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Innovations and best practices regarding access to Justice in Canadian courts and abroad during COVID-19.

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CONTENTS

Introduction 2

Setting the Scene - Canada..... 2

 Virtual Court Proceedings..... 2

 Digital “Best Practices” 3

 Present Concerns..... 4

Best Practices in Other Jurisdictions 7

 Australia 8

Best Practices in Canada 9

Practices to Adopt..... 12

Table of Authorities..... 13

 LEGISLATION..... 13

 SECONDARY MATERIALS 13

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INTRODUCTION

The COVID-19 pandemic has drastically changed virtually every area of life. Across the globe, judicial systems have had to respond to the challenges posed by COVID-19. Facets of the legal system that used to be taken for granted, such as the ability to enter courthouses or consult with counsel face-to-face, suddenly became inaccessible in March 2020. Those looking to resolve both legal and interpersonal conflicts faced unprecedented barriers due to the pandemic necessitating online proceedings. In the wake of this, the judicial system in Canada and across the globe underwent massive changes and alterations to accommodate the new state of the world. This report will explore these innovations as they pertain to Canada, as well as practices adopted in the United Kingdom and Australia. This project aims to reflect how court systems in Canada and across the globe have adapted in the wake of the COVID-19 pandemic and identifies the best practices of those jurisdictions which have improved the efficiency of court and have had a positive impact on access to justice.

SETTING THE SCENE - CANADA

Virtual Court Proceedings

In September 2021, Ontario's Chief Justice Geoffrey Morawetz of the Superior Court of Justice expressed his vision for the future state of the court: "flexibility and adaptability to meet rapidly changing circumstances and the needs of the litigants, the public, the bar and the judiciary."¹ The Canadian judicial system rapidly digitized to continue its operations in the wake of COVID-19. Across the country, court hearings and proceedings transitioned to an online format, with many jurisdictions continuing to hold hearings virtually as of the beginning of 2022. Audio-conference and video-conference proceedings have made the administration of justice more accessible in many ways, as they remove the need for travel costs or costs associated with the production of hard copy materials. These facets of trials can serve as barriers to justice for many in the country.² Furthermore, virtual proceedings have increased the efficiency of the courts in many cases by cutting down waiting times for trial, making the attainment of legal services overall more affordable.³

¹ The Honourable Geoffrey B Morawetz, "[Opening of the Courts](#)" (14 September 2021), online: [Ontario Courts](#).

² Margot Mary Davis & Jennifer Lynch, "[Virtual vs. in-person trials: Benefits, negatives, considerations](#)" (24 February 2021), online: [The Lawyer's Daily](#).

³ Steve Rubley, "[Forum Infographic: The COVID-19 pandemic and the courts – Aggravation or opportunity?](#)" (December 2021), online: [Thomson Reuters](#).

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Digital “Best Practices”

Some provinces have developed particular “best practices” regarding the digitization of the administration of justice. British Columbia has instituted mandatory pre-trial conferences for the entirety of the pandemic to make more efficient use of court resources.⁴ In Ontario, the Court of Appeal currently requires parties to file electronic versions of all court documents in a text-searchable format. In Prince Edward Island, the mode of hearing is guided by the wishes of the parties and directions of the court to ensure the best format for all parties involved is used.⁵ Overall, across Canada, there has been enthusiasm to move away from reliance on paper-based systems. Most Canadian jurisdictions have embraced the shift into the virtual world.

Increasing Efficiency of Trials

The transition to the virtual world has created possibilities for increasing the efficiency of trial proceedings. According to Justice Garrison of the Harris County Civil Court (offering a perspective from the United States), "The legal profession may realise that we can operate this way and we don't have to be in the courthouse to do it. We'll have more efficient hearings."⁶

For instance, the Ontario Superior Court of Justice has encouraged using the Small Claims Court E-Filing Service portal or the Small Claims Court Submissions Online portal to file forms and documents online without going to court, where possible. Moving away from paper documentation to searchable text-based documentation allows for increased efficiency in the processing of trial documentation and therefore the administration of justice as a whole.

The Ministry of the Attorney General and the Ontario Superior Court of Justice have also implemented Caselines, a new cloud-based document sharing platform that supports remote and in-person court proceedings.⁷ After materials are filed with the court, Caselines provides a platform for parties to upload, mark-up, share, and present electronic copies of their documents for review by the judiciary before and during a court hearing.⁸ Consistent with

⁴ [“Practice Direction: Criminal Pre-Trial Conferences During COVID-19” \(February 2021\), online: *The Provincial Court of British Columbia*.](#)

⁵ Hon. David H. Jenkins, [“Message from the Chief Justice of Prince Edward Island” \(July 2020\), online: *Courts of PEI*.](#)

⁶ Tanya N. Garrison, [“Virtual Court from a Judge’s Perspective” \(August 2020\), online: *Onit*.](#)

⁷ [“Supplementary Notice to the Profession and Litigants in Civil and Family Matters Regarding the Caselines Pilot, E-Filing, and Fee Payment” \(28 February 2022\), online: *Ontario Courts*.](#)

⁸ *Ibid.*

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efforts to provide timely and efficient access to justice, CaseLines has helped address the backlog of cases.⁹ Soon after its implementation in August of 2020, it has been quickly adopted across the province for civil, family, and criminal matters.¹⁰ Furthermore, amendments were made to the *Ontario Rules of Civil Procedure* such that pursuant to Rule 4.05.3, relevant documents are required to be submitted to CaseLines in any hearing, pre-trial conference, or case conference.¹¹

Present Concerns

While the current court proceedings in Canada hold some areas of promise, various concerns surrounding accessibility and fairness as digital infrastructures continue to develop. Though there are some bright spots in terms of accessibility with virtual trials for those in rural areas regarding travel costs and time, there are still concerns that these areas lack broadband internet and tech resources to benefit from virtual proceedings.¹²

Only 53.4 percent of rural communities in Canada have access to unlimited broadband at 50/10 megabits per second, which is significantly lower than the national rate of 87.4 percent with access.¹³ Further, there are concerns surrounding the fairness of virtual trials as compared to in-person trials. For instance, a 2010 study based in Cook County, Illinois, found that those who had video bail hearings were more likely to have higher bail amounts than individuals who had in-person hearings.¹⁴ Moreover, in some provinces, digital court proceedings have put jury trials on a complete hold.¹⁵ As jury trials continue to face more and more delays, some accused persons may give up their right to a jury trial to get faster resolution, knowing that judge-alone trials are still proceeding.¹⁶

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ RRO 1990, Reg 194, r 4.05.3.

¹² *Supra* note 1.

¹³ Canadian Radio-television and Telecommunications Commission, "[Broadband Fund: Closing the Digital divide In Canada](#)" (16 December 2021), online: *Government of Canada*.

¹⁴ Alicia Bannon and Janna Adelstien, "[The Impact of Video Proceedings on Fairness and Access to Justice in Court](#)" (September 2020), online: *Brennan Centre for Justice*.

¹⁵ "[COVID-19: Canada Litigation Updates](#)" (9 June 2022), online: *Thomson Reuters Practical Law*.

¹⁶ Michelle Bertrand, "Dispensing Digital Justice: COVID-19, Courts, and the Potentially Diminishing Role of Jury Trials" (2021) 10 *Ann Rev of Interdisciplinary Justice Research* at 52 (CanLII).

Canadian Innovations

To Promote Access to Justice During the Pandemic

Virtual Court Proceedings

The Canadian judicial system as a whole rapidly digitised in an effort to continue its operations in the wake of COVID-19.





Mandatory Pre-Trial Conferences

British Columbia instituted mandatory pre-trial conferences for the entirety of the pandemic in an attempt to make more efficient use of court resources.

Electronic Court Documents

In Ontario, the Court of Appeal currently requires parties to file electronic versions of all court documents in a text-searchable format.





Differing Modes of Hearings

In Prince Edward Island, the mode of hearing is guided by the wishes of the parties and directions of the court to ensure the best format for all parties involved is used.

Increasing Trial Efficiency

The Ontario Superior Court of Justice has encouraged the use of the Small Claims Court E-Filing Service portal or the Small Claims Court Submissions Online portal to file forms and documents online without going to court, where possible.







BEST PRACTICES IN OTHER JURISDICTIONS

United Kingdom

The United Kingdom (UK) has taken the digital administration of justice a step further than Canada by creating a digitized common case management systems to be used across jurisdictions. The Common Platform is, used by Her Majesty's Courts & Tribunals Service (responsible for the administration of criminal, civil and family courts and tribunals in England and Wales) staff, the judiciary and professional court users such as defence lawyers and the Crown Prosecution Service.¹⁷

The Common Platform has numerous features that make virtual and in-person court 20hearings more accessible. For example, defence professionals can download the Initial Details of the Prosecution Case directly from Common Platform, instead of requesting this from the Crown Prosecution Service, making the attainment of this information quicker and easier.¹⁸ Legal professionals can also upload case documents directly to Common Platform, including the *Preparation for Effective Trial and Better Case Management* forms.¹⁹ Not only do these features of the Common Platform make case management more accessible, but also more accurate. With the direct uploads of case documents, there is less room for error, making the system in its entirety more efficient. Additionally, the UK has launched a pilot digital service for Damages Claims enabling legal professionals to submit a personal injury claim digitally. They can manage and progress the claim themselves for the initial stages of the claim process.²⁰

The increased accuracy using common digital case management systems in the UK is evidenced in data collected by the purveyors of another digital case management system in the UK, MyHMCTS. It was found that in the area of family law:

¹⁷ [“HMCTS Weekly Operational Update - Week commencing Monday 23 August 2021” \(August 2021\), online: *HM Courts & Tribunals Service*.](#)

¹⁸ [“Initial Details of the Prosecution Case \(Advance Information\)” \(October 2021\), online: *The Crown Prosecution Service*.](#)

¹⁹ *Supra* note 10.

²⁰ [“HMCTS Weekly Operational Update - Week commencing Monday 14 June 2021” \(June 2021\), online: *HM Courts & Tribunals Service*.](#)

Forced to Adapt

“Applications are proceeding more smoothly, and we now return fewer than 1% of online applications compared to around 20% of paper applications for legal representatives to amend or provide more information.”²¹

While these findings were specific to the area of family law, it can be extrapolated that the use of a common case management system is effective in other areas of the law. A more effective judicial system leads to a more cost-efficient and accessible court system in many ways. Various UK jurisdictions have communicated their desire to maintain the services of these common digital case management systems even after the COVID-19 restrictions are fully lifted due to the increased accuracy and efficiency they create.

Australia

Most Australian courts were able to rely to some extent on pre-existing technologies (such as e-filing or online court mechanisms), but, similar to Canada, those electronic systems were not designed to replace in-person hearings in their entirety. Advancements in technology such as e-filing, case management and digitized case files allowed Australian courts to switch seamlessly to “virtual mode”.²² Judges and judicial staff members, therefore, had to rapidly become adept at documents-only, telephonic, and audio-visual procedures, using a variety of online platforms. As familiarity with the new technology grew, online justice became more sophisticated and ultimately more efficient.

Perhaps the most significant change that Australia adopted was a change to its legislation, which broadened the courts’ powers. The COVID-19 Legislation Amendment (Emergency Measures) Act 2020 created a new section, 22C, which explicitly permits remote proceedings in some types of matters and adopts a presumption that certain types of proceedings will take place remotely unless good cause is shown.²³ This legislation created a transparent and predictable approach to online justice, creating clarity in a time when change is being introduced quite rapidly. It also meant that matters would only be heard ‘in person’ if they could not be dealt with in any other way. After the passing of this legislation the Magistrates Court in Victoria was able to double its regular daily number of hearings using their Virtual

²¹ [“Divorce applications will now be made online” \(September 2021\), online: Collins & Hoy Solicitors.](#)

²² S I Strong, [“Procedural Law in a Time of Pandemic: Australian Courts’ Response to COVID-19” \(2020\) at 3, online \(PDF\): The University of Sydney.](#)

²³ *Ibid* at 4.

courtrooms and created an Online Magistrates Court, staffed by elected magistrates, to deal with long lists of matters deemed to be resolved by virtual adjudication.²⁴

BEST PRACTICES IN CANADA

Some of the practices that provinces have enacted to increase accessibility and safety during the pandemic have had positive impacts and should be considered as permanent fixtures within the Canadian court system going forward.

One such example is the development of digital infrastructure and guides on how to use them. In particular, the Nova Scotia court system has created a best practices checklist for attending virtual hearings, providing step-by-step guidelines for those who may not be technologically literate to attend their virtual hearings successfully. Similar best practices for remote hearings and virtual courtroom etiquette rules have been created by the Ontario Superior Court of Justice.²⁵ With the possibility of virtual hearings becoming a mainstay in jurisdictions across the country, best practices guides and checklists such as those in Nova Scotia and Ontario should be kept and utilized post-pandemic for those who lack access to or literacy in technological support resources.

Further, some jurisdictions have extended virtual hearings in Canada to correctional institutions. In Saskatchewan, CCTV video conferencing is also available between courthouses and most correctional institutions.²⁶ The pandemic has opened larger conversations surrounding correctional institutions and access to technology. With incarcerated persons being less likely to possess technological literacy than the general population, having these services available and executed by the province is of great importance to make sure inmates can attend their trials in an online format.²⁷ Perhaps Canada can take this a step further by implementing video visitation in the future for the family members of inmates that are unable to visit in-person due to the cost and time and travelling.

²⁴ Anne Wallace & Kathy Laster, “Courts in Victoria, Australia, During COVID: Will Digital Innovation Stick?” (2021) 12:2 Intl J for Court Administration 9.

²⁵ “[Notice to the Profession, Parties, Public and the Media](#)” (19 April 2022), online: *Ontario Courts*.

²⁶ Thia James, “[Pandemic spurs Corrections to let Sask. jails allow video calls](#)” (February 2021), online: *Saskatoon StarPhoenix*.

²⁷ Rosemary Ricciardelli, “Correctional services during and beyond COVID-19” (8 April 2021), 6 Facets J at 497.

Five Steps Forward

Learnings from other Jurisdictions



Digitizing Case Management

The United Kingdom has taken the digital administration of justice a step further by creating digitised common case management systems to be used across jurisdictions.

Increased Technological Competency

Judges and judicial staff members in Australia rapidly became adept at documents-only, telephonic, and audio-visual procedures, using a variety of online platforms.



Legislative Action

The Australian COVID-19 Legislation Amendment (Emergency Measures) Act 2020 created a new section, 22C, which explicitly permits remote proceedings in some types of matters and adopts a presumption that certain types of proceedings will take place remotely.

Create Further Digital Developments

With countries such as the United Kingdom implementing many digital developments, Canada may take inspiration and adopt some of these practices to integrate into the existing court systems and their operations.



Maintain Existing Best Practices

Some of the practices that have been adopted by the court system during COVID-19 have created positive changes and increased access to justice, and should remain as permanent fixtures of the judicial system.

PRACTICES TO ADOPT

As courts in Canada and the world look to the future and consider what post-pandemic life may look like, some of the practices that the court system has adopted during COVID-19 have created positive changes and increased access to justice and should perhaps remain as permanent fixtures of the judicial system. Echoing Chief Justice Richard Wagner, “there is no turning back” as the judicial system must continue to adapt and modernize beyond the COVID-19 pandemic.²⁸ The creation of internalised digital case management systems like in the United Kingdom has proven results in both efficiency and accessibility. With the UK implementing these digital developments, Canada may take inspiration and adopt some of these practices to integrate into the existing court systems and their operations.

Similarly, the Canadian government may wish to step up to the plate and issue legislation, as was the case in Australia, that would help with the transparency of virtual court proceedings going forward. As we reach the other side of the COVID-19 pandemic, this type of legislation could help determine which cases would and should continue to be heard virtually, to make virtual justice more accessible to Ontarians and improve the efficiency of our court system.

²⁸ [“Canada’s Chief Justice says system must continue modernizing beyond COVID-19 pandemic” \(7 February 2022\), online: *The Canadian Bar Association BC Branch*.](#)

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