



The Impact Of COVID-19 Measures on the Justice System



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By the

Alberta Civil Liberties Research Centre

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Acknowledgments



Dedication

This project is dedicated to the memory of Linda McKay-Panos, B.Ed., J.D., LL.M., Executive Director (1992-2024), whose vision, dedication, and contributions were integral to this report.

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I- Introduction

After the World Health Organization (WHO) declared COVID-19 a pandemic in March 2020, many countries declared public health emergencies, forcing them to implement swift measures with little or no preparation to contain the virus's spread. These measures included lockdowns, stay at home orders, social distancing, the closure of businesses and schools, all of which played a crucial role in reducing the transmission of the virus.

The COVID-19 pandemic also affected the day-to-day functioning of many institutions, including the judiciary. Lockdown measures impacted court operations, affecting staff, judges, prosecutors, and lawyers.¹ These disruptions had significant implications for human rights, particularly the right to access justice in a timely, fair, and effective way.²

Due to restrictions on in-person gatherings, courts in many countries were forced to shut down, leading to significant operational changes. These included the closure of courtrooms, the reduction of in-house services, and the suspension of trials.³ In Canada, courts similarly had to halt their operations, resulting in delays and the rescheduling of legal proceedings. Most of the work during this time was concentrated in lower trial courts, which prioritized only urgent criminal and family matters.⁴

¹ Coronavirus Emergency: Challenges for the Justice System, online: United Nations Human Rights Office of the High Commissioner

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25810&LangID=E>>.

² Ensuring Access to Justice in the Context of COVID-19 (May 2020), online: United Nations Development Programme <<https://www.undp.org/publications/ensuring-access-justice-context-covid-19#modal-publication-download>> at 7 [Ensuring Access to Justice in the Context of COVID-19].

³ Leah Cleghorn, "Domestic Violence and Access to Justice during COVID 19 in Trinidad and Tobago: Responses to Domestic Violence during Crisis by the Courts and its Implications for Access, online: <<https://www.britisoccrim.org/wp-content/uploads/2020/08/BSCN85-Cleghorn.pdf>> at 13-14 [Leah Cleghorn].

⁴ Kate Puddister & Tamara A. Small, "Trial by Zoom? The Response to COVID-19 by Canada's Courts" (19 May 2020), online: NCBI <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7264448/>> [Kate Puddister & Tamara A. Small].

Malandrino and Demichelis stated:

Crises are events that call for urgent public action. When they occur in multilevel governance systems, decision makers at different levels have to make decisive calls about courses of actions during difficult conditions of value complexity, short response time, threat, and uncertainty. In such contexts, effectiveness might be valued as more important than the rule of law and, as such, crises might lead to the weakening of the rule of law. In some cases, a law does not even exist to guide the management of certain unexpected situations, while in other cases there could be genuine uncertainty regarding the categorization of situations requiring management and, consequently, in the identification of applicable laws.

...

In pandemic crises, uncertainty is ever-present element that needs to be highlighted in order to strengthen public trust in both science and government, especially in multilevel governance systems.⁵

During the pandemic, the judiciary had to implement “remote court hearings” using technology to replace certain services and operations. Courts, tribunals, and other dispute resolution bodies worldwide, including in Canada, adopted teleconferencing, videoconferencing, and virtual hearings to manage proceedings and maintain access to justice.⁶

The transition to virtual court proceedings during COVID-19 presented several challenges. In the United States, courts encountered both technical and constitutional issues with remote hearings, including concerns over privacy, particularly regarding the use of platforms like Zoom. In Canada, parliamentarians raised concerns about the quality and reliability of digital technology, highlighting issues of inequality. Individuals in rural areas and some Indigenous communities, who had limited access to digital technology, faced significant barriers in accessing the court system.⁷

⁵ Anna Malandrino & Elena Demichelis, “Conflict in Decision Making and Variation in Public Administration Outcomes in Italy during the COVID-19 Crisis” (6 October 2020), online: <<https://onlinelibrary.wiley.com/doi/full/10.1002/epa2.1093>>.

⁶ No Turning Back: CBA Task Force Report on Justice Issues Arising from COVID-19 (February 2021), online: The Canadian Bar Association <<https://www.cba.org/CBAMediaLibrary/cba_na/PDFs/Publications%20And%20Resources/2021/CBATaskForce.pdf> at 8 [CBA Task Force Report on Justice Issues Arising from COVID-19].

⁷ Kate Puddister & Tamara A. Small.

Courts were unprepared to integrate technology especially in countries that were already lagging in using remote case management systems and e-filing for various matters. Court staff and judges were not equipped with the necessary tools and training to work remotely, as filings and pleadings were traditionally handled in person or on paper. This lack of preparedness led to significant disruptions in court operations.⁸

In its report entitled “Ensuring Access to Justice in the Context of COVID-19,” the United Nations Development Programme (UNDP) stated:

As states around the world adopt emergency measures to address the crisis, they must continue to uphold the rule of law, protect and respect international human rights standards and basic principles of legality, and the rights to access justice and due process. Emergency powers must be in line with constitutional (where applicable) and national legal frameworks as well as international human rights obligations.⁹

The pandemic worsened inequalities in access to justice, disproportionately affecting marginalized groups such as the poor, migrants, women, detainees, and children, making them even more vulnerable.¹⁰

Stay-at-home orders and the suspension of in-person court operations limited physical access to courts and their services. Victims of domestic violence, for example, struggled to submit applications for protection orders or leave homes shared with their abusers. The lack of face-to-face hearings also reduced their opportunity to be heard.¹¹

Additionally, the increase reliance on digital access created barriers for vulnerable individuals, raising concerns about ensuring equal access to justice. When digital access became

⁸ Marco Fabri, “Will COVID-19 Accelerate Implementation of ICT in Courts?” (2021), online: International Journal For Court Administration < <https://www.iacajournal.org/article/10.36745/ijca.384/> > [Marco Fabri].

⁹ Ensuring Access to Justice in the Context of COVID-19 at 7.

¹⁰ Justice in a Pandemic – Briefing One Justice for All and the Public Health Emergency (April 2020), online: Pathfinders < <https://cic.nyu.edu/sites/default/files/justice-for-all-and-the-public-health-emergency.pdf> > at 4.

¹¹ Leah Cleghorn at 14.

the only option for interacting with the legal system, many vulnerable people found themselves unable to engage effectively.¹²

Additionally, courts saw a decrease in new civil case filings, as lawyers and litigants had to prioritize pandemic-related issues. At the same time, existing cases remained unresolved, leading to a large backlog of civil cases waiting for courts to resume their activities.¹³

As the UNDP highlighted:

The pandemic and states' responses to it are having an unprecedented effect on the functioning of justice systems globally. Courts are closing, reducing, or adjusting their operations, which can negatively impact the provision of timely and fair hearings, contribute to increased case backlogs, and lead to increased length of judicial and administrative proceedings. Certain groups, including women and children at risk of violence, undocumented migrants, refugees, and asylum seekers, and those in migrant detention centres are acutely affected by these changes. Reduced court operations may also result in the prolonged detention of pretrial detainees or of prisoners eligible for early release, for example if bail or parole hearings are postponed. Juvenile detainees are particularly vulnerable. Finally, without functioning judicial oversight, persons detained while emergency measures are in place to contain the virus may not be brought before a judge in a timely manner.¹⁴

The ability for judges and court staff to use the case management system remotely was crucial for maintaining the functioning of court operations.¹⁵ However, the reliance on online technologies in the justice system raised concerns about the right of access to justice, which is “one of the fundamental principles of international human rights law and is integral to the rule of

¹² Equality and non-Discrimination in the Access to Justice, Resolution 2054 (2015), online: Parliamentary Assembly < <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21753&lang=en>>.

¹³ Twelve Essential Steps to Tackle Backlog and Prepare for a Surge in New Civil Cases (8 July 2020), online: NCSC < https://www.ncsc.org/_data/assets/pdf_file/0011/42230/RRT-Civil-12-steps.pdf> at 1.

¹⁴ Ensuring Access to Justice in the Context of COVID-19 at 8.

¹⁵ Marco Fabri.

law and the principle of equality before the law”, as well as the right to a fair trial and the administration of justice in general.¹⁶

The COVID-19 pandemic highlighted the need for technology to reshape traditional court procedures and practices. The judicial system must be modernized to effectively manage the overwhelming caseload and better meet the needs of justice seekers. Many individuals working in the judicial field require training and digital education to successfully access remote court registers and hearings.¹⁷

It is believed that remote court hearings are here to stay, even after the pandemic. Therefore, strategies and techniques must be developed to improve the effectiveness and accessibility of these hearings.

II- Historical Impact of Pandemics on Court Operations

A pandemic is defined as “an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people.”¹⁸ According to the Canadian Encyclopedia, “a pandemic is an outbreak of an infectious disease that affects a large proportion of the population in multiple countries or worldwide.”¹⁹

Most definitions of the term “pandemic” refer to diseases that spread across broad geographic areas, such as the 14th-century plague (the Black Death), cholera, and influenza. A pandemic ends once the virus is no longer widespread globally. This can take place in two ways:

¹⁶ Tania Sourdin, Bin Li & Donna Marie McNamara “Court Innovations and Access to Justice in Times of Crisis” (30 August 2020), online: NCBI < <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7456584/> > [Tania Sourdin, Bin Li & Donna Marie McNamara].

¹⁷ Marco Fabri.

¹⁸ How Does a Pandemic End? (25 August 2020), online: Avera <<https://www.avera.org/balance/infectious-disease/how-does-a-pandemic-end/>>.

¹⁹ Patricia Bailey, “Pandemics in Canada” (9 March 2023), online: The Canadian Encyclopedia < <https://www.thecanadianencyclopedia.ca/en/article/pandemic> > [Patricia Bailey].

“the medical, which occurs when the incidence and death rates plummet, and the social, when the epidemic of fear about the disease wanes.”²⁰ In the social ending, people grow tired of living in panic mode and adapt to living with the virus.²¹

To halt the spread of the virus, governments have historically carried out public health measures such as isolation, quarantine and testing.²² For example, during the Spanish flu outbreak in 1918, newspapers in Canada reported that criminal courts were ordered to close until the epidemic was over.²³

In the past, in response to pandemics, the United States would postpone court hearings. When the United States Supreme Court postponed arguments in March 2020 due to COVID-19, it referenced the court’s operations during the Spanish flu epidemic and the yellow fever outbreaks of 1793 and 1798 as precedents. In 1918, Justice Oliver Wendell Holmes wrote that the court “had been adjourned on account of the epidemic as it was not thought right to require lawyers to come, often across the continent, to a crowded and infected spot.”²⁴

While remote proceedings were not available in 1918, today we have technology tools that allow courts to continue their activities while reducing the transmission of the virus during a pandemic.²⁵

²⁰ Gina Kolata, “How Pandemics End” (10 May 2020), online: The New York Times < <https://www.nytimes.com/2020/05/10/health/coronavirus-plague-pandemic-history.html> > [Gina Kolata].

²¹ Gina Kolata.

²² Patricia Bailey.

²³ Richard Haigh & Bruce Preston, “The Court System in a Time of Crisis: COVID-19 and Issues in Court Administration” (19 January 2021), online: Osgoode Hall Law Journal < <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3608&context=ohlj> > at 8.

²⁴ Lynne Townley & Jon Clifford, “Lessons from the Spanish Flu and Other Pandemics” (August 2020, online: < <https://www.counselmagazine.co.uk/articles/lessons-from-the-spanish-flu-and-other-pandemics> > [Lynne Townley & Jon Clifford].

²⁵ Lynne Townley & Jon Clifford.

III- Judicial Responses to the COVID-19 Crisis

As mentioned previously, COVID-19 caused serious disruptions to justice systems worldwide, forcing courts to act quickly to address the challenges presented by the pandemic. Access to justice was impacted in various ways, from court closures and mounting case backlogs, to the enactment of emergency legislation.

The International Commission of Jurists (ICJ), in its general guidance on the Courts and COVID-19, mentioned the important role that courts play in protecting human rights and the rule of law, even during emergencies. According to the ICJ, courts must always function effectively to uphold “the right to a fair trial by an independent and impartial court; the right to judicial control of deprivation of liberty; the right to an effective remedy; and to ensuring that all branches of government act lawfully.”²⁶

A- Global Perspectives on Court Operations During COVID-19

A report by the Global Access to Justice Project, which collected data from 51 countries, showed that only eight percent of justice systems continued to operate normally during the COVID-19 outbreak.²⁷

Due to the pandemic, many courts around the world had to cease operations entirely. Others like the European Court of Human Rights, only handled “essential” or “high priority” cases.²⁸

²⁶ Videoconferencing, Courts and COVID-19 Recommendations Based on International Standards (November 2020), online: The International Commission on Jurists < https://www.unodc.org/res/ji/import/guide/icj_videoconferencing/icj_videoconferencing.pdf > at 2 [Videoconferencing, Courts and COVID-19].

²⁷ Covid-19 has spurred changes to justice systems (27 November 2020), online: The Commonwealth < <https://thecommonwealth.org/news/covid-19-has-spurred-changes-justice-systems> >.

²⁸ Tania Sourdin, Bin Li & Donna Marie McNamara.

In the United States, the Supreme Court and Federal Appeals Court conducted hearings remotely, with all judgments being issued virtually.²⁹

In Kenya, court hearings were held either over the phone or online, depending on the strength of the internet connection. In South Africa, the judiciary provided clear directives to maintain court operations during the pandemic, including limiting physical presence in courtrooms to urgent and essential matters, which were often conducted online or by phone.³⁰

Similarly, in Nepal and India, courts issued guidelines on how to continue functioning during the pandemic “by allowing petitioners to submit applications and court documents via email, establishing safety measures on court premises, and permitting video conferencing for judicial custody hearings.”³¹

In Australia, most courts delayed hearings, except for the most urgent cases. However, courts quickly adopted digital solutions for remote hearings, and the judiciary adjusted with remarkable speed. Still, there was little time to reflect on the challenges and opportunities presented by online courts and how they were managed.³²

In the United Kingdom, the *Coronavirus Act 2020* was introduced, which expanded the “availability of live links in criminal proceedings and in other criminal hearings.”³³ The *Coronavirus Act* also mandated that “public participation in proceedings will be conducted by

²⁹ Access to Justice During the COVID-19 Pandemic, online: Centre for Reproductive Rights < <https://reproductiverights.org/wp-content/uploads/2020/12/Access-to-Justice-During-the-COVID-19-Pandemic-Factsheet.pdf> > at 5 [Centre for Reproductive Rights].

³⁰ Centre for Reproductive Rights at 5.

³¹ Centre for Reproductive Rights at 5.

³² Joe McIntyre, Anna Olijnyk & Kieran Pender “Civil courts and COVID-19: Challenges and opportunities in Australia” (2 September 2020), online: Sage journals < <https://journals.sagepub.com/doi/full/10.1177/1037969X20956787> > [Joe McIntyre, Anna Olijnyk & Kieran Pender].

³³ Emma van Gelder, Xandra Kramer & Erlis Themeli, “Access to justice in times of corona When COVID-19 makes the case for greater digitalisation of justice” (7 April 2020), online Conflict of Laws.net < <https://conflictflaws.net/2020/access-to-justice-in-times-of-corona/> > [Emma van Gelder, Xandra Kramer & Erlis Themeli].

video or audio, and live links are used in magistrates' court appeals for requirements or restrictions imposed on a potentially infectious person.”³⁴ According to a report by *The Economist* in April 2020, before the pandemic, approximately 200 cases a day were heard, at least partially, via conference call or video link. By March 31st, 2020, that number had climbed to about 1,800 cases.³⁵

In Italy, major measures were implemented to manage the judiciary during the pandemic. Cases were postponed, and legal deadlines were suspended, except for urgent matters. Access to courts was also limited. The Court of Cassation used video conferences to decide on cases, allowing judges who were unable to travel due to COVID-19, to participate remotely.³⁶

B- The Impact of COVID-19 on the Canadian Court System

Almost every court in Canada adjourned their activities and limited access to the court system during the COVID-19 pandemic, relying heavily on remote hearings.³⁷ Filing deadlines and limitation periods were either suspended or modified.³⁸ To help alleviate delays, some courts also encouraged the use of alternative dispute resolution methods as most hearings were postponed.

Gelder, Kramer and Themeli stated:

The use of technology in out-of-court dispute resolution is more widespread and accepted, resulting in various forms of online dispute resolution (ODR). For example, in the COVID-19 period, ODR procedures offer benefits of virtual hearings centralizing disputes regardless of geographical distances between parties, paperless processes, flexibility and convenience enabling parties to

³⁴ Emma van Gelder, Xandra Kramer & Erlis Themeli.

³⁵ Emma van Gelder, Xandra Kramer & Erlis Themeli.

³⁶ Emma van Gelder, Xandra Kramer & Erlis Themeli.

³⁷ Patricia Hughes, “The Coronavirus Pandemic and Access to Justice” (17 March 2020), online: Slaw < <https://www.slaw.ca/2020/03/17/the-coronavirus-pandemic-and-access-to-justice/> > [Patricia Hughes].

³⁸ Bart Krans et al., “Civil Justice and Covid-19” (2020), online UiT The Arctic University of Norway < <https://septentrio.uit.no/index.php/SapReps/issue/view/465/entire> > at 11.

participate from their own home computer. Positive side-effects are cost and time reductions as online procedures eliminate *inter alia* travel costs. In any case, the Covid-19 crisis may lead to a ‘wake-up’ call among lawyers and parties to consider the ability of ODR/ADR as a viable option of dispute resolution.³⁹

The Supreme Court of Canada, despite being better equipped technologically than other courts, postponed many hearings. Although it closed its doors to the public, the Court continued hearing cases, with certain matters managed by telephone or video conference.⁴⁰

The Federal Court and Federal Court of Appeal suspended their operations, except for urgent matters. Hearings were postponed, and some cases were heard by telephone or video conference and filings were accepted by email. The Federal Court remained open for urgent matters, including those matters “where hardship or substantial financial consequences are likely to result from delay.”⁴¹

Across Canada, courts offered minimal services, with trials and proceedings either cancelled or postponed. Most cases were heard in lower trial courts, while higher courts, despite being better equipped to transition to online hearings, were slower to reschedule their cases.⁴²

i- Court Operations in Alberta During the Pandemic

Early in the pandemic, many trials were adjourned, and courts moved many matters to video conferencing. The Provincial Court and the Court of Queen’s Bench (at the time) limited in-person hearings to urgent cases only, in an effort to reduce the number of people in

³⁹ Emma van Gelder, Xandra Kramer & Erlis Themeli.

⁴⁰ Patricia Hughes.

⁴¹ James Gotowiec et al., “Impact of COVID-19 on Canadian courts and litigation deadlines” (3 April 2020), online: TORYS <<https://www.torlys.com/Our%20Latest%20Thinking/Publications//2020/04/impact-of-covid-19-on-canadian-courts-and-litigation-deadlines/>> [James Gotowiec et al.].

⁴² Kate Puddister & Tamara A. Small.

courthouses. Similarly, the Alberta Court of Appeal conducted all its hearings via video or teleconference.⁴³

Access to provincial courthouses was limited to individuals essential to the proceedings, including “counsel, litigants and witnesses when advised they must attend in person, in-custody accused, sureties and members of the media.”⁴⁴

Here are some of the measures implemented in the Provincial Court in Alberta during the pandemic:

- No traffic court matters were dealt with in person
- Circuit court dockets were handled remotely, and no personal attendance was allowed
- Low-complexity out-of-custody trials (other than domestic violence) that were scheduled between Dec. 14, 2020 and Jan. 8, 2021 were adjourned to new dates
- At regional courts, family and child protection docket matters proceeded remotely
- At regional courts, civil matters were heard remotely
- At regional courts, youth matters were heard remotely.⁴⁵

Moreover, Alberta's criminal courts had to deal with a significant backlog, as many cases were pushed well into 2022.⁴⁶

ii- Court Operations in Ontario During the Pandemic

In the immediate aftermath of the COVID-19 restrictions, Ontario’s justice system faced significant challenges. The Ontario Superior Court of Justice, the Small Claims Court, the

⁴³ Paige Parsons, “Trials Postponed as Alberta Courts Take Precautions in Face of Pandemic Third Wave” (12 May 2021), online: CBC News < <https://www.cbc.ca/news/canada/edmonton/alberta-courts-postpone-trials-in-face-of-third-wave-1.6022108>> [Paige Parsons].

⁴⁴ Caley Gibson, “Alberta Courts to Delay Matters, Move Proceedings Online as COVID-19 Cases Soar” (14 December 2020), online: Global News < <https://globalnews.ca/news/7521817/alberta-court-delay-online-proceedings-covid-19/>> [Caley Gibson].

⁴⁵ Caley Gibson.

⁴⁶ Paige Parsons.

Ontario Court of Justice, the Divisional Court, and the Ontario Court of Appeal all closed their doors.⁴⁷ Ontario courts deferred thousands of hearings, motions, pre-trial conferences, trials, and other courtroom appearances, except for COVID-19 related matters, extremely urgent matters, child protection issues, and some criminal cases.⁴⁸

In addition, the Ontario Superior Court of Justice instructed courts to delay as many matters as possible. Chief Justice Geoffrey B. Morawetz announced that courts needed to decrease the number of staff, lawyers or parties required to leave their homes.⁴⁹

Chief Justice Morawetz stated that “courts will focus on the most serious child protection matters, urgent family matters, critical criminal matters and urgent commercial or economic matters... proceedings that are in progress may continue subject to the discretion of the judge.”⁵⁰

According to the Financial Post:

In family and child protection matters, only requests relating to the safety of the child or parent — including such things as an essential medical decision or the wrongful removal or retention of a child — may qualify. All urgent matters were ordered to be conducted either in writing, by teleconference or videoconference unless the court ordered otherwise. Each courthouse appointed a triage judge to determine whether the urgent matter filed met the threshold test of urgency and would be heard.⁵¹

⁴⁷ Megan E Hodges, “Access to Justice In The Time Of COVID-19: Lessons From Classical Antiquity” (14 May 2020), online: mondaq < <https://www.mondaq.com/canada/trials-appeals-compensation/933478/access-to-justice-in-the-time-of-covid-19-lessons-from-classical-antiquity> >.

⁴⁸ Justin Safayeni, “Even in the Age of Covid-19, Justice Requires Open Courts” (31 March 2020), online: Centre for Free Expression < <https://cfe.ryerson.ca/blog/2020/03/even-age-covid-19-justice-requires-open-courts> >.

⁴⁹ Ontario’s Superior Court of Justice to Defer Cases due to COVID-19 Pandemic (21 April 2021), online: Global News < <https://globalnews.ca/news/7777186/ontario-superior-court-justice-defer-cases-covid/> > [Ontario’s Superior Court of Justice to Defer Cases due to COVID-19 Pandemic].

⁵⁰ Ontario’s Superior Court of Justice to Defer Cases due to COVID-19 Pandemic.

⁵¹ Laurie H. Pawlitza, “Antiquated Technology Holding Ontario’s Justice System Back during COVID-19 Crisis” (26 March 2020), online: Financial Post < <https://financialpost.com/personal-finance/antiquated-technology-holding-ontarios-justice-system-back-during-covid-19-crisis> > [Laurie H. Pawlitza].

Court proceedings in Ontario took place remotely, but judges, lawyers and parties agreed that the justice system was falling behind in terms of modern technology and was struggling to function effectively under these exceptional circumstances.⁵²

iii- Court Operations in Quebec During the Pandemic

Courts were closed to the public and access was restricted to individuals whose presence was deemed necessary. The Court of Appeal postponed its hearings, allowing only urgent matters to be heard at the Court's discretion. The Superior Court of Québec and the Court of Québec focused solely on urgent matters, with non-urgent trials being postponed until further notice.⁵³

Urgent civil applications before the Superior Court of Québec and the Court of Québec such as “applications for provisional injunctions, safeguard orders and all other matters judged urgent by the Court”, continued, though they were not open to the public. Telephone conferences and video conferences were used to hear these urgent matters.⁵⁴

iv- Court Operations in British Columbia During the Pandemic

The Supreme Court of British Columbia adjourned most of its activities, except for necessary and urgent matters. The Court provided a specific list of urgent matters, including applications for urgent injunction and preservation orders.⁵⁵ Additionally, the Supreme Court of British Columbia made arrangements with respect to jury trials, cancelling jury selection, and

⁵² Laurie H. Pawlitza.

⁵³ James Gotowiec et al.

⁵⁴ James Gotowiec et al.

⁵⁵ James Gotowiec et al.

permitting accused to be tried by judge alone if they wish; the court permitted parties in civil cases to proceed without a jury and left it to the presiding judge to decide if current proceedings should continue.⁵⁶

Similarly, the British Columbia Court of Appeal limited its operations. Appeal hearings, chambers applications and other matters were delayed unless the Chief Justice determined that a case must proceed. Matters that went forward were heard remotely, either by teleconference or in writing.⁵⁷

This highlights how the pandemic significantly restricted people's access to justice at a time when it was most needed.

IV- Ensuring Access to Justice: International Standards and the Canadian Approach

The old expression “justice delayed is justice denied” originates from the 1759 case *Whitham v Hill*, where Justice Willes of the English Court of King's Bench famously stated, “Delaying justice and denying justice are considered as the same thing in the Magna Carta.”⁵⁸

Access to justice is a basic principle of the rule of law. Without it, individuals cannot have their voice heard, exercise their rights, challenge discrimination, or hold decision-makers accountable.

Manuel & Manuel define access to justice as follows:

Access to justice is a core state function. It is associated with peacebuilding and state-building, economic growth and investment, as well as equity and social justice. Justice has been seen as the opposite of poverty because limited access to

⁵⁶ Patricia Hughes.

⁵⁷ James Gotowiec et al.

⁵⁸ Lloyd Duhaime, “Delay in Reasons for Judgment: Justice Delayed is Justice Denied” (5 April 2011), online: Ernst v. EnCana Corporation < <https://www.ernstversusencana.ca/delay-in-reasons-for-judgment-justice-delayed-is-justice-denied/>>.

justice disempowers individuals and communities from claiming their rights and defending themselves from injustice.⁵⁹

Different people define access to justice in different ways. At its simplest, it means the ability to appear in court. However, it also encompasses the broader social context of the legal system, addressing the significant barriers that some members of the community might face in accessing justice.⁶⁰

A- International Standards

The United Nations (UN) collaborates with national partners to develop domestic initiatives for justice reform and service delivery, with a focus on reinforcing access to justice. UN bodies support Member States in improving their justice system in different areas such as:

monitoring and evaluation; empowering the poor and marginalized to seek response and remedies for injustice; improving legal protection, legal awareness, and legal aid; civil society and parliamentary oversight; addressing challenges in the justice sector such as police brutality, inhumane prison conditions, lengthy pre-trial detention, and impunity for perpetrators of sexual and gender-based violence and other serious conflict-related crimes; and strengthening linkages between formal and informal structures.⁶¹

The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Human Rights

⁵⁹ Marcus Manuel & Clare Manuel, “People-Centred Justice for all, A Route to Scaling up Access to Justice Advice and Assistance in Low-Income Countries” (April 2021), online: ODI < https://cdn.odi.org/media/documents/FINAL_-_DPF-PoGo_Justice_Finance_-_120421.pdf > at 10.

⁶⁰ What is Access to Justice? Five Different Ways of Considering Access to Justice, online: ACLRC < <https://www.aclrc.com/what-is-access-to-justice/> >.

⁶¹ Access to Justice, online: United Nations and the Rule of Law < <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> >.

Committee's General Comment No. 29 all affirmed that States should not suspend access to justice during a public emergency.⁶²

The Inter-American Commission on Human Rights (IACHR) emphasized the following regarding guarantees for democracy and the rule of law during the COVID-19 pandemic:

... access to justice is a fundamental pillar of democracy, the exercise and functioning of which cannot be suspended or limited. This implies that the current emergency cannot be used as a reason to suspend judicial proceedings that guarantee the exercise of rights and freedoms, particularly those that seek to oversee or check the actions of authorities during this time. It is therefore essential that states ensure there are suitable, flexible means available for filing appeals that seek to oversee and keep check on provisions and rulings that are issued during emergency situations. In this regard, all public institutions must be able to oversee and keep check on each of the temporary measures adopted that suspend or restrict rights. States must also adopt measures to protect judicial personnel and ensure judicial services continue to operate.⁶³

The IACHR and the UN Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayá also emphasized that:

Judicial procedures that guarantee the full exercise of rights and freedoms, including habeas corpus and amparo actions aimed at verifying the response of national authorities to the COVID-19 pandemic, should never be suspended or delayed. These safeguards must be exercised within the framework and principles of due process of law. In particular, the suspension of judicial activity must be analysed under a strict scrutiny test as the judiciary is a fundamental pillar for the protection and promotion of human rights. Such restrictions must comply with the principle of legality and proportionality, be the least restrictive measures and be necessary in a democratic society for the achievement of common goals. Similarly, States must ensure the functioning of independent and impartial courts and guarantee effective compliance with judicial decisions issued by judicial bodies.⁶⁴

⁶² Centre for Reproductive Rights at 1.

⁶³ IACHR Calls for Guarantees for Democracy and the Rule of Law during the COVID-19 Pandemic (10 June 2020), online: OAS < https://www.oas.org/en/iachr/media_center/PReleases/2020/130.asp >.

⁶⁴ Joint declaration on access to justice in the context of the COVID-19 pandemic (27 January 2021), online: OAS < http://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2021/015.asp > [OAS Joint Declaration].

Additionally, the IACHR and the UN Special Rapporteur highlighted that the use of technology in courts had an adverse effect on access to justice for certain groups due to the digital gap. Without access to these electronic means, certain groups could not access court services.⁶⁵

To address this, the IACHR and the UN Special Rapporteur urged States to ensure low-cost Internet access for everyone within their country, particularly for vulnerable groups, in order to reduce the digital gap. They also asserted that if the gap persisted, on-site access to justice services must be guaranteed, with appropriate health and safety measures in place for everyone in courthouses.⁶⁶

In a resolution adopted by consensus in July 2020, the UN Human Rights Council urged States to do the following:

Urges States to ensure that judiciaries have the necessary resources and capacity to help to maintain functionality, accountability, transparency and integrity, and to ensure due process and the continuity of judicial activities, including efficient access to justice consistent with the right to a fair trial and other fundamental rights and freedoms, during extraordinary situations, including the COVID-19 pandemic and other crisis situations.

Encourages States to make available to judiciaries current information and communications technology and innovative online solutions, enabling digital connectivity, to help to ensure access to justice and respect for the right to a fair trial and other procedural rights, including in extraordinary situations, such as the COVID-19 pandemic and other crisis situations, and to ensure that judicial and any other relevant national authorities are able to elaborate the necessary procedural framework and technical solutions to this end.⁶⁷

⁶⁵ OAS Joint Declaration.

⁶⁶ OAS Joint Declaration.

⁶⁷ Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers, Resolution Adopted by the Human Rights Council on 16 July 2020, online: United Nations < <https://undocs.org/en/A/HRC/RES/44/9> > at paras 17-18.

Lastly, the Bangalore Principles of Judicial Conduct⁶⁸ emphasized that judges must remain available to serve citizens, particularly in urgent matters involving fundamental rights or the protection of vulnerable individuals, such as the elderly and victims of domestic violence.⁶⁹

B- The Canadian Approach

According to the Canadian Department of Justice, access to justice is a fundamental principle of the justice system.⁷⁰ It defined access to justice as:

Enabling Canadians to obtain the information and assistance they need to help prevent legal issues from arising and help them to resolve such issues efficiently, affordably, and fairly, either through informal resolution mechanisms, where possible, or the formal justice system, when necessary.⁷¹

Former McGill University Law Professor Roderick Macdonald, outlined factors that define an accessible justice system: “1) just results, 2) fair treatment, 3) reasonable cost, 4) reasonable speed, 5) understandable to users, 6) responsive to needs, 7) certain, and 8) effective, adequately resourced and well-organized.”⁷²

According to the Chief Justice of Canada, the Right Honourable Richard Wagner, access to justice means informing individuals of tools and services available to them. It ensures that individuals can get legal assistance when needed, are aware of their right to counsel, and have

⁶⁸ The Bangalore Principles of Judicial Conduct: ECOSOC Resolution 2006/23 (2018), online: United Nations < https://www.unodc.org/res/ji/import/international_standards/bangalore_principles/bangaloreprinciples.pdf >.

⁶⁹ Judge José Igreja Matos, “Access to Justice in Times of Judicial Lockdown”, online: UNODC < <https://www.unodc.org/dohadeclaration/en/news/2020/03/access-to-justice-in-times-of-judicial-lockdown.html> >.

⁷⁰ Access to Justice, online: Government of Canada < <https://www.justice.gc.ca/eng/csj-sjc/access-acces/index.html> > [Access to Justice, Government of Canada].

⁷¹ Susan McDonald, Development of An Access to Justice Index for Federal Administrative Bodies (2017), online: Department of Justice Canada < <https://www.justice.gc.ca/eng/rp-pr/jr/fab-eaf/fab-eaf.pdf> > at 9 [Susan McDonald].

⁷² Susan McDonald at 8-9.

access to courts that can settle their issues in a timely and efficient manner. Access to justice, as described by Justice Wagner, means getting justice for everyone not only a few.⁷³

The Right Honourable Richard Wagner stated:

Under the *Charter*, everyone has the right to equal treatment under the law and equal benefit of the law. To deny access to justice is to deny people their dignity, to say that some people are worthy of justice, and some aren't. Lack of access to justice reinforces existing inequities (lack of fairness and justice). An accused without legal representation may decide to plead guilty when he might have been acquitted or convicted of a lesser crime with a lawyer's help. He may be wrongfully convicted. He may be sentenced to a longer prison term than he would have received had he gotten legal advice. Out on bail, he may not be given the support he needs to comply with his bail conditions. In the end, those who can't access legal services may spend more time in jail. It has profound effects on people's lives.⁷⁴

During the COVID-19 crisis, many individuals in Canada faced barriers to accessing justice as part of efforts to stop the spread of the virus. These measures created significant challenges for the justice system, despite the courts' transition to virtual hearings.

V- The Rise and Struggles of Remote Court Proceedings During COVID-19

As mentioned earlier, many courts worldwide, including in Canada, began conducting remote hearings in the aftermath of the pandemic. But what are remote hearings?

⁷³ The Right Honourable Richard Wagner, Chief Justice of Canada "Access to Justice: A Societal Imperative" (4 October 2018), online: Supreme Court of Canada < <https://www.scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx> > [Access to Justice: A Societal Imperative].

⁷⁴ Access to Justice: A Societal Imperative.

A- Redefining Courtrooms: The Shift to Remote Hearings

Remote court hearings, or online court hearings, are proceedings where those involved in the litigation participate without being physically present. They use computers and the internet to exchange messages, images, and other information. This is different from the traditional way court hearings were conducted, which were predominantly in-person and involved little to no reliance on technology. Remote hearings require a stable internet connection and were mostly established to address public health emergencies during the pandemic.⁷⁵

According to the journal of Global Health:

Remote court hearings help reduce the risk of infection and improve their court appearance rate. In an age centred on information and internet technology, online communication slowly removes barriers between people, which makes us connect more easily to others. Remote court hearings enable both parties to communicate freely, and makes hearings more convenient to all parties involved. As long as the litigants have the equipment and network, they can enter the court hearing in a non-face-to-face manner instead of attending hearings in person. Remote court hearings reduce contact between people and uses technology to transmit communication information and complete online statements, defences, evidence presenting, cross-examinations and inquiries. In the application of remote court hearing, litigation documents and evidence materials are presented, transmitted, reviewed and kept on file electronically. This helps to further reduce contact transmission.⁷⁶

Remote court hearings transformed traditional face-to-face hearings into non-face-to-face proceedings, enabling courts to continue operations even during public health emergencies. However, individuals without access to a stable internet connection might have faced violations of their rights to equal treatment. While remote hearings can fulfill procedural due process

⁷⁵ Xingmei Zhang, "Remote Court Hearing as a Judicial Response to the COVID-19 Outbreak: An Impact Assessment and Suggestions for Improvement" (2021), online: NCBI < <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8005302/> > [Xingmei Zhang].

⁷⁶ Xingmei Zhang.

requirements, they present challenges, compared to face-to-face hearings, particularly for certain marginalized groups.⁷⁷

B- Remote Justice: The Pros and Cons of Virtual Courtrooms

According to the Canadian Bar Association, remote proceedings were particularly successful for appeals and simple matters. The ability to file court documents and pay court fees online was seen as significant progress. Remote work also enabled some individuals to access justice by removing geographical and financial barriers. As a result, remote hearings helped ensure the continuity of the justice system, despite facing technical challenges.⁷⁸

However, for certain types of cases, remote hearings were found to be unsuitable. A report prepared by the Nuffield Family Justice Observatory highlighted significant concerns regarding the fairness of remote proceedings. The report noted that “not having face-to-face contact made it difficult to read reactions and communicate in a humane and sensitive way.” It also raised issues around the ability for full participation in remote hearings.⁷⁹

Complex and sensitive matters involving witnesses and experts are especially difficult to conduct remotely. The Health Law Section with the Canadian Bar Association reported that:

E-hearings by professional regulatory bodies were effective for certain types of disciplinary matters but not as effective for complex ones involving allegations of physical or sexual assault. For criminal matters normally held in a courtroom, counsel can walk to the prisoner’s dock for a short, discrete conversation with their client. This is not possible in a remote hearing. Last minute Crown disclosures are problematic when working remotely because it is difficult to arrange a quick meeting with a client to discuss the new information. The Family Law Section noted that online platforms make it harder for bullied, abused or less

⁷⁷ Alice Fremuth-Wolf et al., “How the COVID-19 Pandemic may Shape the Future of International Arbitral Proceedings”, online: International Bar Association < <https://www.ibanet.org/article/A7F75D89-2CFD-4386-96B9-53341D0A55DA>>.

⁷⁸ CBA Task Force Report on Justice Issues Arising from COVID-19 at 8-9.

⁷⁹ Paul Magrath, “Covid-19, human rights and access to justice” (2 October 2020), online: The Lawyer < <https://www.thelawyer.com/covid-19-human-rights-and-access-to-justice/>>.

outspoken individuals to speak up. It is also more difficult to observe body language or intimidating influences.⁸⁰

While technology reduced the risk of spreading COVID-19 and made meetings easier despite geographical obstacles, many vulnerable groups struggled with access to, or proficiency with technology.

i- Technology in the Courtroom

During the COVID-19 pandemic, many courts in Canada and around the world shifted to remote management of their activities using telephone, video and online platforms. Some courts permitted the electronic filing of documents and implemented other technologies such as mobile apps to settle disputes between parties.

The Canadian Bar Association (CBA) found that many of these technological developments enhanced access to justice, leading to more effective dispute resolutions in a court system struggling with a significant backlog of cases.⁸¹ However, challenges related to privacy, access, and fairness remained. The CBA noted that learning to use video conferencing, online applications and maintaining a stable internet connection were barriers for some individuals.⁸²

An additional challenge is unequal access to technology. While law firms are likely to have reasonable access to technology, self-represented litigants – who want or need to attend hearings – often do not. This inequality created serious impacts on the ability of parties to fully participate in litigation.⁸³

⁸⁰ CBA Task Force Report on Justice Issues Arising from COVID-19 at 9.

⁸¹ CBA Task Force Report on Justice Issues Arising from COVID-19.

⁸² Ryan Patrick Jones, “Justice System Needs more Resources after Pandemic Pushed Operations Online: report” (17 February 2021), online: CBC News < <https://www.cbc.ca/news/politics/canadian-bar-association-task-force-report-1.5917056>>.

⁸³ Joe McIntyre, Anna Olijnyk & Kieran Pender.

The Office for Democratic Institutions and Human Rights, in its report on the functioning of courts in the Covid-19 pandemic, stated:

The most discussed aspect of the impact of COVID-19 on courts may be the rapid increase in the use of technology to manage the workload of courts and to maintain some functioning during lockdown and in its aftermath. Such IT solutions include video platforms to conduct remote hearings, systems to enable the filing, dissemination and sharing of documents, digital case management and e-signatures. The use of such technology requires internet connectivity and data security, and access of court users to computers, cameras/webcams, microphones, screens and Wi-Fi. While reluctance among judges to adapt to IT solutions and online delivery has been noted as almost proverbial in the past, the pandemic catapulted the judiciary into the age of technology. Some IT tools have been absorbed by judges enthusiastically in a number of jurisdictions, sometimes overlooking its insufficiencies for parties, and related fair trial concerns.⁸⁴

Courts began using Zoom for many of their proceedings to manage case backlogs. This approach made it easier to accommodate participants and helped keep cases moving. However, there were concerns about the effectiveness of Zoom trials. For example, jurors can get distracted, making it challenging to maintain their focus. Additionally, while trials are conducted via Zoom, jurors may use their phones or computers to research the case or parties, compromising the integrity of the process. Since not everyone had access to technology, the jury pool could be affected by excluding those who lack access to modern technology or the necessary computer skills. Similarly, lawyers may not be as efficient virtually as they are in person.⁸⁵

⁸⁴ The functioning of Courts in the Covid-19 Pandemic (October 2020), online: OSCE < <https://www.osce.org/files/f/documents/5/5/469170.pdf> > at 20 [OSCE].

⁸⁵ 3 Alternative Methods Courtrooms Are Turning to Amid Pandemic-Induced Case Backlogs (1 March 2021), online: Risk & Insurance < <https://riskandinsurance.com/sponsored-3-alternative-methods-courtrooms-are-turning-to-amid-pandemic-induced-case-backlogs/> >.

A survey conducted by the Civil Justice Council to assess how court users were affected by the widespread changes in the civil system due to COVID-19, revealed the following:

Almost half of all hearings experienced technical difficulties: - in 44.7% of hearings, respondents reported that there were problems with the technology used. More technical difficulties were experienced during fully video hearings than fully audio hearings: - 50.8% of respondents who had participated in video hearings reported experiencing minor problems during the hearing, and 12.9% reported experiencing significant difficulties during the hearing.⁸⁶

In addition, most survey respondents felt that remote hearings were worse than in-person hearings. They found remote hearings, particularly those conducted via video, to be more tiring. Furthermore, many respondents thought that remote hearings might not be cheaper to participate in compared to in-person hearings.⁸⁷

ii- The Challenges of Remote Legal Representation

In criminal cases, defendants should not be put at a disadvantage, particularly when it comes to videoconferencing. Remote hearings raised concerns about unrepresented individuals facing decisions that could lead to prison sentences. There were also challenges related to the efficiency of participation and legal representation. Videoconferencing prevents individuals from fully observing the entire courtroom, including the body language of other participants, which can impact the credibility of witnesses. Moreover, proper communication between lawyers and their clients can be very challenging.⁸⁸

⁸⁶ Dr Natalie Byrom, Sarah Beardon & Dr Abby Kendrick, “The Impact of COVID-19 Measures on the Civil Justice System” (May 2020), online: Civil Justice Council & The Legal Education Foundation < <https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f-1.pdf> > at 8 [Dr Natalie Byrom, Sarah Beardon & Dr Abby Kendrick].

⁸⁷ Dr Natalie Byrom, Sarah Beardon & Dr Abby Kendrick at 9.

⁸⁸ OSCE at 24-25.

With virtual hearings, the absence of defendants from the physical courtroom can affect their ability to meaningfully participate in their own criminal proceedings. This is especially significant when defendants are unrepresented, as they become disengaged and confused by the proceedings. Furthermore, defendants may experience internet connectivity issues that affect the quality of their audio or video, further hindering their participation in the process.⁸⁹

The Office for Democratic Institutions and Human Rights (ODHR) raised several additional concerns:

Other difficulties arise in how to verify the identity of the parties and witnesses (particularly given the possibilities of the technology being infiltrated), how to file and inspect evidence, how to prevent witnesses or parties from looking at “cheat sheets” or from being influenced or receiving signals by third parties during testimony, and how to enable appropriate cross-examination and the right (and in some jurisdictions the legal requirement) of a defendant to be present when a witness is questioned. The European Court of Human Rights has held, for example, that “it is difficult to see how” the right of an individual charged with a criminal offence “to defend himself in person”, to examine witnesses and have the assistance of an interpreter, if necessary, could be exercised without being physically present.⁹⁰

In domestic violence cases, providing proper evidence during a virtual hearing can be especially challenging if the victim is participating from home, where they may feel unsafe or at risk of being overheard. In detention facilities, communication is often supervised and may be recorded, making it difficult for detained individuals to have confidential and secure online communication.⁹¹

⁸⁹ OSCE at 23.

⁹⁰ OSCE at 25.

⁹¹ OSCE at 25.

Additional questions were raised about the impact of virtual hearing tools such as muting and unmuting microphones, raising hands, and using chat functions, which can affect the opportunity for parties to intervene during hearings.⁹²

iii- The Impact of Remote Hearings on Marginalized Groups

According to the Department of Justice, vulnerable and marginalized people encounter unique challenges in accessing justice. While technology can help address some of these challenges, it is not a comprehensive solution to all of them.⁹³

Vulnerable and disadvantaged groups were the most affected by the measures implemented during the pandemic, particularly women and children, Indigenous peoples, people with disabilities, and self-represented litigants.⁹⁴

a- Women

Since the onset of the COVID-19 crisis, the issue of domestic violence grew globally. The United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) reported that violence against women, particularly domestic violence, increased in several countries:

In France, for example, cases of domestic violence have increased by 30 per cent since the lockdown on March 17. Helplines in Cyprus and Singapore have registered an increase in calls by 30 per cent and 33 per cent, respectively. In Argentina, emergency calls for domestic violence cases have increased by 25 per cent since the lockdown started. In Canada, Germany, Spain, the United

⁹² OSCE at 26.

⁹³ Access to Justice, Government of Canada.

⁹⁴ Impact of COVID-19 on Access to Justice (28 April 2020), online: OECD <https://www.oecd.org/gov/Impact_of_COVID19_on_Access_to_Justice_Draft_agenda.pdf> at 2.

Kingdom, and the United States, government authorities, women's rights activists and civil society partners have indicated increasing reports of domestic violence during the crisis, and/or increased demand for emergency shelter.⁹⁵

Under normal circumstances, many women face limited access to justice. The COVID-19 pandemic introduced new challenges, further impacting women's ability to access justice in an efficient way. As courts around the world shifted to virtual hearings, concerns grew regarding women who lacked access to proper technology to effectively participate in legal proceedings.⁹⁶

Women are more likely than men to report legal issues related to social welfare, domestic violence, and child support. During the pandemic, first responders and crisis hotlines, which are often the first point of contact for legal resources, housing, and financial aid, faced limitations in providing assistance. Additionally, widespread job losses made it difficult for many to pay alimony and child support.⁹⁷

The closure of courts during the pandemic left many survivors of domestic violence unable to pursue legal protection against their abusers. Additionally, medical examiners were often unable to report physical abuse due to concerns about exposure to the virus, further limiting survivors' access to justice and support.⁹⁸

⁹⁵ COVID-19 and Ending Violence Against Women and Girls, online: UN Women < <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2020/Issue-brief-COVID-19-and-ending-violence-against-women-and-girls-en.pdf> > at 3.

⁹⁶ Jarpa Dawuni, "The Gendered Face of COVID-19: Women and Access to Justice", online: UNODC < <https://www.unodc.org/dohadeclaration/en/news/2020/04/gendered-face-of-covid19-women-and-access-to-justice.html> >.

⁹⁷ Justice for Women Amidst COVID-19 (22 May 2020), online: UNDP < <https://www.undp.org/publications/justice-women-amidst-covid-19> > at 15 [Justice for Women Amidst COVID-19].

⁹⁸ Justice for Women Amidst COVID-19 at 19.

b- Children

After the COVID-19 pandemic hit, children around the world faced an increased risk of abuse, violence, exploitation, and neglect.⁹⁹

When the WHO declared COVID-19 a global health emergency, UNICEF and its partners highlighted the pandemic's impact on children's access to justice in this context. They called on States to take the following actions:

- All governments and other detaining authorities to urgently release all children who can safely return to their families or an appropriate alternative environment, including extended families and other family- or community-based care.
- An immediate moratorium on new admissions of children to detention facilities and, for children who remain in detention, continued protection of their health and well-being.
- Governments to refrain from arresting and detaining children for violations of curfew and related movement restriction orders.¹⁰⁰

Children in confined and overcrowded detention facilities faced an increased risk of contracting the virus. They were also vulnerable to abuse, neglect, and violence, particularly when staffing levels were affected by the measures taken during the pandemic.¹⁰¹

Moreover, in family law matters, limiting remote hearings to only urgent matters left many parties, particularly children, trapped in disputes with no effective way to protect their interests. The justice system was slow to intervene and embrace new measures to address access, child support and preservation orders.¹⁰²

⁹⁹ Access to Justice for Children in the Era of COVID-19: Notes from the Field (December 2020), online UNICEF < <https://www.unicef.org/documents/access-justice-children-era-covid-19-notes-field-2> > at 8 [UNICEF].

¹⁰⁰ UNICEF.

¹⁰¹ UNICEF at 8-9.

¹⁰² CBA Task Force Report on Justice Issues Arising from COVID-19 at 9.

c- Remote Communities

The COVID-19 pandemic created widespread confusion regarding how Indigenous peoples living in remote communities could effectively access the justice system. These communities often faced significant barriers to accessing legal services and protections, further exacerbating existing challenges.

According to Statistics Canada:

Indigenous groups were experiencing greater health impacts, greater impacts on Indigenous people could widen pre-pandemic inequalities, greater financial impacts on visible minority groups could threaten an inclusive recovery, low-wage workers continue to be among those hit hardest by lockdowns.¹⁰³

In the Yukon, Northwest Territories, and Nunavut, the circuit court model had long been used, where judges, court personnel and lawyers fly in to hold hearings to serve isolated communities. While this model brings the justice system closer to these communities, it has always had gaps in meeting their needs, such as providing meaningful participation in the justice system. Delays between circuit court visits often leave community members feeling disappointed.¹⁰⁴

The use of technology during the pandemic worsened the inequality of access to justice, particularly in remote communities. Not everyone had access to broadband internet, as it was often expensive and sometimes unavailable. Many communities also lacked the necessary equipment or domestic expertise to solve technical problems. Additionally, due to COVID-19

¹⁰³ COVID-19 in Canada: A One-year Update on Social and Economic Impacts (11 March 2021), online: Statistics Canada < <https://www150.statcan.gc.ca/n1/pub/11-631-x/11-631-x2021001-eng.htm> >.

¹⁰⁴ Emily Tsui, “COVID-19’s Impact on the Administration of Justice in Canada’s Arctic” (17 December 2020), online: The Arctic Institute < <https://www.thearcticinstitute.org/covid-19-impact-administration-justice-canadas-arctic/> > [Emily Tsui].

related closures of public facilities, individuals were unable to visit public libraries to access the internet, which further impacted the outcome of their cases.¹⁰⁵

Alexander Wolf, the provincial court judge for Port Alberni and west coast communities, stated:

I would say that those communities have less access to justice as a result of the circuit pulling out. In this time of fiscal restraint because of COVID, we can't lose access to justice, because we've seen that take place all over.¹⁰⁶

d- Self-Represented Litigants

As mentioned earlier, remote hearings showed that not everyone had the same access to technology, including self-represented litigants, who often faced greater barriers to accessing justice. These differences usually depended on different factors.¹⁰⁷

The Canadian Bar Association asserted:

For self-represented litigants especially, timely and relevant assistance is key to improving access to justice. Online resources and technology can be useful. Simplified procedures and well-resourced technology have tremendous potential for reducing inefficiencies and empowering individuals, including self-representatives and those with accessibility issues. However, delivering justice remotely has underlined the unequal access to technology (e.g. differences in software, hardware, internet speed, user skills) and its impacts on access to justice for self-represented litigants. These differences often reflect the participant's income, age, physical and mental conditions. Many people need human help to navigate the system. Closing courthouses and registry offices makes it more difficult to obtain legal information.¹⁰⁸

¹⁰⁵ Emily Tsui.

¹⁰⁶ Eric Plummer, "Pandemic limits access to justice for remote communities" (27 October 2020), online: Ha-Shilth-Sa <<https://hashilthsa.com/news/2020-10-27/pandemic-limits-access-justice-remote-communities>>.

¹⁰⁷ CBA Task Force Report on Justice Issues Arising from COVID-19 at 19.

¹⁰⁸ CBA Task Force Report on Justice Issues Arising from COVID-19 at 19.

In addition, some self-represented litigants in the family justice system were unable to access the courts at all, despite all the positive steps that had been taken during the pandemic to increase accessibility. Technology was simply unavailable to many of them. For example, some self-represented litigants did not have access to a phone or computer with broadband internet, which made it difficult for them to prepare for and participate in court proceedings.¹⁰⁹

e- Individuals with Special Needs

Remote justice procedures had serious effects on people with disabilities. In traditional court settings, defendants with mental disabilities already encountered significant obstacles in receiving proper legal assistance and participating effectively. Remote hearings aggravated these barriers for these defendants, making it difficult for them to understand and follow court proceedings. Similarly, individuals who required language assistance, faced additional communication barriers.¹¹⁰

VI- The Impact of Remote Proceedings on Fair Trial Rights

Every person has the right to a fair trial, both in civil and in criminal cases, and the right to recourse, to competent, independent, and impartial courts that provide due process.

Criminal justice systems around the world had to adjust due to the COVID-19 pandemic. Changes implemented in the court system to restrain the spread of the virus made it harder for defendants to receive a fair trial. The use of technology such as videoconferencing and telephone

¹⁰⁹ Agenda for Justice 2021, online: The Canadian Bar Association, British Columbia Branch < https://www.cbabc.org/CBAMediaLibrary/cba_bc/pdf/A4J/2021/AgendaforJustice2021.pdf > at 6.

¹¹⁰ Justice for Women Amidst COVID-19 at 8.

hearings in courts and police stations, instead of physical access, due to the imposed restrictions, had a serious effect on defence rights.¹¹¹

In addition, it was important for individuals charged with a criminal offence not to remain in doubt about their fate any longer than necessary. As mentioned earlier, and as the old saying goes: "justice delayed is justice denied."

A- International Standards for Fair Trial Rights

Article 10 of The Universal Declaration of Human Rights (UDHR) reads:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.¹¹²

Article 14 of the International Covenant on Civil and Political Rights (ICCPR)¹¹³, article 7 of the African Charter on Human and Peoples' Rights (ACHPR)¹¹⁴, article 8 of the American Convention on Human Rights (ACHR)¹¹⁵ and article 6 of the European Convention on Human

¹¹¹ The Right to a Fair Trial, online: Fair Trials < <https://www.fairtrials.org/resources/hub/?issue=COVID-19>>.

¹¹² Universal Declaration of Human Rights, GA Res 217(III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948), online: United Nations < https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf>.

¹¹³ International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Can TS 1976 No 47, (entered into force 23 March 1976), online: United Nations Human Rights office of the High Commissioner < <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>>.

¹¹⁴ African Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 1520 UNTS 217, (entered into force 21 October 1986), online: African Commission on Human and Peoples' Rights < <https://www.achpr.org/legalinstruments/detail?id=49>>.

¹¹⁵ American Convention on Human Rights, 22 November 1969, OASTS No 36, 1144 UNTS 123, (entered into force 18 July 1978), online: Organization of American States < https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf>.

Rights (ECHR)¹¹⁶, all address the need for a fair trial and hearings to be held within a reasonable time.

The UN Human Rights Committee mentioned some restrictions to the scope for derogations from article 14 of the ICCPR in situations of emergency. It stated:

Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole and that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a state party's decision to derogate from the Covenant.¹¹⁷

In addition, the European Court of Human Rights affirmed that while physical presence may not always be required for some hearings, it is crucial for others, especially those where, for example, the testimony of the individual and the assessment of credibility are essential. The Court found that some courts violated the European Convention on Human Rights because they failed to perform a critical analysis of whether physical presence was necessary to ensure a fair trial in a particular case. Additionally, they did not explore alternative options or consider what kind of compensation could be provided for damages suffered by one of the parties.¹¹⁸

¹¹⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), 4 November 1950, 213 UNTS 221, Eur TS No 5, (entered into force 3 September 1953), online: <https://www.echr.coe.int/documents/convention_eng.pdf>.

¹¹⁷ UN Human Rights Committee, General Comment No 29: States of Emergency (Article 4), UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001), online: United Nations <<https://undocs.org/CCPR/C/21/Rev.1/Add.11>> at paras 15-16.

¹¹⁸ Videoconferencing, Courts and COVID-19 at 6.

B- Fair Trial Protections Under Canadian Law

The right to a fair trial means that individuals have the right to go to court and have their case heard and decided by a judge. These individuals should be able to exercise and protect their rights without any limitations and in a reasonable time frame.

i- *The Charter of Rights and Freedoms (the Charter)*

Section 11(d) of the *Charter* provides that “any person charged with an offence has the right to a fair and public hearing by an independent and impartial tribunal.”¹¹⁹

Section 11(b) of the *Charter* further protects against excessive delays, affirming that the accused has the right to be tried within a reasonable time. Many factors are taken into consideration to determine whether the accused's right to a trial in a reasonable time has been violated, including: “the length of the delay (delays of more than eight to ten months can be suspect); any explanations for the delay, any waiver by the accused, and any prejudice suffered by the accused.”¹²⁰ Courts typically allow more time for complex cases, but the prosecution can be held accountable if delays are caused by insufficient court resources or prosecutorial inefficiency. In such cases, the remedy is a *stay of proceedings*, which effectively halts the prosecution permanently.¹²¹

¹¹⁹ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

¹²⁰ Kent Roach & M.L. Friedland, “The Right to a Fair Trial in Canada”, online: <<http://hrlibrary.umn.edu/fairtrial/wrft-kr.htm>> [Kent Roach & M.L. Friedland].

¹²¹ Kent Roach & M.L. Friedland.

However, the right to a fair trial is not absolute. Section 1 of the *Charter* allows for limitations on *Charter* rights if such limitations are deemed reasonable and can be demonstrably justifiable in a free and democratic society. For example, some laws that might infringe on the presumption of innocence may still be justified if they are necessary to ensure the functioning of the justice system. Therefore, section 11 of the *Charter* is subject to limitations that can be justified as reasonable limits under section 1 of the *Charter*. This allows courts to define the right broadly and allows governments to justify exceptions when exceptional circumstances arise.¹²²

Long delays can have serious consequences. When a judge determines that an accused has been denied their constitutional right to be tried within a reasonable time under section 11(b) of the *Charter*, the judge can order a stay of proceedings, and the charges can be dismissed. To safeguard the constitutional right to a trial within a reasonable time, the justice system must remain fair and efficient, advancing proceedings promptly.¹²³

The Honourable Bob Runciman and the Honourable George Baker stated:

The stress of long trials on accused persons – who remain innocent until proven guilty – can also be significant. Accused persons are not financially compensated for what might be a lengthy period of pretrial incarceration. They may also have lost a job or accommodation, experienced damage to personal relationships while incarcerated, and spent a considerable amount of money on legal fees. If an accused person is found not guilty, they have likely endured many months of being stigmatized and perhaps even ostracized in their community and will have to rebuild their lives with their own resources.¹²⁴

¹²² Kent Roach & M.L. Friedland.

¹²³ The Honourable Bob Runciman & The Honourable George Baker, “Delaying Justice Is Denying Justice, An Urgent Need to Address Lengthy Court Delays in Canada” (August 2016), online: Senate of Canada <https://sencanada.ca/content/sen/committee/421/LCJC/Reports/CourtDelaysStudyInterimReport_e.pdf> at 2 [Delaying Justice Is Denying Justice].

¹²⁴ Delaying Justice Is Denying Justice at 2.

They further noted:

Witnesses highlighted that another critical consequence of lengthy trials is the erosion in the confidence many Canadians have in the efficiency and fairness of the criminal justice system. The phrase “justice delayed is justice denied” applies here. As the delay increases, the connection between the commission of an offence and its condemnation weakens. Swift, predictable justice, which many see as the most powerful deterrent of crime, diminishes when delays become too great. Delays also have an impact on the quality and reliability of evidence since accused persons’ and witnesses’ memories will be less clear as time passes.¹²⁵

Accused individuals are often deeply affected by the criminal proceedings, and excessive delays can be particularly harmful, especially since they are presumed innocent. Therefore, both the accused and the victims have a vested interest in ensuring that proceedings move efficiently and are resolved within a reasonable time.

ii- The Jordan Case and Reasonable Time Limits

In July 2016, the Supreme Court of Canada established a new framework regarding delays in the criminal justice process in *R v Jordan*.¹²⁶

In *R v Jordan*, Barrett Richard Jordan, along with nine other individuals, was charged in December 2008 with criminal offences related to drug possession and trafficking in the lower mainland area of British Columbia. For various reasons, Jordan’s trial did not begin until September 2012, and did not end until early 2013, taking over four years to complete.

At the beginning of the trial, Mr. Jordan sought a stay of proceedings, arguing that his right to be tried within a reasonable time, according to section 11(b) of the *Charter* had been

¹²⁵ Delaying Justice Is Denying Justice at 6.

¹²⁶ *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631 [*R v Jordan*].

violated. The trial judge dismissed his application, and the Court of Appeal of British Columbia upheld this decision. Mr. Jordan subsequently appealed to the Supreme Court of Canada which agreed to set aside his conviction and granted the stay of proceedings.

The Supreme Court ruled that:

The presumptive ceiling is set at 18 months for cases going to trial in the provincial court, and at 30 months for cases going to trial in the superior court (or cases going to trial in the provincial court after a preliminary inquiry).

If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) exceeds the ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable, and a stay will follow.¹²⁷

Palma Paciocco affirmed this, stating:

Section 11(b) of the *Charter* guarantees that, once a person has been charged with a crime, the state will act reasonably to ensure that person will not be made to endure an unreasonably long wait before the charge is resolved. This right to reasonable state action in avoiding excessive trial delay is understood to implicate the accused's liberty interests, since trial delay prolongs the period during which the accused is held in pre-trial custody or under release conditions; their security of the person, because trial delay exacerbates the stigma and anxiety associated with unresolved criminal charges; and their fair trial interests, since delay can make it harder to mount an effective defence as evidence deteriorates or is lost. The Jordan majority made clear that unreasonable trial delay is irrebuttably prejudicial to accused persons. When it occurs, the remedy that issues through section 24(1) of the *Charter* is a stay of proceedings.¹²⁸

As a result of the *Jordan* case, there is now a clear limit for how long a case can continue before it is dismissed due to delay under the *Charter*. Most cases are now subject to an 18-month

¹²⁷ *R v Jordan* at paras 46-47.

¹²⁸ Palma Paciocco, "Trial Delay Caused by Discrete Systemwide Events: The Post Jordan Era Meets the Age of COVID-19" (19 January 2021), online: Osgoode Hall Law Journal <<https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3607&context=ohlj>> at 13 [Palma Paciocco].

time limit from the first court appearance to the conclusion of the case. However, more serious cases can have up to a 30-month time limit.

iii- COVID-19 and Its Impact on Court Delays

Less than four years after the *Jordan* case, COVID-19 was declared a global pandemic by the WHO, and courts across Canada were closed to help slow the transmission of the virus. The importance of having timely trials was put on hold in favour of public health and safety. However, these court closures, mandated by COVID-19 measures, led to serious trial delays, directly impacting the right to be tried within a reasonable time according to section 11(b) of the *Charter*.¹²⁹

The measures were taken to reduce the spread of the virus, including lockdowns, delayed the time it took to resolve cases. But the question arose: Did that delay count toward the time limits established by the Supreme Court in the *Jordan* case? Was COVID-19 an “exceptional circumstance” under the *Jordan* framework that determines section 11(b)?

The delay caused by the closure of courthouses for many months resulted in many cases exceeding the 18- or 30-month time limits set by the Supreme Court. However, this delay did not necessarily lead to dismissal, as the court had to determine the reasons for the delay. As stated, “delay that is due to exceptional circumstances is not counted towards the Jordan time limits.”¹³⁰

¹²⁹ Palma Paciocco, at 2.

¹³⁰ Arun S. Maini, “5 Ways that COVID-19 will Affect your Case” (6 July 2020), online: The Defence Group < <https://www.defencegroup.ca/blog/5-ways-that-covid-19-will-affect-your-case/> > [Arun S. Maini].

In the *Jordan* case, the Supreme Court provided guidance on what qualified as an exceptional circumstance:

Exceptional circumstances lie *outside the Crown's control* in the sense that (1) they are reasonably unforeseen *or* reasonably unavoidable, *and* (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. So long as they meet this definition, they will be considered exceptional.¹³¹

According to Arun Maini:

An “exceptional circumstance” is one which is unforeseeable or one which was not within the control of the Crown or the court. Examples include:

- A medical emergency involving the Crown, judge, or a witness;
- An “Act of God” such as a flood or fire that shuts down the courthouse.

It is expected that the COVID-19 pandemic which closed the courts will be seen as such an “Act of God” or “exceptional circumstance”.

But that is not the end of the matter, because once the courts re-open there will be a huge backlog of cases for the Crown and the court to contend with, and how that backlog is handled will likely be quite relevant to the issue of delay.¹³²

iv- Court Decisions During the Pandemic

In the 2021 case, *Kalashnikoff v Her Majesty the Queen*, the three accused – Alexander Dimitri Kalashnikoff, Tara Lee Cartwright and Matthew James Robert – faced charges of drug trafficking.¹³³ They applied for a stay of proceedings under section 11(b) of the *Charter* arguing that their right to a trial within a reasonable period had been infringed due to the delay of their trial from May 2020 to May 18, 2021.¹³⁴

¹³¹ *R v Jordan* at para 69.

¹³² Arun S. Maini.

¹³³ *Kalashnikoff v Her Majesty the Queen*, 2021 ABQB 327 [*Kalashnikoff v Her Majesty the Queen*].

¹³⁴ *Kalashnikoff v Her Majesty the Queen* at paras 1-2.

The accused argued that only the period during which the court was not conducting any in-person trials should be deducted from the total delay. This would mean that only the time between May 5, 2020, and either the end of June 2020 or September 2020, when the court was able to hear in-person trials, should be considered as delay attributable to the pandemic.¹³⁵

The Court of Queen's Bench concluded:

[...] the entire delay occasioned by the COVID 19 pandemic from May 5, 2020 to the anticipated completion of trial on May 21, 2021 is properly considered an exceptional circumstance and should be deducted from the total delay.

The delay in this matter from the date of the first Information to the conclusion of trial is 40 months (Jan 22, 2018 to May 21, 2021).

The total delay attributable to the pandemic runs from May 8, 2020 to May 21, 2021. That amounts to 12 months, 13 days. When that amount is deducted from the total delay, the remaining delay is below the 30-month presumptive ceiling in *Jordan*.¹³⁶

In *R v Walker*, Richard Walker applied for a stay of his sentencing, a stay of the execution of his sentence, or a reduction in the severity of his sentence, in line with section 24(1) of the *Charter*. He argued that his right to be sentenced within a reasonable time as guaranteed by section 11(b) of the *Charter* had been violated.¹³⁷

The application was dismissed by the Superior Court of Justice:

The delay caused by the suspension of court operations and the resulting backlog due to the pandemic has already been found to be reasonable because of the presence of exceptional circumstances. The pandemic was not reasonably foreseeable, and the Crown could not have reasonably remedied the delays that emanated from it.¹³⁸

¹³⁵ *Kalashnikoff v Her Majesty the Queen* at para 3.

¹³⁶ *Kalashnikoff v Her Majesty the Queen* at paras 35-37.

¹³⁷ *R v Walker*, 2020 ONSC 8153 at para 1 [*R v Walker*].

¹³⁸ *R v Walker* at para 43.

In *R v Harker*, Marvin Ross Harker was charged with multiple historic sexual offences on January 17, 2018. In 2020, after his conviction, but before his sentencing, Harker applied for a stay of his convictions according to section 11(b) of the *Charter*.¹³⁹

His application was dismissed by the Court of Queen's Bench:

The delay in this proceeding is entirely related to the onset of the Pandemic which is still ongoing. The Pandemic has injected uncertainty into Court scheduling. It is entirely possible that further interruptions could occur should a further state of emergency be declared, or if Court personnel and resources were disastrously affected by illness. In addition, the Court continues to have to balance priorities to address not only the backlog of cases resulting from the Pandemic, but also the availability of COVID-safe court facilities and virtual courtrooms. Establishing a presumptive ceiling in the midst of a pandemic would ignore the current reality in which the Court is operating, the fact that there are a backlog of cases requiring rescheduling, and the effect that this has on the scheduling of new criminal matters. The Court's response to the Pandemic also reflects balancing the right of access to justice, amongst a wide variety of litigants, with public safety. As such, in considering all of those interests, the public safety considerations, as a part of public confidence are paramount in the time of a pandemic.¹⁴⁰

Despite these various court decisions, the implications on the right to a fair trial and the right to a trial within a reasonable time should not be ignored. Even in these exceptional situations, when possible, court proceedings should be conducted in person to protect the rights of defendants. The criminal justice system must continue to function during public health emergencies to prevent any future backlog of cases that could disrupt court proceedings.

¹³⁹ *R v Harker*, 2020 ABQB 603 at para 1 [*R v Harker*].

¹⁴⁰ *R v Harker* at para 18 (ii).

VII- Adapting Canada's Justice System: The Digital Shift

Before the COVID-19 pandemic, courts relied on paper-based exchanges, and few had established videoconferencing systems for virtual hearings. Many courts were not fully digitised lacking e-filing systems or other technological adjustments.

In response to the COVID-19 lockdown, courts started to develop supportive technologies, such as online filing systems and videoconferencing platforms such as Teams, Skype, Zoom and others. However, this transition posed significant challenges for the justice system.¹⁴¹

A- How COVID-19 Pushed Canadian Courts to Go Digital

The COVID-19 crisis forced most courts worldwide, including in Canada, to modernize by incorporating technology in different ways. The pandemic required judges, lawyers, and court personnel to adapt quickly to using online filing systems and videoconferencing to continue operations.¹⁴²

The following are examples of court decisions made during the pandemic regarding the use of technology in the courtroom:

In *Rovi Guides, Inc. v Videotron Ltd.*, the Federal Court of Canada, following a trial management conference, established a framework for a remote trial via videoconference:

The Court recognizes the importance of reducing the spread of COVID-19 and prioritizes the health and safety of all court participants, including members of the Court, registry staff, counsel, witnesses, stenographers and interpreters. At the same time, the Court must balance the need to maintain judicial operations.

¹⁴¹ Tania Sourdin, Bin Li & Donna Marie McNamara.

¹⁴² Neil Wilson, Technology and the Courts: Now or Never (20 April 2020), online: The Lawyer's Daily < https://www.thelawyersdaily.ca/articles/18652/technology-and-the-courts-now-or-never-neil-wilson?article_related_content=1>.

The Court has mandated that the hearing will be resumed using the Zoom platform.¹⁴³

In case of any technological issues, the court outlined specific steps:

[...] counsel for the parties shall jointly prepare a list with back-up phone numbers of the assigned registry officer, the Court reporter(s), the interpreter and all counsel for the parties, so that all stakeholders can communicate with one another in the event that the Internet connection of one or more stakeholders is interrupted.

Counsel shall take reasonable steps to ensure that they have suitable technology, including Internet and audio-visual connections, to allow for the conduct of the virtual portions of this trial.¹⁴⁴

...

In the event that there is a loss of an Internet connection to such a degree that an Essential Individual ... is no longer able to meaningfully participate in the trial, the trial shall be adjourned until all Essential Individuals have a sufficient Internet connection to be able to meaningfully participate in the trial.¹⁴⁵

...

In the event that Internet connection problems precluded counsel from objecting to a question being asked of a witness prior to the witness answering such question, counsel shall be permitted to raise the objection after the witness has already answered the question, provided that counsel objects as soon as reasonably possible.¹⁴⁶

...

It is understood that the registry officer for the trial hearing will be the “host” of the Zoom sessions and the trial judge will be “co-host”. During witness examinations, the video feed will be restricted to the trial judge, the witness, the examining lawyer and one opposing counsel. Other than those individuals, and the registry officer, all other participants will be muted and will have no video feed during the examination. At other times, second counsel may also participate by audio and video, as appropriate.

Trial participants shall not use the Zoom chat functionality for any private discussions.¹⁴⁷

¹⁴³ *Rovi Guides, Inc. v Videotron Ltd.*, 2020 FC 637 at paras 1-3 [*Rovi Guides, Inc. v Videotron Ltd.*].

¹⁴⁴ *Rovi Guides, Inc. v Videotron Ltd.* at paras 8-11.

¹⁴⁵ *Rovi Guides, Inc. v Videotron Ltd.* at para 24,

¹⁴⁶ *Rovi Guides, Inc. v Videotron Ltd.* at para 28.

¹⁴⁷ *Rovi Guides, Inc. v Videotron Ltd.* at paras 36-37.

In *Teksavvy Solutions Inc. v Bell Media Inc.*, the Federal Court acknowledged the significant changes brought by the pandemic:

These days, many courts have been challenged by the COVID-19 pandemic. In response, they have had to find new ways of doing old things. For the first time, some courts are receiving electronic documents, are hearing cases through online videoconference, and are determining disputes on the basis of written materials alone.

Six years ago, the Supreme Court urged all participants in the justice system—but most particularly courts—to fashion new procedures and adopt culture change to make the justice system more efficient, faster, and less expensive.¹⁴⁸

In *Winchester Investments Ltd. v Polygon Restoration Inc./Polygon Apres Sinistre Inc.*, the court had to determine how to proceed with a case in which a representative for discovery was in Montreal, while both counsel were located in Vancouver.¹⁴⁹ The plaintiff applied for an order asking for in-person discovery in Montreal, while the defendant asked that both counsel proceed remotely from Vancouver.

The court decided that:

[...] plaintiff counsel’s preference to travel to Montreal to conduct an in-person examination for discovery of the defendants representative at a reporter’s office, is an unnecessary and unwarranted imposition on the participants in the examination for discovery... Both counsel practice in Vancouver, and the technology exists through court reporting services in Vancouver to conduct remote examinations for discovery of a person located in Montreal.¹⁵⁰

The court ordered that “the examination for discovery proceed remotely by video conference arranged through a Vancouver Court reporter that offers this service.”¹⁵¹

¹⁴⁸ *Teksavvy Solutions Inc. v Bell Media Inc.*, 2020 FCA 108 at paras 3-5.

¹⁴⁹ *Winchester Investments Ltd. v Polygon Restoration Inc./Polygon Apres Sinistre Inc.*, 2020 BCSC 999 [*Winchester Investments Ltd. v Polygon Restoration Inc./Polygon Apres Sinistre Inc.*].

¹⁵⁰ *Winchester Investments Ltd. v Polygon Restoration Inc./Polygon Apres Sinistre Inc.* at para 8.

¹⁵¹ *Winchester Investments Ltd. v Polygon Restoration Inc./Polygon Apres Sinistre Inc.* at para 10.

It was expected during the pandemic that some of these technological methods would continue beyond the crisis. As family lawyer Russell Alexander stated, “many courts are considering making some of these changes permanent. Once this pandemic is over ... I think a lot of these tools and technologies will continue to be used, and the court system is going to be more efficient as a result”.¹⁵²

B- Amendments to the Criminal Code in Response to COVID-19

Bill C-23 and Bill S-4 proposed amendments to the *Criminal Code* and other acts to address challenges in the justice system brought on by the COVID-19 pandemic.

Bill C-23, introduced in February 2021, aimed to modernize the criminal justice system by improving flexibility in court proceedings. However, the bill died on the Order Paper when Parliament dissolved in August 2021.¹⁵³ The objectives of Bill C-23 were subsequently pursued through Bill S-4, *An Act to amend the Criminal Code and the Identification of Criminals Act and to make related amendments to other Acts (COVID-19 response and other measures)*, introduced in November 2021.¹⁵⁴

¹⁵² COVID-19 Lockdown Responsible for Major Backlog in Divorce Proceedings, Lawyers Say (22 July 2020), online: CBC News < <https://www.cbc.ca/news/canada/toronto/covid-divorce-courts-backlog-toronto-1.5658314>>.

¹⁵³ C-23 43rd Parliament, 2nd Session, An Act to amend the Criminal Code and the Identification of Criminals Act and to make related amendments to other Acts (COVID-19 response and other measures) (15 August 2021), online: LEGISinfo < <https://www.parl.ca/legisinfo/en/bill/43-2/c-23>>.

¹⁵⁴ S-4, 44th Parliament, 1st session, An Act to amend the Criminal Code and the Identification of Criminals Act and to make related amendments to other Acts (COVID-19 response and other measures) (6 January 2025), online: LEGISinfo < <https://www.parl.ca/legisinfo/en/bill/44-1/s-4?view=about>>.

Bill S-4 largely mirrored the proposed changes in Bill C-23, focusing on modernizing the criminal justice system by increasing flexibility in court proceedings without compromising public safety or individual rights.¹⁵⁵

Key proposals in Bill S-4 included:

- **remote appearances for accused individuals:** clarify and expand the law by providing clear mechanisms to allow accused persons or offenders to appear remotely by videoconference or audioconference in most criminal proceedings, with consent, at the discretion of the court and with other appropriate safeguards
- **remote participation for jury selection proceedings:** allow videoconference participation by prospective jurors in the jury selection process under certain circumstances, with the consent of the parties, at the discretion of the court and with other appropriate safeguards
- **use of technology for jury selection:** allow for the enhanced use of technology to draw the names of prospective jurors in the jury selection process
- **judicial case management rules for unrepresented persons:** allow courts to make judicial case management rules that permit court personnel to deal, out of court, with administrative matters relating to proceedings with unrepresented accused persons
- **telewarrant process:** revise the existing telewarrant process to allow peace officers to remotely apply for a wider range of investigative orders
- **fingerprinting process:** allow fingerprinting under the *Identification of Criminals Act* to occur at a later date, particularly where previous attempts at fingerprinting were not possible due to exceptional circumstances, such as those posed by COVID-19.¹⁵⁶

The proposed changes sought to promote fair, timely justice for both victims and accused individuals by enhancing the safety, effectiveness, and flexibility of the justice system. By modernizing court processes and increasing flexibility, Bill S-4 sought to address challenges

¹⁵⁵ Department of Justice Canada, Government of Canada introduces legislation to improve the operation of the criminal justice system and address the impacts of the COVID-19 pandemic (8 February 2022), online: Government of Canada < <https://www.canada.ca/en/departement-justice/news/2022/02/government-of-canada-introduces-legislation-to-improve-the-operation-of-the-criminal-justice-system-and-address-the-impacts-of-the-covid-19-pandemic.html> > [Changes to the *Criminal Code*].

¹⁵⁶ Changes to the *Criminal Code*.

posed by the COVID-19 pandemic, including the backlog of cases. The Department of Justice emphasized that these reforms were designed to reduce the risk of further delays and contribute to long-term improvements in the accessibility and efficiency of the justice system.¹⁵⁷

On December 15, 2022, Bill S-4, received royal assent and became law.¹⁵⁸

¹⁵⁷ *Changes to the Criminal Code.*

¹⁵⁸ *An Act to amend the Criminal Code and the Identification of Criminals Act and to make related amendments to other Acts (COVID-19 response and other measures)*, SC 2022, c 17.

VIII- Recommendations

The Alberta Civil Liberties Research Centre makes the following suggested recommendations:

A- Addressing a Pandemic Crisis

1. While a pandemic can cause significant disruptions to the justice system, courts must remain resilient and adaptable to prevent future delays in access to justice.
2. Courts should continue to operate efficiently to ensure cases are heard within a reasonable time frame.
3. The backlog of cases, particularly in family and criminal matters, must be addressed promptly.
4. Lawyers and court staff should collaborate to streamline proceedings and manage the unprecedented backlog of cases.
5. Lawyers should encourage individuals to engage in alternative dispute resolution to reduce court delays. Alternative dispute resolution processes can be quicker, more cost-effective, and more efficient for parties who do not want to wait for years for a settlement through the courts.

6. Lawyers can support access to justice by offering free legal advice to low-income individuals when possible.
7. Governments and justice system professionals should learn from the COVID-19 pandemic's impact to develop strategies that prevent similar disruptions in the future.
8. Individuals must have equal access to fair, timely and effective justice services. The justice system must promptly determine which procedures should be prioritized during emergency situations.

B- Defendants' Rights

9. Prisons and detention facilities should be equipped with technological tools to allow detainees, accused persons and their lawyers to participate in online hearings in a way that respects defendants' rights, including their presumption of innocence.
10. Policies should be established for remote hearings to safeguard fair trial rights, due process, and victims' rights. These policies must ensure that defendants can be represented by a lawyer and that attorney-client privilege is maintained.
11. Courts should have proper equipment to facilitate confidential videoconferencing or telephone calls between lawyers and defendants, such as dedicated spaces with videoconferencing tools for lawyer-defendant communications.

12. In-person court proceedings should remain the primary option to protect defendants' rights, even during a pandemic. Defendants should be physically present in the courtroom during their trial whenever possible.
13. The right to a fair trial must not be compromised by the use of technology. Courts should carefully consider the impact of remote hearings on defendants' rights. Defendants must be able to fully exercise their rights fully, even when they are not physically present in court or unable to meet their lawyers in person.

C- Support for Technology

14. Training should be offered to individuals who may have little or no experience with relevant technologies.
15. Governments should invest in both court infrastructure and technology to improve access to legal advice, particularly for individuals facing barriers to justice.

D- Access to Justice and Legal Advice for Vulnerable People

16. Marginalized and vulnerable individuals should be given assistance to ensure that they can access the justice system.
17. Vulnerable groups should be provided with the necessary support to effectively communicate using remote access technology.

18. Courts should consider the specific needs of vulnerable groups when implementing and managing technology.
19. Case prioritization should focus on safeguarding the rights and well-being of the most vulnerable populations, including women, children, Indigenous peoples, and persons with disabilities.

E- Modernization of the Courts

20. The changes surrounding virtual hearings could become permanent if proven to be cost-effective and efficient. However, governments should assess their overall impact on the justice system before adopting these measures permanently. Courts should modernize and implement measures to improve access to justice during a pandemic, such as offering remote hearings (video, online, telephone) and electronic filings of court documents.
21. Governments should invest in technology to improve remote access to justice.
22. Processes and procedures that may be too complex for parties should be simplified to ensure that hearings are quick and accessible.
23. Courts should proactively prepare for any future court closures, having learned from the challenges posed by the COVID-19 pandemic.

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