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## The Court System in a Time of Crisis: COVID-19 and Issues in Court Administration

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## The Court System in a Time of Crisis: COVID-19 and Issues in Court Administration

### Abstract

The authors examine court administration in Canada during the COVID-19 crisis. Until recently, court administration has lagged behind other aspects of pandemic scholarship; in recent times, particularly in the U.S., a body of literature has developed to deal with this problem. Courts have initiated plans to deal with disasters. However, the coronavirus pandemic has presented a new set of problems for court administration that were largely unplanned for. The authors discuss these issues and propose adoption of innovative technologies to aid in dealing with some of the immediate problems, but also to move toward broader adoption of helpful technologies to bring court administration into the 21st century.

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### Cover Page Footnote

The authors would like to thank the very helpful research and citation assistance from Patrick McCaugherty, Matti Thurlin, Jennah Khaled and Alexis Bass, and insightful comments provided by Carl Baar and Lynn Fournier-Ruggles on an earlier draft.

# The Court System in a Time of Crisis: COVID-19 and Issues in Court Administration

Richard Haigh\* and Bruce Preston\*\*

## Abstract

Canadian courts, in many ways, are neither efficient nor effective. This has been clear for many years. This article looks broadly at how little attention has been paid to court administration in the past, especially during times of crisis, and examines the impact the current pandemic may have on the future of Canadian court administration. In this vein, we examine emergency plans in general before turning to pandemic-specific plans and how, especially in Canada, these have been found wanting during this current crisis. Like most organizations, courts have developed plans—as referenced above to “BCPs” in Canada and “COOPs” in the United States—laying out policies and processes to follow in an emergency. Yet none of the various disaster plans created by courts in both Canada and the United States highlight the role and importance technology would play.

Despite the increasing use of remote access for hearings—there has been a great deal of success in scheduling appeal hearings remotely—most courts have been unable to operate at pre-pandemic levels. In fact, most courts have postponed the majority of their hearings and have had to push dockets forward. Postponing a large portion of the courts’ hearings will undoubtedly add to a backlog of cases and increase the administrative burden on operations once physical distancing is removed. But the change in attitude that has taken place over the past few months is arguably greater than the sum of all changes made over the last forty years since Carl Baar’s reference to courts being “horse-and-buggy” organizations. The pandemic has provided a perfect occasion—no doubt forced but relatively low-risk—to try new things. Our position is that steps need to be taken to ensure that an increased reliance on “privileged access to technology” during COVID-19 does not lead to an “exacerbation of denial of access to justice.”

<b>INTRODUCTION.....</b>	<b>1</b>
<b>I. COURTS DURING TIMES OF DISASTER: A BRIEF HISTORY .....</b>	<b>2</b>
<b>II. COVID-19: THE COURTS IN A TIME OF CRISIS .....</b>	<b>8</b>
A. DELAYS, CLOSURES, AND A GLOBAL PANDEMIC .....	8
B. EMERGENCY PLANS AND THE COURTS: GENERAL.....	12
C. EMERGENCY PLANS AND THE COURTS: PANDEMICS .....	13
D. PANDEMICS, TECHNOLOGY, AND THE COURTS.....	17
<b>III. CONCLUSION.....</b>	<b>22</b>

## Introduction

Court administration is defined as the practice, procedures, and offices that deal with the administrative aspects of the court system.<sup>1</sup> While basic administrative theory is often concerned with creating efficiencies, court administration seeks effectiveness.<sup>2</sup> Canadian courts, in many ways, are neither efficient nor effective. This has been clear for many years.

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<sup>1</sup> Perry S Millar & Carl Baar, *Judicial Administration in Canada* (McGill-Queen’s University Press, 1981).

<sup>2</sup> *Ibid.*

One measure of effective court administration is to reduce backlog and delay but not at the expense of fairness. Doctor Livingston Armytage, now the Director of the Centre for Judicial Studies in Sydney, Australia, is a leading figure in justice administration reform. His recipe for reducing backlog and delay is, at its core, straightforward and simple. Improving “case management,” by giving it “high institutional priority,” ensuring that there is “judicial leadership and stakeholder participation in the reform process,” and focusing on the “dual strategy [of] backlog reduction and management of new cases” are all necessary elements to achieving a more effective court system.<sup>3</sup> Professor Richard Susskind, who has made a career of imagining legal practice in the future,<sup>4</sup> posits the idea of using online judges, judges without courtrooms, and justice without hearings as one way of improving the system.<sup>5</sup>

For a century or more, many courts have operated like neoclassical economies unconnected with the grid: tradition-bound, resistant to change, and functioning at a distant remove from the high-tech, wired world upon which most of society relies. The largely paper-based processes of many courts are maintained as a bulwark against the potential risk of cyber breaches or hacker intrusions—fully automated courts could be as risk-prone to hacking as wastewater treatment plants, for example.<sup>6</sup> Judicial independence and a largely monopolistic lock that the judiciary have traditionally had on the running of the courts means that, historically, breaking through that mentality has been a daunting prospect. The COVID-19 pandemic appears to have had an impact on this hidebound way of thinking.

This paper looks broadly at how little attention has been paid to court administration in the past, especially during times of crisis, and examines the impact the current pandemic may have on the future of Canadian court administration. In this vein, we examine emergency plans in general before turning to pandemic-specific plans and how, especially in Canada, these have been found wanting during this current crisis. We conclude by offering some suggestions for the future. But first, we take a brief look at how courts have been perceived during past disasters.

## I. Courts During Times of Disaster: A Brief History

The first outbreak of the bubonic plague in England, a pandemic which occurred over two years from 1348 to 1350 (commonly known as the Black Death), killed upwards of one-third of the population. Accurate figures remain difficult to come by, however, best estimates place the

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<sup>3</sup> Livingston Armytage, *Reforming Justice, A Journey to Fairness in Asia* (Cambridge University Press, 2012) at 255.

<sup>4</sup> See Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2012).

<sup>5</sup> Canadian Institute for the Administration of Justice, “Will COVID-19 Be the Catalyst We Were Waiting for to Modernize the Courts?” (20 May 2020) at 01h:29m:16s, online (webcast): <ciaj-icaj.ca/en/library/videos/webinars-cpd/#goto-2020-special-webcasts> [perma.cc/96V4-3HZ6] [“Will COVID-19 Be the Catalyst?”].

<sup>6</sup> See Andy Greenberg, *Sandworm: A New Era of Cyberwar and the Hunt for the Kremlin's Most Dangerous Hackers* (Doubleday, 2019). The 2019 Annual Report of the Auditor General of Ontario found that the overall pace of court system modernization remains slow, and the system is still heavily paper-based, making it inefficient and keeping it from realizing potential cost savings. See Office of the Auditor General, *2019 Annual Report*, vol 3 (Queens Printer for Ontario, 2019) ch 2, online (pdf): <www.auditor.on.ca/en/content/annualreports/arreports/en19/v3\_200en19.pdf> [perma.cc/7LTG-HVHC].

number of deaths at over two million.<sup>7</sup> But what happened to the court system during those horrific times?

In Robert Palmer's *English Law in the Age of the Black Death, 1348–1381*, courts played a large role, as he describes their place in the power structure of English society at that time, in the changes wrought to the legal system as a result of the pandemic. In particular, he attributes the growth of the Court of Chancery and its equity jurisdiction to the Black Death.<sup>8</sup> In all of this, however, the basic operation of the courts is barely mentioned, and where court operation is referenced, the suggestion is that it continued, albeit in attenuated form:<sup>9</sup>

A different index of mortality that has a similar countrywide basis is the level of litigation. Litigation is a more difficult index than reports of deaths, because litigation could diminish substantially for a complex of reasons. Still, the level of litigation in the court of common pleas, measured by the membranes of legal records in the plea rolls, confirms the drastic impact of the first occurrence of the Black Death. The rolls even between 1353 and 1356, after an immediate precipitous decline in 1349, remained less than 60 percent the size of the 1348 rolls.

In sum, litigation tailed off during the Black Death—how could it not?!—but there's no mention of the courts closing or not functioning. It is only many pages later, in a single reference that forms only part of a sentence, where we learn that the courts were adjourned for a short period: “The Parliament summoned for early in 1349 was canceled; the courts were adjourned during Trinity term because of the plague.”<sup>10</sup> The consequences of these closures on the administration of justice merited no further mention.

In tracing the history of many of the great pandemics and disasters following the Black Death, up until the late twentieth century, there is a similar lack of scholarly information and analysis concerning the courts. A non-exhaustive list includes pestilence in Europe in the early 1600s;<sup>11</sup> the eruption of Mount Etna in 1669;<sup>12</sup> the plague in Spain and Gibraltar in 1804 to 1805;<sup>13</sup> the Yellow fever in North and South America during the mid- to late-1800s;<sup>14</sup> cholera in Europe in the years 1865 to 1873;<sup>15</sup> the San Francisco earthquake in 1906;<sup>16</sup> Spanish Flu in 1916 to 1918;<sup>17</sup> and even World War I and II.<sup>18</sup> In all of these disasters, our admittedly incomplete

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<sup>7</sup> See John Hatcher, *Plague, Population and the English Economy, 1348-1530* (Palgrave, 1977). See also Robert C Palmer, *English Law in the Age of the Black Death, 1348-1381: A Transformation of Governance and Law* (University of North Carolina Press, 1993).

<sup>8</sup> Palmer, *ibid* at ch 9.

<sup>9</sup> *Ibid* at 3.

<sup>10</sup> *Ibid* at 17. Trinity term in UK law is the term from May to July.

<sup>11</sup> See Sherston Baker, *The Laws Relating to Quarantine of Her Majesty's Dominions at Home and Abroad* (C Kegan Paul & Co, 1879). Note especially the preface.

<sup>12</sup> DK Chester et al, *Mount Etna: The Anatomy of a Volcano* (Chapman and Hall, 1985).

<sup>13</sup> George Augustin, *History of Yellow Fever* (Searcy & Pfaff, 1909). In a monograph of nearly 1200 pages, Augustin mentions “courts” only three times.

<sup>14</sup> *Ibid*.

<sup>15</sup> Felice J Batlan, “Law in the Time of Cholera: Disease, State Power and Quarantine Past and Future” (2007) 80 Temp L Rev 53.

<sup>16</sup> Stephen Kroll-Smith, *Recovering Inequality: Hurricane Katrina, the San Francisco Earthquake of 1906 and the Aftermath of Disaster* (University of Texas Press, 2018); William Bronson, *The Earth Shook, the Sky Burned: 100th Anniversary Edition* (Chronicle Books, 2006) (a single reference to the court house of Santa Rosa in ruins but nothing more about the judicial system).

<sup>17</sup> Kroll-Smith, *ibid*.

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

research has not revealed any serious consideration of how the justice system was affected or impaired.<sup>19</sup>

A typical example of what we mean is found in a long, detailed article by Canadian anthropologists Lawrence Sawchuck and Stacie Burke.<sup>20</sup> In examining the yellow fever epidemic in Gibraltar in 1804 to 1805, Sawchuck and Burke make the following claim:<sup>21</sup>

The short- and long-term consequences of the yellow fever epidemic are then examined, with special attention to their influence on changing local conditions, including the development of public health ... reform, the enforcement of more stringent immigration legislation, and the altered social fabric by which the civilian community was bound.

None of these conditions describe the courts. The article then stresses how the disease shaped the character and identity of early Gibraltar as it irreversibly tore apart the social fabric of the community.<sup>22</sup> Yet, there is not a single reference to the courts or the justice system. It does not seem possible that at least a small aspect of the tearing of the social fabric would not include effects on the legal system.

We are not faulting the scholarship of Sawchuck and Burke, nor any of the other authors mentioned above. All significant disasters produce astronomical amounts of information and pose innumerable questions, mostly concerning human health and policy responses. Understandably, focus and attention is therefore devoted to such matters.<sup>23</sup> Our point is that for much of history the role of courts, their specific functioning and administration, have been considered insufficiently important to warrant detailed analysis.

As a result, little scholarship is available to assess what courts have done during pandemics. For example, it is unclear whether they continued to hear motions and appeals but not trials; whether responses were different for criminal versus civil jurisdictions; whether case delays are a natural by-product of disasters. This is not to say that there is no record at all as to whether courts remained fully functioning and open during all these calamities. Newspapers

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<sup>19</sup> We make no claim to have exhausted all available sources. However, we are relatively confident in our assertion given that we examined many of the key sources related to each of the above disasters and found nothing specific to the justice system discussed in any of them. We also communicated with four leading legal historians: Professors Philip Girard at Osgoode Hall Law School, Blake Brown at St. Mary's University in Halifax, John Witt at Yale Law School, and Craig Muldrew at the University of Cambridge in England. None of them were aware of any significant work specifically devoted to court administration during various disasters prior to the 1980s. Blake Brown sent us three newspaper reports about court closings during the Spanish Flu (Figure 1, *infra*, is an example). As Muldrew reported in an email: "Understandably most books on the effects of quarantine focus on how the poor managed to survive with no work, but what happened to other businesses does not seem to have attracted much attention apart from ships which had marine insurance." Emails from Philip Girard (17 April 2020), Blake Brown (17 April 2020), John Witt (29 April 2020) and Craig Muldrew (22 April 2020) to Richard Haigh (emails are on file with the authors).

<sup>20</sup> Larry Sawchuk & Stacie Burke, "Gibraltar's 1804 Yellow Fever Scourge: The Search for Scapegoats" (1998) 53 J Hist of Medicine and Allied Sciences at 3.

<sup>21</sup> *Ibid* at 4.

<sup>22</sup> *Ibid*.

<sup>23</sup> It is also worth pointing out that pandemics, in general, do not offer up many easy answers to questions even of health and epidemiology. For example, it is still not known why the first wave of the Spanish Flu epidemic disappeared in the spring of 1918, but then returned in the fall. See Nicholas Kristof, "Let's Remember That the Coronavirus is Still a Mystery," *New York Times* (20 May 2020) online: <[www.nytimes.com/2020/05/20/opinion/us-coronavirus-reopening.html](http://www.nytimes.com/2020/05/20/opinion/us-coronavirus-reopening.html)> [perma.cc/HX68-QJ9X].

have been reporting on court closures for centuries; an example from Montreal during the Spanish Flu outbreak in Canada in 1918 is shown in Figure 1.

FIGURE 1: COURT CLOSURE DURING SPANISH FLU PANDEMIC<sup>24</sup>

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<sup>24</sup> “Session of King’s Bench Postponed,” *The Gazette* (31 October 1918) at 5.

## SESSION OF KING'S BENCH POSTPONED

First Time in History of  
Court; Epidemic the  
Cause

MONTH'S DELAY ORDERED

Court Was in Session During  
Smallpox Epidemic—Legal  
Formalities To Be Com-  
plied With

For the first time in the history of the Court of King's Bench, criminal side, it has been necessary to postpone the opening of a session, Hon. Justice Martin announcing yesterday that the session for November, which will open on Saturday, will be adjourned until December 9th, on account of the epidemic.

Several days ago the City Board of Health had written to Mr. E. A. Corriveau, clerk of the Crown and peace, asking that the criminal courts be closed until the epidemic was over. In accordance with this wish the police courts were closed, but a letter was sent to Dr. Eoucher, health officer, asking if it would be possible to hold a session or two of the King's Bench Court. Yesterday an answer was received to the effect that it was inadvisable owing to the seriousness of the epidemic, and Hon. Justice Martin decided to postpone the November session until December.

"Of course, the opening ceremony as prescribed by law will take place on November 2nd," said Judge Martin yesterday, "and the witnesses and the jurymen will be told that they will have to come back on December 9th." His Lordship pointed out that the postponement was in a way a good thing as the Court of King's Bench was very short-handed just at present, and that as the civil side of the court was not hampered by the health regulations and would have a sitting here on November 15th and another in Quebec on December 1st, he would be enabled to sit on the civil side.

Fortunately for the officials of the court, there are not many cases down on the lists for the coming term. There are 87 names for about 70 cases, and the term will not likely last very long when it does start.

### NOTICES SERVED.

The 70 cases call for 250 or more witnesses, and High Constable Cinq Mars has sent out all the summonses. All the notices for the members of the grand jury and those of the petit jury have also been sent out, and the work had just been completed when the notice of the postponement came. It is the first time that the High Constable has ever had his notices all served so long before the actual opening of the term.

Mr. E. A. Corriveau, clerk of the Crown and peace, stated yesterday that in his experience of over 30 years with the Court of King's Bench he had never known of a session being postponed. "I do not think that it ever happened before," he said. Coroner McMahon, who, before being appointed coroner, was for 20 years chief clerk of the court, also said yesterday that he had never heard of the court having a session postponed.

All the officials of the court who can remember the epidemic of smallpox state that even during those trying times when many people in the city of Montreal were affected with the dreadful disease, the court, which was in session at the time, continued to sit.

As far as the prisoners are concerned, they will have a month longer to wait for their trial, while accused who are out on bail will be allowed to retain their liberty until the opening of the court.



(It is interesting to note from this report how court closures in Montreal, during a pandemic worse than the current one, were extremely minimal and limited, and only applied to the criminal courts. Court offices remained open. As will be discussed below, the situation we face in 2020 is significantly different.)

One explanation for the lack of a scholarly record is that court administration was not a recognized profession nor an academic discipline until recently. Historical scholarship, such as Palmer's examination of the Black Death, makes reference to courts but from the perspective of changes in law or justice resulting from subsequent litigation related to the disaster.<sup>25</sup> Detailed analysis of courts and their functioning, in the aftermath of disasters, was generally overlooked. This despite the fact that courts were and are essential to the creation and maintenance of the rule of law and, if courts find it necessary to close in a time of disaster, little stands between citizens and the breakdown of that cardinal concept.<sup>26</sup>

This changed in the late twentieth century as court administration became increasingly professionalized and studied academically. In 1970 in the United States, the Institute for Court Management was created by a group of leaders of the court reform movement who soon after founded the National Center for State Courts.<sup>27</sup> Formal educational programs and training of court managers led to the formation of the discipline, and along with it, a growing body of academic literature on the subject.<sup>28</sup> The ground-breaking study, *Managing the Courts*, made the workings of the courts a fit topic for study.<sup>29</sup> Shortly thereafter, Carl Baar's monograph on court budgeting, *Separate But Subservient: Court Budgeting in the American States* appeared, and by 1978 Tom Church's equally ground-breaking analysis of court delay, *Justice Delayed: The Pace of Litigation in Urban Courts*, popularized the concept of local legal culture.<sup>30</sup> In 1974 *Justice System Journal*, the first fully refereed journal in the field, began publication. A few short years later, the discipline moved north to Canada, led by Carl Baar, who, with Judge Perry S. Millar, wrote the seminal text, *Judicial Administration in Canada*, laying the foundation for the academic study of court administration here.<sup>31</sup> With this increased scrutiny over management of the courts, scholars began questioning how courts and the justice system could be affected by external events. As Thomas Birkland and Carrie Schneider put it in "Emergency Management in the Courts": "since at least 1989 ... the power of ... disasters to disrupt the courts' business has been understood."<sup>32</sup> Their summary chart of important events affecting the courts in the United

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<sup>25</sup> Another good example of this is can be found in Robert A James, "Six Bits or Bust: Insurance Litigation Over the 1906 San Francisco Earthquake and Fire" (2011) 24 Western Leg History 127.

<sup>26</sup> Diane P Wood, "The Bedrock of Individual Rights in Times of Natural Disaster" (2008) 51 Howard LJ 747.

<sup>27</sup> See National Center for State Courts, "ICM History," online: <[www.ncsc.org/Education-and-Careers/ICM-Courses/ICM-History.aspx](http://www.ncsc.org/Education-and-Careers/ICM-Courses/ICM-History.aspx)> [perma.cc/MSU4-ZFHB]. This is not to say that studying the operation and administration of courts was a late twentieth century phenomenon. See e.g. Reginald Heber Smith & Herbert B Ehrmann, "The Criminal Courts" in Roscoe Pound & Felix Frankfurter, eds, *Criminal Justice in Cleveland: Reports of the Cleveland Foundation Survey of the Administration of Criminal Justice in Cleveland Ohio*, (Cleveland Foundation, 1922) 229. Smith and Ehrmann analyze the court system, both qualitatively and quantitatively, in a manner that pre-dates the "science" of court administration.

<sup>28</sup> See e.g. Carl Baar, "The Scope and Limits of Court Reform" (1980) 5 Just Sys J 274 (noting that "with the growth of court workload, the management of courts as distinct from the adjudication of cases becomes more important" at 275).

<sup>29</sup> Ernest Friesen, Edward Gallas & Nesta Gallas, *Managing the Courts* (Bobbs-Merrill, 1971).

<sup>30</sup> Carl Baar, *Separate But Subservient: Court Budgeting in the American States* (Lexington Books, 1975); Thomas W Church, *Justice Delayed: The Pace of Litigation in Urban Courts* (National Center for State Courts, 1978).

<sup>31</sup> Millar & Baar, *supra* note 3.

<sup>32</sup> Thomas A Birkland & Carrie A Schneider, "Emergency Management in the Courts: Trends After September 11 and Hurricane Katrina" (2007) 28 Just Sys J 20 at 21.

States begins, therefore, not with the civil war or the Spanish Flu, but in 1989 with the Loma Prieta Earthquake in the Bay Area of California. This disaster forced the US Court of Appeals for the Ninth Circuit to relocate because the building was deemed unsafe;<sup>33</sup> a body of literature on court operation during times of disaster thereafter began to develop.<sup>34</sup>

In particular, two recent incidents in the United States stand out: the downing of the World Trade Center towers in New York on 11 September 2001 and the large-scale flooding of New Orleans after Hurricane Katrina in 2005.<sup>35</sup> Both significantly disrupted court operations in those cities and shed light on the importance of court administration. In New York, a number of courts were closed or inaccessible in large part due to the “frozen zone” limiting access to the area around the World Trade Center for a number of days.<sup>36</sup> Even more, the catastrophic flooding that followed Hurricane Katrina rendered most of the court facilities in New Orleans and the surrounding areas unusable for an extended period of time. This resulted in many court records being damaged or lost, and consequently, many inmates went unaccounted.<sup>37</sup>

As a result of these two key events, disaster management became an important aspect of court administration in the United States. Court managers came to realize that a number of complex issues—which had long been overlooked—needed consideration: from physical design of courthouses, to safety of employees, to structure of data and communication systems and their ability to function in times of disaster, to the need to balance access to justice with security.<sup>38</sup> In response, most US court systems began developing “Continuity of Operations” (COOP) plans. Canadian courts quickly followed suit by developing their own version, called “Business Continuity Plans” (BCP). We turn to these next, examining them in relation to the current novel coronavirus pandemic.

## II. COVID-19: The Courts in a Time of Crisis

### A. Delays, Closures, and a Global Pandemic

Canadian courts have been facing a crisis of sorts for several years, at least as related to delay and the criminal justice system. An early warning of the size and scope of the problem was signaled in 1990 when the Supreme Court of Canada delivered its decision in *R v Askov*.<sup>39</sup> Askov challenged his criminal extortion trial as unconstitutional due to unreasonable delay, contrary to section 11(b) of the *Canadian Charter of Rights and Freedoms*.<sup>40</sup> In his opinion, Justice Cory,

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<sup>33</sup> *Ibid* at 22.

<sup>34</sup> See Carl Baar, “Will Urban Trial Courts Survive the War on Crime?” in Herbert Jacobs, ed, *The Prospects for Reform of Criminal Justice* (Sage Publishing, 1974) 331 at 336, n 31. It is worth noting that in a controversial paper published in 1974, Carl Baar highlighted the possibility of court administration contributing to the displacement of justice goals, and referred to court administrators engaging in “emergency planning activities of their courts” such as “arrangements which facilitate the processing of mass arrests.”

<sup>35</sup> See Birkland & Schneider, *supra* note 34 at 23-25.

<sup>36</sup> *Ibid* at 23-24.

<sup>37</sup> See Hon Justice Sarah S Vance, “Justice After Disaster—What Hurricane Katrina Did to the Justice System in New Orleans” (2008) 51 *How LJ* 621.

<sup>38</sup> See SH Daniels, “Better Blast Resistance Coming Soon to Façade,” *Engineering News-Record* 248 (25 March 2002) 39. See also Michael Griebel & Todd S Phillips, “Architectural Design for Security in Courthouse Facilities” (2001) 576 *Annals Am Acad Pol & Soc Sci* 118; Birkland & Schneider, *supra* note 31 at 23.

<sup>39</sup> *R v Askov*, [1990] 2 SCR 1199 [*Askov*].

<sup>40</sup> *Canadian Charter of Rights and Freedoms*, s 11(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

for a plurality of the Court, said the following: “No matter what standard of measure is used or what test is applied, the trial in this case has been inordinately delayed . . . . It is apparent that the situation in Peel District has been in a deplorable state for many years. Something is terribly wrong.”<sup>41</sup> As a result, the Court stayed the charges against the accused, and they all were allowed to go free.

The *Askov* decision was followed by several other Supreme Court cases relating to section 11(b) of the *Charter*, including *Morin*,<sup>42</sup> *Jordan*,<sup>43</sup> and *Cody*.<sup>44</sup> At paragraph 2 of the *Jordan* decision, the majority of the Court stated:<sup>45</sup>

As the months following a criminal charge become years, everyone suffers. Accused persons remain in a state of uncertainty, often in pre-trial detention. Victims and their families who, in many cases have suffered tragic losses cannot move forward with their lives. And the public, whose interest is served by promptly bringing those charged with criminal offences to trial, is justifiably frustrated by watching years pass before trial occurs.

That was four years ago. The problem of excessive delays has lasted for over thirty years and, despite recent court decisions, continues to plague the justice system today. This is clearly indicated in Table 1, which lists total offences of all types (excluding administration of justice offences) for all provinces and territories excluding Quebec, from 2008 to 2018.

TABLE 1: CRIMINAL COURT WORKLOAD INDICATORS, 2008–2018<sup>46</sup>

REFERENCE PERIOD	CASES INITIATED	CASES COMPLETED	COMPLETION RATE	MEDIAN CASE PROCESSING TIME <sup>47</sup>
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<sup>41</sup> *Askov*, *supra* note 38 at paras 113, 121.

<sup>42</sup> *R v Morin*, [1992] 1 SCR 771.

<sup>43</sup> *R v Jordan*, 2016 SCC 27 [*Jordan*].

<sup>44</sup> *R v Cody*, 2017 SCC 31.

<sup>45</sup> *Jordan*, *supra* note 45. See also Ottawa, Senate Standing Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada*, Final Report (June 2017), online (pdf): <[sencanada.ca/content/sen/committee/421/LCJC/reports/Court\\_Delays\\_Final\\_Report\\_e.pdf](http://sencanada.ca/content/sen/committee/421/LCJC/reports/Court_Delays_Final_Report_e.pdf)> [perma.cc/WM6T-RSWU].

<sup>46</sup> Statistics Canada, *Court workload indicators, adult criminal courts, by cases initiated, cases completed, completion rate and case processing time*, Table 35-10-0124-02 (2020), online: <[www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510012402](http://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510012402)> [perma.cc/G895-BX24].

<sup>47</sup> Note that this is the national median. The average is lower than might be expected due to less populous provinces not experiencing the same delay in the processing of cases (*i.e.* Prince Edward Island, with a median days to disposition of 49 in 2017-2018). See Statistics Canada, *Court workload indicators, adult criminal courts, by cases initiated, cases completed, completion rate and case processing time - Prince Edward Island*, Table 35-10-0124-02, online:

<[www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510012402&pickMembers%5B0%5D=1.4&pickMembers%5B1%5D=2.2](http://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510012402&pickMembers%5B0%5D=1.4&pickMembers%5B1%5D=2.2)> [perma.cc/9SZK-XN3Z]. The median number of days to disposition for Ontario is slightly higher than the national statistics. See Statistics Canada, *Court workload indicators, adult criminal courts, by cases initiated, cases completed, completion rate and case processing time - Ontario*, Table 35-10-0124-02, online:

<[www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510012402&pickMembers%5B0%5D=1.8&pickMembers%5B1%5D=2.2](http://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510012402&pickMembers%5B0%5D=1.8&pickMembers%5B1%5D=2.2)> [perma.cc/F6VL-H5JR]. However, when one considers the average number of days to disposition the situation in the Ontario Court of Justice (OCJ) is quite different. In 2019, the average number of days to disposition in that court was 150. See Ontario Court of Justice, “Offence Based Statistics - All Criminal Cases Provincial Overview January 2019 to December 2019,” online (pdf): <[www.ontariocourts.ca/ocj/files/stats/crim/2019/2019-Offence-Based-Criminal.pdf](http://www.ontariocourts.ca/ocj/files/stats/crim/2019/2019-Offence-Based-Criminal.pdf)> [perma.cc/KMS7-4TXA]. In 2012, the average days to disposition was 126. See

	Number	Number	Per cent	Days
2008 / 2009	385,838	376,038	97.5	102
2009 / 2010	407,667	383,506	94.1	97
2010 / 2011	391,028	383,590	98.1	99
2011 / 2012	378,150	355,624	94	99
2012 / 2013	375,445	344,913	91.9	99
2013 / 2014	350,259	334,955	95.6	106
2014 / 2015	335,358	308,672	92	107
2015 / 2016	358,495	324,123	90.4	111
2016 / 2017	366,756	339,030	92.4	120
2017 / 2018	358,047	338,073	94.4	121

SOURCE: Statistics Canada, *Court workload indicators, adult criminal courts, by cases initiated, cases completed, completion rate and case processing time*, Table 35-10-0124-02 (2020), online: <[www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510012402](http://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510012402)> [perma.cc/G895-BX24].

The data suggests that even though the number of cases initiated has declined, the completion rate has also declined from percentages in the mid-to-high 90s to the low 90s, and the median processing time has increased over this period from around 100 days to over 120 days. This trend, of the courts becoming less efficient in the processing of criminal matters after *Jordan*, is problematic in that it indicates that the Court’s admonition in *Jordan* is not having the desired effect. As a result, large numbers of criminal cases across Canada have been stayed.

Enter the coronavirus pandemic. On 29 December 2019, the first four cases of COVID-19 were reported in the Huanan (Southern China) Seafood Wholesale Market in Wuhan, Hubei Province, China.<sup>48</sup> Three months later, on 16 March 2020, the Supreme Court of Canada announced that it was restricting access to all visitors except those persons necessary to the proceedings before the Court.<sup>49</sup> Then on 17 March 2020, the Ontario Superior Court closed.<sup>50</sup> On 20 March 2020, the Ontario Court of Justice was effectively shut down; by 28 March 2020, only emergency matters were being heard by either teleconference or videoconference. As of 17 June 2020, the Tax Court of Canada’s website states that its Registry offices are closed for the transaction of business until further notice; however, a Notice to the Public and the Profession, dated 8 July 2020, suggests that hearings will resume in a number of cities on 20 July 2020.<sup>51</sup> Other courts across Canada have taken similar approaches as set out in the Appendix.<sup>52</sup> And

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Ontario Court of Justice, “Offence Based Statistics - All Criminal Cases Provincial Overview January 2012 to December 2012,” online (pdf): <[www.ontariocourts.ca/ocj/files/stats/crim/2012/2012-Offence-Based-Criminal.pdf](http://www.ontariocourts.ca/ocj/files/stats/crim/2012/2012-Offence-Based-Criminal.pdf)> [perma.cc/Q3CZ-A2LW]. And in 2016, the year *Jordan* was decided, the average days to disposition was 142.

<sup>48</sup> Qun Li et al, “Early Transmission Dynamics in Wuhan, China, of Novel Coronavirus–Infected Pneumonia” (2020) 382 *New Eng J Med* 1199. A recent *New Yorker* article disputes the Huanan Market as being the source of the outbreak. See David Quammen, “The Warnings,” *The New Yorker* (11 May 2020) 16 at 21.

<sup>49</sup> Supreme Court of Canada, News Release (16 March 2020), online: <[decisions.scc-csc.ca/scc-csc/news/en/item/6823/index.do](http://decisions.scc-csc.ca/scc-csc/news/en/item/6823/index.do)> [perma.cc/HXW9-7P5L].

<sup>50</sup> Bryann Aguilar, “Ontario Superior Court to suspend operations amid COVID-19 pandemic,” *CP24* (15 March 2020), online: <[www.cp24.com/news/ontario-superior-court-to-suspend-operations-amid-covid-19-pandemic-1.4854091](http://www.cp24.com/news/ontario-superior-court-to-suspend-operations-amid-covid-19-pandemic-1.4854091)> [perma.cc/9YUL-R7EX].

<sup>51</sup> Tax Court of Canada, “Notice to the Public and the Profession” (24 July 2020), online (pdf): <[www.tcc-cci.gc.ca/tcc-cci/pdf/Notice%20to%20the%20Public%20and%20the%20Profession-%20July%202020-EN.pdf](http://www.tcc-cci.gc.ca/tcc-cci/pdf/Notice%20to%20the%20Public%20and%20the%20Profession-%20July%202020-EN.pdf)> [perma.cc/UE65-4GMH].

<sup>52</sup> See also Palma Paciocco, “Trial Delay Caused By Discrete Systemwide Events: The Post-*Jordan* Era Meets the Age of COVID-19” (2020) 57 *Osgoode Hall LJ* 000 at 5-6 (for a “montage” of how courts across Canada reacted to the pandemic).

Canada is not an isolated case—unprecedented system-wide court closures have occurred in many countries. There is no doubt that the COVID-19 crisis has created a shockwave for court administration throughout the world.

Janet Mosher, in a 2014 article remarkable for its prescience, expressed concern that pandemics are often cast in terms analogous to terrorism, such that national security issues take on an undeserved prominence, leading to potential civil liberties infringements which will more than likely disproportionately impact marginalized populations.<sup>53</sup> Lisa Bilty, writing during this pandemic, makes a similar point:<sup>54</sup>

It is unsettling that some of our courts have essentially ceased operations, without facilitating video-conferencing or other “no contact” methods that could allow courts to continue dispensing justice. The shut-down of our courts will have to be temporary, and technology will need to be utilized to ensure access for constitutional challenges and judicial review, among other pressing matters, should governments prolong their emergency powers or infringe our liberties unjustifiably.

These views raise an important issue. Protecting liberties and the right of access to the courts are generally intertwined, and fundamental to the preservation of legal rights, freedoms, and obligations under the rule of law.<sup>55</sup> In *BCGEU v British Columbia (Attorney General)*, Chief Justice Dickson, as he then was, said the following:<sup>56</sup>

A balance must be sought to be attained between the individual values and the public or societal values. In the instant case, the task of striking a balance is not difficult because without the public right to have absolute, free and unrestricted access to the courts the individual and private right to freedom of expression would be lost. The greater public interest must be considered when determining the degree of protection to be accorded to individual interests.

While a single court closing (or even a few contemporaneous ones) may take place without a significant impact on access to justice, effectively shutting down entire judicial systems across a country, as mentioned earlier, is significantly different. This clearly puts “absolute free and unrestricted access to the courts” in jeopardy. Further, the longer this situation is allowed to persist, the more detrimental are these effects.

A disaster such as COVID-19 puts incredible stresses on public institutions and systems, including the courts. Like most organizations, courts have developed plans—as referenced above to “BCPs” in Canada and “COOPs” in the United States—laying out policies and processes to follow in an emergency. Was the possibility of the inaccessibility of a country’s entire court

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<sup>53</sup> Janet E Mosher, “Accessing Justice amid Threats of Contagion” (2014) 51:3 Osgoode Hall LJ 919, at 921.

<sup>54</sup> Lisa Bilty, “Justice dismantled as restrictions placed on court systems,” *The Post Millennial* (20 March 2020), online: <[thepostmillennial.com/justice-dismantled-as-restrictions-placed-on-court-systems?mc\\_cid=c9c8cfae98&mc\\_eid=5047929257](https://thepostmillennial.com/justice-dismantled-as-restrictions-placed-on-court-systems?mc_cid=c9c8cfae98&mc_eid=5047929257)> [perma.cc/8UKQ-XX5W]. Bilty is a lawyer from London, Ontario who joined the Justice Centre for Constitutional Freedoms in 2019.

<sup>55</sup> Graham Sharp, “The Right of Access to Justice Under the Rule of Law: Guaranteeing an Effective Remedy” (2016), online (pdf): <[ciaj-icaj.ca/wp-content/uploads/page/2016/05/the-rule-of-law-and-the-right-to-effective-access.pdf](https://ciaj-icaj.ca/wp-content/uploads/page/2016/05/the-rule-of-law-and-the-right-to-effective-access.pdf)> [perma.cc/AU7R-CPN5].

<sup>56</sup> *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214 at para 77.

system contemplated and planned for in the development of COOPs and BCPs?<sup>57</sup> We examine this next.

## B. Emergency Plans and the Courts: General

When preparing for any crisis or disaster it is important to recognize that each event will differ from other events in “potential for preparedness, degree of predictability, and levels of response capacity.”<sup>58</sup> One factor which is essential to the success of any disaster management plan for the courts is that the response must conform with the national disaster plan in place at the time. It must be broad enough to be able to respond to any critical situation which may arise, and it must be tested to determine its strengths and weaknesses.<sup>59</sup>

One of the first organizations to develop court-based disaster plans was the National Association for Court Management (NACM) in the United States.<sup>60</sup> Its handbook on developing disaster plans sets out four main components.<sup>61</sup> First, a court must perform a risk assessment in order to identify “potential impacts on the court, given a range of possible disasters.”<sup>62</sup> Second, it must identify essential functions, namely, what is its primary business objective and how can it focus on and meet this objective until the crisis is over.<sup>63</sup> Third, the court must secure facilities by finding alternative locations for the court to conduct business.<sup>64</sup> Finally, the court must consider management support by ensuring court leaders, both judicial and administrative, “take direct responsibility for making sure that all levels of management know what is covered in the disaster plan and what their role is in the event of a disaster.”<sup>65</sup> Ultimately, plans are

developed and implemented for situations in which the courthouse or court-related facilities are threatened or inaccessible ... and ... establish effective processes and procedures to quickly deploy pre-designated personnel, equipment, vital records, and supporting hardware and software *to an alternative site* to sustain organizational operations for up to 30 days. [They] also cover the resumption of normal operations after the emergency has ended.<sup>66</sup>

In short, a functioning disaster plan looks to past occurrences for precedents and attempts to predict future likelihood of incidents as the two key indicators for implementation. The situation

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<sup>57</sup> Brandon L Garrett & Tania Tetlow, “Criminal Justice Collapse: The Constitution after Hurricane Katrina” (2006) 56 Duke LJ 127 at 129.

<sup>58</sup> Jess Bonnan-White, “Avoiding the emperor’s prophecy: a case for the primacy of emergency management in criminal justice and human security studies” (2018) 18 Contemporary Justice Rev 296 at 297.

<sup>59</sup> Mary L Boland, “Will Your Criminal Justice Systems Function in the Next Disaster” (2007) 22 Crim Just 28 at 34.

<sup>60</sup> The National Association for Court Management is broadly seen as being instrumental in the development of international best practices in Court administration.

<sup>61</sup> National Association for Court Management, “Disaster Recovery Planning for Courts: A Guide to Business Continuity Planning” (last visited 27 April 2020), online (pdf): <[www.txcourts.gov/media/1353226/KIS\\_BusDisRcvyPlanCts.pdf](http://www.txcourts.gov/media/1353226/KIS_BusDisRcvyPlanCts.pdf)> [perma.cc/6GUT-KKWB].

<sup>62</sup> *Ibid* at 3.

<sup>63</sup> *Ibid*.

<sup>64</sup> *Ibid*.

<sup>65</sup> *Ibid* at 4.

<sup>66</sup> National Coalition for Emergency Management in the Courts, “Continuity of Court Operations: Steps for COOP Planning” (2007), online: <[www.ncsc.org/services-and-experts/areas-of-expertise/emergency-planning-and-security/planning-guide](http://www.ncsc.org/services-and-experts/areas-of-expertise/emergency-planning-and-security/planning-guide)> [perma.cc/UR3Z-4UMA] [emphasis added].

created by Hurricane Katrina emphasizes the shortcoming of this approach to planning. At that time, the disaster recovery plan of the Louisiana Supreme Court was completely dependent on equipment and hardware located in an area known to be subject to floods and hurricanes.<sup>67</sup> Canadian approaches have followed suit. For example, the Attorney General of Ontario, similar to most government agencies, appears to have developed its BCP using many of the NACMs rationales.<sup>68</sup>

But models developed prior to 9/11, or Hurricane Katrina, or even broader pandemics, did not seem to envision the shutdown of an entire organization or institution across national borders, let alone that of a country or even the world. From both the NACM guide and Ontario's Emergency Management Program, it is clear that little attention was paid to any crisis where a complete organization would be closed to staff and the public. Plans typically assumed that a disaster would be localized and would only need to consider providing business continuity somewhere else (see the NACMs "alternative site" quoted above). So what happens when the world is faced with an unprecedented situation; for example, where physical distancing rules are put in place forbidding close contact? Where shutdowns apply across an entire nation? How should organizations plan for this? What contingencies should be put in place? Only extraordinary plans which specifically address a global pandemic would seem to suffice.

### C. Emergency Plans and the Courts: Pandemics

The business continuity plans of many courts appear to be woefully inadequate to address a pandemic that caused institutional resources to be inaccessible for a period of time at the beginning of COVID-19. In the Court Leaders Advantage Podcast of 25 June 2020, the panelists discussed the lessons learned from business continuity planning and this pandemic.<sup>69</sup> What became clear was that no one envisioned a situation where the courts were required to close for more than three weeks, nor were they prepared for a crisis in which there would be no physical location available to the courts for the continuation of operations. We are not surprised by this. However, as mentioned on the same podcast, the process of planning for a pandemic becomes almost more important than the plan itself. We came to understand this in the process of writing this article, as it became clear that even the most thorough business continuity planning will not be able to anticipate all eventualities—constant changes in direction throughout a crisis are required. Finally, participants in the podcast universally mentioned the use of technology, and the need to invest in technology and identify essential functions which could be performed by employees at home.

As a matter of policy, the development of pandemic plans in the justice sector has not been a priority, despite the existence of broad pandemic plans.<sup>70</sup> For example, the purpose of the

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<sup>67</sup> Greg G Guidry, "The Louisiana Judiciary: In the Wake of Destruction" (2010) 70 La L Rev 1145 at 1176.

<sup>68</sup> The Ministry of the Attorney General of Ontario, *The Emergency Management Program* (2015), online: <[www.attorneygeneral.jus.gov.on.ca/english/about/pubs/emergencymgmt.php](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/emergencymgmt.php)> [perma.cc/4HLC-EH3Q].

<sup>69</sup> "The Coronavirus: How are Courts Coping with the Crisis?" (25 June 2020) at 00h:02m:20s, online (podcast): *Court Leaders Advantage Podcast* <[podcasts.apple.com/us/podcast/coronavirus-how-are-courts-coping-crisis-thursday-june/id1456796136?i=1000479479934](https://podcasts.apple.com/us/podcast/coronavirus-how-are-courts-coping-crisis-thursday-june/id1456796136?i=1000479479934)> [perma.cc/K6CZ-A86X] ["COOPs and the Coronavirus: The Lessons May Surprise You"].

<sup>70</sup> Although not exhaustive, our research has revealed an assortment of plans. See US Department of Homeland Security, *Pandemic Influenza Preparedness, Response, and Recovery Guide for Critical Infrastructure and Key Resources* (19 September 2006), online (pdf): <[www.dhs.gov/sites/default/files/publications/cikrpandemicinfluenzaguide.pdf](http://www.dhs.gov/sites/default/files/publications/cikrpandemicinfluenzaguide.pdf)> [perma.cc/RK57-9HA6] [*US Plan*];

US plan is to “stimulate the US private sector to act now.”<sup>71</sup> The objective of the WHO plan is to “improve pandemic influenza preparedness and response, and strengthen the protection against the pandemic influenza.”<sup>72</sup> The purpose of the Canadian Pandemic Influenza Preparedness (CPIP) guide is to provide the health sector with strategic guidance and a framework for pandemic preparedness and response.<sup>73</sup> As might be expected, these frameworks address pandemic preparedness from a medical perspective, covering issues such as risk assessment, diagnostics, surveillance, antiviral stockpiles, and access to vaccines. Not unexpectedly, given the lack of attention directed to court administration historically, there is no mention of the issues faced by justice administration in any of these pandemic plans. Further, several provinces, including Alberta,<sup>74</sup> Manitoba,<sup>75</sup> Ontario,<sup>76</sup> Quebec,<sup>77</sup> New Brunswick,<sup>78</sup> and Newfoundland and Labrador,<sup>79</sup> have published guides for planning in the event of an influenza pandemic. Once again, these plans address health care planning and response and do not include any provision for court administration. From our analysis, we conclude that the business continuity plans for most courts will need to be completely re-imagined to include not only short term site-specific planning but also long term system-wide pandemic preparedness.

In the United States, there have been some attempts at creating pandemic plans for courts. In 2007, the American University School of Public Affairs, Criminal Courts Technical Assistance Project formed a task force that published *Guidelines for Pandemic Emergency Preparedness Planning: A Road Map for Courts*.<sup>80</sup> This appears to be the first comprehensive

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Her Majesty the Queen in Right of Canada, as represented by the Minister of Health, *Canadian Pandemic Influenza Preparedness: Planning Guidance for the Health Sector* (2015), online (pdf): <[www.phac-aspc.gc.ca/cpip-pclcp/asssets/pdf/report-rapport-2015-eng.pdf](http://www.phac-aspc.gc.ca/cpip-pclcp/asssets/pdf/report-rapport-2015-eng.pdf)> [perma.cc/Z4P7-65TL] [*CPIP*]. Canada had also produced earlier pandemic plans: The Canadian Contingency Plan for Pandemic Influenza was published in 1988 and in 2004 the Canadian Pandemic Influenza Plan for the Health Sector was first published. See also Public Health England, *Pandemic Influenza Response Plan* (2014), online (pdf):

<[assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/344695/PI\\_Response\\_Plan\\_13\\_Aug.pdf](http://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/344695/PI_Response_Plan_13_Aug.pdf)> [perma.cc/P7NT-YYL]; World Health Organization, *Pandemic Influenza Preparedness: sharing of influenza viruses and access to vaccines and other benefits* (WHO Press, 2011) at 6 [*WHO Plan*].

<sup>71</sup> *US Plan*, *ibid* at 2.

<sup>72</sup> *WHO Plan*, *supra* note 78 at 6.

<sup>73</sup> *CPIP*, *supra* note 72 at 7.

<sup>74</sup> Government of Alberta, *Alberta’s Pandemic Influenza Plan* (March 2014), online (pdf):

<[open.alberta.ca/publications/alberta-s-pandemic-influenza-plan](http://open.alberta.ca/publications/alberta-s-pandemic-influenza-plan)> [perma.cc/67D2-W7KL].

<sup>75</sup> Office of the Chief Medical Officer of Health, *Preparing for Pandemic: Influenza in Manitoba* (March 2006), online (pdf): <[www.gov.mb.ca/health/publichealth/cmoh/docs/ppim.pdf](http://www.gov.mb.ca/health/publichealth/cmoh/docs/ppim.pdf)> [perma.cc/HWR8-S7KW].

<sup>76</sup> Ontario Ministry of Health & Ontario Ministry of Long-Term Care, *Ontario Health Plan for an Influenza Pandemic* (March 2013), online: <[www.health.gov.on.ca/en/pro/programs/emb/pan\\_flu/pan\\_flu\\_plan.aspx](http://www.health.gov.on.ca/en/pro/programs/emb/pan_flu/pan_flu_plan.aspx)> [perma.cc/3YWA-DBEM]. Further, it is noted that on 14 April 2020, Ontario enacted the *Coronavirus (COVID-19) Support and Protection Act, 2020*, to amend various acts to address COVID-19. The *Act* makes no mention of court administration. See *Coronavirus (COVID-19) Support and Protection Act, 2020*, SO 2020, c 6.

<sup>77</sup> Ministère de la Santé et des Services Sociaux, *Quebec Pandemic Influenza Plan—Health Mission* (2006), online (pdf): <[publications.msss.gouv.qc.ca/msss/fichiers/2005/05-235-06a.pdf](http://publications.msss.gouv.qc.ca/msss/fichiers/2005/05-235-06a.pdf)> [perma.cc/TPB3-QVHD].

<sup>78</sup> New Brunswick, *New Brunswick Pandemic Influenza Plan: Appendix D, Pandemic Influenza Planning Guide for Municipalities* (December 2005), online (pdf): <[www2.gnb.ca/content/dam/gnb/Departments/ps-sp/pdf/emo/Pandemic\\_Planning-e.pdf](http://www2.gnb.ca/content/dam/gnb/Departments/ps-sp/pdf/emo/Pandemic_Planning-e.pdf)> [perma.cc/86SP-UEQA].

<sup>79</sup> Newfoundland and Labrador Health and Community Services, *Pandemic Influenza-Planning Guidelines, Roles and Responsibilities for the Health Sector* (November 2007), online (pdf): <[www.health.gov.nl.ca/health/publichealth/pandemic/complete\\_pandemic\\_web.pdf](http://www.health.gov.nl.ca/health/publichealth/pandemic/complete_pandemic_web.pdf)> [perma.cc/W6BK-2725].

<sup>80</sup> Task Force on Pandemic Preparedness Planning for the Courts, *Guidelines for Pandemic Emergency Preparedness Planning: A Road Map for Courts* (April 2007) [*Guidelines*].



plan created specifically to provide assistance to courts in the event of a pandemic. In the Guidelines, the task force states:<sup>81</sup>

Should a pandemic occur, it will impact the very essence of society. Businesses will close. Government institutions will be crippled. Health systems will be overwhelmed. It should not come as a surprise, then, that the operation of the courts, like all government agencies, will be seriously affected.

Following this, the US Federal Courts prepared to mitigate disruptions caused by a pandemic by developing COOP plans that included preparing for such an eventuality.<sup>82</sup> These plans made assumptions based on what was considered the worst-case scenario. The five key assumptions were: (1) Emergency response actions taken by federal, state, and municipal agencies may impact all COOP plans; (2) Social distancing and infection control measures, as well as fear of contagion, will affect the ability to hold court in public areas and to conduct court proceedings; (3) Federal courthouses and buildings controlled by the General Services Administration (GSA) will be accessible, but right of entry may be limited; (4) Access to the internet by court employees, parties in a proceeding, and attorneys (including the ability to read notices and announcements on the courts' websites) will continue and will not be impaired; and (5) Congress will favourably consider legislation that would empower a chief district court judge to toll all civil statutes of limitation, including those in bankruptcy cases, during times of crisis.<sup>83</sup>

Based on these, the US Federal Courts then created a framework which attempted to achieve a number of objectives. First, the health and safety of all affected individuals, including judges, lawyers, parties, clerks and deputy clerks, marshals and deputy marshals, court administrators and staff, as well as the general public, would be paramount. Second, that courts' essential functions and services be maintained in the event of significant and sustained employee absenteeism or attrition. Third, clear direction on the manner in which the US Federal Courts would support federal, state, and local responses to the pandemic would be provided. In addition, the role of these courts in upholding the rule of law would be maintained during the outbreak. Finally, it was recognized that an effective communication strategy was essential to ensure pandemic preparedness, implementation, and response guidance. Messages to court-related organizations and to people who have an interest in the courts' operation would need to be clear and coherent.<sup>84</sup>

In 2016, the National Center for State Courts developed *Preparing for a Pandemic: An Emergency Response Benchbook and Operational Guidebook for State Court Judges and Administrators*.<sup>85</sup> The State Court Guidebook is a blueprint for developing a pandemic benchbook, offering strategies and resources to assist judges and administrators in taking steps to keep the courts open, and retaining the ability to respond to persons seeking emergency judicial relief, while protecting the health and safety of all participants.<sup>86</sup> The State Court Guidebook

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<sup>81</sup> *Ibid.*

<sup>82</sup> George B Huff Jr, "Planning for Disasters: Emergency Preparedness, Continuity Planning, and the Federal Judiciary" (2006) 45 *Judges' J* 7.

<sup>83</sup> *Ibid* at 42.

<sup>84</sup> *Ibid* at 43.

<sup>85</sup> National Center for State Courts, "Preparing for a Pandemic: An Emergency Response Benchbook and Operational Guidebook for State Court Judges and Administrators" (2016) online: <[ncsc.contentdm.oclc.org/digital/collection/facilities/id/194](https://ncsc.contentdm.oclc.org/digital/collection/facilities/id/194)> [perma.cc/Q69J-VY2X] ["State Court Guidebook"].

<sup>86</sup> *Ibid.*

aims to provide judges with legal authority for keeping courts open during a pandemic and acts as a reference for legal questions that may arise during public health threats. It also functions to explain the role of the courts during such events.<sup>87</sup> Thus, both the federal and state court systems in the United States had developed some, albeit limited, guidelines for retaining a functioning justice system well before the COVID-19 pandemic.

In the United Kingdom, the Coronavirus Act 2020 was enacted on 25 March 2020.<sup>88</sup> Sections 53 to 57 of the act provide for the use of video and audio technology by courts and tribunals. Further, the Courts and Tribunals Judiciary have posted coronavirus (COVID-19) advice and guidance, a webpage with the latest advice and guidance from the judiciary in relation to the coronavirus pandemic.<sup>89</sup>

Canadian courts, similar to those in the United Kingdom, seem not to have put in place any pandemic plans prior to 2020—somewhat like fiddling while Rome burns.<sup>90</sup> The *Provincial Court of Alberta Pandemic Plan: COVID-19* was “developed and implemented for situations in which the Provincial Court of Alberta must restrict its operations to essential functions.” This plan was developed in reaction to the COVID-19 pandemic.<sup>91</sup> As set out in the document, the seven main goals of the Alberta Plan are to: (1) Maintain and preserve the rule of law; (2) Protect the health and well-being of staff, the judiciary, and the public; (3) Identify, prioritize, and continue the court’s essential functions and operations; (4) Facilitate decision-making processes, including identifying the chain of command at a court location; (5) Develop a communications protocol; (6) Reduce or mitigate disruption to normal court operations; and (7) Recover and resume regular court operations when possible to do so.<sup>92</sup> These are markedly similar to the objectives of the US Federal Court plan—which might be described as best practices, since they were the first organization to develop any form of detailed plan—albeit very late in the game.

As with Alberta, other provinces have developed spontaneous responses to COVID-19. Although not strictly a pandemic plan, effective 11 May 2020, the Ontario Court of Justice (OCJ) implemented a protocol, “Notice to Counsel and the Public re: Criminal Matters in the Ontario Court of Justice.”<sup>93</sup> The protocol makes provision for the suspension of criminal trials and preliminary inquiries, addresses matters involving persons in custody, serving and filing by email, extensions of filing deadlines, the use of electronic signatures, judicial pre-trials and guilty

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<sup>87</sup> *Ibid* at 4.

<sup>88</sup> See *Coronavirus Act 2020* (UK), c 7.

<sup>89</sup> See Courts and Tribunals Judiciary, “Coronavirus (COVID-19) Advice and Guidance,” online: <[www.judiciary.uk/coronavirus-covid-19-advice-and-guidance](http://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance)> [perma.cc/4PWZ-BPVS]. The site is updated regularly.

<sup>90</sup> We are basing this on available research. It is possible that plans existed—many BCPs are confidential and may have included sections relating to pandemics—but the authors are only aware of plans from 2020. Alberta, British Columbia, Newfoundland and Labrador, and Ontario all have such plans; of these, only Alberta and Ontario have provided public access to them. As an aside, it may be worth pondering whether the secretiveness of COOPs and BCPs might be connected to Mosher’s argument that pandemics are framed as analogous to national security/terrorism problems (Mosher, *supra* note 55). Plans about what to do in the event of terrorist attacks need to be secret so terrorists are not able to work around them; it isn’t clear why pandemic plans should necessarily be secret – unless a pandemic is the result of a terrorist act. is created by to know what we’re going to do.

<sup>91</sup> Alberta Courts, “Provincial Court of Alberta Pandemic Plan COVID-19” (15 April 2020), online (pdf): <[www.albertacourts.ca/docs/default-source/pc/prov-court-pandemic-plan-covid19.pdf?sfvrsn=3d378180\\_6](http://www.albertacourts.ca/docs/default-source/pc/prov-court-pandemic-plan-covid19.pdf?sfvrsn=3d378180_6)> [perma.cc/8ZYU-L4QA] [“Alberta Plan”].

<sup>92</sup> *Ibid* at 2.

<sup>93</sup> Ontario Court of Justice, “COVID-19: Notice to Counsel and the Public re: Criminal Matters in the Ontario Court of Justice” (11 May 2020), online: <[www.ontariocourts.ca/ocj/covid-19/covid-19-criminal-matters](http://www.ontariocourts.ca/ocj/covid-19/covid-19-criminal-matters)> [perma.cc/NGV7-J8V7].

pleas.<sup>94</sup> Simultaneously, the OCJ issued “COVID-19: Ontario Court of Justice Protocol Re Bail Hearings,”<sup>95</sup> which stipulates that parties should take reasonable steps to ensure that bail hearings proceed without requiring that accused persons be remanded into custody at a correctional facility.<sup>96</sup> Further Crown and defence counsel are to make reasonable efforts to communicate with each other to determine whether the release will be on consent or if contested, which issues are in dispute.<sup>97</sup> Not surprisingly, bail hearings are to be conducted by audioconference or videoconference, or a combination of both.<sup>98</sup> Finally, the OCJ Bail Protocol makes it clear that, in the event defence counsel and the accused find it difficult to have private conversations during a remote appearance, they should be accommodated wherever possible.<sup>99</sup> Based on the tenor of the OCJ Bail Protocol, we believe that the presumptive use of “consent release” raises an expectation that the numbers of accused released on bail will be greater during the pandemic than might ordinarily occur.<sup>100</sup> Since more than 2,300 inmates had been released from Ontario jails between 16 March 2020 and 9 April 2020, as part of measures taken to lessen the risk of COVID-19 spreading in prisons, this is not surprising.<sup>101</sup>

Since one of the most visible changes arising from the COVID-19 pandemic is the use of videoconferencing programs facilitating communication between socially-isolated people,<sup>102</sup> it is striking that none of the various disaster plans created by courts in both Canada and the United States highlight the role and importance technology would play. For us, it is obvious that any route through this and future similar crises must, at a minimum, consider how various forms of technology may be utilized.

#### **D. Pandemics, Technology, and the Courts**

In an effort to protect the health of court staff and the public, court systems around the globe have initiated a series of health and safety measures designed to alleviate risk of transmission of COVID-19. In South Korea, for example, courts adopted flexible working hours and working from home; staggered lunch breaks; required face masks to be worn; and provided hand sanitizer

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<sup>94</sup> This, and other protocols, have been updated frequently as circumstances necessitate.

<sup>95</sup> Ontario Court of Justice, “COVID-19: Ontario Court of Justice Protocol Re Bail Hearings” (11 May 2020), online: <[www.ontariocourts.ca/ocj/covid-19/covid-19-protocol-bail-hearings](http://www.ontariocourts.ca/ocj/covid-19/covid-19-protocol-bail-hearings)> [perma.cc/2QTG-2RFB] [“OCJ Bail Protocol”].

<sup>96</sup> *Ibid.* This would suggest that bail hearings are being conducted while the accused is in police custody, presumably at a police station or division. It also points to the importance the courts place on a person’s right to a bail hearing as soon as practicable.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.* at heading 2.

<sup>100</sup> We have heard anecdotally from a JP in Toronto (who wishes to remain anonymous) that there have been more police releases than ever before. Policing in the time of COVID-19, however, is necessarily a subject for another paper. Email from JP to Richard Haigh (23 June 2020).

<sup>101</sup> “More than 2000 inmates released, 6 COVID-19 cases confirmed inside Ontario jails,” *CBC News* (9 April 2020), online: <[www.cbc.ca/news/canada/toronto/ontario-jails-coronavirus-1.5527677](http://www.cbc.ca/news/canada/toronto/ontario-jails-coronavirus-1.5527677)> [perma.cc/Q8ZL-4EVA]. Further, the *Globe and Mail* reported that the Minister of Public Safety suggested that “up to 600 federal inmates have been identified as low-risk prisoners who might be released from custody to keep them out of the virus’s way.” See “Hundreds of federal inmates moved toward release as COVID-19 spreads behind bars,” *Globe and Mail* (21 April 2020), online: <[www.theglobeandmail.com/canada/video-hundreds-of-federal-inmates-moved-toward-release-as-covid-19-spreads](http://www.theglobeandmail.com/canada/video-hundreds-of-federal-inmates-moved-toward-release-as-covid-19-spreads)> [perma.cc/WV7R-98C9].

<sup>102</sup> It is interesting to note that the share price of Zoom Video Communications, Inc. has gone from approximately \$68 USD on December 31, 2019 to \$401 USD on December 15, 2020.

stations and antiviral films on elevator buttons. In Germany, the courts initiated two shifts per unit, with at-risk groups and those with children staying home on paid leave; reduced opening hours; and established glass barriers at contact points. All public hearings were moved to separate buildings, all but the main entrance of buildings were closed, and admittance was forbidden to anyone with a temperature above 37.5 degrees Celsius. Finally, all persons were screened prior to entering a court building, and the buildings themselves were disinfected prior to reopening each morning.<sup>103</sup>

As noted above, the Provincial Court of Alberta Pandemic Plan stipulates that one of the main goals of the plan is to protect the health and wellbeing of staff, the judiciary, and the public. In addition, it indicates that the Court would ensure that the judiciary and workforce are supported through the pandemic and that hand sanitizer, tissues, and precautionary information would be provided.<sup>104</sup> At the time of writing we have not located any other plans for the protection of staff in other Canadian courts. However, we would recommend that, if these health and safety related practices are in place in Canadian courts, they should be maintained well after the threat from COVID-19 has subsided. Even after physical distancing has ended, many people will experience fear and anxiety relating to their health and the health of their families.<sup>105</sup> Further, there is the real possibility of a “second wave” of COVID-19. Just as the first and third waves of the Spanish Flu were fairly mild, the second wave resulted in “catastrophic global losses, with deaths reaching into the tens of millions.”<sup>106</sup> The concern with the spread of most pandemics is that it is “difficult to predict why, how, and when waves will occur in different countries.”<sup>107</sup> If courts remove these practices too soon the results could be catastrophic.

Implementing these adaptations for social distancing and health restrictions present significant but not insurmountable challenges for court administrators. However, when courts decide to shutter, then a pressing need for robust and effective technological solutions becomes immediate. Courts cannot operate remotely without fully integrated and secure systems in place. Judges and court staff working from home need to be linked to each other. Lawyers, litigants, accused, witnesses, and other stakeholders must be able to connect into the system from their homes, prisons, et cetera.

We soon learned that much of the Canadian justice system was not up to the task. Although this is beginning to change,<sup>108</sup> most courts in Canada have never had a strong

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<sup>103</sup> National Judicial College Webinar, “Lessons Learned from Around the World About Managing Courts in a Pandemic” (23 April 2020), online: <[www.judges.org/news-and-info/recorded-webcasts-keyed-to-the-covid-19-pandemic](http://www.judges.org/news-and-info/recorded-webcasts-keyed-to-the-covid-19-pandemic)> [perma.cc/DH2J-CXF5].

<sup>104</sup> “Alberta Plan,” *supra* note 93 at 6.

<sup>105</sup> Centers of Disease Control and Prevention, “Pandemics can be Stressful” (1 July 2020), online: <[www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/managing-stress-anxiety.html](http://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/managing-stress-anxiety.html)> [perma.cc/JC69-7BUC].

<sup>106</sup> Patrick R Saunders-Hastings & Daniel Krewski, “Reviewing the History of Pandemic Influenza: Understanding Patterns of Emergence and Transmission” (2016) 5 *Pathogens* 66 at 3.

<sup>107</sup> *Ibid* at 14.

<sup>108</sup> Part II of the Federal Court’s strategic plan for 2014 to 2019 outlines the courts’ plan for modernizing the court. See Federal Court, “Strategic Plan (2014-2019),” online (pdf): <[www.fct-cf.gc.ca/content/assets/pdf/base/Strategic%20Plan%20\(Final%20for%20posting%20with%20COA%20and%20accessibility\)%20English.pdf](http://www.fct-cf.gc.ca/content/assets/pdf/base/Strategic%20Plan%20(Final%20for%20posting%20with%20COA%20and%20accessibility)%20English.pdf)> [perma.cc/74P9-PDG8] at 19-26. Further, the Ontario Court of Justice has a Modernization Committee which has produced a dashboard each year since 2016. See Ontario Court of Justice, “Ontario Court of Justice Criminal Justice Modernization Dashboard” (31 December 2019), online: <[www.ontariocourts.ca/ocj/stats-crim-mod](http://www.ontariocourts.ca/ocj/stats-crim-mod)> [perma.cc/M8CD-JT2T]. Chapter 3 of the Annual Report 2016-17 and 2017-18, Courts Services Division, Ministry of the Attorney General Ontario discusses online filing, online child support and videoconferencing. See Ministry of the Attorney General Court Services Division, *Annual Report 2016-17 and 2017-18*, online: <[www.attorneygeneral.jus.gov.on.ca/english/about/pubs/courts\\_annual\\_16\\_18](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/courts_annual_16_18)>

relationship with innovation and technology. Carl Baar’s words from forty years ago could have been written this morning:<sup>109</sup>

Courts are perpetually labelled “horse-and-buggy” organizations trying to survive in an era when other large systems are adopting modern technology and modern management techniques. Court reformers therefore support the introduction of a variety of modern devices and methods such as computerized management information systems, modern recording and transcribing equipment, miniaturization of records, internal planning capability, and operations research techniques for analyzing system problems.

(Maybe the only thing missing from Baar’s list would be videoconferencing or remote hearing capability, but he could not have known of that in 1980.) What quickly became clear in the spring of 2020 was that the lack of investment in technology was crippling a large part of Canada’s justice system. A huge reliance on paper-based processes was not conducive to maintaining court operations during a pandemic.<sup>110</sup> How do you hold court hearings when the physical “Court Record” is in the court facility and no one is allowed in the building?<sup>111</sup> What if court staff cannot communicate effectively with judges or lawyers?

Not only was the lack of an electronic court record a problem but many court administrators in the United States have indicated that the availability of equipment, the deployment of equipment, the need for protocols for the use of equipment, and connectivity issues due to insufficient bandwidth to enable the required technology to operate effectively were all problems in the early days of the pandemic.<sup>112</sup> Further, it was suggested that while court staff are issued desktop computers to perform their daily work, these remained inaccessible due to building closures. It was only after lockdown when court administrators realized that they should have laptop computers. For many, this was just the first of many challenges they faced.<sup>113</sup>

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[perma.cc/UDC2-YR3R]. Finally, Cyberjustice Laboratory is a hub for thought and creativity, where justice processes are modelled and re-imagined. See Cyberjustice Laboratory, “The Laboratory” (6 February 2020), online: <[www.cyberjustice.ca/en/laboratoire/presentation](http://www.cyberjustice.ca/en/laboratoire/presentation)> [perma.cc/DT67-Y4H7].

<sup>109</sup> Baar, *supra* note 30 at 275.

<sup>110</sup> In addressing the “Virtual Advocacy - Best Practices for Navigating the Courts in the Post-COVID-19 Era” webinar held by Canadian Lawyer, Ontario AG Doug Downey indicated that some 96 per cent of proceedings in Ontario are paper based. See Doug Downey, “Virtual Advocacy - Best Practices for Navigating the Courts in the Post-COVID-19 Era” (Webinar delivered by Canadian Lawyer, Canada, 21 May 2020), [unpublished] [“Virtual Advocacy Webinar”]. Note that a transcript of this webinar is not available; we are basing our discussion from notes made at the time.

In August 2019, the British Columbia Supreme Court authorized a pilot project to replace paper records of proceedings with an electronic version in the New Westminster Courthouse at the Supreme Court of British Columbia. See The Courts of British Columbia, “Annual Report 2019” (2019), online (pdf): <[www.bccourts.ca/supreme\\_court/about\\_the\\_supreme\\_court/annual\\_reports/2019\\_SC\\_Annual\\_Report.pdf](http://www.bccourts.ca/supreme_court/about_the_supreme_court/annual_reports/2019_SC_Annual_Report.pdf)> [perma.cc/KL9M-7M84].

<sup>111</sup> Our JP source in Toronto states that there are several courts where administrative staff have been working at the court building throughout the pandemic while parties to a dispute are required to join by video/teleconference. Further, the longer the pandemic lasts and the more society opens the more this will become the norm. See *supra* note 102.

<sup>112</sup> “The Coronavirus: How are Courts Coping with the Crisis?” (2 April 2020) at 00h:14m:19s, online (podcast): *Court Leaders Advantage Podcast* <[podcasts.apple.com/us/podcast/coronavirus-how-are-courts-coping-crisis-april-2-2020/id1456796136?i=1000470230729](https://podcasts.apple.com/us/podcast/coronavirus-how-are-courts-coping-crisis-april-2-2020/id1456796136?i=1000470230729)> [perma.cc/J5CB-6646] [“How are Courts Coping with the Crisis”].

<sup>113</sup> *Ibid.*

Although we are not aware of these same issues occurring in Canada, it is not beyond the realm of possibility that they did.

Another crucial issue faced by some courts was the difficulty in adopting remote hearings. Some courts with video conferencing facilities were unable to access it as their buildings were closed.<sup>114</sup> Those courts that adapted early and began relying on any of the widely available videoconferencing softwares were faced with other difficulties.<sup>115</sup> Anecdotal reports from court staff suggest a steep learning curve because they were unfamiliar with the applications which initially led to difficulties in adjusting to new court operations.<sup>116</sup> Courts that used the Zoom platform were initially concerned about security breaches.<sup>117</sup> (Court administrators know how necessary it is to protect these types of applications behind a court’s “firewall” to ensure security from hackers, malware, and viruses.) Furthermore, there was an issue of insufficient bandwidth to accommodate the overall increase in demand in some communities. Moreover, there was a lack of preparation regarding the volume and duration of hearings. Finally, the inability of many self-represented litigants to sign onto or gain access to the applications due to a lack of hardware or software has been described by many.<sup>118</sup> It is also worth noting that access to computers and the ability to use certain technological devices can exacerbate socioeconomic divisions, especially amongst self-represented litigants, and raises additional access to justice issues for those who do not have the technological tools. Despite these concerns, it is our view that the courts and government should not delay modernization initiatives. Not only will they act as a defence against another pandemic or similar crisis, but more importantly, reasonable innovation will ensure the efficient and effective operation of the justice system of the twenty first century.

The need for remote access soon became widespread for courts. Many courts have adapted relatively quickly,<sup>119</sup> especially with respect to urgent matters such as emergency incarceration and custody; domestic violence; lack of legal capacity or danger to self or others;

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<sup>114</sup> Our JP source notes that some members of the judiciary are not comfortable with the technology and have opted to work in the courts despite the health risks. See *supra* note 97.

<sup>115</sup> Examples of these include: Zoom Video Communications Inc (2020), online: <zoom.us> [perma.cc/X3NW-P93S]; CourtCall (2020), online: <courtcall.com> [perma.cc/D7QY-GKU5]; CourtSmart Inc (2017), online: <www.courtsmart.com> [perma.cc/3Y3E-44N3]; Microsoft Corporation, “Microsoft Teams” (2020), online: <www.microsoft.com/en-ca/microsoft-365/microsoft-teams/group-chat-software> [perma.cc/RD6E-LA7T]; Telephonic Communications Inc (2020), online: <telephonic.ca> [perma.cc/A5GM-XRT8]; Microsoft Corporation, “Skype” (2020), online: <www.skype.com/en> [perma.cc/B7FM-XJSP]; Cisco Webex (2020), online: <www.webex.com> [perma.cc/6DS8-4SK8]; and LogMeIn Inc, “GoToMeeting” (2020), online: <www.gotomeeting.com/en-ca> [perma.cc/6U36-QHSK].

<sup>116</sup> “Virtual Advocacy Webinar,” *supra* note 112.

<sup>117</sup> These were of particular concern in the first few weeks of remote videoconferencing. Zoom provided some software upgrades to alleviate security concerns (through the use of encryption, identification of participants and waiting room features) but security risks remain with all of the systems. An excellent fictional portrayal of the difficulty of trying cases remotely was captured in the CBS drama series “All Rise”: a videoconference trial at the centre of the episode devolves into chaos whereupon the judge recesses and returns to take back control of the virtual court—to us, while somewhat exaggerated, seems entirely plausible! See CBS, “All Rise Season 1 Episode 21—Dancing at Los Angeles” (4 May 2020), online (video): <www.cbs.com/shows/all-rise/video/sk7yDkw9fMMPYYptbz1zV8P07JcOKJIU/all-rise-dancing-at-los-angeles> [perma.cc/5NJ8-5MPY].

<sup>118</sup> “The Coronavirus: How are Courts Coping with the Crisis?” (16 April 2020), online (podcast): *Court Leaders Advantage* <podcasts.apple.com/us/podcast/coronavirus-how-are-courts-coping-crisis-april-16-2020/id1456796136?i=1000471592349> [perma.cc/J9AW-GSJM] [“How are Courts Coping with the Crisis?”].

<sup>119</sup> Special recognition must be given to senior court administrators. Our JP source reports that they are highly involved in the development of the strategies and protocols being developed and have had a large voice in planning and implementing the courts’ response to the COVID-19 pandemic. See *supra* note 102.

and permanent loss of rights.<sup>120</sup> Apart from technological hiccups, however, is the equally serious problem of remote access being, by default, not public. A foundational tenet of the rule of law principle is that justice should operate on the open court principle.<sup>121</sup> Yet, attempts to overcome even this limitation have occurred: the Sacramento County Court in California, has commenced holding initial court appearances in criminal matters on YouTube.<sup>122</sup>

Despite the increasing use of remote access for hearings—there has been a great deal of success in scheduling appeal hearings remotely—most courts have been unable to operate at pre-pandemic levels. Preliminary matters are one thing but larger, more substantive matters are another. Thus, trial courts have faced different challenges.<sup>123</sup> In fact, most courts have postponed the majority of their hearings and have had to push dockets forward. For example, the Ontario Superior Court of Justice has, as of the date of writing, not provided a date for the resumption of in-person hearings.<sup>124</sup> Further, although we understand that some jury trials are beginning to take place (at least in the United Kingdom),<sup>125</sup> courts have been struggling with the challenge of conducting them safely.<sup>126</sup> Postponing a large portion of the courts' hearings will undoubtedly add to a backlog of cases and increase the administrative burden on operations once physical distancing is removed.

Finally, there is at least one other serious predicament which courts will undoubtedly face. Once they have recovered from the COVID-19 crisis, and once they have grappled with the likely crisis caused by the increased backlog,<sup>127</sup> courts will need to face up to a society-wide financial crisis. The pandemic has been very costly for governments throughout the world, and Canada is no exception. The costs of federal COVID-19 aid to individuals and corporations is expected to reach \$212 billion and the federal deficit is projected to be \$343 billion in 2020-

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<sup>120</sup> The *Globe & Mail*, 16 May 2020 edition was devoted to “46 Ways our World is About to Change.” Number 7 on the list, written by Paul Waldie, was “Court hearings will become must-see TV” and outlined how some courts have moved to remote operation (the article made particular reference to the UK). It concluded, “For now, judges and lawyers have had to adjust to the new reality and some are keen for it to continue”, quoting one lawyer, referring to a Court of Appeal hearing in England as “efficient and sav[ing] all parties unnecessary time and costs.” See Paul Waldie, “Court Hearings Will Become Appointment Viewing,” *The Globe and Mail* (16 May 2020) A12, online: <[www.theglobeandmail.com/canada/article-post-coronavirus-future-of-canada-and-the-world](http://www.theglobeandmail.com/canada/article-post-coronavirus-future-of-canada-and-the-world)> [perma.cc/A72K-KP9K].

<sup>121</sup> *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 (where the Supreme Court of Canada gave their latest disquisition on this subject).

<sup>122</sup> Dave Manoucheri, “Sacramento County courts hold virtual hearings amid pandemic,” *KCRA3* (3 April 2020), online: <[www.kcra.com/article/sacramento-county-courts-hold-virtual-hearings-amid-pandemic/32038954](http://www.kcra.com/article/sacramento-county-courts-hold-virtual-hearings-amid-pandemic/32038954)> [perma.cc/E3RA-HHEE]. See also Superior Court of California Country of Sacramento, “Hearing Live-Streams,” online: <[www.saccourt.ca.gov/criminal/hearing-livestreams.aspx](http://www.saccourt.ca.gov/criminal/hearing-livestreams.aspx)> [perma.cc/9K5Q-6EKA]. Here, court hearings are listed and choosing a particular listing brings the viewer to a live stream of the hearing on YouTube.

<sup>123</sup> “Virtual Advocacy Webinar,” *supra* note 107.

<sup>124</sup> The authors understand that on 25 June 2020 the Superior Court of Justice, Ontario announced that in-person hearings would be resuming on 6 July 2020. See Superior Court of Justice, “Notice to the Profession, Litigants, Accused, Media and Members of the Public” (25 June 2020), online: <[www.ontariocourts.ca/scj/notices-and-orders-covid-19/notice-june-25-2020](http://www.ontariocourts.ca/scj/notices-and-orders-covid-19/notice-june-25-2020)> [perma.cc/3W6Y-9NTB].

<sup>125</sup> His Honour Judge Anthony Potter, Warwick Crown Court, UK, in an unpublished article, describes his experience presiding over an in-person jury trial which commenced on 26 May 2020. The article is held on file by the authors. See Anthony Potter, “My Experience of a Socially Distanced Trial” (26 May 2020), [unpublished].

<sup>126</sup> *Ibid.*

<sup>127</sup> Paciocco, *supra* note 54, proposes a very creative temporary solution to help with s 11(b) delay claims—sentence reductions in criminal matters. Even if this idea is adopted, it will not deal with the overall backlog the pandemic will create to the justice system as a whole.

21.<sup>128</sup> With a deficit of this magnitude, it is difficult to imagine governments not entering a lengthy period of fiscal restraint once the pandemic has ended. Yet, in order to institutionalize the technological and process-based changes that have become essential during the pandemic (and which will continue to be essential if the courts are to make inroads into their backlogs), courts will require a significant influx of money. We are unsure how this gulf will be resolved.

### III. Conclusion

Prior to the COVID-19 pandemic, the Canadian justice system was, for the most part, overloaded, unresponsive, and faced ongoing struggles with backlogs and delays. As a result of the wide-scale restrictions imposed on society due to the pandemic, live court hearings have been significantly reduced. Further impacts will inevitably follow: on a criminal accused's right to be tried within a reasonable time, for example, but also on a civil litigant's aggravation and frustration as the wheels of justice grind almost to a halt, and on health and safety concerns in family law matters such as domestic abuse.<sup>129</sup> However, once courts reopen fully and begin hearing cases again, it will almost certainly be necessary to increase resources in order to prevent any *additional* delays and ineffectiveness caused by the virus and the inexorable progression of new cases through the system.

Noticeably absent from the justice system for decades has been adequate resourcing for the acquisition, upgrading, and maintenance of appropriate court technologies.<sup>130</sup> The situation is now urgent. George Strathy, Chief Justice of Ontario, remarked that courts are overburdened by a “fixation on paper and personal appearances” and must figure out ways of administering justice which get rid of “layers of procedure.”<sup>131</sup> Implicit in Chief Justice Strathy's comment is the fact that automating the justice system without addressing the systemic problems which have plagued it will do no more than automating bad systems. The current lack of technology is not the sole cause of the backlogs and delays currently experienced in Canadian courts. We believe that the systemic introduction of technology should only be undertaken after a thorough review of a court's processes.

Emergencies provide opportunities. Arguments for a reimagining of the courts are being mounted by a number of prominent jurists and legal officials. A sampling: In an interview with

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<sup>128</sup> See Canadian Press, “Canada's COVID-19 fiscal snapshot—the numbers that matter” (last visited 22 July 2020), online: <[financialpost.com/news/economy/the-covid-19-fiscal-snapshot-by-the-numbers](https://financialpost.com/news/economy/the-covid-19-fiscal-snapshot-by-the-numbers)> [perma.cc/TV6G-JEY7].

<sup>129</sup> See Janet Mosher, “COVID-19, the Shadow Pandemic and Access to Justice for Survivors of Domestic Violence” (2020) 57 Osgoode Hall LJ 000 (for an excellent account of this phenomenon).

<sup>130</sup> See *e.g.* Frank Marrocco, Associate Chief Justice of the Superior Court of Justice for Ontario, who remarked:

I think the best way to conceptualize the present situation is to imagine what would happen if some of the great barristers of the past walked through that courtroom entrance ready to try one more case. They would feel right at home because, in fact, nothing has changed. They would find a paper-based system much like the one they were used to. The proceeding would look the same as the one they remembered. They would easily take advantage of the opportunity to display their knowledge and eloquence one last time.

“Opening of Courts”, (Speech delivered at the Superior Court of Justice for Ontario, 10 September 2019), online: <[www.ontariocourts.ca/scj/news/speeches/oc](https://www.ontariocourts.ca/scj/news/speeches/oc)> [perma.cc/3XDT-SC6G].

<sup>131</sup> The Advocates' Society, “Virtual Fireside Chat with the Hon. Chief Justice Strathy” (19 May 2020), online (video): <[www.advocates.ca/TAS/COVID-19/Ontario/TAS/COVID-19/Provinces/Ontario.aspx?hkey=d190465b-676d-4ba7-9c96-0444c6bdec14](https://www.advocates.ca/TAS/COVID-19/Ontario/TAS/COVID-19/Provinces/Ontario.aspx?hkey=d190465b-676d-4ba7-9c96-0444c6bdec14)> [perma.cc/ZSH7-EEQB]. Although we completely agree with Chief Justice Strathy, this is not a new idea; it is almost one hundred years in the making. See Smith & Ehrmann, *supra* note 27 at 234 (“too many steps in the procedure of justice”). Perhaps we are finally ready for the necessary changes.



the BBC, the Lord Chief Justice of England and Wales suggested that it is going to take “blue-sky thinking” and a look at “more radical measures” to safely restart jury trials.<sup>132</sup> In a webcast put on by the Canadian Institute for the Administration of Justice on 20 May 2020, Chief Justice Richard Wagner of the Supreme Court of Canada acknowledged that courts were required to take steps to dispense justice despite being closed.<sup>133</sup> Ontario’s Chief Justice Strathy described the COVID-19 crisis as a “*Jordan* moment” for the entire justice system.<sup>134</sup> The Attorney General for Ontario, Doug Downey, suggested that Covid-19 has provided the courts with an opportunity.<sup>135</sup> Robert Bauman, Chief Justice of British Columbia, echoed this idea, maintaining that the silver lining of COVID-19 is giving the courts across Canada a common vision for moving forward with innovation,<sup>136</sup> and Ontario Court of Appeal Justice David M. Brown added that there is a “generational opportunity” now occurring, of which we should take advantage.<sup>137</sup>

As far as court administration is concerned, the change in attitude that has taken place over the past few months is arguably greater than the sum of all changes made over the last forty years since Baar’s reference to “horse-and-buggy” organizations. The pandemic provides a perfect occasion—no doubt forced but relatively low-risk—to try new things. In doing so, courts need to test these changes that have been implemented out of necessity, assess them, and incorporate only those which are found to be efficacious. One of the end goals should be a *contribution* to access to justice, not a reduction.<sup>138</sup> Our position is that steps need to be taken to ensure that an increased reliance on “privileged access to technology” during COVID-19 does not lead to an “exacerbation of denial of access to justice.”<sup>139</sup>

It appears as though courts have taken heed of all these comments and commenced the long and difficult process of self-evaluation. After decades of neglect and maladministration this is an encouraging sign. Rather than anticipating a return to “normal,” courts appear to be preparing for a “new normal.”<sup>140</sup> What this will look like is yet to be seen; however, any new normal must include learning and implementing new and innovative ways of doing things.

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<sup>132</sup> Clive Coleman, “Coronavirus: Jury trials face ‘biggest change since WW2,’” *BBC News* (30 April 2020), online: <[www.bbc.com/news/uk-52462678](http://www.bbc.com/news/uk-52462678)> [perma.cc/872Y-4LUG].

<sup>133</sup> Canadian Institute for the Administration of Justice, “Will COVID-19 Be the Catalyst We Were Waiting for to Modernize the Courts?” (20 May 2020), online (webcast): <[ciaj-icaj.ca/en/upcoming-programs/special-webcast-richard-wagner-richard-suskind-may-20-2020](http://ciaj-icaj.ca/en/upcoming-programs/special-webcast-richard-wagner-richard-suskind-may-20-2020)> [perma.cc/PX3L-BUEM].

<sup>134</sup> *Supra* note 131.

<sup>135</sup> “Virtual Advocacy Webinar,” *supra* note 112.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Supra* note 7. Richard Susskind made the same point noting that minds have been changed and now is the time to act.

<sup>138</sup> The principles of a fair electronic trial are fully considered in Ronald van den Hoogen’s article. See Ronald van den Hoogen, “Will E-Justice still be Justice? Principles of a Fair Electronic Trial” (2008) 1 *Int’l J Court Admin* 65.

<sup>139</sup> See TVO, “The Trauma of Wrongful Arrests; Removing Barriers to Justice- The Agenda with Steve Paikin” (26 May 2020), online (video): <[www.tvo.org/video/removing-barriers-to-justice-in-ontario](http://www.tvo.org/video/removing-barriers-to-justice-in-ontario)> [perma.cc/ET33-U784]. During the episode, Annamaria Enenajor expressed this very concern.

<sup>140</sup> This could even include amendments to the Criminal Code to potentially override *Jordan* requirements: Chief Justice Wagner has suggested the possibility of amendments to the Criminal Code to address the backlog caused by COVID-19. See Olivia Stefanovich “Supreme Court Chief Justice Suggests Criminal Code Changes to Cut into Court Backlogs,” *CBC News* (13 June 2020), online: <[www.cbc.ca/news/politics/stefanovich-chief-justice-reopening-proposals-1.5604773](http://www.cbc.ca/news/politics/stefanovich-chief-justice-reopening-proposals-1.5604773)> [perma.cc/XJD5-4US2]. Chief Justice Wagner was subsequently criticized for these comments as it was felt that he was in a potential conflict of interest. See Olivia Stefanovich “Chief Justice Wagner Denies Crossing a Line by Suggesting Criminal Code Changes,” *CBC News* (18 June 2020), online: <[www.cbc.ca/news/politics/stefanovich-criminal-defence-lawyers-concerns-post-pandemic-1.5615924](http://www.cbc.ca/news/politics/stefanovich-criminal-defence-lawyers-concerns-post-pandemic-1.5615924)> [perma.cc/B3JL-UUSM].

It is our opinion that this must include the judicious use of technology in all aspects of the judicial process and judicial case management from a case's inception.<sup>141</sup> Moreover, in the light of the fact that the justice system's effectiveness has not improved since *Jordan*—in fact, COVID-19 has made it worse<sup>142</sup>—a thorough review of court processes must contemplate a complete reimagining of the justice system for the twenty-first century. Richard Susskind's dreams of having judges without courtrooms and justice without hearings may soon be a reality.<sup>143</sup> Or maybe the solution has not as yet been envisaged and will be revealed through the discussions which will occur as a result of the COVID-19 shutdown. Regardless, only when we shake off our tradition-bound approaches and embrace new ideas will we be able to ensure that the courts are nimble and responsive to the challenges faced by modern justice systems.

As we have noted, the possibility of a global pandemic was by and large absent from consideration when business continuity plans were developed by Canadian courts. Nevertheless, we have concluded that the very practice of developing such plans clearly provided them with a foundation upon which they were able to respond to the COVID-19 pandemic. Moving forward, we strongly recommend that the courts seize upon this opportunity to establish comprehensive pandemic and disaster plans based on lessons learned. And then continually revisit and revise them as technology and knowledge change.

The current crisis in Canada, predictable in all but its timing, affected most courts in unpredictable ways. While the rapid response of Chief Justices, judges, and court administrators across the country to close, adjust, and reset courts should be commended, much remains to be assessed in looking to the future. The pandemic has, as pandemics generally do, raised many more questions that will require further analysis once it is over. When it is, research will need to focus on such things as: How have the courts performed during the crisis? Have they done a creditable job of addressing this pandemic, particularly through their use of technology? How did they accommodate local variances? What lessons have been learned, or innovations made, that will aid the courts in getting out of the *Jordan* dilemma? Which of these lessons or innovations are sustainable and which ones will prove to be ineffective in the long-term? What role have court administrators played during this crisis? What role can they play after it is over? Only in time will answers to these be revealed, and a prudent path forward mapped out.

In *Kafka on the Shore*, Haruki Murakami wrote about the consequences of major events on humans. He said,<sup>144</sup>

And once the storm is over, you won't remember how you made it through, how you managed to survive. You won't even be sure, in fact, whether the storm is really over. But one thing is certain. When you come out of the storm, you won't be the same person who walked in.

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<sup>141</sup> This is distinct from rules-based case management, where all cases are treated in the same manner, or party-based case management, where the parties determine whether case management is required. Judicial case management looks at every case on its own merits and determines the level of case management required for each individual case. This encompasses the notion of proportionality and recognizes that no two cases are the same. It should involve the use of some form of what David Steelman calls Differentiated Case Management, where cases are determined to be on one of three tracks, expedited, standard or complex. In this differentiated approach the level of judicial involvement in managing the case increases with the complexity. See David C Steelman, "Improving Caseload Management: A Brief Guide" (2008), online: *National Center for State Courts* <cdm16501.contentdm.oclc.org/digital/collection/ctadmin/id/1022> [perma.cc/4UZK-CENR].

<sup>142</sup> For a very thorough examination of this see Paciocco, *supra* note 54.

<sup>143</sup> "Will COVID-19 Be the Catalyst," *supra* note 5.

<sup>144</sup> Haruki Murakami, *Kafka on the Shore* (Vintage International, 2005) at 6.

For him, storms are a metaphor for the flotsam and jetsam of personal experience, of life in general. The COVID-19 pandemic storm has laid bare numerous weaknesses in many of our institutions and social systems. The justice system is just one that Murakami's metaphor could apply to. There is little doubt that courts will not be the same as they were before this current storm. Whether they will be better is up to us.

## **Appendix Court Closures During COVID-19**

### ***Alberta***

On 30 March 2020, access to Alberta courthouses was restricted. See Court of Queen’s Bench of Alberta, “News & Announcements” (27 March 2020), online: <[www.albertacourts.ca/qb/resources/announcements/notice-to-the-public-and-legal-profession-restricted-access-to-courthouses](http://www.albertacourts.ca/qb/resources/announcements/notice-to-the-public-and-legal-profession-restricted-access-to-courthouses)> [perma.cc/WN89-8FFP].

### ***British Columbia***

British Columbia suspended all operations on 19 March 2020. See Supreme Court of British Columbia, “Notice to the Profession, the Public and the Media Regarding Civil and Family Proceedings, COVID-19: Suspension of Regular Court Operations” (16 April 2020), online (pdf): <[www.bccourts.ca/supreme\\_court/documents/COVID-19\\_Notice\\_No.8\\_Notice\\_of\\_Suspension\\_of\\_Civil\\_and\\_Family\\_Proceedings\\_April\\_16\\_2020.pdf](http://www.bccourts.ca/supreme_court/documents/COVID-19_Notice_No.8_Notice_of_Suspension_of_Civil_and_Family_Proceedings_April_16_2020.pdf)> [perma.cc/TL2Y-7UZ7].

### ***Saskatchewan***

Effective 20 March 2020, regular operations at the Court of Queen’s Bench for Saskatchewan were suspended. See Courts of Saskatchewan Communications Office, “Court of Queen’s Bench for Saskatchewan Directive and Advisory” (19 March 2020), online (pdf): <[sasklawcourts.ca/images/documents/Queens\\_Bench/COVID\\_Update\\_3\\_19.pdf](http://sasklawcourts.ca/images/documents/Queens_Bench/COVID_Update_3_19.pdf)> [perma.cc/KYM2-GUUZ].

### ***Manitoba***

On 16 March 2020, access to courthouses in Manitoba was restricted to those person necessary for a proceeding. See Manitoba Courts, “COVID-19 - Manitoba Courts” (13 March 2020), online: <[www.manitobacourts.mb.ca/news/covid-19-manitoba-court-schedule-changes](http://www.manitobacourts.mb.ca/news/covid-19-manitoba-court-schedule-changes)> [perma.cc/3P3L-34ES].

### ***New Brunswick***

Since 16 March 2020, the courts in New Brunswick have restricted access. See The Courts of New Brunswick, “COVID-19 General Notice” (March 2020), online (pdf): <[www.courtsnb-coursnb.ca/content/dam/courts/pdf/NB-Courts.pdf](http://www.courtsnb-coursnb.ca/content/dam/courts/pdf/NB-Courts.pdf)> [perma.cc/DAM3-EEUE].

### ***Newfoundland and Labrador***

The Supreme Court of Newfoundland and Labrador limited regular operations effective 18 March 2020. See Supreme Court of Newfoundland and Labrador, “Notice to the Profession and General Public, COVID-19: Preventative Measures” (18 March 2020), online (pdf): <[court.nl.ca/supreme/pdf/2020%2003%2018%20-%20Notice%20to%20the%20Profession%20-%20COVID-19%20Preventative%20Measures.pdf](http://court.nl.ca/supreme/pdf/2020%2003%2018%20-%20Notice%20to%20the%20Profession%20-%20COVID-19%20Preventative%20Measures.pdf)> [perma.cc/W9SW-YYP7].

### ***Nova Scotia***

On 19 March 2020 the Supreme Court of Nova Scotia adopted the essential services model. See Executive Office of the Nova Scotia Judiciary, “COVID-19: Supreme Court Adopts Essential Services Model” (19 March 2020), online (pdf):

[www.courts.ns.ca/News\\_of\\_Courts/documents/NSSC\\_Essential\\_Services\\_Model\\_03\\_19\\_20.pdf](http://www.courts.ns.ca/News_of_Courts/documents/NSSC_Essential_Services_Model_03_19_20.pdf) [perma.cc/TY77-ULYX].

### ***Ontario***

On 17 March 2020, the Ontario Superior Court closed. On 20 March 2020, the Ontario Court of Justice was effectively shut down; and on 28 March 2020 it was announced that only emergency matters were being heard by either teleconference or videoconference. (For further details see Part II.A.)

### ***Prince Edward Island***

On 20 March 2020, the courts in Prince Edward Island restricted access. See Prince Edward Island Provincial Court, “COVID-19 Impact on Provincial Courts in Prince Edward Island” (20 March 2020), online (pdf): [www.courts.pe.ca/sites/www.courts.pe.ca/files/2020-03/COVID-19%20CHANGES%20TO%20PROVINCIAL%20PROCESSES%20MARCH%202020,%202020.pdf](http://www.courts.pe.ca/sites/www.courts.pe.ca/files/2020-03/COVID-19%20CHANGES%20TO%20PROVINCIAL%20PROCESSES%20MARCH%202020,%202020.pdf) [perma.cc/XGN9-5GZF].

### ***Quebec***

Effective 16 March 2020 the service in the courts of Quebec was reduced. See Gouvernement du Québec, “Mise en place de mesures dans les palais de justice en raison de la COVID-19” (13 mars 2020), online: [www.fil-information.gouv.qc.ca/Pages/Article.aspx?idArticle=2803139851](http://www.fil-information.gouv.qc.ca/Pages/Article.aspx?idArticle=2803139851) [perma.cc/Y3E7-PKMW].

### ***Northwest Territories***

The courts in the Northwest Territories initially suspended hearings until 1 May 2020, but this has subsequently been updated. See Courts of Northwest Territories, “NWT Courts Response to COVID 19” (26 June 2020), online: [www.nwtcourts.ca/en/nwt-courts-response-to-covid-19](http://www.nwtcourts.ca/en/nwt-courts-response-to-covid-19) [perma.cc/RU53-8XTE].

### ***Nunavut***

Regular operations of the Nunavut Court of Justice were suspended on 17 March 2020. See Nunavut Courts, (2020), online: [www.nunavutcourts.ca/index.php/68-flash-news/211-continued-suspension-of-regular-operations](http://www.nunavutcourts.ca/index.php/68-flash-news/211-continued-suspension-of-regular-operations) [perma.cc/2RCU-5EHB].

### ***Yukon***

Effective 18 March 2020 the courts in the Yukon implemented a number of measures. See Ian Burns, “Yukon Courts Amend Procedures in Light of COVID-19,” *The Lawyer’s Daily* (18 March 2020), online: [www.thelawyersdaily.ca/articles/18231/yukon-courts-amend-procedures-in-light-of-covid-19](http://www.thelawyersdaily.ca/articles/18231/yukon-courts-amend-procedures-in-light-of-covid-19) [perma.cc/7LTB-MLV8].