



# LESSONS LEARNED AND NEW HORIZONS:

How Technology is Helping Canadian Legal Systems Adapt for a Post-Pandemic World

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## Lessons Learned and New Legal Horizons

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Please note: This commentary does not constitute legal advice.

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## INTRODUCTION

In recent years, the COVID-19 pandemic has demanded that we adapt our systems, procedures, and ways of life to safeguard the health and safety of Canadians. Almost all elements of everyday life were altered to embrace safety protocols, including the Canadian justice system. In March 2020, Canada’s courthouses had to adapt to be able to carry out their duties, when national lockdowns took effect, Canada’s courthouses had to adapt to be able to carry out their duties. Last year, Christina Piccinin and Sophie Sklar, both students at Osgoode Hall Law School working at the Winkler Institute for Dispute Resolution, prepared a report, “Forced to Adapt,” that analyzed this phenomenon.<sup>1</sup> Our report builds on this work and outlines the evolving circumstances and practices of Canadian courts. In particular, this report explores the most prominent “best practices” that Canadian courts have implemented and how they have facilitated access to justice for citizens during a time of crisis. We also comment on the effectiveness of those procedures and consider several persisting issues. Our goal is to showcase the adaptability of Canadian courts and to highlight to readers the anticipated direction of Canada’s legal system.

## A LAY OF THE LAND: CANADIAN COURTS AND BEST PRACTICES

In large part, the Canadian justice system’s response to the pandemic was to digitize and make virtual many court procedures to permit court operations to continue while keeping safe all stakeholders – from court users to employees. The pandemic expedited the progress of modernizing the court system in many ways. As Ontario’s Attorney General Doug Downey

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<sup>1</sup> Christina Piccinin and Sophie Sklar, “Forced to Adapt” (2022) online (PDF): *Winkler Institute for Dispute Resolution* online: <[Forced to Adapt \(2022\) online \(PDF\): Winkler Institute for Dispute Resolution](#)>.

stated, COVID-19 “modernized the justice system 25 years in 25 days.”<sup>2</sup> The Chief Justice of Canada, Richard Wagner, acknowledged the difficulties of delivering justice in the aftermath of the pandemic, while the Action Committee, Minister Lametti, and other government groups continued to manage change in the courts.<sup>3</sup> Reviews are mixed about the approaches Canadian courts have undertaken in the last three years. Some believe the move online is long overdue and that virtual procedures are here to stay. Others see it as a temporary measure and predict a full return to in-person procedures and paper documents. Below, we outline the practices commonly implemented by courts including electronic document filings, video conferences, presumptive and hybrid modes of hearings, and the remote commissioning of affidavits.

## BEST AND MOST NOTABLE PRACTICES ACROSS CANADIAN COURTS

### Digital Documents and Filings

Before the pandemic, the Canadian judicial system was largely dependent on paper, and paper filings were the primary (and often only) means of operation. In responding to the pandemic and the difficulties involved with exchanging hard copies of documents, the use of digital documents became a convenient way to facilitate the continuation of procedures. Many of those temporary measures have become permanent. The Ontario Court of Appeal (ONCA) went so far as to allow electronic signatures to have the same effect as ink signatures and allowed parties to serve documents electronically whether by email or file-sharing protocols that use

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<sup>2</sup> Trevor Pritchard, “Law in the time of COVID: How the pandemic radically reoriented Ontario’s justice system”, CBC News (14 March 2022), online: <[Law in the time of COVID: How the pandemic radically reoriented Ontario’s justice system](#)>.

<sup>3</sup> [Canada, Office of the Commissioner for Federal Judicial Affairs Canada, 2021-2022 Progress Report: Action Committee on Court Operations in Response to COVID-19 \(Ottawa\)](#)

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shared links to online or cloud drives.<sup>4</sup> In a similar vein, although the Court of Appeal and Supreme Court of PEI lifted all COVID-19 restrictions and procedures as of June 2022, the courts maintained the practice of filing documents via email, and opted to leave the Dropbox open to encourage its use for document delivery.<sup>5</sup>

The use of digital documents has improved access to justice for many people by reducing travel costs and time. However, this transition is, predictably, not without flaws, nor is it beneficial to all. Although electronic document filing has improved efficiency and convenience for many lawyers and clients, some litigants – especially- those without representation – struggle to navigate the new system without adequate technology or support.<sup>6</sup> Similar procedures regarding digital documents filing have been adopted in almost all other jurisdictions, including the Court of Appeal of Alberta, requiring mandatory electronic filing as of March 1<sup>st</sup>, 2021.<sup>7</sup>

### Video Conferencing

A primary problem during the pandemic was the prohibition on communal gathering given potential transmission and outbreaks. A natural response was to transition to existing online platforms to conduct work. For the courts, that meant video conferencing, using a variety of platforms, to conduct hearings. As pandemic restrictions eased, many courts maintained the practice, whether by preference of the parties or the discretion of the court. For example, beginning in March 2022, the Court of Appeal of Quebec allowed parties to choose whether to

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<sup>4</sup> Ontario, Ontario Court of Appeal, online: <[Consolidated Practice Direction Regarding Proceedings in the Court of Appeal During the COVID-19 Pandemic \(October 2022\)](#)>.

<sup>5</sup> Prince Edward Island, online: <[Supreme Court of Prince Edward Island, Notices of the Supreme Court \(June 2022\)](#)>.

<sup>6</sup> Claire, Houston, Rachel Birnbaum & Nicholas Bala, “Moving Towards a Post-Pandemic “New Normal”:  
Perspectives of Ontario Family Justice Professionals and Self-Represented Litigants” (2022) 41:1 *Can Fam LQ* at 3.

<sup>7</sup> Court of Appeal of Alberta online: (PDF): <[Practice Direction Electronic Filing” \(Last modified 31 August 2020\)](#)>.

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have their appeals heard via videoconference,<sup>8</sup> while the courts in Prince Edward Island (PEI) opted to allow virtual hearings at the discretion of the courts.<sup>9</sup>

The Government of Canada has also updated the way courts deal with criminal proceedings. In January 2023, Bill S-4 came into effect, purporting to increase the “efficiency, effectiveness and accessibility of the criminal justice system in response to the challenges posed by the COVID-19 pandemic.” The amendments were said to “give courts increased flexibility in how they hold criminal proceedings and issue orders.”<sup>10</sup> The changes allow accused to appear remotely by videoconference or audioconference in most criminal proceedings and permit videoconference participation by prospective jurors in the jury selection process.<sup>11</sup> Veronica Martinez, group leader at the Ontario Court of Justice, has said that many of these online procedures will remain in place even though in-person hearings had resumed. In discussing Bill S-4, Martinez explained that virtual hearings are more convenient for many people because it means they do not need to take time off of work or away from their other responsibilities to be able to participate in the criminal justice system.<sup>12</sup>

Although virtual hearings and proceedings have made the courts more accessible for some, there continue to be technological impediments that may undermine access to justice for all. For example, some users lack access to the necessary technology or infrastructure to access the

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<sup>8</sup> Online: <[Quebec, Court of Appeal of Quebec, COVID-19 Pandemic – Update \(2022\)](#)>.

<sup>9</sup> Prince Edward Island, Supreme Court of Prince Edward Island, online: <[Update on Court Operations \(April 2022\)](#)>.

<sup>10</sup> Department of Justice Canada, News Release, (February 8, 2022), online: <[Government of Canada Introduces Legislation to Improve the Operation of the Criminal Justice System and Address the Impacts of the COVID-19 Pandemic](#)>.

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

<sup>12</sup> Veronica Martinez, Ontario Court of Justice “Concerning Court Protocols” (15 October 2022) via telephone call [communicated to Macrina Dirracolo].

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virtual world properly. As “Forced to Adapt” highlighted that approximately one half of rural communities have access to unlimited internet broadband.<sup>13</sup> These are often the communities that are the furthest away from legal institutions like courthouses. Some lack access to the basic hardware needed to attend virtual proceedings. Still, others lack the technical proficiency needed to navigate these types of hearings. On top of this is the obstacles that comes with technical difficulties that we all experience from time-to-time. These shortcomings do not just create frustration on the part of all participants, but also create delay. The digital justice system, while rectifying certain issues and improving accessibility in some ways, has introduced new problems.

### Best Practices

Presumptive Modes of Hearing	Video Conferencing	E-Documents
Courts are starting to post charts to help the public understand more easily the default mode of proceeding.	Courts have turned to virtual meeting to save time and cost, and to increase access.	Courts have shifted towards a broader acceptance of electronic filings, including e-signatures on documents.

#### Presumptive Modes of Hearing (Embracing a Hybrid Environment)

As Canada emerges from the pandemic, some jurisdictions have elected to maintain virtual modes of operation or to adopt a hybrid model. In April 2022, the Ontario Superior Court of Justice announced the different possibilities along with an online chart for parties to consult.<sup>14</sup> In criminal matters, first appearances, summary conviction appeals, and family law matters

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<sup>13</sup> Piccinin & Sklar, *supra* note 1 at 4.

<sup>14</sup> Ontario, Superior Court of Justice, online: <[Notice to Profession and Parties – Toronto Region \(April 2022\)](#)>.



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were made presumptively virtual, along with urgent and short motions.<sup>15</sup> Similarly, in February 2023, the Supreme Court of Nova Scotia adopted “default positions” for certain (civil, family and criminal) proceedings which include telephone, virtual and in-person options. At the same time, The Supreme Court Futures Working Group encouraged courts across the country to continue to use virtual proceedings where appropriate.<sup>16</sup> In essence, courts were urged to maintain a hybrid model that would reflect some of the technological innovations that have come about because of the pandemic while also facilitating better access to justice with easier access to courts. The introduction of presumptive procedures is designed to help parties easily determine in advance how their proceedings will move forward and, with it, reduce uncertainty.

Building on “Forced to Adapt,” we note that many hybrid options have persisted despite the return to many pre-pandemic practices. There appears to be a permanent shift towards the use of hybrid proceedings across Canada, albeit with different approaches. A pilot project underway at the Alberta Court of King’s Bench illustrates the point. Generally, “the default mode for matters that are more adjudicative/substantive in nature is an in-person hearing [and] the default mode for matters that are more administrative/procedural in nature is a remote hearing.”<sup>17</sup> For example, bail hearings, proceedings in bankruptcy, estate conferences, and even proceedings in family court are presumptively remote.<sup>18</sup> However, criminal trials, sentencing, family court appeals, and most chambers are dealt with in person by default. Any

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<sup>15</sup> *Ibid.*

<sup>16</sup> Nova Scotia, Supreme Court of Nova Scotia: <[Supreme Court of Nova Scotia Adopts Default Positions For The Format Of Proceedings \(February 27, 2023\), online \(PDF\)](#)>.

<sup>17</sup> Court of King’s Bench Alberta, online: *Court Operations and Schedules* <[Hearing Guidelines” \(last visited 30 March 2023\)](#)>.

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

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matter may be changed to remote or hybrid format by completing a simple webform application. The available grounds for making the request are broad, including the health or personal circumstances of a party, their distance from the location of a hearing, or any such reason approved by the court.<sup>19</sup> The approach in Alberta is thus far more expansive than Ontario's program, which does not offer the same level of flexibility. Such innovative departures from traditional methods are bound to produce significant results requiring study. The Alberta project will be reviewed in 2023, and will include feedback from counsel, pro bono organizations, and media. Other jurisdictions have a more moderate approach. British Columbia's Court of Appeal's and Supreme Court will consider remote attendance on an application-by-application basis assessing factors such as travel cost and convenience to the party, and any other relevant facts, but requires in-person attendance for most substantive matters outside regular fixed appearances.<sup>20</sup> Saskatchewan is taking a similar approach.<sup>21</sup>

### Remote Affidavits

The pandemic has, by and large, expanded the availability of remote commissioning of documents, including affidavits. Law Societies and courts across the country have created rules to permit this practice, which was generally prohibited before the pandemic. Some provinces have readily adopted the change. In Alberta, the Court of Appeal and Court of King's Bench now permit the practice, provided counsel follow the detailed directive for the remote

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<sup>19</sup> *Ibid.*

<sup>20</sup> Supreme Court of British Columbia,

["<Notice to the Profession, the Public and the Media Regarding Criminal Proceedings" \(2022\) at 1-2 online \(pdf\)>.](#)

<sup>21</sup> Courts of Saskatchewan, (2022), online: ["<The Courts' Covid-19 Message>.](#)

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commissioning of affidavits in civil and family proceedings.<sup>22</sup> In response to the pandemic, the Law Society of Alberta approved the exceptional measure for use by those who are ill, cannot receive visitors, or are otherwise unable to leave their residences.<sup>23</sup> Commissioning can now take place using video technology, but counsel must meet stringent criteria involving the verification and display of identification, and all exhibits in paper before both parties while connected. To be valid, the affidavit must include a statement indicating that the affidavit was taken remotely.<sup>24</sup> This requirement appears permanent as Manitoba recently introduced an amendment to *The Manitoba Evidence Act* to allow the ongoing use of remote affidavits and witness commissioning including this provision.<sup>25</sup> As a rule of evidence, this legislation applies broadly, to all levels of court and removes requirements detailing extenuating circumstances for remote use.<sup>26</sup> This approach will result in greater certainty around remote commissioning, removing the ambiguity of whether such affidavits will be accepted by other parties, and highlights the long-term codification of a practice brought about by the pandemic.

Other provinces have adopted similar procedures, though perhaps with less enthusiasm. In British Columbia, all levels of court adopted the same remote affidavit commissioning practice generally consistent with Alberta's. Although the Law Society of Ontario actively advised against the use of remote commissioning of documents before the pandemic, the Society reversed its

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<sup>22</sup> Court of King's Bench of Alberta, (25 March 2020), online: *News and Announcements* <[Notice to the Profession and Public: Remote Commission of Affidavits for use in Civil and Family Proceedings during the Covid-19 Pandemic](#)>.

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

<sup>24</sup> Man Reg 78/2021, s 6(1).

<sup>25</sup> Lewis Allen and Michelle McFadden, (22 November 2021), online: *Thompson Dorfman Sweatman* <[Manitoba Introduces Legislation to Allow for the Permanent Use of Remote Witnessing and Commissioning](#)>.

<sup>26</sup> *Ibid.*

position midway through 2020.<sup>27</sup> Now, Ontario allows remote affidavits but also emphasizes the risk associated with their use and provides that a recipient need not accept them.<sup>28</sup>

### CHALLENGES ARISING FROM THE ADOPTION OF TECHNOLOGY

Given the rapid adoption of technological change in recent years, it is unsurprising that courts have started to recognize both emerging and persistent challenges. For one, the push towards a more virtual and digital judicial system has been divisive. Some believed the increased use of technology has enhanced access to justice, but others are less certain, believing it undermines access for those who are unable, for various reasons, to navigate online platforms effectively. Courts will need to further adapt to address these types of barriers to access. Despite technological innovation, notable issues persist, including backlogs and delays. For instance, the Ontario Court of Justice saw the number of cases processed decline by 50%, while the specific number of criminal cases processed decline by 20% in 2020. That made for a significant increase in the backlog of pending cases.<sup>29</sup> Between 2020 and 2021, the hearing of chambers applications in the British Columbia Supreme Court declined by approximately 20%. Trials declined by a full 30%.<sup>30</sup> Courts will need to continue to do what they can to combat these delays.

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<sup>27</sup> Thomson Reuters Practical Law, (25 March 2020), *Practical Law Canada Corporate & Commercial Litigation*, online: <[Covid-19 Commissioning Affidavits Remotely](#)>.

<sup>28</sup> Law Society of Ontario, online: *Law Society of Ontario* <[Remote Commissioning" \(Last modified 1 August 2020\)](#)>.

<sup>29</sup> David Matyas, Peter Wills and Barry Dewitt, "Imagining Resilient Courts: from COVID-19 to the Future of Canada's Court System" (2022) 48:1 *Can Pub Pol'y* at 193.

<sup>30</sup> *Ibid.*

## CONCLUDING THOUGHTS

This report only scratches the surface of the complexities arising from the technological change brought about by the pandemic. Over the next five years, courts should collect and publish data to help analyze which changes seem to enhance access to justice and which remain opportunities for improvement.

Despite some enduring challenges, Canada's courts and legislators have been responsive to the need to develop innovative solutions to respond to the unique challenges of a pandemic that made it difficult to gather safely in public spaces. Distinct approaches in different jurisdictions have afforded us the opportunity to learn from one another about what worked and what was worth implementing permanently. Different provinces and courts may continue to require distinct approaches to deal with their unique circumstances to improve long-term access to justice, but those approaches must still be standardized.

What has become clear is the need for consistent and transparent standards governing the use of these technological innovations in judicial proceedings. The case-by-case approach of the early pandemic is no longer enough. Without a standardized approach, parties will face uncertainty and ambiguity, and with it, increased time, and expense.

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