

As researchers have noted, given the inability to make natural eye contact, people testifying virtually “may struggle to understand...when they are being given an opportunity to speak – something that is particularly challenging for members of vulnerable groups.”<sup>15</sup> VHC participants stressed in particular the concern that other parties will miss the non-verbal cues that indicate that the claimant would like to speak, such as the shifts in a claimant’s posture or facial expressions. This, especially if combined with a decision-maker’s impatience to press on with questions, may deprive claimants of the opportunity to answer questions fully and fluidly.

In a similar vein, the subjects in a previous study had noted their concern that language interpretation, in particular, was hampered in the virtual setting by “people speaking

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<sup>12</sup> Susan A Bandes & Neal Feigenson, "Empathy and Remote Legal Proceedings" (2021) 51 Southwestern Law Rev 20 at 31

<sup>13</sup> Hilary Evans Cameron, Jane Herlihy & Michaela Hynie “Investigating Deception Findings in Canadian Refugee Status Rejections: Legal Inferences and Psychological Assumptions” (2025) Psychiatry, Psychology and Law 1.

<sup>14</sup> Evans Cameron et al., above note 5 (Participant P015).

<sup>15</sup> Factor et al., above note 10 at 1561.

over each other.”<sup>16</sup> A VHC academic participant who researches in this area noted the “crucial role” that interpreters play in “identifying...who is speaking to whom and who is trying to talk” and managing the flow of the communication. This participant observed that this coordinating function can be much harder to fulfill across a screen, since through “body language and non-verbal communication, we clarify who is speaking and listening.”<sup>17</sup> One lawyer participant mentioned that, to try to work around this problem, some interpreters would use hand gestures (“stop”) to signal to claimants to stop talking,<sup>18</sup> and that claimants found a large hand suddenly appearing on the screen to be jarring.

Studies suggest that, compared to in-person interpretation, online interpretation is characterized by additional challenges that increase the risk for miscommunication, for example by making it harder for the interpreter to check their own or other participants’ understanding.<sup>19</sup> In another study of virtual refugee hearings, “about a quarter of respondents reported difficulties for the claimant and interpreter to understand each other, while a third identified possible issues of misinterpretation.”<sup>20</sup> VHC participants identified a lack of eye contact as one potential reason for this reduced accuracy: being unable to make direct eye contact with the other parties makes it difficult for interpreters to find a rhythm, interject naturally or know when to adjust their pace. VHC participants felt that these problems are compounded when interpreters or claimants use a phone or a device with a smaller screen.

One lawyer participant observed that the rhythm of spoken communication that the parties adopt in a virtual hearing to compensate for the lack of eye contact also makes it harder for counsel to do their job effectively. They explained that, in an in-person setting, they found it easier to intervene to ask a question to the decision-maker or to clarify a point for the claimant. The inherent “your-turn-then-my-turn” rhythm of the communications in the virtual setting make it difficult to interject naturally. The lawyer reported that decision-makers are stricter in allowing clarifying questions virtually compared to in-person and they observed that this was perhaps because such questions break this expected rhythm.

VHC participants reported that the lack of visual cues to guide the rhythm of spoken communication in the virtual setting was a source of stress for claimants. To the extent

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<sup>16</sup> Canadian Council for Refugees, above note 5 at 16.

<sup>17</sup> See Christian Licoppe & Clair-Antoine Veyrier, “The interpreter as a Sequential Coordinator in Courtroom Interaction: ‘Chunking’ and the Management of Turn Shifts in Extended Answers in Consecutively Interpreted Asylum Hearings with Remote Participants,” (2020) 22:1 *Interpreting* 56.

<sup>18</sup> On the MS Teams platform, participants can choose to display the image of a hand, a symbol that is typically used to signal that a participant is raising their hand.

<sup>19</sup> Sabine Braun, “Keep Your Distance? Remote Interpreting in Legal Proceedings: A Critical Assessment of a Growing Practice” (2013) 15:2 *Interpreting: International Journal of Research and Practice in Interpreting* 200; Yvonne Fowler, “Court Interpreting in England: What Works? (And for Whom)? How Interpreted Prison Video Link Impacts Upon Courtroom Interaction” (2016) 3:2 *Language and Law* 135; Tatiana Grieshofer, above note 4.

“Remote Interpreting in Immigration Tribunals” (2023) 36:2 *International Journal for the Semiotics of Law* 767.

<sup>20</sup> Canadian Council for Refugees, above note 5 at 16.

that the resulting loss of ‘interactional competence’ also leads to misunderstandings, to gaps in communication, to a loss of fluidity, or to less accurate interpretation or less effective representation, it then also increases the risk that a claimant will be wrongly disbelieved.

#### **4.1.2. The virtual interface limits how the other parties perceive and understand the claimant**

Some aspects of a person’s non-verbal presentation will come across in the virtual format. In a previous study where law students acted as decision-makers in a mock hearing, the students who watched a video of the claimant testifying noted many aspects of a claimant’s non-verbal presentation in their decisions. They noted, for example, that the claimant was “fidgeting” “shrugging” “rocking back and forth” and that he “put his hand behind his neck.”<sup>21</sup> VHC participants were concerned, however, that other aspects of the claimant’s non-verbal presentation are often not visible, as the camera typically only captures a person’s head and shoulders.

For a start, participants felt that the content of the claimant’s testimony may be more intelligible when the decision-maker, interpreter and counsel can register the nuances that their non-verbal presentation adds to their meaning: “studies have pointed out that a lack of non-verbal communication cues and simulated eye contact...could make it easier to misinterpret the intention and implications of the speaker.”<sup>22</sup> Beyond this, participants felt that when the decision-maker cannot see “the whole person,” they may simply find the claimant’s account less convincing. As a refugee lawyer participant in a previous interview study had said, “I ask myself often when credibility is a live issue: I wonder, if this hearing occurred in person, if the member would find this person as compelling and as credible as I do?”<sup>23</sup>

Researchers have highlighted the potential for virtual hearings to be more inclusive of participants with disabilities.<sup>24</sup> Yet researchers have also flagged the potential for flawed findings “due to the effect of image compression on observers’ perceptions of those with

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<sup>21</sup> Evans Cameron, Rehaag & Friesen, above note 9. These observations, while not all cited in the article, were included among the participants’ written reasons for their decisions, which can be found on the Toronto Metropolitan University’s data repository:

<<https://borealisdata.ca/dataset.xhtml?persistentId=doi%3A10.5683/SP3/BI5IWJ>>.

<sup>22</sup> Yi Ran, “Human Interpreters in Virtual Courts: A Review of Technology-Enable Remote Settings in Australia (2023)” 1:3 *Journal of Digital Technologies & Law* 712 at 719.

<sup>23</sup> Evans Cameron et al., above note 5 (Participant P096). See related discussion in Taylor Benninger et al., “Virtual Justice? A National Study Analyzing the Transition to Remote Criminal Court,” (2021) Stanford Criminal Justice Center, online (report): <<https://law.stanford.edu/publications/virtual-justice-a-national-study-analyzing-the-transition-to-remote-criminal-court/>> at 96-97.

<sup>24</sup> For example, “the reduced visibility on Zoom may permit subjects to minimize the impact of their own distracting behaviors, such as uncontrolled bodily movements due to disabilities such as Parkinson’s disease and other neuromuscular conditions.” Bandes & Feigenson, above note 12 at 29, referencing Adam M. Samaha, “Opening and Reopening: Dealing with Disability in the Post-pandemic World” (2021) online (essay): <<https://slate.com/technology/2021/07/pandemic-disability-reopening-essay.html>>. See Carla Regina Nunes Dos Santos Reis & Oneide Perius, “Inclusive Virtual Conciliation Hearings: The Role Of The Judiciary In Ensuring Accessibility” (2024) 26:1 *IOSR Journal of Business and Management* 46.

physical and cognitive disabilities,”<sup>25</sup> a concern raised by a refugee lawyer participant in a previous study. This lawyer suggested that their client’s physical disability, which was a basis for the client’s claim, would have been much more apparent to the decision-maker if they had met in person.<sup>26</sup> An immigration judge in another study similarly explained that they were “unable to identify a respondent’s cognitive disability over [video teleconference, although] the disability was clearly evident when the respondent [later] appeared in person.”<sup>27</sup>

VHC participants did note, however, the related and potentially overlapping concern that the other parties may miss the claimant’s non-verbal expressions of strong emotion. One participant, a lawyer, described an instance where their client was scratching at her arm during the hearing due to stress, but because her actions were outside of the camera’s frame, the decision-maker could not observe this. This participant also recounted a case where a claimant urinated out of fear, and another instance where a claimant stood up, moved away from the computer, and collapsed off-screen. In both latter cases, the participant had had to explain verbally for the record what had occurred as it was not visible to the decision-maker.

Researchers have suggested that in a virtual courtroom setting, “judges may have trouble reading the situation and understanding when defendants or witnesses are struggling or need a break,”<sup>28</sup> and that counsel, likewise, may miss “nonverbal cues (eye contact, gestures, or posture) that might normally allow the detainee to capture the attorney’s attention.”<sup>29</sup> Of note, most lawyer participants in a recent interview study “felt that they were able to consult with their clients during their hearings, but 36% felt that they were unable or only partially able to do so.”<sup>30</sup>

VHC participants likewise noted that the decision-maker and the claimant’s counsel may miss signs that the claimant is fatigued, stressed or starting to disconnect – a particular concern when a hearing drags on for hours, in a virtual setting that itself may increase exhaustion.<sup>31</sup> One service agency participant felt that decision-makers and counsel in the virtual setting may overlook cues that would call their attention to significant aspects

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<sup>25</sup> Bandes & Feigenson, *supra* note 12 at 30-31.

<sup>26</sup> Evans Cameron et al., *above* note 5 (Participant P071). The lawyer in fact explained that they had suggested that their client “get up for a glass of water at some point during the proceedings” so that the decision-maker could observe his mobility difficulties, which were central to his claim and which would otherwise not have been evident in the virtual setting.

<sup>27</sup> Bandes & Feigenson, *supra* note 12 at 30-31.

<sup>28</sup> Factor et al., *above* note 10 at 1560, referencing Jo Hynes, Nick Gill & Joe Tomlinson “In Defence of the Hearing? Emerging Geographies of Publicness, Materiality, Access and Communication in Court Hearings,” (2020) 14:9 *Geography Compass*.

<sup>29</sup> Factor et al., *above* note 10, referencing Anne Poulin, “Criminal Justice and Videoconferencing Technology: The Remote Defendant” (2004) 78 *Tulane Law Review*.

<sup>30</sup> Canadian Council for Refugees, *above* note 5 at 17.

<sup>31</sup> “For various reasons, it takes more effort to sustain presence of mind in a videoconference than in a physical meeting, including the strain of sitting relatively immobile in front of a camera for extended periods, the need to make subconscious microadjustments for the lags in video transmission, the sense of being gazed at constantly by many others, and the constant awareness of one’s own image in the video array.” Bandes & Feigenson, *above* note 12 at 33.

of the claimant's emotional state, and gave as examples "substance use and homelessness":

If you have someone in the room keeping an eye out for these things, they can track and keep an eye on claimants more effectively. A claimant may have spent the night on the street or using drugs before their hearing, but we would never know unless we are in the room.

VHC participants felt strongly that the fact that the decision-maker and the claimant's counsel may not recognize these kinds of non-verbal presentations increases both target risks. If the decision-maker and counsel are not aware of the claimant's distress, the decision-maker may not respond sensitively or in a trauma-informed way, and counsel may not advocate for their client effectively. Psychologist participants cautioned that proceeding with questioning – or allowing questioning to proceed – when a claimant is experiencing acute stress increases the risk that the claimant will disassociate or be retraumatized. If the claimant's testimony is consequently incoherent, it also increases the risk that the decision-maker will misunderstand or wrongly disbelieve them.

In addition, a body of research suggests that one common reason why decision-makers do not believe testimony is if it is "emotionally incongruent": if the speaker either expresses an unexpected emotion or fails to express an expected emotion.<sup>32</sup> In the mock hearing study discussed above, many students concluded that the claimant's lack of emotion suggested that he was lying, e.g.:

The first thing that stood out to me that made me question whether or not the claimant was telling the truth was the lack of emotion when discussing the events. What the claimant is alleging happened is a traumatic event - it's something that often strikes fear, anxiety, pain, and sadness - however, when the claimant was recounting the events, he lacked all of these emotions...The claimant was discussing the event as if he were talking about an everyday occurrence which lends evidence to the fact that these events may not have actually happened to the claimant.<sup>33</sup>

Refugee lawyers report seeing this factor operate in real-life hearings. In a recent interview study, nearly two-thirds of the lawyers reported that "emotional affect" was a factor that potentially led decision-makers to conclude that a claimant was lying. As one noted, affect "definitely impacts the credibility assessment at the hearing" because decision-makers expect to see "genuine human emotion about something painful or expressions of fear at the hearing."<sup>34</sup> If decision-makers are not able to see the

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<sup>32</sup> Hannah Rogers, Simone Fox & Jane Herlihy, "The Importance of Looking Credible: The Impact of the Behavioural Sequelae of Post-traumatic Stress Disorder on the Credibility of Asylum-seekers" (2015) 21:2 *Psychology, Crime & Law* 139. Of note, in interpreter-mediated hearings, the interpreter's demeanour may likewise contribute to a perception of emotional incongruence. See Katrijn Maryns, "Disclosure and (Re)performance of Gender-based Evidence in an Interpreter-mediated Asylum Interview" (2013) 17:5 *Journal of Sociolinguistics* 661.

<sup>33</sup> Evans Cameron et al., above note 5 (Participant P035).

<sup>34</sup> Ibid. (Participant P015).

claimant's signs of distress, they may conclude that the claimant is not experiencing any emotional pain, increasing the risk that they will wrongly disbelieve them.

Lastly, one VHC psychologist participant observed that obscuring or minimizing the claimant's non-verbal expression in the virtual setting "pushes the whole process to be even more verbal." Indeed, interviewers in an earlier study reported that, when they conducted their interviews by videoconference, "they could focus more on the verbal content of the exchanges, as opposed to the totality of the conveyed communication, both verbal and non-verbal."<sup>35</sup>

While the sources noted above have cautioned against relying on demeanour, they have likewise cautioned against an overzealous and microscopic focus on textual minutia – on expecting too much consistency and completeness from the claimant's narrative.<sup>36</sup> VHC participants raised the concern that the singular emphasis on verbal communication in virtual hearings may raise the bar for how much detail a claimant is expected to provide and how consistent their statements will need to be. When decision-makers cannot use non-verbal cues to help them understand the claimant's meaning, the claimant must express everything in words, clearly and in detail. This poses a risk for all claimants, and especially for those whose memories are fragmented by trauma, or who, for cultural or cognitive reasons, may recount their experiences in a less linear way.

## **4.2. The virtual interface overemphasizes and may distort aspects of the claimant's appearance**

In addition to limiting their read a claimant's non-verbal presentation, the virtual setting may cause decision-makers to rely to heavily on what they do see of the claimant's appearance in ways that increase the target risks:

- The virtual interface may lead decision-makers to monitor aspects of the claimant's appearance for signs of deception
- The virtual interface overemphasizes and may distort aspects of the claimant's appearance

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<sup>35</sup> Mark Federman, "On the Media Effects of Immigration and Refugee Board Hearings via Videoconference" (2006) 19:4 *Journal of Refugee Studies* 433 at 440; Derek S Chapman & Patricia M Rowe, "The Impact of Videoconference Technology, Interview Structure, and Interviewer Gender on Interviewer Evaluations in the Employment Interview: A Field Experiment" (2001) 74:3 *Journal of Occupational and Organizational Psychology* 279 at 290.

<sup>36</sup> See Anthea Vogl, *Judging refugees: Narrative and Oral Testimony in Refugee Status Determination* (2024: Cambridge University Press); Jane Herlihy, Laura Jobson & Stuart Turner, "Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum" (2012) 26:5 *Applied Cognitive Psychology* 661.

### 4.2.1. The virtual interface may lead decision-makers to monitor aspects of the claimant's appearance for signs of deception

A person's appearance, presentation and demeanour are notoriously unreliable credibility indicators. As one VHC academic participant who researches in this area noted, when it comes to reading faces for clues to deception, "there is no Pinocchio's nose."<sup>37</sup> Yet as the same participant explained, the tendency to believe that we can tell that a person is lying by reading their face is commonplace. Laypeople regularly look to these factors in judging a person's credibility.<sup>38</sup>

Since the camera allows the decision-maker to see the claimant's face in detail, VHC participants felt that decision-makers will more closely monitor a claimant's face for deception cues. Participants in another study made the same observation: in a virtual hearing, the decision-makers may read the claimant's expressions with "almost like hyper vigilance" because they can see "every single thing that crosses their face";<sup>39</sup> "I think everything in an online virtual hearing is magnified because you just have the face of the person there... So any frown, anything, I think, is exaggerated."<sup>40</sup>

VHC participants expressed concern that their close read of the claimant's face will lead decision-makers to misidentify the claimant as lying if the claimant is nervous or is finding the process of testifying mentally taxing. A body of research suggests that when laypeople try to identify deception, they tend to look for presentations that line up with two prominent theories: that a liar will feel and appear more nervous or more ashamed; and that a liar will have to work harder to tell their story, that they will carry a heavier 'cognitive load.'<sup>41</sup> While "these kinds of presentations are at best only very weakly correlated with deception, and are in any case useless tools for detecting lies in strangers in real time,"<sup>42</sup> laypeople are often swayed by them<sup>43</sup> – and as a result, a person who is telling the truth is more likely to be misread as lying the more they show signs that they are nervous or finding the process mentally challenging.

VHC participants recognized that some – and indeed possibly many – claimants may find virtual hearings less stressful.<sup>44</sup> They nonetheless identified many reasons why, for other claimants, the virtual format may increase both stress and cognitive load, as

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<sup>37</sup> See Denault et al., above note 8; Evans Cameron, Rehaag & Friesen, above note 9.

<sup>38</sup> See sources cited in above note 41.

<sup>39</sup> Evans Cameron et al., above note 5 (Participant P071).

<sup>40</sup> Evans Cameron et al., above note 5 (Participant P071).

<sup>41</sup> Hilary Evans Cameron, "Principled Asymmetry: Bringing Psychology Research Evidence to Refugee Status Decision-making" (forthcoming). See Glynis Bogaard et al., "Strong, but Wrong: Lay People's and Police Officers' Beliefs about Verbal and Nonverbal Cues to Deception" (2016) 11:6 PLOS One 1; Amy-May Leach et al., "Looks Like a Liar? Beliefs About Native and Non-native Speakers' Deception" (2020) 34:2 Applied Cognitive Psychology 387; Erik Mac Giolla & Timothy J Luke, "Does the Cognitive Approach to Lie Detection Improve the Accuracy of Human Observers?" (2021) 35:2 Applied Cognitive Psychology 385; Aldert Vrij & Ronald P Fisher, "Unraveling the Misconception About Deception and Nervous Behavior" (2020) 11 Frontiers in Psychology 1.

<sup>42</sup> Evans Cameron, above note 41.

<sup>43</sup> See sources in above note 41.

<sup>44</sup> See discussion in this report's Conclusion.

discussed further below. If so, for the latter, the close-up focus on faces in the virtual setting only heightens the risk that they will be wrongly disbelieved.

Indeed, in a study of student decision-makers judging a claimant's credibility in a mock refugee hearing, the subjects noted many observations about the claimant's face that they identified as having contributed to their finding that he was lying. These included the fact that the claimant had "tense" facial expressions; that, conversely, he appeared too "relaxed"; that he was not making "eye contact" by looking directly into the camera ("gaze aversion"). Perhaps inspired by popular pseudoscientific theories, several subjects also inferred that the claimant was lying because of where he appeared to be looking instead: "the claimant would 'look down and away,' he 'looks up and left,' he 'was always looking [sic] the top right, which in some research indicates he [is] being deceitful.'" <sup>45</sup>

VHC participants raised the concern that, even if decision-makers recognize the dangers of looking for unreliable cues to deception in the claimant's facial expressions, they may not be able to avoid doing it. In the study above, subjects who were instructed not to rely on the claimant's appearance were statistically just as likely to disbelieve him as those who did not receive the instruction (although they were much less likely to cite his appearance as a reason for their decision).<sup>46</sup>

#### **4.2.2. The virtual interface overemphasizes and may distort aspects of the claimant's appearance**

In addition to drawing the wrong conclusions from their read of the claimant's expressions, if the decision-maker cannot see the claimant clearly because the technology is inadequate, they may misperceive these expressions: they may believe that they are seeing expressions that are not present. A VHC academic participant who researches in this area explained that this risk will be heightened for claimants with darker skin. Many video-conferencing platforms automatically adjust the colour balance to accommodate lighter skin tones, which can make it more difficult to see individuals with darker skin. As the participant noted, social psychologists have also warned that darker-skinned participants who are using technology that does not accurately represent a range of skin tones may appear darker than they are and that this is more likely to trigger implicit racial biases.<sup>47</sup>

Another VHC participant who provided support to claimants in their hearings similarly explained how the small on-screen images and tight close-ups can lead decision-makers to misperceive and misgender claimants. This participant had seen a decision-

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<sup>45</sup> Evans Cameron, Rehaag & Friesen, above note 9 at 115.

<sup>46</sup> Ibid.

<sup>47</sup> Elayne E Greenberg, "Blinding Justice and Video Conferencing?" (2022) 52:2 Stetson L Rev 275 at 293. On a related note, researchers have suggested that "cultural gaps between the detainee and judge may be magnified" in the virtual setting, which may "lead the judge to rely, unconsciously, on stereotypes." Factor, above note 10 at 1562.

maker continually misgender a transgender claimant, despite the claimant repeatedly correcting them. The participant noted that this would have been less likely to have occurred in an in-person hearing. In person, when the decision-maker is not solely focused on the claimant's facial features, they may more easily register other ways that the claimant embodies and expresses their identity (e.g. clothing, posture, non-verbal presentation). A VHC former claimant participant, whose claim was based on their sexual orientation, felt that the decision-maker scrutinized them more closely because they could not see them fully and so could not appreciate these other kinds of identity expression. Since they could only see the claimant in a limited way, "the judge took more time to determine that I was indeed the person I was claiming to be."

### **4.3. The virtual interface increases detachment and decreases the opportunity for trust-building**

VHC participants noted that hearings in the virtual context feel detached, impersonal, alienating, even dehumanizing. There is a palpable lack of human connection. Decision-makers are less able to express empathy; claimants are less able to perceive empathy; and in interpreter-mediated hearings, the parties' ability to verify mutual understanding is made even more challenging. It is much harder for the parties to build the kind of trust that would help them to communicate fluidly and that would decrease the stressfulness of the claimant's experience.

One former claimant participant explained that, although her claim was granted, she came away disappointed by the lack of connection that she felt during her hearing. After waiting over a decade to tell her story to someone who would listen, the virtual format made the process feel detached, impersonal, and transactional. Her claim was recognized, but she did not feel that recognition: she did not feel heard.

VHC participants noted several reasons why claimants may not feel heard in virtual hearings:

- The virtual interface creates a sense of 'unreality'
- Procedures become more mechanical
- Decision-makers may feel less empathy
- Decision-makers may be less able to demonstrate empathy effectively
- The parties share fewer 'humanizing' moments
- The claimant may feel disconnected from the interpreter and from their counsel.

#### **4.3.1. The virtual interface creates a sense of 'unreality'**

For a start, the participants felt that our human ability to connect when we meet face-to-face simply cannot be replicated in the virtual setting. Indeed, researchers suggest that,

beyond eye contact and non-verbal presentation, simple physical presence – the “‘bio-physical rush’ generated by the presence of other people” – enables “trust-building.”<sup>48</sup>

VHC participants noted that, in contrast, the screen interface itself creates a sense of disconnection and, indeed, of ‘unreality.’ An academic participant with expertise in this area noted that non-verbal communication is part of what makes interactions feel “real.” Another lawyer participant explained that seeing a “floating head” on the screen makes the experience “feel like watching TV.” She wondered if claimants might come across to decision-makers more like actors than like real people. In a similar vein, a former claimant VHC participant explained that during her hearing she had been “more focused on speaking to the computer screen than to the person behind the screen.”

Multiple participants in other studies exploring the effect of virtual hearings in legal contexts likewise note the ‘unrealness’ of the virtual format and, in particular, the feeling that “it’s like sitting at home watching your TV”:

A Miami defense attorney spoke in almost identical terms when describing a particular client’s case: “[E]verything was done via video. It’s almost like, it almost feels like it’s not real life. It’s like everything is happening on TV.” A North Dakota defense attorney similarly described a “separation,” like “the difference between watching a concert” or “watching a sporting [event], even, in-person versus on TV.”<sup>49</sup>

The idea that the screen itself gets in the way was likewise emphasized by a refugee lawyer participant in a recent interview study:

[The virtual setting] allows the member distance. There's a distance. You're not sitting in the same room with this person. You're not sitting in the same room with the counsel. You don't actually have to look them in the eye because, although it looks like you're looking them in the eye, you're not. You're looking at your computer screen. You're never looking at the person in the eye. That connection is never made ever with anybody.<sup>50</sup>

### 4.3.2. Procedures become more mechanical

VHC participants also noted that the emotional and physical distance afforded by the virtual hearing context brings with it a focus on efficiency. A VHC participant who supports claimants described how decision-makers in virtual hearings often give the impression of working through a checklist, of sticking closely to a rigid process, and explained that the hearing experience consequently feels “dehumanizing.” One VHC academic participant explained that participants in other virtual processes have

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<sup>48</sup> Factor et al, above note 10 at 1560. See Michael Storper & Anthony J Venables, “Buzz: Face-to-face Contact and the Urban Economy” (2004) 4:4 Journal of Economic Geography 351.

<sup>49</sup> Benninger et al., above note 23 at 91.

<sup>50</sup> Evans Cameron et al., above note 5 (Participant P071).

compared their experience to livestock being processed by the “cattle industry” – quickly in and out, without any meaningful engagement.

Researchers have suggested that the virtual format setting leads to “procedures becoming more automatic and less personal.”<sup>51</sup> A defence attorney in another study, reflecting on virtual hearings in the criminal court context, used a similar image and language to the VHC participants: “this system already feels like a conveyor belt at times...doing virtual hearings just further dehumanizes this process.”<sup>52</sup> Refugee lawyer participants in a previous interview study noted that in the virtual setting “[t]he whole process becomes very mechanical”<sup>53</sup> and “devoid of the human element.”<sup>54</sup>

VHC participants noted that this impression is amplified when decision-makers are multi-tasking during the hearing. One lawyer participant shared a recent example where the decision-maker was “just writing and asking questions, not responding to what the client was saying,” even when the claimant was visibly upset. She noted that the interaction did not feel “real or responsive” but instead felt “more like a checklist than a real conversation.” A former claimant likewise noted that her hearing “felt more like an interview than a proper hearing.” In another recent interview study, “several claimants commented that the Board Member was typing and writing for most of the hearing.”<sup>55</sup> In this context, decision-makers come across to claimants as indifferent. While this can of course occur in in-person hearings as well, when it happens in virtual hearings it compounds the alienating effect of the online setting.

### 4.3.3. Decision-makers may feel less empathy

Beyond this, VHC participants expressed the concern that decision-makers hearing claims virtually may not only appear indifferent – the virtual format may in fact reduce their ability to empathize with the claimant. In the words of a lawyer participant in another interview study, the decision-maker needs to see the claimant in person to “feel what they are feeling and get the vibes from their testimony.”<sup>56</sup> A lawyer in a previous interview study noted the same concern: in virtual hearings, “there is reduced empathy on the member’s part.”<sup>57</sup>

One VHC psychologist participant noted that, at the close of a virtual hearing, the decision-maker will simply click a button and end the experience. Compared to an in-person hearing, a virtual hearing ends more suddenly and abruptly. The participant suggested that this ability to disengage quickly and completely may allow the decision-maker to write their decision and move on, avoiding the emotional intensity of the hearing. This participant acknowledged that this detachment may play a protective role

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<sup>51</sup> Factor et al., above note 10 at 1562.

<sup>52</sup> Benninger et al., above note 23 at 93.

<sup>53</sup> Canadian Council for Refugees, above note 5 at 16.

<sup>54</sup> *Ibid.* at 18.

<sup>55</sup> *Ibid.* at 11.

<sup>56</sup> *Ibid.* at 18.

<sup>57</sup> *Ibid.* at 16.

for decision-makers: it may help them to minimize burnout. Yet they reflected that it comes at a cost to claimants, who may be left to carry the emotional weight alone. This sense of easy detachment may cause a claimant to feel unseen and unheard.

Recent scholarship supports the concern that the virtual setting may in some cases reduce decision-maker empathy. Researchers note many reasons why the video format makes the participants' "presence less salient."<sup>58</sup> They suggest that, while this may help to encourage empathy in some cases, "on the whole, video interfaces probably make empathizing more challenging"<sup>59</sup> – and especially for "litigants who are already burdened by empathy deficits based on race, social class, gender, ethnicity, or other factors that may differentiate them from decision-makers."<sup>60</sup> As the researchers explain, the "reduced field of view" that hides the participants' non-verbal presentation makes it easier to misread and misunderstand what they are feeling: it "limits access to others' gestures and postures, which can help correct for mistaken inferences of others' emotional states based on their facial expressions alone."<sup>61</sup>

At the extreme, decision-makers may dismiss the suffering of the real human being who appears to them only on video, as in the case of this self-represented litigant at an immigration proceeding: "[The immigrant] was sobbing . . . No one even noticed how stressed out she was. Everyone was stapling exhibits and passing papers, and then it was over . . . It seems like her condition might have had more of an impact had she been in the courtroom, but no one even noticed her."<sup>62</sup>

#### 4.3.4. Decision-makers may be less able to demonstrate empathy effectively

Even when decision-makers are sensitive to the claimant's emotional state, VHC participants also felt – and research suggests – that the virtual format may make it harder for them to *show* empathy and *be read* as empathetic. The participants noted that, since the claimant has a limited view of the decision-maker's non-verbal presentation, they may misread how the decision-maker is responding to their testimony: they may not be able to register the presentations that convey, for example, the decision-maker's sympathy, shock, or concern. As a criminal prosecutor in another

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<sup>58</sup> Bandes & Feigenson, above note 12 at 29. See Carolyn McKay & Kristin Macintosh, "Remote Criminal Justice and Vulnerable Individuals: Blunting Emotion and Empathy?" (2024) 29:2 *Tilburg Law Review* 125–143.

<sup>59</sup> Bandes & Feigenson, above note 12 at 29; McKay & Macintosh, above note 58; Shari Seidman Diamond et al., "Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions" (2010) 100 *J. Crim. L. & Criminology* 869.

<sup>60</sup> Bandes & Feigenson, above note 12 at 21. See Alicia Bannon & Janna Adelstein, "The Impact of Video Proceedings on Fairness and Access to Justice in Court" (2020) online (report): <<https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court>>.

<sup>61</sup> *Ibid.* at 23.

<sup>62</sup> *Ibid.* at 29-30.

study noted: “It is very hard to convey warmth over a computer screen.”<sup>63</sup> A judge in that same study further explained:

I don’t think [Zoom is] even close to what you can do when people are in person. You deal with people, and I think you’ve got to show compassion. There’s gotta be sympathy. There’s gotta be empathy both for the criminal and for the victims. And when all of that stuff is done by Zoom, and electronically, I think there’s a lot lost.<sup>64</sup>

Researchers have also suggested that “[t]he impersonality of remote proceedings can erode basic norms of politeness, even if this is not intended.”<sup>65</sup> One VHC lawyer participant wondered whether decision-makers, conscious of their self-view on the screen, might involuntarily withhold the kinds of non-verbal affirmations that demonstrate sympathy or understanding in an effort to appear neutral. Researchers have likewise suggested that the virtual setting may interfere with involuntary expressions of empathy:

[T]he compression and distortion of what each participant can see of others in Zoom’s gallery view—those small head-and-upper body views, more or less always frontal, sometimes captured from awkwardly high or low angles, possibly not very well lit—limit the opportunities for the unconscious mimicry of others’ facial expressions of emotion, a recognized implicit path for empathy.<sup>66</sup>

#### 4.3.5. The parties share fewer ‘humanizing’ moments

VHC participants emphasized that in-person hearings can also feel dehumanizing. Yet they also noted how, unlike in the virtual setting, the in-person hearing at times offers opportunities for (re)humanizing moments of connection. A refugee lawyer in a previous interview study explained that in-person hearings sometimes present these opportunities, which are lost in the virtual setting. In a virtual hearing, when the participants take a break, they all turn off their cameras. During the breaks in an in-person hearing, in contrast, the member might have the opportunity “to see the [claimant] as a human being.”

They're getting up, they're getting a coffee...they might even chit-chat with the member...and that humanizes them. So, you don't even get that in the video at all. Because, remember, you know, if anybody has done, you know, race studies or anything like that about how racism is perpetuated, a lot of it has to do with dehumanization. And so, how do you oppose dehumanization? By humanizing the person. And so that is eliminated in a virtual setting completely.<sup>67</sup>

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<sup>63</sup> Benninger et al., above note 23 at 92.

<sup>64</sup> Ibid.

<sup>65</sup> Factor et al., above note 12 at 1562.

<sup>66</sup> Bandes & Feigenson, above note 12 at 30.

<sup>67</sup> Evans Cameron et al., above note 5 (Participant P071).

#### 4.3.6. The claimant may feel disconnected from the interpreter and from their counsel

Lastly, VHC participants were concerned that the increased detachment and decreased opportunities for trust-building in the virtual setting also affect the relationships between the claimant and the interpreter, and between the claimant and their counsel.

As noted above, VHC participants felt that the virtual setting reduces the effectiveness of language interpreters because it limits their ability to read the claimant's non-verbal cues and monitor or verify their understanding. In a similar vein, the participants noted that, in an in-person hearing, the claimant and the interpreter will typically be sitting together in the hearing room for a few minutes as they wait for the hearing to begin. In this context, they will often engage in small talk naturally. This "chatting" can 'break the ice' and may help the claimant to feel more comfortable with the interpreter, and it may also reveal language difficulties such as differences in dialect. Although the claimant and the interpreter are also given the opportunity to speak together before the start of a virtual hearing, this conversation does not arise naturally, and as a result it is stilted and more formal and may serve neither purpose as well.

VHC participants were also concerned about the impact of the virtual setting on claimants' relationships with their counsel. As one participant who supports claimants observed, the trouble is not merely that refugee hearings have moved online: lawyers have also moved their practices online, and as a result, "some claimants go into virtual hearings without ever meeting their lawyers" in person. In these virtual interviews, claimants and counsel encounter the same barriers to non-verbal communication described above, the same detachment, and the same loss of opportunities for trust-building. As this participant noted, as a consequence, since the move to virtual hearings, "lawyers and clients have a harder time trusting each other."

A recent study of lawyers in the criminal field raises this same concern: "Some interviewees noted that they were less able to get to know or build relationships with their clients" and "many defense attorneys felt that remote communication prevented the clients from trusting them."

A Miami defense attorney described a client she had only ever met on Zoom and noted the adverse effects on the attorney-client relationship: "It hinders the ability to establish good working relationships with the clients. I think that you don't get the same feel for a person, even though you're seeing their face. . . . [Y]ou get a vibe from somebody when you're in the same room with them, and that is completely gone."<sup>68</sup>

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<sup>68</sup> Benninger et al., above note 23 at 108. See Meredith Rossner & David Tait, "Presence and Participation in a Virtual Court" (2021) 23:1 Criminology & Criminal Justice 135 at 150.

Of note, a criminal lawyer participant in this study stressed “that in-person interactions can be especially important for building trust in interracial attorney-client relationships,” as these relationships may begin with a “trust deficit.”<sup>69</sup> This observation is particularly relevant in the refugee claim context.

In sum, VHC participants felt that the increased detachment and decreased opportunity for trust-building in the virtual setting heightened both of the target risks. If they experience the hearing as dehumanizing, the claimant will feel more acute stress. This, in turn, will affect how well they testify, increasing the risk that they will be wrongly disbelieved. Both risks are further heightened if decision-makers feel less engaged and are, or appear to be, less empathetic, and if interpreters and counsel do their jobs less effectively.

#### **4.4. The virtual interface limits counsel’s field knowledge and relationship-building**

Closely related to the loss of opportunities for trust-building generally is a distinct concern: VHC participants felt that counsel cannot develop relevant field knowledge or build a productive relationship with decision-makers, when they are not able to connect with them informally.

Two VHC lawyer participants explained how, when hearings were held in person, counsel and decision-makers had many more opportunities to make small talk and to get to know one another. Counsel could learn the decision-makers’ personality traits, communication preferences, triggers and biases. Now that hearings are held virtually, they felt that they no longer know the decision-makers as well. Decision-makers are now assigned to hear cases across the country, so the pool of decision-makers is much larger. And as noted above, there are fewer, if any, opportunities for informal relationship-building – which, as a participant in another study also clarified, are further limited by the fact that these sessions are recorded in full.

When we were in person, the member had control of the recording. So with a finger they could decide, ‘I’m off the record’, ‘I’m on the record’, ‘off the record’, ‘on the record’. And many times, it did happen like that: ‘Okay, I wanna say something to counsel. Counsel, I’m off the record’, and then we’ll have a very informal chat—and then we’ll go back on the record. And I find with these hearings online, they don’t have that control. The recording has to stay on... I think it’s something to do with the connection, that if you lose the connection you have to dial back in [and] it’s a pain finding the case officer. So even for breaks, they run the recording... So you know, the member then has less leeway.<sup>70</sup>

When they were able to make a personal connection with the decision-maker, and when this connection was positive, it facilitated counsel’s work. Decision-makers were more

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<sup>69</sup> Benninger et al., above note 23 at 109.

<sup>70</sup> Evans Cameron et al., above note 5 (Participant P071).

likely to trust, for example, that counsel’s procedural requests were sincere: that counsel was not playing tactical games or needlessly stalling. Similarly, knowing the specific decision-maker better helped counsel to decide, for example, when it was necessary to intervene in their line of questioning and when it was safe to allow it to continue. The participants explained that this field knowledge – knowing that if *this* decision-maker is asking the claimant *this* kind of question it is very likely for *this* reason – is a valuable aspect of the expertise that they offer their clients. Without it, one participant explained that they feel that they need to err on the side of caution with their interventions, and that as a result they more often “annoy” the decision-maker: “I may interject more if I don’t know what to expect from them.” Annoying the decision-maker may at times be necessary, but it always carries risks, and this participant felt that in the virtual setting they are less able to avoid running this risk unnecessarily.

## 4.5. The virtual interface increases distraction and impairs the parties’ ability to focus

VHC participants were concerned that the virtual interface greatly increases distraction for the parties in a refugee hearing and impairs their ability to focus because of:

- Technological glitches and failures
- Notifications and other distractions.

### 4.5.1. Technological glitches and failures

For a start, the participants flagged the distraction and interruption caused by technological glitches and failures. They noted that internet connectivity issues, poor or inconsistent audio and video quality, and confusion about how to use a platform’s functions are just a fact of life in the virtual setting. As one VHC participant observed, upgrades to virtual platforms often change how they function, and this can cause confusion even for parties who are experienced with the online format.

Yet VHC participants also noted that this kind of risk is inequitable: while it affects all claimants, it hits hardest those who are least “tech savvy,” those with limited technological literacy and/or unreliable devices. One lawyer participant gave an example where a claimant’s device failed to charge during a five-hour session, resulting in the device shutting down mid-hearing. A recent interview study found that “many [claimants]...did not have suitable devices to support the virtual hearing”<sup>71</sup> and that “nearly half...experienced technical issues during the hearing, ranging from trouble signing into the hearing, to video cutting out towards the end of the meeting.”<sup>72</sup> In the same study, a large majority of the thirty lawyers interviewed (77%) reported “that they must often or sometimes support their clients in accessing a device or knowing how to use it.”<sup>73</sup> This suggests that this risk will most strongly affect those claimants who have

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<sup>71</sup> Canadian Council for Refugees, above note 5 at 7.

<sup>72</sup> *Ibid.* at 9.

<sup>73</sup> *Ibid.* at 16.

the least support: those without counsel, those with less helpful counsel, and those who are reluctant to ask their counsel for help.

#### **4.5.2. Notifications and other distractions**

The participants also raised the serious concern that technological devices generate notifications – phone, text, email, social media and other message alerts – that distract the parties. They also observed that, unlike in an in-person hearing, a party sitting in front of their computer may be tempted to check their email, send a text, or glance at the news. Several VHC participants mentioned they find it difficult to avoid focusing on their self-view in an online platform, and that the self-consciousness that their image provokes is distracting. The participants felt that these kinds of distractions may hinder all parties' abilities to concentrate.

Even if the hearing parties were required to turn off all notifications and self-view, since multi-tasking in other virtual meetings has become the norm for busy professionals, VHC participants noted that the temptation for decision-makers and counsel to use other devices off-screen would remain. A VHC participant who supports claimants in their hearings explained that when decision-makers and counsel appear indifferent during virtual hearings, it may simply be because they are not paying attention to the claimant. She recounted an instance when the decision-maker asked the claimant a triggering question, and the claimant tried to get their lawyer's attention, but their lawyer was on their phone and did not notice.

### **4.6. The virtual interface increases the parties' cognitive load**

A refugee hearing is cognitively demanding for claimants at the very best of times. VHC participants observed that in virtual hearings, in addition to dealing with technological issues noted above, claimants may have to work harder to hold back intrusive thoughts or to block out other distractions. This adds to the claimant's 'cognitive load' – it makes the process of testifying more mentally taxing – which increases both the stressfulness of the experience and the risk that claimants will be misread as lying. This increase is caused by:

- Concerns about the virtual setting
- Hypervigilance and suggestibility
- Testifying from a distracting location
- Concerns about the security of their information.

#### **4.6.1. Concerns about the virtual setting**

VHC participants noted that some claimants are more anxious about testifying virtually than they would have been if they were testifying in person. As one former claimant participant explained, before their hearing they had been "stressed knowing it would be

virtual.” Another interview study found that while “most claimants reported feeling tense and anxious in the days leading up to the hearing,” these feelings were “heightened by the online format.”<sup>74</sup> VHC participants noted that claimants may be more anxious if they perceive that they may be more likely to be disbelieved for any of the reasons noted in this paper.

The claimant participants in a previous study elaborated on another common cause for this added stress: the fear that they would be blamed if anything went wrong with the technology. As one commented, “I was afraid I’d be held responsible.” Another said, “I was concerned that I would not be able to connect, and because of that I’d be seen as not complying with what I agreed to, and then be deported and sent back. I was scared.”<sup>75</sup>

In addition, a VHC participant who supports claimants explained that the virtual setting can be particularly stressful for those whose experiences of persecution have been technologically mediated. They explained that queer and trans claimants have often been monitored through social media: they have been “followed by their home security, police or authorities through their Google accounts, Facebook pages, etc.” or had their accounts hacked. This may increase their concerns about the security of their information, discussed further below – and in any case, this experience alone increases their anxiety heading into a virtual hearing. For these claimants, “computers and phones” are not safe spaces: as a VHC participant explained, “there is already an element of trauma and their relationship to the computer itself, or the communication platforms, is already not a positive experience.”

#### **4.6.2. Hypervigilance and suggestibility**

The technological glitches and failures that come standard in the virtual setting are not merely distracting, as discussed above – they can also be frustrating. The VHC participants felt that this frustration can create a tense atmosphere that affects the hearing experience for all parties. They noted, in particular, the concern that when decision-makers appear frustrated, this can increase the claimant’s stress and anxiety.

As the participants also noted, this risk may be further heightened in the virtual setting by the close-up focus on the decision-maker’s face. This close focus makes it more difficult for decision-makers to mask their frustration, and it may enable and encourage claimants’ hypervigilance: their tendency to monitor decision-makers closely for cues to whether they are reacting positively or negatively.

The two VHC psychologist participants stressed that this ability in the virtual setting to perceive subtle changes in the decision-maker’s expressions also increases the risk of suggestibility. A claimant who perceives that the decision-maker is reacting negatively to their testimony may alter their testimony in response, even subconsciously: they may

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<sup>74</sup> Ibid. at 8.

<sup>75</sup> Ibid. at 14.

unintentionally adjust their answers based on what they think the decision-maker wants to hear. One VHC lawyer participant explained how they counsel claimants to try to minimize this risk: “I say to them, if they see the member making faces, don’t look at them. Instead, look at me – because it may just be that they are distracted by something else, an email, suppressing a yawn.”

In a previous interview study, a lawyer participant explained that the ability to see the decision-maker’s face more closely was an advantage: “it allows me to ‘read’ the Member more effectively.”<sup>76</sup> One VHC lawyer participant was rather concerned, on the contrary, that they might misread the decision-maker, and they recognized that they themselves were vulnerable to this risk of suggestibility. To guard against this risk in their virtual court hearings, this lawyer had “a note written on top of laptop screen saying, ‘Don’t change argument based on what the judge looks like.’”

VHC participants observed that this same close-up focus may also cause claimants to monitor their self-view, and that the resulting self-consciousness may increase their stress. They may be hyperaware of how they are presenting themselves, especially if they experience the setting as detached and impersonal. One former claimant participant explained that during their virtual hearing, they felt that they “had to put in extra effort to connect with the judge on a human level through the screen.”

In particular, seeing themselves on the screen may reinforce the idea that their testimony is a performance. As the same former claimant explained, appearing on screen not only made them feel that they needed ‘to perform,’ but left them anxious and unsure how to perform their identity across a screen. Their claim was based on their sexual orientation, and they explained that in an in-person hearing, the decision-maker would have met them as a whole person and would have had a better sense of who they were. In a virtual hearing, should they compensate by dressing in way that would emphasize their identity? Or would this be held against them?

“I was kind of lost in terms of the look I was supposed to or expected to portray based on my identity at the hearing...That increased my level of stress and trauma in terms of which look is better to portray. Should I keep a more neutral look? What would the judge think? That really stressed me out.”

### **4.6.3. Testifying from a distracting location**

VHC participants stressed that claimants may be joining their virtual hearing from a location that exposes them to external distractions. An environment that makes it difficult for claimants to concentrate will increase their anxiety, and the participants noted that this is a common concern, in particular, for claimants who live in transitional and shared housing.

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<sup>76</sup> Canadian Council for Refugees, above note 5 at 18.

A recent study found that just over half of the claimants interviewed had joined their virtual hearings from their homes, with the rest connecting “from various locations such as their lawyer’s offices, temporary shelters for newcomers, co-working spaces, and IRB offices.”<sup>77</sup> While most who testified from home were “very comfortable” with the experience, others were “troubled by their hearing spaces due to frequent disruptions.” VHC participants emphasized, in particular, the disturbances caused by children and noisy neighbours. One claimant in the interview study explained, for example, that his “neighbours were playing loud music during his virtual hearing. He was distracted and distressed by the background noise.” Of note, this issue is not unique to claimants: in another study, a lawyer expressed frustration after being interrupted multiple times due to the sound of voices in the background on the decision-maker’s audio feed.<sup>78</sup>

As VHC participants also noted, a claimant will experience even greater distress if they are worried that others may overhear their testimony. One claimant in another interview study explained, “I was worried about my neighbours being able to hear me.” Another lived with her brother, who was “‘only kind of supportive of her LGBTQ+ identity.’ This made her more anxious, as he was in the room next door during her hearing.” This threat to their privacy may cause claimants acute stress and potentially affect the content of their testimony. A lawyer in another interview study also highlighted a separate potential invasion of the claimant’s privacy in the virtual setting: they felt that the background view of the claimant’s home could lead decision-makers to make unfavourable judgments about the claimant.<sup>79</sup>

#### **4.6.4. Concerns about the security of claimants’ information**

Lastly, and on a related note, VHC participants noted that claimants are often very afraid that online hearings may not be secure. A VHC former claimant participant who also supports other claimants explained that many are “terrified” that, through a security breach, the authorities in their home countries could access any information that they share over the virtual hearing platform.

As this participant explained, given their experiences with their own governments, some claimants are terrified that the Board’s decision-makers will share information with the Canadian government, which will in turn share it with the authorities in their country: “by default, they do not believe that they can trust the [Canadian] system itself because of the experience they have with their home authorities.” As well, claimants whose personal computers were previously hacked are often afraid to use these same devices for their virtual hearings.

These claimants fear that sharing their information will put them at risk – and also that it will put others at risk. As this VHC participant explained, this is especially the case for activists, queer claimants, or others who may be asked, as part of their claim, to discuss their social, community or political networks.

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<sup>77</sup> Ibid. at 8.

<sup>78</sup> Evans Cameron et al., above note 5 (Participant P054).

<sup>79</sup> Ibid. (Participant 071).

In short, claimants who fear technologically sophisticated persecutors are often very concerned that the Board is not up to the task of protecting their information. This concern is shared by refugee lawyers and academics. As one lawyer explained in an interview study, this concern is the “main reason” why they do not support virtual hearings:

“While I enjoy virtual hearings, I still believe that they should not replace the in-person hearings. The main reason is because I do not believe that confidentiality is guaranteed. Many refugee claimants are fleeing their countries because of persecution (often the government) and threats from powerful groups (organized crime) all powerful and capable to have access to the rapid and latest technology and to use it to their convenience.”<sup>80</sup>

As a VHC academic participant with expertise in this area stated bluntly, “a platform can be hacked and [the information] saved.” According to this participant, given what we know about the state of cybersecurity, a claimant could very reasonably ask themselves: “How can I trust that the information won’t get back home? ... Yes, I got my application approved, but who else knows about this?”

These observations raise a very serious concern beyond the scope of this project: that the virtual setting may directly pose a risk to the safety of claimants and others back home. In the context of this study’s investigation, VHC participants also felt strongly that this fear alone is a risk factor. Because of it, the claimant may “avoid talking about points that may be very important.” If they choose not to share their most sensitive information, their claim may be rejected as a result. And if they do choose to share their information despite this fear, it will be a significant cause of acute stress, and the cognitive resources needed to proceed in the face of it may be overwhelming.

## 5. Conclusion

Do the risks of the virtual hearing format outweigh the benefits? In other studies, former claimants and refugee lawyers reflected on this question.

Some concluded that, on balance, virtual hearings disadvantage claimants. They felt that, in the virtual setting, refugee claims will more often be wrongly denied. Indeed, several studies from before the COVID pandemic, when legal hearings were held using older technologies, amplify this concern. These studies concluded that, for a host of reasons related to the points discussed above, decision-makers may in some cases judge the credibility of the participants in legal proceedings more harshly than they would in person.<sup>81</sup> One found that “judges set higher bail for defendants appearing in

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<sup>80</sup> Canadian Council for Refugees, above note 5 at 18.

<sup>81</sup> See Factor et al., above note 10 at 1560; Sara Landström, Karl Ask & Charlotte Sommar, “The Constraints on Non-Verbal Cues Over VC May Affect How Judges Perceive the Credibility of Defendants” (2015) 26:1 Scandinavian Journal of Psychology 99; Frank M Walsh & Edward M Walsh, “Effective

court via video than for those appearing in person,<sup>82</sup> and another that “that the use of [video conferencing] in asylum hearings doubled the likelihood that the application would be denied.”<sup>83</sup> Even post-COVID, criminal lawyers commonly report the fear that judges may issue “overly harsh punishments” when they hear cases virtually.<sup>84</sup>

Yet in these other studies, other former claimants and refugee lawyers concluded that, with the current technologies, the benefits of virtual hearings outweigh the risks. The upsides that these participants identified extended beyond the convenience of reduced travel time and easier access to remote witnesses.<sup>85</sup> They reported, for example, that many claimants feel more at ease testifying from the comfort of their own homes;<sup>86</sup> that the virtual setting, since it is less formal than the courtroom-like hearing room, is less intimidating, even more “intimate”;<sup>87</sup> that decision-makers are often “very understanding” when technological issues arise, and that when the parties commiserate about these problems together it can, in fact, be a bonding opportunity.<sup>88</sup> Indeed, “while the loss of emotional resonance may rob some testimony of its impact, it has also been observed that virtual proceedings may reduce grandstanding, bullying, and other intimidating behavior,”<sup>89</sup> and one refugee lawyer in another study made such an observation: “the virtual hearings are, I find, are less antagonistic.”<sup>90</sup> Significantly, when one study asked former claimants “[I]f you could do it again, which hearing format do you think you would prefer?”, 78% of those who answered said that they would prefer a virtual format.<sup>91</sup>

As noted at the outset, the VHC project did not set out to weigh the risks and benefits of the virtual setting. It did not ask its participants which format they would prefer. Instead, the participants identified many reasons why the virtual setting may increase the risk that refugee claimants will feel acute stress during their hearing and that they will be wrongly disbelieved. Since virtual hearings “will continue until further notice,”<sup>92</sup> the participants hope that their contributions will help researchers at the intersection of law and technology to understand these risks better and to find solutions to address them.

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Processing or Assembly-line Justice? The Use of Teleconferencing in Asylum Removal Hearings” (2007) 13:22 *Georgetown Immigration Law Journal* 259; Camille Gourdet et al., “Court Appearances in Criminal Proceedings Through Telepresence: Identifying Research and Practice Needs to Preserve Fairness While Leveraging New Technology” (2020) online (report): <

[https://www.rand.org/pubs/research\\_reports/RR3222.html](https://www.rand.org/pubs/research_reports/RR3222.html)> 7-8.

<sup>82</sup> Bandes & Feigenson, above note 12 at 27.

<sup>83</sup> Factor et al., above note 10 at 1560, discussing Walsh & Walsh, above note 81.

<sup>84</sup> Benninger et al., above note 23 at 93.

<sup>85</sup> Of note, one participant cautioned that the fact that the virtual setting facilitates witness participation may lead decision-makers to have increased and potentially unrealistic expectations that witnesses will be available. Evans Cameron et al., above note 5 (Participant P071).

<sup>86</sup> Canadian Council for Refugees, above note 5 at 11. See MacKay & Macintosh, above note 58 at 134.

<sup>87</sup> *Ibid.* at 12.

<sup>88</sup> *Ibid.* at 11.

<sup>89</sup> Bandes & Feigenson, above note 12 at 34.

<sup>90</sup> Evans Cameron et al., above note 5 (Participant P077).

<sup>91</sup> *Ibid.*

<sup>92</sup> Immigration and Refugee Board of Canada, above note 3.