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Dispensing Digital Justice: COVID-19, Courts, and the Potentially Diminishing Role of Jury Trials¹

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Abstract

Courts around the world moved quickly in determining how to conduct proceedings remotely in response to COVID-induced shutdowns. However, both implicitly and by their actions, in the initial wake of pandemic closures Canadian courts demonstrated a consensus that jury trials could only be conducted in person, even as other proceedings moved to a digital realm. We provide a snapshot of what Canadian courts' initial responses were in adapting to their new reality. We then highlight general issues that need to be considered in conducting court proceedings online, as well as describe issues specific to criminal jury trials. Our contention is that the failure of Canadian courts to address these issues, and their failure to make any considerations towards conducting jury trials remotely despite doing so for nearly all other proceedings, leaves the jury trial vulnerable to obsolescence in a digital world.

Introduction

Criminal jury trials present particular difficulties in their administration, even above and beyond those of other court proceedings. Jury selection is a time-intensive and logistically complex process, and the trials themselves often take longer than judge-alone proceedings. For example, jurors must be removed from

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the courtroom for *voire dire*s and to allow lawyers to make evidentiary arguments and motions. Additionally, an accused must be able to communicate privately with their counsel. Thus, a jury trial involves more individuals, more time, and more complexity than judge-alone trials.

When the World Health Organization (2020) classified COVID-19 as a global pandemic on March 11, 2020, courthouses around the world shut down in response to various shelter-in-place orders. While jurisdictions such as the United States (US), the United Kingdom (UK), Brazil, China, India, and Singapore moved fairly swiftly to conduct some legal matters via technological means (Susskind, 2020), criminal jury trials were almost universally paused, and courts in Canada have given no indication they are amenable to conducting jury trials through digital means. This has potentially chilling effects on the rights of accused persons in Canada.

We aim to do three things in this commentary. First, relying primarily on news media articles published between March 14, 2020, and June 30, 2020, we describe how Canadian courts initially reacted to pandemic-related shutdowns. Next, we identify issues that need to be addressed in conducting remote court proceedings in a general sense, as well as specific to the context of criminal jury trials. Last, we illustrate that Canadian courts have an apparent lack of willingness to consider these issues in the context of criminal jury trials. This lack of willingness, in combination with existing system perceptions of jury trials as a protracted and laborious undertaking, leads us to argue that criminal jury trials are vulnerable to a marked decline, or even disappearance, if Canadian courts continue their refusal to investigate moving jury trials to virtual delivery.

Canadian Jury Trials Are Being Excluded from Remote Adjudication

Using technology to conduct remote court proceedings is not new in Canada. Courts have conducted hearings by phone and video conference on an *ad hoc* basis for some time. Often, access to justice in rural settings has been augmented by the use of telephones, particularly for straightforward and brief matters. What is different

during the pandemic is the prevalence and necessity of digital platforms and that all matters — including full trials — may need to be conducted by digital means. Courts in Canada initially reacted and adapted to pandemic-related shutdowns by implementing various videoconferencing technologies to hear cases while counsel, litigants, and witnesses were not physically in the courtroom.

The Supreme Court of Canada decided to use the Zoom videoconferencing platform to host several hearings scheduled for June 2020 (Schmitz, 2020a). The Zoom platform was chosen because it “supports simultaneous interpretation, and can be integrated into the audiovisual system of the Ottawa courtroom to enable webcasting” (Schmitz, 2020a). Additionally, Zoom’s relatively simple interface, which facilitates “face-to-face interaction among people of varying technological competence,” made it particularly ideal software (Holdsworth, 2020). As of May 14, 2020, the Federal Court of Canada had rescheduled approximately forty hearings to be heard over Zoom (Schmitz, 2020a), which is an encouraging move.

Schmitz (2020c) notes that by mid-May, a national COVID-19 action committee was established in order to provide Canadian courts with more cohesive directives. Co-led by Chief Justice Richard Wagner and federal Minister of Justice David Lametti, the committee advised, on May 26, 2020, that “physical distancing should be the foundation for any court’s strategy to mitigate the risks posed by COVID-19,” but listed the use of remote technology as an appropriate alternative (Schmitz, 2020c). Additionally, according to the committee, any mitigation must not impede access to justice, “particularly for vulnerable court users” (Schmitz, 2020c).

The May 2020 trial of *Rovi Guides Inc. v. Videotron Ltd* was the first Federal Court Zoom hearing to involve witness testimony that included cross-examination (Burns, 2020). In addition to facilitating real-time language translation, it permitted parties to observe, but not participate in, the hearing. Following the proceedings, the judge indicated there were advantages to remote technology (e.g., cost) and that he believed the court would be amenable to remote trials in the future. However, one counsel for Videotron indicated that “part of the reason it worked was due to the features of the case,” (e.g., witnesses

all being expert witnesses; Burns, 2020). Though acknowledging some matters will simply not work in a virtual setting, all counsel involved indicated overall satisfaction with Zoom.

Despite those positive moves towards remote proceedings only a couple months following widespread court shutdowns, criminal jury trials were not included in this adaptation. Criminal jury trials were suspended across the country mid-March, with the majority of provinces indicating they did not predict resumption of proceedings until at least September. For example, a March 13, 2020, announcement from Manitoba Courts stated that, “[e]ffective immediately, all trials scheduled to proceed by judge and jury prior to June 30, 2020, will not proceed with a jury. Rather, they will proceed by judge alone or will be rescheduled to proceed at a later date. Jury Selections are therefore also cancelled during this time” (Manitoba Courts, 2020a). The first post-shutdown jury selection in Manitoba took place on August 27 for a trial scheduled to start in September (Pritchard, 2020). Similarly, a June 25 notice from the Ontario courts noted that “Jury matters will continue to be deferred until at least September 2020” (Ontario Courts, 2020, June 25). Newfoundland stated the same (Bradbury, 2020). Thus, while Canadian courts were willing to experiment with, and work towards, moving other types of proceedings to a digital format, jury trials were simply paused for nearly half a year.

General Problems with “Zooming Justice”

On June 13, 2020, Chief Justice Wagner of the Supreme Court of Canada said that “one of the only positive aspects” of the pandemic was the technological progress that had been made in the courts since April 2020 (Stefanovich, 2020). Justice Wagner further noted that improving the justice system using technology has not only been a “remedy for the immediate circumstances” but also told reporters that “it should be a new way of rendering justice in the future” (Stefanovich, 2020).

However, despite the many positives, Zoom and other digital technologies are not without their issues. We now highlight some of the potential issues applicable to any remote court proceeding that

must be considered, regardless of whether the proceedings include a jury trial or not. In some cases, we draw from the experiences of other jurisdictions to illustrate potential problems in Canadian proceedings.

Technological Issues

The first and most obvious issue is the potential for problems with the functionality of the technology being used to conduct remote court proceedings, and whether all participants in the court proceedings have access to appropriate technology and internet connections. Early recommendations from the University of Surrey (2020) are that for technology to be effective and efficient in the courts, there needs to be, among other things, comprehensive planning and communication among stakeholders; fast, reliable, and secure internet access; high-quality technological infrastructure; and staff trained in the technologies. This highlights the fact that it is also important to determine whether any technological solutions in conducting trials will be “one size fits all,” or whether different considerations must be made for different geographic locations in Canada. For example, how might remote trials, whether jury-based or not, work in Northern communities if access to reliable internet is an issue?

Illustrating some of these technological pitfalls, the Michigan Supreme Court, during its May 6, 2020, hearing, experienced some “technological difficulties” (e.g., judges twice began to speak while on mute; a speaker was frozen for a period of time; and individuals sometimes spoke over each other) despite what appeared to be an overall smooth process (Michigan Supreme Court, 2020). We also note that, assuming the freezing was due to either poor technology or slow internet connection, should all participants in court proceedings not have access to appropriate technological means by which to participate, this could present a significant impediment to moving to digital proceedings (University of Surrey, 2020).

In a similar vein, on May 18, 2020, a Texas court conducted the first remote jury trial — a civil jury matter — in the US, including conducting jury selection remotely (Bleiberg, 2020; Raymond, 2020).

While an overall smooth process, the presiding judge still had to help some jurors with their technology throughout the hearing.

Impacts on Accessibility

An interesting conundrum is that while digital technologies may increase accessibility to court proceedings for some persons, it may create barriers for others. For example, as noted earlier, one of the reasons the Supreme Court of Canada wanted to use Zoom in proceedings is because it facilitated simultaneous language translation (Schmitz, 2020a).

For persons who have disabilities which make it difficult to access the physical courtroom space, remote proceedings could increase accessibility and therefore facilitate participation. For example, two former Manitoba lawyers with physical disabilities have a pending complaint with the Manitoba Human Rights Commission based on having to quit the profession due to the inaccessibility of court buildings (Olijnyk, 2020). As another example, jurors who have issues that may prevent them from sitting for a long time would be able to move around in their own space without unduly distracting others during court proceedings.

On the other hand, accessibility for other persons might be decreased. For example, one of the judges in the aforementioned May 6, 2020, Michigan proceedings was blind and thus Zoom was not an accessible format for him (Michigan Supreme Court, 2020).

Balancing Security Issues with Open-Court Principles

Holdsworth (2020) notes that a pressing concern arising from the increased reliance on Zoom is possible security breaches, referred to as “Zoom-bombing,” in which anonymous individuals were interrupting Zoom meetings across the globe and flooding them with “pornographic or hate-filled messages.” In order to rectify this security concern, Zoom has since upgraded its security.

The remote May 6, 2020, *Rovi Guides Inc. v. Videotron Ltd* case has precedential value moving forward as it addressed many concerns

regarding remote trials and set some ground rules for securely using Zoom (Schmitz, 2020a). For example, the registry officer should be the “host” and the trial judge should be the “co-host”; chat functions should be disabled for private discussions except for by the trial judge and registry officer; Zoom breakout rooms should be used to isolate any witnesses; microphones should be muted and video cameras turned off at various points of the hearing; and members of the public and the media could view public portions of the remote hearing by requesting a Zoom meeting link from the Court (Jeffries-Chung & Brechtel, 2020). In addition to addressing counsels’ concerns regarding the technology, the court also established rules, a witness guide, and best practices that will surely be of use to parties as remote trials become more commonplace (Jeffries-Chung & Brechtel, 2020). Established via a remote trial management conference, the guidelines were deemed by some to be “both instructive and a must read for litigators,” particularly given that there is no way to predict when the pandemic will end (Joseph, 2020).

While security is certainly a concern, there is also the question of how to balance potential security issues with long-held principles of open-court access. Non-profit organization Court Watch NOLA questions how the principles of open court can be respected if matters are moved to an online setting (Honig, 2020). For example, will members of the public be able to “attend” a Zoom jury trial? If so, would the link be publicly available, or would members of the public have to request the access link as per *Rovi Guides Inc. v. Videotron Ltd* (Schmitz, 2020a)? And would there be a limited number of people admitted or would a criminal jury trial be open to all?

Risk of Harsher Outcomes for Accused Persons

Another problem with virtual justice may be the risk of harsher outcomes for accused persons. Kirchner (2020) reported that remote hearings sometimes “lead to harsher outcomes for defendants.” For years, in the late 1990s and early 2000s, courts in Cook County, Illinois, conducted bail hearings primarily through CCTV. Defence counsel at the time decried the move to remote bail, arguing that it “impeded their clients’ rights to effective counsel and due process” (Kirchner, 2020). To study these claims, researchers at Northwestern

University looked at bail amounts both before and after switching to CCTV and found that the move “coincided with a 51% increase in bail amounts, on average” (Kirchner, 2020). Though the use of CCTV bails did not last in Cook County, the research could become a helpful aid in how *not* to conduct remote bails.

Credibility Assessments

Additionally, Kirchner (2020) discussed concerns regarding the ability to judge credibility over video that are supported by research showing individuals tend to be at a disadvantage on screen. Studies have demonstrated that “people are more likely to be deported in immigration hearings if they appear on video than in person, and people applying for asylum are less likely to be granted it over video too” (Kirchner, 2020). What is more, research also exists backing up the concern that technology is not the great equalizer it is sometimes purported to be; for low-income individuals, for example, access to justice is unlikely to be solved by expensive technology.

Eugene Meehan, a lawyer who “specializes in Supreme Court cases,” expressed concern that the nuances of human communication will be lost if hearings no longer have “direct human contact between judges and legal counsel” (Fine, 2020a). Alternatively, Eric Purtzki, a lawyer who argued a criminal issue before the Supreme Court of Canada in June 2020, conceded that, while not ideal, video was “appropriate in the circumstances,” particularly given that his client, like all criminal accused, had the stress of a conviction “hanging in the balance” (Fine, 2020b).

Permanency of the Internet

The permanency of the internet is also a concern for some as courts move towards increased virtual hearings. Regarding the tendency to upload hearings to sites like YouTube, American lawyers like Dade County Public defender Carlos Martinez have asked, hypothetically, “what happens with sealing and expungement? What if you seal and expunge your criminal record, but you still have all these videos available of all your court hearings?” (Kirchner, 2020). This is an

excellent point and one that seems to have had little attention in Canada.

Considerations Unique to Remote Jury Trials

The aforementioned issues with “Zooming Justice” will apply to all court proceedings, including jury trials, yet there are several issues unique to criminal jury trials that must also be considered. Honig (2020) noted that the overarching question for those who practice criminal law is whether a jury trial could effectively proceed virtually. Even the Texas judge involved in the May 18, 2020, remote civil jury trial noted that such proceedings may be more appropriate for civil jury matters versus more serious charges (Bleiberg, 2020). Below, we discuss possible issues in conducting remote jury trials.

Jury Selection Procedures

A primary consideration is whether jury selection procedures can be done remotely while maintaining the integrity of the selection procedures. The first post-shutdown, remote (civil) jury trial in the US happened on May 18 (Bleiberg, 2020). The jury selection was streamed live on YouTube, but issues with a non-court-controlled jury trial environment were illustrated when a potential juror walked away from his computer to make a phone call during a break and subsequently did not hear when the judge attempted to call him back. While Bleiberg notes that the presiding judge stated this is akin to what happens not infrequently in normal court proceedings, what is different is that no one could be physically sent to track down the missing juror.

Other considerations that did not arise in the aforementioned trial include whether other aspects of jury selection may be impacted. For example, when a jury selection involves a challenge for cause, it is typical for potential jurors to be called in to the courtroom one at a time so that other potential jurors do not overhear the challenge questions(s). If proceedings are streamed live so as to respect open-court principles, how could the court ensure members of the jury panel would not watch them and hear the challenge questions ahead of time?

Another consideration is whether potential jurors may — or should — be excused from service if they contend they do not have appropriate technological means by which to participate, or whether the court would be obligated to provide a solution for them.

Lack of Control Over Jurors' Movements and Their Environments

Other non-technologically based factors in non-court-controlled environments that could impact proceedings are the potentially numerous possible distractions in a juror's home environment (e.g., noise, other adults and/or children in the residence, pets).

As well, there is no way to monitor or prevent whether jurors are engaged in other activities off-screen that may distract them and cause them to miss important trial information (e.g., checking/playing on their cell phone).

Further, how can courts ensure that jurors are not swayed by outside influence or conducting their own independent research about the trial? (Honig, 2020)? Judges in jury trials go to great lengths to explain why it is essential for jurors to base their decision only on the evidence presented at trial. Independent research on the part of jurors is strictly forbidden. If jurors participate virtually from their homes, they may be tempted to, and with little effort, look up information about the accused or witnesses, or engage in any number of other forbidden activities, even during the trial.

Accessing Evidence

According to Bleiberg (2020), jurors in the May 18, 2020, Texas civil jury trial were able to access evidence via Dropbox folders for a matter about a “disputed insurance claim.” Certainly, some evidence, such as written material, is amenable to this format. However, not all evidence can be turned into a digital document. Some evidence can only appropriately be seen in person, and courts would need to determine procedures for such situations.

Further, even if evidence is amenable to digital formatting, the quality of a juror's view of the evidence can vary significantly

depending on the technology they are using to join the proceedings. In the Texas trial, jurors connected via a variety of technologies: laptops, tablets, and cell phones (Bleiberg, 2020). The quality of the view of video evidence, for example, would vary greatly for a person watching it on a cell phone versus on a laptop. It is also unclear how the courts could ensure jurors were not copying, recording, and/or distributing digital evidence that is not meant to be shared.

Maintaining the Sanctity of Jury Deliberation

Unlike in the US, where jurors are free to discuss the contents of deliberation after a trial's conclusion, Canadian jurors are prevented from doing so by section 649 of the *Criminal Code* (1985). Thus, another issue regarding remote jury trials is how, exactly, jurors would deliberate (Honig, 2020). Certainly, software such as Zoom allows for the creation of separate virtual rooms. For example, in the previously mentioned remote Texas civil jury trial, jurors were put into breakout rooms to talk privately and look at evidence (Bleiberg, 2020).

However, we foresee numerous procedural difficulties. Normally, jurors are sequestered in the jury room for deliberation. This process is controlled by court staff and the jury is a relatively stable group that can be kept together. What then of a virtual deliberation? In the remote Texas civil jury trial, jurors deliberated for only one day (Bleiberg, 2020). Readers will likely, by this time, be aware of the concept of “Zoom fatigue,” the reported exhaustion associated with frequent and/or heavy usage of videoconferencing technologies (e.g., Sklar, 2020). Are twelve jurors meant to deliberate over Zoom for days or even weeks, after first attending a potentially lengthy trial over Zoom? What would the impact of this be on the jurors and the court proceedings?

Further, how would deliberations be administrated? Who would set up and administer the Zoom to ensure deliberations remained confidential and avoid the possibility of a non-juror listening in? If jurors attended deliberations from their homes, how could deliberations remain confidential if the juror lived with other persons? What if the jury members experienced technical difficulties?

And how could the courts ensure none of the jury members recorded deliberations? In addition, some lawyers have expressed concern that digital deliberations would erode the ability for the jurors to interact more casually and thus build trust with each other (Bleiberg, 2020).

Protecting the Rights of Accused Persons

Concerns already being voiced by defence counsel centre on the possible violation of the constitutionally protected rights of accused at trial. Counsel argued that remote hearings risk infringing on the right to an impartial jury and the right to confront witnesses, and also generate concerns about due process and access to effective counsel (Honig, 2020).

Another issue is how to ensure a defendant has unfettered, yet confidential, access to their counsel during a virtual proceeding (Honig, 2020). Counsel requires instruction from their client and the fluid nature of a trial demands open and confidential communication. If counsel and client are not in the same space, a secure means of communication is necessary. This issue becomes even more complex if the accused is in custody at the time of the jury trial.

Canadian Jury Trials: A Disappearing Right Exacerbated in the Age of COVID-19?

All of the issues identified in the preceding two sections form a body of legitimate questions and concerns that courts should have regarding a move to remote jury trials. However, as jury trials have been resuming across Canada, rather than attempting to interrogate how to conduct remote jury trials, courts in Canada seem uniformly reluctant to even try. To this end, we are not aware of any Canadian courts that have attempted digital adjudication of a jury trial or even had these discussions in the initial aftermath of court closures. For example, Manitoba was one of the first provinces to resume in-person jury trials. Two jury selections took place at a convention centre on August 27, 2020, to allow for physical distancing, and the trials were conducted in the largest courtroom at the courthouse (Pritchard, 2020). Other provinces, such as Alberta, Nova Scotia, Ontario, and Saskatchewan, seem to have followed similar protocols in renting out

large buildings in order to conduct physically distanced jury selections (CBC News, 2020; Dunn, 2020; Rhodes, 2020; Spackman, 2020). Thus, the courts' initial responses appeared to indicate their acceptance that the only way forward for jury trials is the traditional courtroom (or other physical space) model.

Chief Justice Wagner of the Supreme Court of Canada himself stated that — across the country — the most challenging and pressing question facing the courts is how to *safely* resume jury trials (Schmitz, 2020b). This comment tacitly acknowledges the lack of support for using virtual platforms for jury trials. What then is to happen to the jury trial? Does it risk being left by the wayside simply because it is cumbersome?

Courts have shown a willingness to deny justice, at least in the short term, for all Canadians awaiting jury trial in the pandemic. The concern is that, since Canadian courts do not appear to be considering conducting remote jury trials — even though remote trials could provide efficiencies aligning with recent Supreme Court directives in *R v. Jordan* (2016) — the already rare jury trial in Canada will become rarer still. Already a behemoth of adjudication, the jury trial could be further alienated from its judge-alone cousin given the continued digitization of other court proceedings without similar movement for jury trials.

We suggest the seeming Canadian reluctance to “go digital” with jury trials is, in part, due to a general propensity to devalue and discourage jury trials in Canada. While seldom spoken of, the reality is that if all criminal matters proceeding to trial were to be tried before a jury, it may be very difficult to run the system efficiently and impossible to run it cheaply. Practicing criminal defence lawyers in Manitoba, including the second author of the current paper, can attest to the significant pressure placed on an accused not to elect trial by jury.

While this attitudinal barrier to constitutional rights is difficult to show empirically, it can clearly be seen in official regulations in Manitoba, which has a pre-trial procedure referred to as a “resolution conference.” Under this rule the trial judge is mandated to explore “any matters that will promote a fair and efficient trial, including re-

election by the accused” (Government of Canada, 2016). In other words, judges are required to discuss the potential for the accused to give up his or her right to a jury trial — a decision that would save the state significant expenditure. While we do not suggest the courts are overtly looking to end the jury trial system, we do note the incongruence of jury trials and the focus on efficiency that dominates the Court’s recent judgments (e.g., *R v. Anthony-Cook*, 2016, paras. 1–2; *R v. Cody*, 2017; *R v. Jordan*, 2016; *R v. K.J.M.*, 2019).

R. v. Jordan (2016) — in which the Court emphasized expediency and efficiency in court proceedings by setting hard time limits on the conduct of criminal proceedings — determined that when the presumptive ceiling for a criminal proceeding is exceeded, it is automatically considered to be an unreasonable delay, unless the Crown can establish that either the case was so complex as to need extra time, or that an unforeseen and unavoidable event caused the delay. While judges are — at least initially — almost certain to consider pandemic-induced delays to jury trials as falling within the latter category, it does not change the fact that the proceedings would still be delayed.

Thus, when there are no options for conducting a jury trial except to wait until in-person proceedings can safely resume, this places an inordinate amount of pressure on accused persons to agree to a trial by judge. If they elect to exercise their right to a jury trial, they must wait until jury selections and jury trials can safely resume in-person, without knowing exactly when that might be. This means that they could go significantly longer without resolution to their case than if they were to acquiesce to a trial by judge alone. Particularly for an accused person remanded to custody while awaiting trial, giving up their right to a jury trial may be the proverbial “offer [they] can’t refuse” (Coppola & Puzo, 1972).

One example of an accused person giving up their right to trial by jury to avoid COVID-induced procedural delays is the high-profile trial of Brayden Bushby. Bushby was initially charged with second-degree murder in the killing of Barbara Kentner after throwing a trailer hitch at her from a moving vehicle (Porter, 2020). As Porter (2020) notes, “problems in convening a jury were a factor in how

Bushby came to be tried by a judge alone on the lesser charge of manslaughter.” The trial was originally pushed back from January to April “while lawyers awaited clarity on new rules for jury selection,” and then was further paused due to COVID delays (Porter, 2020). The accused agreed to a trial by judge alone in September.

At the time of this writing, Canada is fully in the second wave of COVID, and courts are again shutting down jury trials instead of moving to virtual delivery. For example, on December 14, 2020, Ontario suspended all new jury trials until at least February 2021 (Ontario Courts, 2020). Further, Manitoba Courts suspended criminal jury trials scheduled between November 16 and December 11 (Manitoba Courts, 2020b). They then extended this timeframe to include December 14, 2020, to January 8, 2021 (Manitoba Courts, 2020c). Both of the Manitoba notices stated that “judge-alone criminal trials involving accused persons who are in custody” were an exception and would be allowed to proceed (Manitoba Courts, 2020b, 2020c). Thus, jury trials face yet further delays in Manitoba while judge-alone trials will continue. In the face of further delays to jury trials, but knowing that judge-alone trials will proceed, other accused persons may give up their right to a jury trial in order to get resolution to their case.

Conclusions

In the early days of the pandemic, there appeared to be consensus that “virtual hearings are here to stay, even as people start heading back in the courtroom” (Stefanovich, 2020). Further, jurisdictions across the US and Canada rapidly developed guidelines, best practices, rules, and protocols for those entering the new virtual courts (Esquire Deposition Solutions, LCC, 2020). In the twenty-first century, it does seem antiquated to rely so heavily on paper-based systems when, in fact, “[t]here’s actually very little the courts couldn’t do online” (Beazley, 2020). Perhaps COVID-19 will be an important catalyst for change that is arguably long overdue.

When the Chief Justice of Canada and the federal justice minister opine that the digital hearing environment is here to stay (Schmitz, 2020c), the future of jury trials, a method of adjudication apparently

not suited to the remote hearing format, becomes uncertain. If the courts do not interrogate the possibility of remote jury trials and how to realize them, they may prematurely conclude jury trials can only be conducted in person when various physical safety measures can be enacted. We question why Canadian judges and lawyers believe that jury trials remain the purview of an in-person world. While there are certainly logistics specific to remote jury trials that would need to be addressed — some of which we have identified — we consider them worth interrogating. We have suggested the reticence may be partially because courts would rather conduct more judge-alone trials if at all possible. Our noted concern is that this attitude may lead not to regular procedures for physically distanced jury trials, but to fewer jury trials at all, whether by the courts' design, or also because accused persons forego their right to jury trial in order to have their proceedings move forward. Subtle though this attitude to jury trials may be, any erosion of the rights of an accused to the mode of trial of their choice is constitutionally worrying in the irrevocable march towards digital justice.

References

- Beazley, D. (2020, April 22). Adapting for the aftermath. *CBA National*. Retrieved from: <https://nationalmagazine.ca/en-ca/articles/the-practice/small-and-solo/2020/adapting-for-the-aftermath>
- Bleiberg, J. (2020, May 22). Texas court holds first U.S. jury trial via videoconferencing. *CTV News*. Retrieved from: <https://www.ctvnews.ca/world/texas-court-holds-first-u-s-jury-trial-via-videoconferencing-1.4949856>
- Bradbury, T. (2020, May 16). How do you hold a socially-distant jury trial? *The Telegram*. Retrieved from: <https://www.thetelegram.com/news/local/how-do-you-hold-a-socially-distant-jury-trial-450549/>

Burns, I. (2020, June 26). Proceedings in first-ever Zoom trial at Federal Court met with praise by judge, counsel. *The Lawyer's Daily*. Retrieved from: <https://www.thelawyersdaily.ca/employment/articles/19811/proceedings-in-first-ever-zoom-trial-at-federal-court-met-with-praise-by-judge-counsel>

CBC News. (2020, September 17). Jury trials to resume in Sask. following COVID cancellations. Retrieved from: <https://www.cbc.ca/news/canada/saskatchewan/jury-trials-resume-covid-cancellations-1.5727882>

Coppola, F. F. (Director). (1972). *The godfather* [Film]. United States: Paramount Pictures.

Criminal Code R.S.C., 1985, c. C-46.

Dunn, T. (2020, September 10). Ontario jury trials to resume next week – but not in a courtroom. *CBC News*. Retrieved from: <https://www.cbc.ca/news/canada/toronto/ontario-jury-trials-to-resume-next-week-but-not-in-a-courtroom-1.5718311>

Esquire Deposition Solutions, LLC. (2020, June 3). Remote lawyering is here to stay. *JD Supra*. Retrieved from: <https://www.jdsupra.com/legalnews/remote-lawyering-is-here-to-stay-71392/>

Fine, S. (2020a, May 5). Manitoba court first to confirm date for holding trials again. *The Globe and Mail*. Retrieved from: <https://www.theglobeandmail.com/canada/article-manitoba-court-first-to-confirm-date-for-holding-trials-again/>

Fine, S. (2020b, May 7). Supreme Court of Canada to hold virtual hearings in June. *The Globe and Mail*. Retrieved from: <https://www.theglobeandmail.com/canada/article-supreme-court-of-canada-to-hold-virtual-hearings-in-june/>

Government of Canada. (2016, October). *Criminal Proceedings Rules of the Manitoba Court of Queen's Bench*. Retrieved from: <https://laws-lois.justice.gc.ca/eng/regulations/si-2016-34/page-4.html#h-629462>

Holdsworth, P. (2020, June 12). Virtual law post-COVID-19: Will justice thrive in a Zoom future? *The Lawyer's Daily*. Retrieved from: https://www.thelawyersdaily.ca/articles/19564/virtual-law-post-covid-19-will-justice-thrive-in-a-zoom-future-philip-holdsworth?article_related_content=1

Honig, E. (2020, May 4). The sky didn't fall when the Supreme Court went live. *CNN News*. Retrieved from: <https://www.cnn.com/2020/05/04/opinions/supreme-court-went-live-opinion-honig-cross-exam/index.html>

Jeffries-Chung, J., & Brechtel, M. (2020, May 27). Canada: Ready, set, Zoom! Trials in the time of COVID-19. *Mondaq*. Retrieved from: <https://www.mondaq.com/canada/operational-impacts-and-strategy/947278/ready-set-zoom-trials-in-the-time-of-covid-19->

Joseph, G. (2020, June 3). No going back: Technology and court process. *The Lawyer's Daily*. Retrieved from: <https://www.thelawyersdaily.ca/articles/19344>

Kirchner, L. (2020, June 9). How fair is Zoom justice? *The Markup*. Retrieved from: <https://themarkup.org/coronavirus/2020/06/09/how-fair-is-zoom-justice>

Manitoba Courts. (2020a, March 13). "Media Notice. COVID-19 - Manitoba Courts." Retrieved from: <http://www.manitobacourts.mb.ca/news/covid-19-manitoba-court-schedule-changes/>

Manitoba Courts. (2020b, November 10). "Notice - Adjustments to Current Scheduling Protocols – November 16 to December 11, 2020." Retrieved from: http://www.manitobacourts.mb.ca/site/assets/files/1966/notice_-_adjustments_to_current_scheduling_protocols_-_november_16_to_december_11_2020_2020_nov_10.pdf

Manitoba Courts. (2020c, December 3). "Notice - Adjustments to Current Scheduling Protocols – December 14, 2020 to January 8, 2021." Retrieved from: http://www.manitobacourts.mb.ca/site/assets/files/1966/notice_-_adjustments_to_current_scheduling_protocols_-_december_14_2020_to_january_8_2021_2020_dec_3_docx.pdf

Michigan Supreme Court. (2020, May 6). *159636 Sanford v State of Michigan May 6, 2020 Oral Arguments* [Video]. YouTube. Retrieved from: <https://www.youtube.com/watch?v=fkhwnYd88KU&t=519s>

Olijnyk, Z. (2020, October 23). Former lawyers file complaint with Manitoba Human Right Commission over courthouse accessibility. *Canadian Lawyer*. Retrieved from: <https://www.canadianlawyermag.com/practice-areas/litigation/former-lawyers-file-complaint-with-manitoba-human-right-commission-over-courthouse-accessibility/334545>

Ontario Courts. (2020, June 25). “Notice to the Profession, Litigants, Accused, Media and Members of the Public.” Retrieved from: <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/notice-june-25-2020/>

Ontario Courts. (2020, December 14). “Notice to the Profession and Public Regarding Court Proceedings – December 14, 2020 UPDATE.” Retrieved from <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/notice-to-the-profession-and-public-december-14-2020/>

Porter, J. (2020, November 2). Trailer hitch assault on First Nations woman in Thunder Bay not only factor in her death, defence argues. *CBC Thunder Bay*. Retrieved from: <https://www.cbc.ca/news/canada/thunder-bay/trailer-hitch-manslaughter-trial-1.5786943>

Pritchard, D. (2020, July 13). Jury trials to resume in September: Chief justice describes new post-pandemic order in the courthouse. *Winnipeg Free Press*. Retrieved from: <https://www.winnipegfreepress.com/local/jury-trials-to-resume-in-september-571750572.html>

R v. Anthony-Cook, 2016 SCC 43

R v. Jordan 2016 SCC 27

R v. K.J.M., 2019 SCC 55

Raymond, N. (2020, May 18). Texas tries a pandemic first: A jury trial by Zoom. *The National Post*. Retrieved from: <https://nationalpost.com/pmnn/health-pmnn/texas-tries-a-pandemic-first-a-jury-trial-by-zoom>

Rhodes, B. (2020, October 1). N.S. finally finds a location for Halifax jury trials — a business park. *CBC*. Retrieved from: <https://www.cbc.ca/news/canada/nova-scotia/halifax-jury-trials-burnside-covid-19-1.5746404>

Rovi Guides, Inc. v. Videotron Ltd., 2020 FC 637

Schmitz, C. (2020a, May 14). Courts Zoom ahead with remote hearings due to pandemic, despite concerns of some lawyers, litigants. *The Lawyer's Daily*. Retrieved from: <https://www.thelawyersdaily.ca/articles/19048/courts-zoom-ahead-with-remote-hearings-due-to-pandemic-despite-concerns-of-some-lawyers-litigants>

Schmitz, C. (2020b, May 21). Post-COVID courts could see less oral advocacy, more paper-based and remote adjudication: SCC's Wagner. *The Lawyer's Daily*. Retrieved from: <https://www.thelawyersdaily.ca/criminal/articles/19174/post-covid-courts-could-see-less-oral-advocacy-more-paper-based-and-remote-adjudication-scc-s-wagner>

Schmitz, C. (2020c, May 28). National COVID-19 action committee issues first guidance for reopening courts during pandemic. *The Lawyer's Daily*. Retrieved from: <https://www.thelawyersdaily.ca/articles/19244/national-covid-19-action-committee-issues-first-guidance-for-reopening-courts-during-pandemic>

Sklar, J. (2020, April 24). 'Zoom fatigue' is taxing the brain. Here's why that happens. *National Geographic*. Retrieved from: <https://www.nationalgeographic.com/science/2020/04/coronavirus-zoom-fatigue-is-taxing-the-brain-here-is-why-that-happens/>

Spackman, S. (2020, November 2). Jury trials to resume in Red Deer. *rdnewsNOW*. Retrieved from: <https://rdnewsnow.com/2020/11/02/jury-trials-resume-in-red-deer/>

Stefanovich, O. (2020, June 13). Supreme Court chief justice suggests Criminal Code changes to cut into court backlogs. *CBC News*. Retrieved from: <https://www.cbc.ca/news/politics/stefanovich-chief-justice-reopening-proposals-1.5604773>

Susskind, R. (2020, May 7). Covid-19 shutdown shows virtual courts work better. *Financial Times*. Retrieved from: <https://www.ft.com/content/fb955fb0-8f79-11ea-bc44-dbf6756c871a>

University of Surrey. (2020, May 4). Research examines the impact of new technology used in video court hearings. *Science X*. Retrieved from: <https://phys.org/news/2020-05-impact-technology-video-court.html>

World Health Organization. (2020, March 11). *WHO Director-General's opening remarks at the media briefing on COVID-19*. Retrieved from: <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>