# Part A
# Setting the Stage: Recognizing the Importance of the Open Court Principle and Access to Justice in Manitoba During the COVID-19 Pandemic

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## ABSTRACT

The authors have embarked on an extensive analysis of the open court principle, access to justice concerns, and how these have been impacted by the Manitoba courts' pandemic response measures. Due to the length of this analysis, it is divided into two parts, to be published as separate articles in the same Issue: Part A ("Setting the Stage") and Part B ("Drawing the Curtains in the House of Justice"). Importantly, these papers are to be read in conjunction. Part A provides a vital and extensive background, outlining the modern history of the open court principle and the importance of ensuring access to justice.

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## I. INTRODUCTION

The "open court principle" is a fundamental tenet of constitutional significance recognized in every nation that adheres to the rule of law, including Canada.[1] Although the historical roots of this principle run deep in common law,[2] its tenets have recently been assumed into a broader movement that focuses on improving access to quality justice services. Reformers call for an institutional shift towards easing access to the legal system for individuals by removing barriers to participation, such as reducing upfront associated costs or aligning processes and outcomes with user needs.[3] To these ends, stakeholders like the Canadian Bar Association (CBA) published several reports that argue for a fully accessible justice system, which can be achieved by addressing several contemporary access-to-justice issues in Canada. These reports offer several recommendations that can restructure service delivery in ways that save money through collaboration between institutions and local communities, which can be reinvested to further broaden access to justice.[4] Their conceptual framework

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1 *AG (Nova Scotia) v MacIntyre* [1982] 1 SCR 175, 132 DLR (3d) 385; *Canadian Broadcasting Corporation v New Brunswick (Attorney General)* [1996] 3 SCR 480 at para 23, 139 DLR (4th) 385; see J J Spigelman, "Seen to be Done: The Principle of Open Justice – Part I" (2000) 74:5 Austl LJ 290 at 293; Claire Baylis, "Justice Done and Justice Seen to be Done – The Public Administration of Justice" (1991) 21:2 Victoria U Wellington L Rev 177.

2 *Scott v Scott* [1913] UKHL 2, [1913] AC 417; *R v Sussex Justices; Ex parte McCarthy* [1923] EWHC KB 1, [1924] 1 KB 256 at 259.

3 Martin Partington, "The Relationship between Law Reform and Access to Justice: A Case Study – The Renting Homes Project" (2005) 23 Windsor YB Access Just 375.

4 Canadian Bar Association, "Reaching Equal Justice: An Invitation to Envision and Act - Equal Justice: Balancing the Scales" (Ottawa: Canadian Bar Association, August 2013) [Canadian Bar Association, Reaching Equal Justice][CBA Report] at 60, online (pdf): <www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf> [perma.cc/5SDD-QTWF] [CBA, "Reaching Equal Justice"]; The Action Committee on Access to Justice in Civil and Family Matters, "Access to Civil & Family Justice: A Roadmap for Change" (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October

highlights the pitfalls that prevent many from meeting their legal needs through the justice system, such as the inaccessibility of services from local providers, and also articulates several pathways of systemic reform that can create a more participatory justice system that is inclusive and people-focused.[5] In essence, the CBA's proposed access-to-justice initiatives potentially broaden entry points to the variety of available justice services and reduce the upfront costs associated with achieving desired justice outcomes, while also maintaining accountability structures for system executives.

The conclusions of the CBA's reports have been used by decision-makers in the justice system to create outcome targets for pandemic response measures, both in the courts and under the law generally. For example, concerns regarding access to justice are playing a key role in the federal government's Action Committee on Court Operations in Response to COVID-19's proposed justice system reforms, which are operate in provincial jurisdictions through judicial Practice Directions and Notices that are published by the courts, as well as necessary changes to statutory frameworks that are ratified by local legislators.[6]

Discussions about access to justice have become central to the digitalization of legal practice in response to the pandemic, but their place among the priorities involved in such reform measures remain vague in the outcomes that are being worked towards in the rapid institutionalization of technology in the justice system.

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2013), online (pdf): <www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf> [https://perma.cc/84N5-BKTC]; Canadian Bar Association, "No Turning Back: CBA Task Force Report on Justice Issues Arising from COVID-19" (Ottawa: Canadian Bar Association, February 2021), online (pdf): <www.cba.org/CBAMediaLibrary/cba_na/PDFs/Publications%20And%20Resources/2021/CBATaskForce.pdf> [perma.cc/EYN5-QFPA]; Canadian Bar Association, "A National Framework for Meeting Legal Needs: Proposed National Benchmarks for Public Legal Assistance Services" (Ottawa: Canadian Bar Association, August 2016), online (pdf): <www.cba.org/CBAMediaLibrary/cba_na/PDFs/LLR/A-National-Framework-for-Meeting-Legal-Needs_Proposed-National-Benchmarks.pdf?lang=en-CA> [perma.cc/2X2H-9DWG].

5 CBA, Reaching Equal Justice," *supra* note 4 at 34-50, 60.

6 Office of the Commissioner for Federal Judicial Affairs Canada, "Action Committee on Court Operations in Response to COVID-19: Terms of Reference for the Action Committee - Mandate" (26 August 2021), online: *Action Committee on COVID-19* <www.fja.gc.ca/COVID-19/reference-eng.html> [perma.cc/KE9F-NPL2].

Considering the principled approach that reformers have taken in the tenets of access to justice, this paper examines the reformation agenda's conceptual framework to identify the latent interests that are operating as the justice system embraces the digital future. Authors like the Right Honourable Beverley McLachlin will help us connect the concepts of access to justice with the realities of digitalization to illustrate the inherent conflict between broader public access to judicial proceedings and the privacy interests of relevant parties. To adequately examine this conflict, we contrast Chief Justice McLachlin's views with Judith Resnick's framing of the open court principle, which shifts focus to the access to justice movement's foundational concept of "publicity" to argue that modern access to justice discourse is expanding access to services while simultaneously diminishing measures that hold decision-makers accountable in the process. With these competing frameworks in mind, we examine the proposals being offered by the Federal Action Committee on Court Operations in Response to COVID-19, as well as their operation in Manitoba's courts, to identify whether reforms to the justice system include changes that reduce judicial accountability as part of the broader access to justice agenda.

Measures that hold decision-makers accountable in the justice system are arguably most important for individuals who are accused of the most serious crimes. Considering this, in Part B, we examine the consequences of pandemic reforms in the context of murder charges to demonstrate their effect on judicial accountability and publicity more generally. As an offence that falls within sections 417 and 469 of the *Criminal Code*, those who are charged with murder must have the choice to be heard by a court composed of a judge and a jury of community peers.[7] Jury trials are an important accountability measure because many accused individuals facing serious charges such as murder are racially or economically (or otherwise) marginalized. Biases regarding the perceived "unsavoury" nature of marginalized accused can potentially lead decision-makers that are separated from the relevant community to enter findings of guilt in these contexts, which carry serious consequences. A trial by a jury can provide a deeper understanding of local dynamics, including an ability to see beyond what may appear as unsavoury characteristics that can militate against the innocence of the accused. In essence, jury trials offer a hallmark example of how Resnick's principle of "publicity" safeguards the marginalized from

7 *Canadian Criminal Code*, RSC 1985, c C-46, ss 417, 469.

potentially biased decision-making in court, which must be maintained while system reforms are established to broaden access to justice during the pandemic.

With these features of the justice system in mind, we will examine the effects of pandemic reform measures for marginalized individuals using the principle of publicity, with particular focus on the consequences for executive accountability. First, we will review perspectives regarding access to justice that are offered by Chief Justice McLachlin, as she then was, and Judith Resnick to frame our analysis of justice system reforms that are being put forward during the COVID-19 pandemic. These contrasting narratives will be applied to the measures being proposed for implementation in local courts by the Action Committee on Court Operations in Response to the Pandemic, which is led by the Commissioner for Federal Judicial Affairs. To illustrate their implementation at the regional level, in Part B ("Drawing the Curtains in the House of Justice"), we will then consider Practice Directions and Notices that were issued by Manitoba's courts in response to the pandemic, with particular focus to in-custody hearings that must proceed by way of trial by jury.

In Part B, we will examine the effects of these Practice Directions and Notices on marginalized populations. Following our review of the immediate impacts of pandemic response measures for individuals charged with murder, we will examine several CBA reports regarding the consequences of justice system digitalization on remote, northern, and Indigenous communities to highlight the compounding effect these measures have in terms of their direct participation, as well as their ability to provide community perspectives in jury trials, like the hearings that must be afforded to those charged with s. 469 offences. Bringing these perspectives together, we proceed to analyze the consequences of the justice system reform agenda in the context of judicial accountability. Building from this examination, we will close our analysis in Part B with recommendations that can help resolve these shortfalls while also maintaining the justice system's traditional commitment to publicity, improving access for marginalized populations, and holding decision-makers accountable for the outcomes of the process.

To begin Part A, we turn now to discuss Chief Justice McLachlin's historical review of the open court principle and its role in the modern delivery of justice.

## II. BALANCING THE OPEN COURT PRINCIPLE WITH COURT MODERNIZATION

In 2003, Chief Justice McLachlin wrote about the open court principle and its role towards maintaining public confidence in the administration of justice shortly after internet connectivity gained prevalence as a productivity tool.[8] In response to growing concerns about the threats that digitalization presented to the independence of the court, she sought to address the challenges that mass digital dissemination of court proceedings held in relation to the open court principle, as well as several other important considerations like an accused person's right to a fair trial by an impartial decision-maker. Writing at a time of national distress in the wake of terrorist attacks in the United States, she probed the historical construction of the open court principle to consider the unintentional, and, in her view, untenable, costs of its maintenance in the modern age of technology. In doing so, she attempted to provide guidance to judges regarding measures that could be taken to preserve the open court principle while also balancing other contextual interests, like the right to privacy.

She explained that, in the context of the open court principle, "openness" represents a *bona fide* expectation that members of the press and the public will have access to the courts to observe hearings, express concerns and, ultimately, hold decision-makers accountable. Court processes, documentation and records are available to the public by default, meaning that the reasons for a judgment of interest can be accessed for scrutiny by opposing parties, the media, the bar, legal scholars, or any other citizen who wishes to consider what took place during the judgment. Openness of the court means that members of the public and the media can engage in free discourse about judicial proceedings and publish accounts of court processes, unless such access is restricted by the presiding judge for meritorious reasons.

Chief Justice McLachlin summarized the tenets of the open court principle into three headings. Open court supports the transparency and accountability of the justice system by permitting access to, and

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8 Beverley McLachlin, "Courts, Transparency and Public Confidence - To the Better Administration of Justice" (2003) 8:1 Deakin L Rev 1.

dissemination of, accurate information about court proceedings.[9] By extension, regular reporting of court processes enhances the accountability of judges and other court staff by ensuring that concerns can be raised by accurately informed members of the public. Finally, and perhaps most importantly, open courts ensure that the community can *see* that justice is being adequately done and, when mistakes are identified in a particular judgment, members of the public can hold decision-makers accountable. In short, Chief Justice McLachlin characterized the values of open justice as the preservation of free speech, debate, dialogue, judicial accountability, and therapeutic justice. These values work together to assure public confidence in the justice system's delivery of fair, impartial and independent administration that works to preserve the rule of law. In reaching this conclusion, Chief Justice McLachlin notes that removing avenues of observation would reduce public confidence in the justice system to a credulity as opposed to exercises of reason. The rule of law requires an independent judiciary to safeguard the courts' authority; failure to hold decision-makers accountable undermines this objective from the start.

Although the values of open court are fundamental to upholding the rule of law and perceptions of fairness within the justice system, Chief Justice McLachlin explains that sustaining these expectations carries costs in an accused person's expectations of trial fairness, judicial impartiality, and protection of their security interests, such as information related to their identity. In her view, a modern interpretation of the open court principle recognizes that its values must be limited to meaningfully balance the competing interests of the accused and of the judiciary. While the tenets of the open court principle are valuable, Chief Justice McLachlin believes that contemporary digital realities extend the scope of absolute court openness, or "publicity," beyond the range that was described by its original scholars, like Jeremy Bentham.[10] Considering the novelties of access that can be achieved using digital technology, Chief Justice McLachlin recommends that justice system executives acknowledge that the principles of open court may conflict with other important values, which require the resolution of such conflicts on a contextual, case-by-case basis. To these

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9 *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, 120 DLR (4th) 12 [*Dagenais*]; Timothy Bottomer, "Dagenais 2.0: Technology and its Impact on the Dagenais Test" (2012) 45 UBC L Rev 1.

10 See Jeremy Bentham, *Rationale of Judicial Evidence Specially Applied to English Practice*, vol I (Edinburgh: Edinburgh Review, 1827) 541-542.

ends, she remarked that balancing competing values requires codification of the involved ideals in law, as well as more finite consideration of how these competing values play out in the particular contexts of various cases. In closing, she explained that adequately balancing these competing legal principles requires careful consideration of the precise benefits that would accrue, as well as the harms that could arise, to adequately prioritize some principles over others and achieve the greatest degree of harmony or equilibrium in the context of the case. The open court principle is not an end unto itself, but rather a means to promote the rule of law and the administration of justice. While openness preserves the integrity of the administration of justice, its paramount objectives also lie in its limits and exceptions.

In our view, Chief Justice McLachlin's evaluation of the open court principle appears to provide the necessary analysis for future judicial considerations related to the open court principle. Her analysis of the open court principle offers a compelling commentary regarding its merits, as well as the other important elements that judges must consider when seeking to balance its role among other competing interests when rendering judgment. Although her arguments are compelling, Chief Justice McLachlin's perspective is based in her experience as an executive member—with significant administrative responsibilities—of Canada's justice system. To adequately consider the place of the open court principle in Canadian justice, we now turn to consider the academic criticisms of this modern balancing act offered by Judith Resnick, who has argued that judicial processes are being progressively closed to shield executives from public scrutiny when making decisions in more unsavoury circumstances.

## III. BALANCING ACCESS TO JUSTICE WITH COURT MODERNIZATION

As widespread digitalization continued after the 2001 terrorist attacks in the USA, scholars like Judith Resnik took a broader approach to considering the jurisprudential outcomes of contextually balancing court openness with other adjudicative interests.[11] Contrary to Chief Justice McLachlin's claims, Resnik maintained focus on the original construction

[11] Judith Resnik, "Bringing Back Bentham: Open Courts, Terror Trials and Public Sphere(s)" (2011) 4 L & Ethics Hum Rts 1 at 4 [Resnik]; see Trevor C W Farrow & Garry D Watson, "Courts and Procedures: The Changing Roles of the Participants" (2010) 49:2 SCLR 205 [Farrow & Watson].

of the open court principle, as articulated by Jeremy Bentham, in the context of terror trials to highlight a subtle reconfiguration of justice system processes which progressively reduce oversight and accountability measures for decision-makers. Resnik's analysis identifies a trend in Western justice system reforms towards a preference for private adjudication over the use of formal court functions, which can avoid normative expectations of public openness and dissemination through the media. Although Resnik shared concerns regarding the erosion of open court expectations, her primary objective was to question whether the shift towards more private adjudication is problematic for democratic debate and dispute, as well as the disciplinary functions that such discourses have towards judicial accountability. In other words, she considered the implications of recent reform measures in relation to Bentham's principle of "publicity," as opposed to modern constructions of the open court, like those offered by Chief Justice McLachlin.

Resnik's analysis included consideration of the open court principle and its historical roots in the USA, including the influence of theorists like Jeremy Bentham, as well as its codification into the constitutions of the first thirteen states.[12] As in Canadian courts, participants can expect that American trial judges will take every reasonable measure to accommodate public attendance, particularly for criminal trials. Resnik explained that public observation ensures that political and legal leaders can be held accountable for decisions that forward broader state agendas while minimizing the interests that best serve local communities. In her view, the expectations created by open courts face considerable challenges in the technological era. For instance, Resnik offers an example of measures taken during a trial challenge to California's prohibition regarding same-sex marriage.[13] When scheduling the hearing for this case, the presiding judge authorized the digital attendance of spectators from other federal districts but retained prohibitions for the general public. A majority of the US Supreme Court reversed the ruling overall because the judge failed to provide sufficient public notice regarding the opportunity to observe and comment using digital means. In their view, changing court policy to permit

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12 Resnik, *supra* note 11at 6-18; Del Const 1792, art I, § 9, reprinted in Benjamin Perley Poore, *The Federal And State Constitutions: Colonial Charters, And Other Organic Laws Of The United States* (Washington, DC: Government Printing Office, 1877) 278; *Presley v Georgia*, 558 US 209 (2010).

13 *Hollingsworth v Perry*, 558 US 183 (2010); see Cal Const art I, §7.5.)

the hearing's broadcast via webcast video-stream required adequate posting and dissemination, which could prejudice the outcomes of the decision for all parties involved in the trial. On this basis, the majority reversed the lower court's decision, even though the judge sought to expand access to the hearing for members of the media and other actors in the justice system.[14] To Resnik, the majority's ruling highlighted the contrast between the interests of justice system executives and Bentham's original principle of publicity. Rather than maintain and expand traditional expectations of court openness by allowing the webcast to proceed, the majority concluded that fairness and privacy considerations should prevail when in conflict with judicial decisions to allow more people to witness justice being delivered in practice, particularly when the hearing's subject matter is notably contentious.

The original concept of "publicity" was first introduced by Jeremy Bentham, a scholar who believed that the structure of the justice system, like other institutions in society, should be designed to encourage a dependence of elite rulers on the confidence of public subjects. He recognized early on that the structure of the justice system could influence the means that individuals had at their disposal to make use of their system to meet their needs. With this in mind, he offered a suite of recommendations to improve access to justice, which maintaining focus on reducing the associated costs of participation through government subsidy; ensuring public participation as a method of judicial oversight; and using an integrated state-community approach to delivering justice that could leverage the combined benefits of formal justice processes with less formal conciliatory functions like alternative dispute resolution.[15] To Bentham, ensuring the "publicity" of court processes would allow members of the public to offer simplistic interpretation of the law and its jurisprudence, which would ultimately safeguard the security interests of participants against judicial mis-decisions and omissions. Additionally, such discourse can protect the public from latent justice system operations that serve to further state interests over those valued by local communities.

Resnick explained that preserving Bentham's concept of publicity serves three necessary functions of the justice system: the search for truth, public education regarding the system and its operations, and public oversight of

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14 *Hollingsworth v Perry*, *supra* note 13 at 711.

15 Resnik, *supra* note 11 at 6-18; see Farrow & Watson, *supra* note 11.

the decisions being made by judges and other internal decision-makers.[16] Bentham argued court openness supports the search for truth, in that wide dissemination of case information would ensure that falsehoods would be identified and called out by the published media and other public observers. In addition to allowing the masses to identify shortfalls in adjudicative outcomes, Bentham argued that sharing case details through the press would educate members of the public about the rule of law and their obligatory relationship with the state. At its furthest extension, publicity of court proceedings also serves to impose a level of authoritative oversight of the structural and operational decisions of system executives like judges, administrators, and Ministers. Well before the advent of digital communication technology, Bentham contemplated the ability of governmental Ministers to instantaneously communicate with members of the administrative and judicial branches of government to share, compile and collate records and statistical information, which also held potential to align the interests of fragmented institutional systems beyond their constitutional limits. In Bentham's view, strong avenues of publicity would allow local communities to hold system executives accountable for decisions that complicitly work against their interests in favour of a state agenda, whether those decisions were mistakes, collusion, corruption or worse.[17]

To illustrate Bentham's description of oversight by way of publicity, Resnik commented on Bentham's 1787 concept of the panopticon as a governmental framework for penal institutions. Bentham described a prison that was designed to subject inmates to continual observation and immediate behavioural correction, which served to internalize pro-social behaviour into the minds of inmates. The panopticon was later incorporated into Michel Foucault's theory of governmentality- a portmanteau of "government" and "rationality" - which applied its principles into a post-modern theory of governance that sought to create complicit state subjects by internalizing pro-social values into their minds by

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16 Resnik, *supra* note 11 "at 12-16; see Farrow & Watson, *supra* note 11; Philip Schofield, *Utility And Democracy: The Political Thought of Jeremy Bentham* (New York: Oxford University Press, 2006) at 261-263 (quoting Jeremy Bentham, *Political Tactics*, ed by Michael James & Catherine Pease Watkin (Oxford: Oxford University Press), 1999) at 44-45) [Schofield].

17 Schofield, *surpa* note 16 at 258 (quoting Bentham, *Political Tactics*); Frederick Rosen, *Jeremy Bentham and Representative Democracy: A Study Of The Constitutional Code* (Oxford: Oxford University Press, 1989).

generating knowledge, disseminating it into society, then holding individuals responsible for their compliance, or lack thereof. [18] While Foucault's theories fall outside the scope of this paper, he extended the utility of the panopticon to other societal institutions, such as the school, the factory, and other organizations where hierarchical power structures were applied to organize human behaviour. Bentham utilized the panopticon to exemplify the influence that fear of state power could wield over individuals to encourage pro-state behaviour, whether such influence was intended to cultivate the behaviour of citizens, the incarcerated, or state agents themselves. Considering the potentially dual purpose of institutional structures towards manufacturing behavioural compliance, Bentham argued that public systems should be constructed to place lawmakers before the public eye in several senses, such as building debate chambers to accommodate direct observation, ensuring that members of the press media and public can observe public proceedings, and authorizing mass disseminations of public records to ensure that government narratives are not the only accounts of institutional processes that concern the public.

Bentham placed the burden of ensuring that such avenues of accountability are available on government; legal decisions and their reasons should be disseminated through permanent and reliable means, and opportunities for members of the public to offer commentary should be facilitated by the state to safeguard the rule of law and the foundations of democratic government more generally. The primary method of achieving dissemination was through the press media, who could provide information to the public in a manner that remains independent from the perspective of government. Daily discourse regarding the executive functions of government could ensure that attention would be paid to unfolding events and recourse would be taken, by virtue of public dissent, if response measures began to depart from the range of acceptability in a free and democratic society. In Parliamentary jurisdictions like Canada and other Western countries, the right to a free press was paralleled by the right to a trial by a jury of peers. Although Bentham's arguments are important, Resnik noted that the utility of measures that facilitate fulsome publicity with adequate public participation, like universal postal delivery, relied on

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[18] Christopher Pollard, "Explainer: The ideas of Foucault" (26 August 2019), online: *The Conversation* <theconversation.com/explainer-the-ideas-of-foucault-99758> [perma.cc/M4XP-38TQ].

the literacy of the population, which required separate institutional support from government.

In similar sense to the arguments forwarded by Chief Justice McLachlin, Resnik highlighted that Bentham's criticisms were sensitive to the conflicting nature between the open court principle and other important values, like the right to privacy.[19] Conscious of these considerations, Bentham advocated for closures to the public in certain contexts and prescribed several circumstances where closure of trials was appropriate. In his view, participants in the justice system should be protected from public voyeurism, should only be required to disclose facts that are necessary without disclosing others that could be harmful.[20] In other words, Bentham shared Chief Justice McLachlin's claim that some circumstances would require the open court principle to give way to support the broader objectives of the administration of justice. Bentham also acknowledged that publicity did not typically benefit the individual involved in the case of concern. Rather, public opinion referred to the need of government to gain public confidence through institutional balancing of interests while attempting to maintain equilibrium. Departing from McLachlin's perspective, Resnick explained that Bentham's theory remained focused on ensuring that decision-makers in the justice system are held accountable for their decisions, as opposed to simply permitting public commentary and participation within reasonable limits.

Resnick also acknowledged the common criticisms of Bentham's approach, which argued that his reliance on public engagement as the primary method of oversight was insufficient because public opinion via the majority could be manufactured through the tandem influences of the market and the state, as opposed to his neutral conceptualization of public perception. For example, relations between government executives and leaders in the media can become entangled over time through transactions like soliciting advertisements and providing mandatory reports to the public. As relationships grow between these executives, critics argued that media decision-makers may be inclined to avoid the publication of distasteful details or, alternatively, reports may focus on particular interests

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19 Schofield, *supra* note 16 at 251, 268 (quoting Bentham, *Political Tactics*); Daniel Gordon, "Philosophy, Sociology, and Gender in the Enlightenment Conception of Public Opinion" (1992) 17:4 French Historical Studies 882 [Gordon].

20 Resnik, *supra* note 11 at 12-16; see Farrow & Watson, note 11.

that can support government objectives. Agreeing with these criticisms, Resnik claimed that publicity in democratic societies could become an arena where institutional decision-makers can earn prestige for acting in favour of specially situated interests. To these ends, Resnik cites Jürgen Habermas, who found that the public sphere of modern democracies serves as a performative space where leaders craft prestige by persuading the public to accept pro-social directives, as opposed to one for critical debate. To combat this trend, Habermas argued that strong public engagement is necessary to ensure that laws are developed with appropriate levels of popular legitimacy that can be derived from consistent social discourse.[21] Resnik echoed Habermas' conclusion that constant observation of state functions and meaningfully raising concerns regarding the legitimacy, efficiency, and accuracy of its outcomes is the only way to identify shortcomings for corrective action, which can be facilitated by popular dissent. Failure to do so risks allowing justice system decision-makers to subtly disregard public interests in favour of those that support their own.

Building from Habermas' views regarding performative publicity, Resnik drew from Nancy Fraser's conclusions regarding the plurality of social hierarchies, which she found to operate in democratic societies. To Fraser, groups distinguished based on race, gender, and class compete for participatory capacity in a zero-sum, competitive, and singular public sphere.[22] In this performative space, Resnik shared Fraser's belief that decision-makers can appeal to special interests to maintain public confidence in the administration of justice while other changes are made in the background. Such changes can reinforce hierarchical social orders while mitigating other special-interest concerns in democratic pluralities, which often stratify access and participation outcomes against Euro-centric criteria. In other words, the allocation of state benefits and interventions, as differentiated based on race, gender, and income, may maintain the interests of some communities better than others, despite the implementation of progressive system reforms. To combat these tendencies, Resnik asserted that formal state structures must be established to concretely improve access and participation for the inter-sectionally marginalized in ways that can approach meaningful parity with majoritarian

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21 Gordon, *supra* note 16.

22 Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," Craig Calhoun, ed, *Habermas and the Public Sphere* (Cambridge, Massachusetts: MIT Press, 1992.

members of the public, as opposed to the utilization of special-interest discourses to justify latent system changes while retaining existing institutional hierarchies.

The prevalence of the performative public sphere and its influence on state outcomes provides an illustrative example of why constitutional protections for judicial independence and impartiality of decision-makers are necessary safeguards regarding public confidence in the administration of justice. Resnik highlighted the importance of insulating executives because special interests risk influencing the outcomes of their decisions, which may prejudice state interests or the rule of law.[23] Canada, among other Western nations,[24] constitutionalized the expectation of an independent judiciary to ensure that the justice system could meaningfully hold legislators and other state agents accountable.[25] Canada is a federal country with a constitutional distribution of powers between federal and provincial governments and needs an impartial umpire to resolve disputes between two levels of government, as well as between governments and private individuals—a role that is filled by the courts as an institution and judges as decision-makers. At the same time, judges and the courts continue to be state agents themselves, which means that the open court principle, as well as its roots in Bentham's publicity, still serve as an important accountability measure in terms of preventing their collusion towards broader state interests.

Considering the contentious role of the court as arbiter and state agent, Resnick examined the implementation of new institutional practices to facilitate public participation, while also balancing other interests at play in the judicial process, such as privacy and judicial independence. As democratic enfranchisement expanded in the mid-20th century, the interests

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23 Resnik, *supra* note 11 at 20-23; see Farrow & Watson, *supra* note 11.

24 Guarantee of continued judicial independence, *Constitutional Reform Act 2005* (UK), s 3; US Const art III.

25 See Government of Canada, "The Judiciary: Judicial Independence" (1 September 2021), online: *Canada's Court System* <www.justice.gc.ca/eng/csj-sjc/ccs-ajc/05.html> [perma.cc/9TBF-M5XN]; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.; *R v Beauregard* , [1986] 2 SCR 56, 30 DLR (4th) 481; *Mackin v New Brunswick (Minister of Justice)*, 2002 SCC 13; *R v KGK*, 2017 MBQB 96; affirmed 2019 MBCA 9; affirmed on other grounds 2020 SCC 7 (judicial independence is similarly acknowledged as foundational for public confidence in proper administration of justice and for maintaining constitutional separation of powers).

of marginalized groups came to dominate the public discourse, meaning they presented a heightened risk of influencing the decisions made in the distribution of justice. Resnik conducted a historical analysis of judicial independence in Western nations during this period to demonstrate the system's capacity to gradually implement new processes to standardize public access to published information regarding the administration of justice. While it can be argued that such changes also restricted publicity in the sense of direct access, Resnik's research revealed that Western judiciaries quickly adapted to contemporary realities which emerged as a consequence of war and genocide that drastically altered their role in society. Measures were taken to expand the dissemination of rulings on admissibility, jurisdiction, responsibility, sentencing, and reparations; but were also taken to prevent individuals from participating in court processes if they presented a risk to the independence or impartiality of the judgment. In making these changes, Resnik noted that the courts have made fair process a metric of evaluation, which can dictate whether state decision-makers are adequately providing the right quantum of legal process to ensure that an individual can meaningfully assert their rights while respecting the limits of the court and the discretion of its decision-makers. Borrowing from Pierre Bourdieu's theory of reflexivity, Resnik found that judges sought to create new methods of connecting the public with the administration of justice during the reformation process, whether that involved building new infrastructure, establishing new coordinating institutions, or implementing new technologies.[26]

Like the reformations that took place in the mid-20th century, a reflexive approach to judicial decision-making is more important than ever in the digital era. Continuous technological innovation radically amplifies the ability of the public to access information regarding the administration of justice. For example, some jurisdictions televise legal proceedings, post case details on electronic databases, and translate judgments into as many as twenty different languages to allow for broader dissemination.[27] The

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[26] See Pierre Bourdieu & Löic JD Wacquant, *An Invitation to Reflexive Sociology*,(Chicago: University of Chicago Press, 1992) at 235-236; Pierre Bourdieu, "Participant Objectivation"(2003) 9:2 J Royal Anthropological Institute 281; Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1987) 38:5 Hastings LJ 814; Resnik, *supra* note 11; See Farrow & Watson, *supra* note 11.

[27] Supreme Court of Canada, "Frequently Asked Questions" online: <www.scc-csc.ca/contact/faq/qa-qr-eng.aspx> [perma.cc/46ZH-C52M] . The question of a media right to electronic access is explored in A Wayne MacKay, "Framing the Issues for

combined effect of broader participatory suffrage in Canada and the technologically expanded dissemination of information of administration of justice has drastically transformed the volume, content, and nature of the proceedings conducted in court. Dockets continue to grow, and backlogs seemingly can never be addressed. Canadian governments, like others, have failed to provide adequate funding to directly support litigants or sufficient alternative supports to help them access the justice system, pursue their claims, and achieve a satisfactory result. Rather than addressing the consequences of expanded demand for court services, Resnik identified several techniques that have promulgated in recent years which reconfigure court-based procedures to favour settlement, devolve formal court functions to obscure administrative agencies, and outsource decision-making to quasi-private adjudicators. These trends are concerning; Resnik claimed these practices operate together to facilitate a shift towards a privatization of justice processing, which may benefit state interests but may also hold deleterious potential for the most marginalized. Considering this direction and the risks it presents for constitutional principles like equality and the rule of law, we now turn to consider the measures being taken by Canadian judiciaries to manage the distributive flow of justice and access to system outcomes.

## IV. Privatizing Justice: More Access, Less Oversight

Resnik has been skeptical of shifts towards privatizing the administration of justice because it undercuts the legitimating, correcting, and educating functions of the system. Privatized decision-making, in her view, renders litigants more dependent on judicial preference than on the rule of law.[28] She defined privatization as a series of processes undertaken by government to retain or concentrate control over its activities while reducing or eliminating avenues of public oversight. This includes the

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Cameras in the Courtrooms: Redefining Judicial Dignity and Decorum" (1996) 19:1 Dalhousie LJ 139. In Canada, Supreme Court—but not lower court—proceedings are televised. Most courtroom proceedings are webcast live and are later televised by the Canadian Parliamentary Affairs Channel (CPAC).

28 Resnik, *supra* note 11; See Farrow & Watson, *supra* note 11; Antony Duff et al, "The Public Character of Trial" in , *The Trial on Trial: Towards a Normative Theory of the Criminal Trial*, vol 3 (Oxford: Hart Publishing, 2007); Judith Resnik, "Due Process: A Public Dimension" (1987) 29:2 U Fla L Rev 405.

transfer of government-based activities to non-governmental actors, as well as the transfer of institutional operations to entities in the market. She noted that both forms are prevalent in many countries in the West, holding influential potential for the respect of human rights both locally and internationally. Her research identified this trend has taken place over the last several decades in the United States, across Europe and throughout the commonwealth, including Canada.

In line with the court's reflexive approach to addressing the demand for justice services, Resnik identified three techniques that are prevalent in terms of shifting justice processes away from formal adjudication: reforming court-based procedures to privilege settlement, outsourcing adjudication to private service providers, and devolving more serious adjudicative functions to agencies that provide less access to the public.

In response to growing demands for justice services at the turn of the century, extra-judicial procedures became a suitable alternative to bringing issues to trial. For example, judicial alternative dispute resolution (J-ADR) services can be refereed by a judge who serves as a quasi-judicial case manager. Resnik noted that, in these instances, judges can act like senior partners that advise both parties regarding how to proceed in negotiations, mediations and arbitrations.[29] While J-ADR processes have proven their merit to decision makers in recent years,[30] Resnik remarked that it may be the single largest contributor to the "vanishing trial."[31] Dispute resolution practices have also extended beyond the justice system to include services that are provided on a strictly private basis. Parties to alternative dispute resolution (ADR) adjudication can choose which procedures are used to resolve their conflict, which authority renders judgment, and which issues fall within the purview of the public. While the details of ADR processes

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29 *887574 Ontario Inc v Pizza Pizza Ltd*, [1994] OJ No 3112, 23 B.L.R. (2d) 239; Canadian Judicial Council, "Alternative to Going to Court" (5 September 2021), online: *Know Your Judicial System* <cjc-ccm.ca/en/resources-center/know-your-judicial-system/alternative-going-court> [perma.cc/BGF2-LL76].

30 EC, *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters*, [2008] OJ, L 136 at 3.

31 Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" (2004) 1:3 J Empirical Legal Stud 459; Judith Resnik, "Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts" (2004) 1:3 J Empirical Legal Stud 783; Judith Resnik, "Trial as Error, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III" (2000) 113:4 Harv L Rev 924.

may vary between jurisdictions, Resnik has identified a trend towards their use throughout Western countries.[32]

In addition to establishing processes that allow users to circumvent formal trial proceedings, Resnik has identified a monumental shift towards administrative governance in the late 20th century. Rather than creatures of the court that share the constitutional authority of judges, these agencies function as an extension of the legislative or Parliamentary executive, whose members are appointed by the government in power. Acknowledging the prevalence of administrative adjudication in recent years, Chief Justice McLachlin offered remarks about the evolutionary relationship between Canada's courts and the growing use of administrative adjudication.[33] She explained that thousands of administrative systems occupy the legal landscape; the courts have lost jurisdiction over large areas of important social, economic, and political concern to the vast array of commissions and tribunals that operate at provincial and federal levels. In essence, Chief Justice McLachlin found that Western democracies are moving away from the traditional rule of law model of governance towards a synergistic model of dispersive state regulation. Chief Justice McLachlin acknowledged several new challenges this model creates for the legal system, such as developing adequate measures to maintain the rule of law and the constitutional division of powers; legal adjudication is not a function of the legislature or its executive but is the responsibility of the courts. In the context of the synergistic administrative state, such decisions are instead rendered by appointed delegates that exercise executive regulatory powers. Resnik has expressed agreement with Chief Justice McLachlin's remarks, noting that the wide-spread decline of using courts for adjudication favours processes and outcomes that are inherently less public, less regulated, and less accountable; they are also often in line with the interests of state officials.

While Chief Justice McLachlin's discussion of the administrative state maintained focused on the merits of the shift towards administrative governance, Resnik highlighted the deleterious potential these changes hold for the constitutional and historical obligations of judges and of the justice system more generally. In formal trial proceedings, everyone is treated

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32 *Supra* note 30.

33 Right Honourable Beverley McLachlin, PC, CJC, "Administrative Tribunals and the Courts: An Evolutionary Relationship" (27 May 2013), online: SCC *Speeches* <www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx> [perma.cc/6QP9-UKJB].

equally, adjudicators are independent of the government that employs and deploys them, and trial records are disseminated to the public to facilitate discourse between observers, parties to the action and justice system agents like judges and lawyers. To Resnik, the shift towards delivering justice through administrative processes signifies an erosion of the democratic principles that advocates like Bentham held to locate sovereignty in the people and empowered them to hold elites accountable for their decisions. Resnik has expressed that diminishing public adjudication is a loss for democracy because doing so also reduces the frequency, quality, and consistency of the publicity that Bentham found necessary to maintain public confidence in the administration of justice. In the words of Chief Justice McLachlin, the shift towards privatized adjudication reduces the administration of justice to a credulity, as opposed to acts of reason.

As greater volumes of adjudication continue to move into the private sphere, Resnik has highlighted that discourse regarding justice system reform appear to adopt the language of marginalized communities like women, people of colour, and the poor to manufacture their consent to widescale system changes. Building from Resnik's observations, the authors believe that justice system executives are applying a strategy of "cooptation," which is an elite strategy of using seemingly cooperative practices to persuade opposing groups to accept structural changes in hopes of gaining benefits through compromise.[34] Scholars like Frances Piven and Richard Cloward have found that strategies of cooptation typically benefit elite executives while maintaining previous limits on those who seek change, although they may be re-oriented as reforms are put in place. Said differently, state executives can deploy inclusivity discourse to indicate interest in addressing historical issues regarding system access to persuade marginalized communities to accept a sweeping reformation agenda. This may reorganize the structure of their exclusion and, in some cases,

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[34] Frances Fox Piven, Richard Cloward, *Poor People's Movements: Why They Succeed, How They Fail* (New York: Random House, 1964); William A Gamson, The Strategy Of Social Protest (Illinois: The Dorsey, 1975); Philip Selznick, *TVA and the Grass Roots: A Study in the Sociology of Formal Organization* (Berkeley: University of California, 1949); De Lissovoy, N. (2008) Noah De Lissovoy, "Conceptualising Oppression in Educational Theory: Toward a Compound Standpoint"(2008) 8:1 Cultural Studies ⇔ Critical Methodologies82 at 92.; Michel Foucault *The Archaeology of Knowledge* (London: Tavistock, 1972) at 49; Michel Foucault, *Discipline and Punish* (London: Penguin, 1977) at 194-197; Michel Foucault, *Power/Knowledge: Selected interviews and other writings, 1972–1977*, ed by Colin Gordon, (New York: Pantheon, 1980).

exacerbate their inability to achieve meaningful participation by imposing new responsibilities that require new forms of knowledge to facilitate access.

Building from Resnick's observations and those identified by scholars like Piven and Cloward, the authors believe it is possible that a similar approach is being applied in current justice system reforms that are being made in Canada in response to the COVID-19 pandemic. In line with Resnick's claims regarding cooptation and privatization, it appears that justice system executives are appealing to the plurality of social hierarchies to maintain public confidence while measures are being taken to digitalize the delivery of justice services in Canada. In other words, state actors are using progressive, inclusionary discourse to encourage the public to accept wide-scale reforms to the justice system by appealing to the interests of groups who stand to benefit from broader access to justice. Although the stated objectives of the reformation agenda appear positive; improving system efficiency and expanding access to historically under-served populations, but Resnick's arguments make it clear that these changes may also hold potential to reinforce majoritarian, Euro-centric expectations to the detriment of the marginalized, such as those living in northern, remote, and Indigenous communities.

Although the perspectives offered by Chief Justice McLachlin and Resnick regarding access to justice and the role of public participation hold relevance in terms of modern justice system reform measures, both were written before the onset of the COVID-19 pandemic. Chief Justice McLachlin's statements regarding judicial reflexivity and Resnik's interest in meaningful democratic participation in the adjudication of legal disputes are both pressing considerations as provincial legislatures, Parliament, and the courts chart a new path for the delivery of justice services and access to justice amid this public health crisis. The pandemic inspired justice system executives to authorize the widespread digitalization of court processes and, in doing so, have made broadening access to justice one of their key objectives. Such reforms have already resulted in some positive outcomes in improvement of process efficiency and access to justice in a general sense, but the authors share Resnik's concerns regarding the risks such measures present for publicity and judicial accountability. Particularly, we believe that attention should be paid to the effects of these changes for women, people of colour, and the poor because the access to justice literature designates these populations as the most underserved by the justice system, both before and during the pandemic.

To evaluate the effects of pandemic reforms in relation to the most vulnerable, the following section examines the high-level recommendations of the Action Committee on Court Operations in Response to COVID-19 ("Action Committee") and their operationalization in the court systems in Manitoba through judicial Practice Directions and Notices.[35] The Action Committee conducted consultations across the federal-provincial-territorial justice network, which allowed judges and court administrators to share successes, failures, and recommendations that could meet the court system's statutory obligations while also offering a reflexive approach to delivering the justice outcomes that individuals expect of lawyers, judges, and the system overall. These recommendations were taken forward in provincial justice systems in a series of Practice Directions and Notices to the legal profession, as well as the ratification of several legislative changes that permanently authorize the use of digital technologies to meet traditionally manual justice functions. Keeping our focus on the outcomes of justice system reforms for marginalized populations, our analysis remains focused on the implementation of such measures in the province of Manitoba and their consequences for individuals charged with murder.

Scholars like Bruce MacFarlane explain that individuals from marginalized populations are disproportionately charged with violent offences, but these claims are often the result of structural biases as opposed to fact. [36] Across Canada and particularly in Manitoba,[37] law enforcement practices have disproportionately targeted Indigenous peoples, who are

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35 Department of Justice Canada, "Chief Justice of Canada and Minister of Justice Launch Action Committee on Court Operations in Response to COVID-19" (8 May 2020), online: *Department of Justice News Release* <www.canada.ca/en/department-justice/news/2020/05/chief-justice-of-canada-and-minister-of-justice-launch-action-committee-on-court-operations-in-response-to-covid-19.html> [perma.cc/24PZ-PXF9].

36 Bruce A MacFarlane, "Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System" (Ontario: Ministry of the Attorney General: 2008), online (pdf): <www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/policy_research/pdf/MacfarlaneWrongful-Convictions.pdf> [perma.cc/WF8V-ASR5] [MacFarlane, Tunnel Vision]; Bruce A MacFarlane, "Wrongful Convictions: Determining Culpability When the Sand Keeps Shifting" (2014) 47:2 UBC L Rev 597 at 597 [MacFarlane, "Shifting Sands"]; Bruce A MacFarlane, "Convicting the Innocent: A Triple Failure of the Justice System" (2006) 31:3 Man LJ 403 at 403.

37 Nancy McDonald, "Welcome to Winnipeg: Where Canada's racism problem is at its worst" (22 January 2015), online: *Macleans Magazine* <www.macleans.ca/news/canada/welcome-to-winnipeg-where-canadas-racism-problem-is-at-its-worst/> [perma.cc/F4Z9-QT6R].

statistically more likely to be arrested, charged, detained in custody without bail, convicted, and imprisoned.[38] This community suffers from higher rates of victimization by crime, violent crime,[39] and negative criminal justice outcomes, including over-representation in correctional institutions, which is likely a function of systemic prejudice that may be a consequence of Canada's settler-colonial history.[40] Considering these realities with the objectives of the access to justice movement, our analysis in Part B of Manitoba's jurisprudence will focus on the courts' ability to deliver on expectations of publicity, judicial accountability and access to justice system outcomes, as opposed to simple access to the system that can be facilitated by technological means. With these objectives in mind, we now turn to the justice system's response to COVID-19, which involved both federal and provincial governments in Canada.

## V. Pandemic Policy Changes

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38 *Report of the Aboriginal Justice Inquiry*, "Chapter 4 - Aboriginal Over-Representation" (Manitoba: AJIC, 2001), online: <www.ajic.mb.ca/volumel/chapter4.html> [perma.cc/C529-GTCD] [*AJI*]; *Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide* (Ottawa: Canada Communication Group, 1995) at 309-311; Jillian Boyce, "Victimization of Aboriginal People in Canada, 2014." *Juristat: Canadian Centre for Justice Statistics* (June 28, 2016) online: <www150.statcan.gc.ca/n1/pub/85-002-x/2016001/article/14631-eng.htm> [perma.cc/XSA2-7B24] [*Boyce*]; Canadian Civil Liberties Association and Education Trust, "Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention" (July 2014), online (pdf): *CCLA* <ccla.org/wp-content/uploads/2021/07/Set-up-to-fail-FINAL.pdf > [perma.cc/D422-L3U7] at 19; Ivan Zinger, "Annual Report of the Office of the Correctional Investigator 2019-2020 – 8. Indigenous Corrections", *Office of the Correctional Investigator* (26 June 2020), online: <www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20192020-eng.aspx#s10> [perma.cc/9HJN-3B8K] [*CSC*].

39 Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System," *Ontario Ministry of the Attorney General* (9 March 2017), online (pdf): <www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Rudin.pdf> [perma.cc/7RQP-RDDH] at 1-8, 36-40.

40 Boyce, *supra* note 38; CSC, *supra* note; Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta, "Justice on Trial: Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta" (Edmonton: The Task Force, 1991) at 2-5, 2-46 to 2-51 [*Justice on Trial*].

## A. Action Committee on Court Operations in Response to COVID-19

The COVID-19 pandemic disrupted many institutional structures that individuals depend on to meet their daily needs, including the criminal justice system. In response, federal and provincial lawmakers, as well as their associated judicial councils, adopted several policy measures to prevent unnecessary disease transmission and to implement justice system reforms that could address immediate, as well as longer-term, issues related to access to justice. COVID-19 poses a serious risk to public safety, but the necessary nature of meeting the daily needs of individuals forced decision-makers to find new ways to allow members of the public to access the justice system and for state agents to deliver its products. A key component of response measures was the authorization of technology to facilitate traditional court processes, which allows hearings to be conducted remotely, as well as to permit declarations and executions to take place without the physical presence of the parties. Bills, Practice Directives, and Notices have been issued by justice system executives to make many of these changes permanent, where many of these processes required in-person attendance before the pandemic.

Court functions were interrupted for a short period, but adjudication quickly resumed because digital resources were already in place, and mostly uniform response measures could be enacted across the country by virtue of strong communication channels between the federal-provincial-territorial justice network. This consistency was facilitated by the Commissioner for Federal Judicial Affairs Canada, who assumed responsibility for the Action Committee.[41] The Action Committee's mandate is to ensure that operational reforms are grounded in reliable information, that constitutional and social expectations are adequately considered, and that the courts' broader commitment to meeting the needs of everyone who depends on justice system outcomes continue to be supported under new frameworks.[42] Its purpose is to coordinate the restoration of court operations in ways that protect the health and safety of Canadians by making use of public health advice and expertise.

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41 *Supra* note 35.

42 Office of the Commissioner for Federal Judicial Affairs Canada, "Action Committee on Court Operations in Response to COVID-19: Terms of Reference for the Action Committee" (25 November 2020), online: *Government of Canada* <www.fja.gc.ca/COVID-19/reference-eng.html> [perma.cc/KMA9-KT4B].

To these ends, the Action Committee adopted four overarching principles that guide its work, in addition to the traditional doctrines of the common law justice system and pandemic public health principles. The Action Committee is committed to: providing national level guidance based on a common framework of parameters to enable coordination and consistency in the approach to COVID across the country; facilitating access to essential information, expertise and health and safety resources for chief justices and court administrators as they work to restore and stabilize court operations in their regions; highlighting best practices and facilitating communication, information-sharing and collaboration among courts, government and Canadian communities while also recognizing that local innovation can be valuable at the national level; and ensuring that early decisions around the resumption of court operations are framed within a wider vision of court modernization, meaning that Action Committee decisions should pave the way towards longer term transformation and increased resilience in Canada's justice systems.[43] These guiding principles work together with the fundamental principles of the justice system, of which the Action Committee places priority on: the open court principle, access to justice, the rule of law, judicial independence, federalism, and nexus to the community, or, in other words, ensuring that justice is rendered close to home by triers of fact that are connected to the community being served.

First and foremost, the Action Committee sought to keep court environments safe while the justice system continued to provide essential services to the public.[44] In addition to collating recommendations from the Public Health Agency of Canada, the Action Committee issued several tip sheets and tools to help local decision-makers adapt current processes to keep courts safe and accessible, as well as to provide a standardized approach that could be adopted across the country. Justice system participants were

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43 Office of the Commissioner for Federal Judicial Affairs Canada, "Core Principles and Perspectives" (30 July 2020), online: *Action Committee on Court Operations in Response to COVID-19* <www.fja.gc.ca/COVID-19/principles-eng.html> [perma.cc/B8CV-K69D].

44 Office of the Commissioner for Federal Judicial Affairs Canada, "Action Committee on Court Operations in Response to COVID-19: Message from the Action Committee: Keeping Our Court Environments Safe in the Midst of a Pandemic" (30 July 2020), online: *Protecting the Health and Safety of Court Users and Personnel During the Pandemic* <www.fja.gc.ca/COVID-19/Safe-court-environments-Pour-des-tribunaux-surs-eng.html> [perma.cc/LJZ4-UDLP].

invited to contribute to an ongoing dialogue regarding procedures that could better protect users from health risks, which helped the Action Committee develop tools like the Orienting Principles on Safe and Accessible Courts,[45] the "Court Audit Tool,"[46] procedures for disinfection and protection of personnel,[47] guidelines for contact tracing,[48] and directives regarding the impact of vaccination on court operations.[49] It also created a space where best practices and resources could be shared between jurisdictions for conducting remote hearings, which included tools from provincial Canadian Bar Associations, various courts and tribunals, and comparable international jurisdictions.[50] Overall, these tools and resources

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45 Office of the Commissioner for Federal Judicial Affairs Canada, "Action Committee on Court Operations in Response to COVID-19: Safe and Accessible Courts – Orienting principles for Canadian Court Operations in Response to COVID-19" (6 April 2021), online: *Protecting the Health and Safety of Court Users and Personnel During the Pandemic* <www.fja.gc.ca/COVID-19/safety-eng.html> [perma.cc/53Z7-4QTJ].

46 Canadian Centre for Occupational Health and Safety, "Action Committee on Court Operations in Response to COVID-19: Court Audit Tool – Adapting Small Court Spaces and Identifying Alternative Facilities" (9 February 2021), online: *Publications* <www.ccohs.ca/covid19/courts/audit-tool/> [perma.cc/Y2W3-CCHX].

47 Canadian Centre for Occupational Health and Safety, "Action Committee on Court Operations in Response to COVID-19: Guidance on Protecting Court Personnel and Court Users and General Practices for Cleaning and Disinfecting" (9 February 2021), online: *Publications* <www.ccohs.ca/covid19/courts/general-practices/> [perma.cc/RRC6-KFET].

48 Office of the Commissioner for Federal Judicial Affairs Canada, "Action Committee on Court Operations in Response to COVID-19: Contact Tracing and the Justice System" (30 July 2020), online: *Protecting the Health and Safety of Court Users and Personnel During the Pandemic* <www.fja.gc.ca/COVID-19/Contact-Tracing-La-recherche-de-contacts-eng.html> [perma.cc/7QFS-RS5G].

49 Office of the Commissioner for Federal Judicial Affairs Canada, "Action Committee on Court Operations in Response to COVID-19: Communiqué – the impact of vaccination on the courts" (30 July 2020), online: *Protecting the Health and Safety of Court Users and Personnel During the Pandemic* <www.fja.gc.ca/COVID-19/Impact-of-Vaccinations-on-the-Courts-Incidence-de-la-vaccination-sur-les-activites-des-tribunaux-eng.html> [perma.cc/ME9S-HWGJ]; Canadian Centre for Occupational Health and Safety, "Action Committee on Court Operations in Response to COVID-19: Impact of Vaccination on Court Operations" (25 June 2021), online: *Publications* <www.ccohs.ca/covid19/courts/courts-vaccination/> [perma.cc/G4PS-JSWM].

50 Office of the Commissioner for Federal Judicial Affairs Canada, "Action Committee on Court Operations in Response to COVID-19: Inventory of Existing Resources on Best Practices for Remote Hearings" (30 July 2020), online: *Open Hearings and Access to Court Services During and Beyond the Pandemic* <www.fja.gc.ca/COVID-19/Best-Practices-

serve to support Canada's courts as they work to protect the health and safety of all court users during the public health crisis, while simultaneously upholding the fundamental values of the justice system.

The Action Committee acknowledges that one of the most impacted values of the justice system in terms of the pandemic is the open court principle and its related considerations of privacy, security, and confidentiality. The Action Committee explains that the principle of open court promotes access to hearings for justice system participants, the media, and the public. Be that as it may, the court must balance these expectations against the privacy and safety interests of victims, vulnerable witnesses and accused persons, particularly while hearings are being conducted digitally. To assist court decision-makers in reaching this balance, the Action Committee issued a tip sheet that highlights best practices for assessing how privacy, security and confidentiality issues can be adequately addressed in a virtual court setting for all who benefit from open court.[51] The tip sheet describes six steps that local justice system leaders should consider when restricting court openness in favour of security and privacy interests: understanding risks and identifying available protection measures; assessing the functionalities and limits of the virtual platform or tool being used; establishing measures to regulate access; communicating procedures and rules of access; screening individual cases in advance to identify potential privacy, security or confidentiality issues; and establishing a proper course of action if rules of access are breached or security or confidentiality is otherwise compromised. In addition to these steps, the tip sheet includes an appended checklist of consolidated best practices from courts in different jurisdictions, as well as a sample Notice of Access rules for virtual hearings. Importantly, the Action Committee explains that the guidance provided in the tip sheet does not replace applicable laws, common law, regulations, court rules, notices or practice directions, and that additional considerations may be necessary in terms of assessing the impact of mandatory virtual hearings for marginalized community members. To these ends, the Action Committee recommends ongoing revision of open court guidelines to ensure that the unique contexts of local courts are

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for-Remote-Appeal-Hearings-Pratiques-optimales-audiences-dappel-virtuelles-eng.html> [perma.cc/3YTX-RD5S].

51 *Ibid.*

accommodated, and that information-technology and security experts can contribute to their ongoing improvement.[52]

In line with the traditional focuses of the access to justice movement, the Action Committee examined the disproportionate impact of the pandemic on access to justice for marginalized individuals. It notes that the protections offered by the *Charter* demand certain expectations of the court, which must be met at risk of undermining public confidence in the administration of justice. In the Action Committee's view, the pandemic has underscored and compounded several challenges regarding access to justice services and outcomes; these barriers are heightened for marginalized communities and individuals, who are disproportionately unable to access such services. The Action Committee considered these impacts in two studies: a judicial consultation regarding the restoration of court operations in northern, remote, and Indigenous communities; and a broader consultation with criminal justice stakeholders regarding the disproportionate impacts of the pandemic on access to justice for marginalized individuals, including those in metropolitan regions.

When the pandemic approached its first summer in 2020, the Action Committee consulted with judicial representatives from the Northwest Territories, Saskatchewan, Alberta, and British Columbia regarding how COVID-19 affected the delivery of court services in northern, remote and Indigenous communities.[53] It asked representatives about their experiences to share ideas about how the government could provide relevant supports to assist with the safe restoration of justice services in their communities. Their commentary highlighted that location, demography, and resources all drastically impact access to justice services and that resolving these issues requires a coordinated effort from all levels of government. In addition, all representatives agreed that it was essential to create a central role for Indigenous peoples to adequately restore the functions of the justice system to pre-pandemic levels. The panel identified several common issues between their jurisdictions: such as growing court processing backlogs; a lack of resources and capacity to implement health and safety measures; and

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52 *Ibid*.

53 Office of the Commissioner for Federal Judicial Affairs Canada, "Action Committee on Court Operations in Response to COVID-19: Restoring Court Operations in Northern, Remote and Indigenous Communities" (30 July 2020), online: <www.fja.gc.ca/COVID-19/Northern-Remote-and-Indigenous-Communities-Communautes-nordiques-eloignees-et-autochtones-eng.html> [perma.cc/27GZ-SLZC].

adjusting processes to adapt to the realities of remote service delivery, particularly in culturally relevant ways for Indigenous peoples and other marginalized populations. In the view of the contributors, digital technology acted both to the system's benefit and its detriment. Concerns regarding digital literacy and the availability of digital devices created new barriers to accessing justice services in technological forums. Panelists reported that inequalities of access are being exacerbated by minimal access to reliable telecommunications services, existing issues related to poverty and unstable housing, and the justice system's heightened reliance on digital alternatives to in-person proceedings. Members of some of these communities also hold historical reasons for fearing non-resident state actors because such communities have been devasted in the past by genocidal or otherwise deleterious state interests when these agents entered their communities. In the context of using technology to facilitate access to digital justice services, participants noted that the presence of such agents would likely be necessary as community members learned how to navigate the new dynamics of delivering justice remotely. The Action Committee acknowledged that such concerns affect the willingness of individuals to participate in the justice process, which can impact the integrity of submissions like statements, plea bargains, or even admissions of guilt.

With these concerns in mind, the Action Committee identified two supporting principles that, in its view, justify the shift to using technology to resume court operations in remote, northern, and Indigenous communities: individuals are increasingly turning to digital platforms to meet their daily needs, which makes it likely that marginalized users can adapt to the technological delivery of justice services; and that justice system authorities are duty-bound to encourage user adaptation to new system realities as reform measures are put in place, meaning that such guidance will be available as needed.[54] The Action Committee believes that pandemic reform measures should focus on building user knowledge of technological systems, as well as accessing counsel and participating in court processes using digital means, while also balancing considerations of the health, dignity, and rights of everyone involved in the process. In its view, those who seek to access the justice system must come to terms with the reality that better access to services connotes an expectation that users will learn how to make use of such opportunities. As a shared responsibility between

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54 *Ibid.*

users and authorities, the Action Committee explains that judges, courts, and all participants must work together to facilitate and support pandemic reformation measures. Such collaborative expectations may include learning how to use new technologies, helping to facilitate remote means of communicating with clients and participating in court hearings virtually; as well as working to ensure client understandings of adapted court processes and the historical concerns of remote, northern, and Indigenous community members. By approaching users as partners in this transition, legal professionals and governments can reinforce longer-term strategies for increasing state capacities to deliver justice, both during and beyond the pandemic. In other words, the Action Committee proposes measures that must be adopted by all system participants, and counsel and other justice system authorities must help users assume responsibility for knowing how to properly access the system. Although these expectations are great, the Action Committee acknowledges the unique challenges that face northern, remote, and Indigenous communities in terms of implementing their proposals for change.

In addition to identifying common areas of concern, the consultations also identified numerous successful initiatives that are being deployed in several provinces that hold potential to meaningfully resolve some of these concerns from an access to justice perspective. When considering how holistic services can be implemented to support Indigenous engagement with the justice system, British Columbia delegates shared the successes of the BC First Nations Justice Strategy and representatives from Alberta shared the accomplishments of the Native Counselling Services of Alberta. The Action Committee celebrated these initiatives and recommended their replication in other jurisdictions to facilitate stronger integration of Indigenous perspectives into justice system reforms, which could connect more deeply with local communities through thoughtful, creative, and culturally relevant uses of technology. The BC First Nations Justice Council recommends the formation of a Virtual Indigenous Justice Centre in appropriate communities that would be capable of delivering legal advice and advocacy, services related to addictions and mental health, and additional support to Indigenous individuals that seek to access the justice system, such as victims.[55] Building from the BC First Nations Justice

[55] Doug White, "BC First Nation Justice Strategy: February 2020" (Vancouver: BC First Nations Justice Council, 2020), online (pdf):

Council's proof of concept, the Action Committee recommends the establishment of liaison officers in northern, remote and Indigenous communities to facilitate the use of digital access points, including set-up and operation of local connectivity technologies, alerting court officials about community-specific needs, and acting as a point of contact in these communities who can communicate authoritatively with other governmental officials. The Action Committee notes that having a liaison officer in the community can help to facilitate better delivery of justice services both digitally and in person, which can help to address other, more traditional concerns of access to justice. In other words, the Action Committee anticipates that the delivery of justice services in northern, remote, and Indigenous communities will continue to be delivered using digital means and, with this in mind, it recommends the implementation of culturally-relevant processes to educate users on how to use technology to access justice services, as well as to establish local liaison officers to facilitate compliance with these options to balance the rights of, and respect for, community members.

The Action Committee also conducted a series of consultations that sought to address the pandemic's disproportionate effect on access to justice for marginalized individuals in a general sense, including access to courts and other justice services in metropolitan regions. To frame this broader analysis, the Action Committee's report offered a conceptual overview of the definitions that are relevant to the access to justice movement to ensure that justice system executives and administrators would understand the claims being put forward, as well as to orient the merits of its recommendations. To the Action Committee, "access to justice" means having confidence that the system will come to a just result, where the user will respect and accept the outcome, even if they do not agree with the verdict.[56] The Action Committee believes this definition is appropriate because it estimates nearly half of all adult Canadians will experience a

<www.bcafn.ca/sites/default/files/docs/news/First_Nations_Justice_Strategy_Feb_2020.pdf > [perma.cc/GB59-2PWJ].

56 Right Honourable Richard Wagner, PC, Chief Justice of Canada, "Access to Justice: A Societal Imperative," address (7th Annual Pro Bono Conference, delivered at the British Columbia Justice Summit, 4 October 2018),] online: <www.scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx> [perma.cc/J27P-32KV].

serious legal problem within a three-year period[57] and the high level of state expense that is associated with each one that is resolved through formal justice processes,[58] which means that the adoption of digital means to deliver justice services is necessary for all involved parties to stabilize demands for services and their associated costs for the state. Although the Action Committee noted these concerns as its primary focus, it also acknowledged the disproportionate impact of the pandemic on marginalized populations and their historic concerns regarding access to justice similarly to their commentary in their report on access to justice during the pandemic for northern, remote, and Indigenous communities: it recommends the establishment of court liaison officers that could facilitate the use of technology to meet the demand for justice services in local communities. These officers can leverage existing support programs offered by groups like legal aid, victim services, and court worker programs to help marginalized individuals access justice system products. In other words, these officers can coordinate the user's justice system experience through each service until they receive their judicial verdict, which must be accepted and respected, even if they do not agree with the outcomes.

In addition to the guidance offered by the liaison officer, the Action Committee suggests that universal delivery of services in a single location can maximize the connection of justice system services for users, including specialized addictions and mental health, dedicated technological support and access to necessary digital devices during hearings, and authorized use of secure premises to participate in such hearings.[59] Liaison officers can assist users while they make use of the facility and guide them through each relevant service, while also addressing other case management concerns like ensuring that individuals appear for hearings. In addition to offering access to justice services, the Action Committee believes that centres of this nature can also provide general access to the internet and other

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57 Canadian Forum on Civil Justice, "Everyday Legal Problems and the Cost of Justice in Canada: Spending on Everyday Legal Problems, Canadian Forum on Civil Justice" 2018 CanLIIDocs 11069, online: <canlii.ca/t/t1lx> [perma.cc/Z4R6-TMZZ].

58 *Ibid*; *supra* note 4, Canadian Bar Association "Reaching Equal Justice."

59 Office of the Commissioner for Federal Judicial Affairs, "Action Committee on Court Operations in Response to COVID-19: Statement from the Committee - Examining the Disproportionate Impact of the Covid-19 Pandemic on Access to Justice for Marginalized Individuals" (30 July 2020) at 3.3, online: <www.fja.gc.ca/COVID-19/Justice-for-Marginalized-Individuals-An-Overview-Acces-a-la-justice-pour-les-personnes-marginalisees-vue-densemble-eng.html> [perma.cc/WQ32-EUZZ].

telecommunications services for the general public. Perhaps most importantly, the central delivery of services for marginalized communities can be used by government to generate data about areas where services are lacking; where further resources are required or can be reduced, and how to improve access overall. To the Action Committee, this data could provide a comprehensive snapshot of the effectiveness of access to justice initiatives, such as whether the approach to justice system digitalization improved the accessibility of courts and related services, as well as the experiences that marginalized populations as users within the new structure. The Action Committee also believes this data can be used to determine which processes should continue to be delivered using digital means when the public health crisis ends to retain measures that sufficiently meet user needs while also reducing overall system costs.[60]

After the Action Committee completed its first year of work, Chief Justice Richard Wagner and federal Minister of Justice David Lametti issued a progress report that demonstrated the successful response measures and initiatives that allowed local justice systems to continue delivering justice services and meeting user needs during the health crisis.[61] They explained that the Action Committee's 17 meetings and 21 consultations significantly and efficiently strengthened information sharing and collaboration between the leaders of Canada's court systems, which helped elected decision-makers make expeditious and informed decisions regarding legislative reform as the pandemic continued to unfold. Although these groups worked closely together to implement adjustments as circumstances changed, the authors of the report note that the Action Committee's terms of reference stipulated that all members must keep the constitutional limits between judges and elected officials top of mind while they worked together to create solutions to the challenges COVID-19 imposed. These principles hallmarked the approach taken by the Action Committee towards federal-provincial-territorial collaboration. Rather than breach the constitutional limits of their relationship as institutional leaders, this forum allowed chief justices to share internal accounts of court processes, which could be taken forward to government by Ministers of Justice and their Deputy Ministers to inform

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60 *Ibid* at 3.4.

61 Office of the Commissioner for Federal Judicial Affairs, "Action Committee on Court Operations in Response to COVID-19: Action Committee – Progress Report" (28 July 2021) at "Strengthened Collaboration and Information-Sharing", online: <www.fja.gc.ca/COVID-19/Progress-Report-Bilan-eng.html> [perma.cc/8236-3GS2].

their approach to amending policy and law. The authors of the report attribute the Action Committee's timely and direct access to information from experts, senior officials across government institutions, and frontline organizations, who helped create a truly interdisciplinary response and ensure blind spots did not affect the overall outcomes, in allowing the agile and effective continuation of justice services.

Further to guiding the development of reforms to policy and law, the Action Committee's interdisciplinary collaboration allowed them to create 11 tip sheets and eight associated tools to help courts adapt public health and safety protocols into the context of court operations.[62] These response kits were disseminated by the Heads of Court Administration, the Canadian Judicial Council and the Canadian Council of Chief Judges, allowing chief justices, chief judges, justice ministries and court personnel to quickly retrofit the Committee's recommendations and develop companion protocols that were suited to their individual and unique needs. This information is continually updated and shared with the public through an online portal hosted by the Commissioner for Federal Judicial Affairs Canada.

Member organizations praised these publications as a strong avenue for promoting dialogue, coordinating, and highlighting best practices and creating benchmarks for action. Further to the utility of these publications served between system leaders, they also provided persuasive evidence convincing members of local judiciaries and ministries of justice to implement measures to safeguard public health as part of court operations and their associated functions. As measures were put in place, unconsidered circumstances were identified and concerns raised, which offered a new foundation for future revisions of Action Committee recommendations and allowed for more robust guidelines to be developed. Concerns were not the only local matters that were brought back to the Action Committee: best practices at the local level were communicated and promoted for national duplication, such as New Brunswick's automated system for jury summons and selection. Respondents to stakeholder engagements conducted by the Action Committee lauded efforts to share such ideas, which helped minimize the need for individual courts to create their own versions of work already done elsewhere. Special attention was taken to share initiatives and processes that could alleviate the heightened difficulties

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62 *Ibid* at "Publications That Made A Difference: Creating a Benchmark For Action".

that marginalized populations faced when accessing the justice system, which led to reports that investigated these realities in metropolitan regions and in remote, northern, and Indigenous communities. Perhaps most importantly, the progress report highlighted the value that Action Committee publications offered in terms of creating benchmarks for action, which helped regional justice systems stay ahead of the proverbial curve in measures that were necessary to preserve public health for all actors involved in the system. Despite regional variation in provincial safety measures, the Action Committee's benchmarks and best practices allowed justice system executives to proceed in lockstep to keep courts safe and operating. The Action Committee recommendations offered meaningful starting points for the institutional implementation of such measures, helped decision-makers accept the proposals put forward by participants, and created an accountability structure by drawing attention to jurisdictions that fell behind others in defending public safety.

In similar logic to the Action Committee's role as a driver of accountability, the progress report notes that internal stakeholders and their partners were most grateful for the leadership role that the organization served throughout the pandemic.[63] Stakeholder respondents unanimously believed the Action Committee inspired public confidence in the justice system from the earliest days of the pandemic. The united federal-provincial-territorial messaging provided compelling decisive leadership, and acted as a model for other institutional leaders across the country. The authors of the progress report attributed the merits of their strategy to the care taken to educate and inform participants and the public, as well as crafting the appropriate processes to change behaviours and attitudes in their target audiences. By acting as open-minded leaders, maintaining key drivers of necessity and expediency top of mind, and innovating every step of the process, the Action Committee believed that creative and effective action was bound to follow. All who participated or benefited from the work of the Action Committee believed that its collaborative framework exceeded the inter-governmental outcomes achieved before the pandemic and offered a valuable template for endeavours of its kind in the future.

The Action Committee played a key role in ensuring that the administration of justice could continue in every Canadian province during the pandemic by encouraging sharing of information, broader collaboration

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63 *Ibid* at "Leadership in a Time of Crisis" – "Conclusion".

and offering resource kits. Among these regions is the justice system in Manitoba, which applied many of these recommendations in their local courts to preserve public safety while meeting the justice needs of residents. With the work of the Action Committee in mind, the following section examines the public health measures that were implemented by the Government of Manitoba, as well as the Practice Directions and Notices that were issued by Manitoba's courts, to achieve these ends.

## B. Manitoba's Court System

Manitoba's pandemic response was initiated by the Chief Provincial Public Health Officer (CPPHO), who issued COVID-19 Prevention Orders[64] that came into effect on April 17, 2020, and Self-Isolation and Contact Tracing Orders[65] that came into effect on August 28, 2020. To safeguard public health, the Prevention Orders prohibited gatherings of individuals, restricted non-essential business operations, and mandated several measures to prevent disease transmission, such as wearing face masks and maintaining two meter distances from others when interacting in person.[66] The Self-Isolation and Contact Tracing Order mandated any individual that is diagnosed by a public health official with COVID-19 to self-isolate at home for fourteen days.[67] Although operational amendments were made to these prohibitions as the pandemic unfolded, the CPPHO regularly renewed the Prevention Orders[68] and the Self-Isolation and Contact Tracing Orders[69]. The Government of Manitoba posts the most current details online regarding Orders made in response to an emergency to ensure that the public is informed at all times.[70]

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64 *The Public Health Act*, SM 2006, c 14, *COVID-19 Prevention Orders*, enacted on 17 April 2020, as repealed on 1 May 2020 [Original Prevention Order].

65 *The Public Health Act*, SM 2006, c 14, *Self-Isolation Order*, enacted on 28 August 2020, as repealed on 17 December 2020 [Original Self-Isolation and Contract Tracing Order].

66 Original Prevention Order, *supra* note 64.

67 Original Self-Isolation and Contract Tracing Order, *supra* note 65.

68 *The Public Health Act*, SM 2006, c 14, *COVID-19 Prevention Orders*, enacted on 3 September 2021, as repealed on 5 October 2021.

69 *The Public Health Act*, SM 2006, c 14, *Order Prohibiting Travel to Northern Manitoba and Remote Communities*, enacted on 11 June 2021, as repealed on 18 December 2021.

70 See Manitoba Laws, List of Orders made in an emergency, online: <web2.gov.mb.ca/laws/statutes/index_orders.php?o=title&x=1> [perma.cc/GDG8-MHX7].

While it was necessary for the CPPHO to issue prohibitions to protect public health, many matters could not be postponed indefinitely, including legal issues that involve life, liberty, and property. Conscious of these dual considerations, lawmakers in Manitoba passed several temporary orders to authorize the use of technology to remotely execute oaths, statutory declarations, wills, and powers of attorney. Those orders were later codified into law with the passage of Bill 42, which permanently permits remote commissioning and witnessing under s. 64(1) and (4) of the *Manitoba Evidence Act*[71], s. 10.1(1) and (2) of the *Powers of Attorney Act*[72], and s.4.1(1) and 4.2(2) of the *Wills Act*[73], among other amendments.[74] These amendments were influenced by research conducted by the Manitoba Law Reform Commission, who issued a final report regarding *Electronic Witnessing of Affidavit Evidence* shortly before stringent public safety measures were being put in place by the provincial government.[75] Although the report's research was conducted before the COVID-19 pandemic began in Canada, the decision to make use of its recommendations to amend the law to meet the contemporary needs of Manitobans provides an illustrative example of the value that forward-looking legal research holds in allowing legislators to quickly respond to pressing socio-legal challenges. As part of its investigation, the Commission considered existing processes for affirming evidence or declarations under oath, as defined under *The Manitoba Evidence Act (MEA)*, which mandated a physical meeting between participants to be adequately validated.[76] Considering the availability, and possible utility, of allowing such executions to be completed using digital technology, the report offered several recommendations to authorize remote execution of oaths and affirmations using digital means. With the onset of the pandemic, legislators ratified the Commission's recommendations into law; on a temporary basis at first, which were subsequently made permanent when Bill 42 received Royal Assent.

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71 *The Manitoba Evidence Act*, CCSM c E150, ss 64(1), 64(4).

72 *The Powers of Attorney Act*, CCSM c P97, ss 10.1(1), 10.1(2).

73 *The Wills Act*, CCSM c W150, ss 4.1(1), 4.2(2).

74 *The Remote Witnessing and Commissioning Act* (Various Acts Amended), SM 2020, c 25.

75 Cameron Harvey, QC, *Electronic Witnessing of Affidavit Evidence: Final Report* (Winnipeg: Manitoba Law Reform Commission, August 2020), online (pdf): *MLRF Publications* <www.manitobalawreform.ca/pubs/pdf/140-full_report.pdf> [perma.cc/78BV-3P83].

76 *The Manitoba Evidence Act*, CCSM c E150, s 64.

The report highlighted the historical barriers that the *MEA* created for individuals living in remote, northern, and Indigenous communities to underscore the opportunity for meaningful reform that arose with the onset of the pandemic. They concluded that s. 64(1) limited access to commissioning services for individuals residing in remote parts of Manitoba because of its physical presence requirements, as these individuals do not have stable access to commissioners who can take affidavit evidence. Considering the availability and relative accessibility of modern tools that can address these historical access-to-justice issues, the report recommended legislative amendments that would permanently authorize the use of digital options for executions of oaths, affidavits and other affirmations or declarations under the *MEA*.[77]

Consultations with legal professionals and research into the realities of accessing legal services in Manitoba's remote communities revealed that residents are often unable to have an oath, affirmation or statutory declaration administered, or affidavit taken remotely because of s. 64(1)'s compulsory physical meeting requirements. While in-person commissioning requirements were retained because of its value towards validating the authenticity of individuals completing such processes, the pandemic forced decision-makers to permit remote executions to prevent disease transmission. The Commission's final report proposed four recommendations to these ends that could permanently improve access to legal services in Manitoba, which were taken forward by legislators under Bill 42. The most important of these recommendations was to amend s. 64(1) of the *MEA* to permanently remove the physical presence requirement. Bill 42 ratified this change into law on December 3, 2020.[78] The Bill included amendments to *The Health Care Directives Act*, *The Homesteads Act*, *The Powers of Attorney Act*, *The Real Property Act*, and *The Wills Act* to authorize the use of technology for remote witnessing and commissioning in each of their respective contexts.[79]

Lawmakers also passed several other legislative amendments to improve access to justice for Manitobans during the pandemic, such as broadening

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77 Harvey, *supra*, note 75 at vi – vii.

78 Bill 42, *The Remote Witnessing and Commissioning Act*, 3rd Sess, 42nd Leg, Manitoba, 2020 (assented to 3 December 2020).

79 *The Health Care Directives* Act, SM 1992, c 33; *The Homesteads Act*, SM 1992, c 46; *The Powers of Attorney Act*, *supra* note 72; *The Real Property Act*, RSM 1988, c R30; *The Wills Act*, *supra* note 73.

eligibility requirements for justices of the peace and the statutory limits regarding the training and collaboration of judges in Manitoba's courts, expanding the range of service providers who can provide legal services beyond lawyers, and allowing administrative tribunals to decide questions of constitutional significance. Cognizant of the pressing need to allow justice system executives to undertake collaborative efforts with their counter-parts across the country, as well as to increase the number of available decision-makers to ensure that the adjudication of matters could continue while public safety measures were put in place, the Government of Manitoba proposed and ratified Bill 46, *The Court Practice and Administration Act*.[80] While the Office of the Commissioner of Federal Judicial Affairs was establishing the Action Committee on Court Operations in Response to COVID-19, chief judges were invited to participate, but the costs of doing so fell to the province under the existing legal framework, even though the federal government was willing to assume the costs of participation in order to encourage participation from every Canadian justice system. With these cost saving considerations in mind, Bill 46 amended *The Court of Appeal Act*[81] and *The Court of Queen's Bench Act*[82] to allow judges to attend conferences dealing with the administration of justice, with a primary interest in allowing the federal government to assume the costs of attendees. In line with this logic, amendments were also made to *The Court Services Fees Act* to clarify that some services related to court proceedings are not provided by government, but would be assumed by the relevant party.[83] In addition to changes that allowed the federal government to pay for the costs associated with the participation of Manitoba judges in the work of the Action Committee, amendments were made to *The Provincial Court Act* and *The Jury Act* to expand the availability of decision-makers in trial processes of first instance. Amendments were made to *The Provincial Court Act* to clarify the eligibility requirements for justices of the peace, primarily to eliminate existing limits on the number of retired judges who could perform judicial functions in the provincial court.[84] In addition

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80 Bill 46, *The Court Practice and Administration Act (Various Acts Amended)*, 1st Sess, 42nd Leg, Manitoba, 2021 (assented to 20 May 2021).

81 *The Court of Appeal Act*, RSM 1987, c C240, ss 12.2, 25.1, 25.2, 33(a.1).

82 *The Court of Queen's Bench Act*, SM 1988-89, c 4, ss 10.1, 89.

83 *The Court Services Fees Act*, RSM 1987, c L80, ss 1, 2, 3, 4, 7, 10.

84 *The Provincial Court Act*, RSM 1987, c C275, ss 6.5(4), 41, 42.2(4), 75(b.1).

to bolstering the number of justices of the peace that were available to hear matters in provincial court, Bill 46 amended *The Jury Act* in order to eliminate barriers to jurors who had been convicted for summary conviction offences from participating as a trier of fact in jury trials.[85] Changes made to *The Jury Act* permit a person convicted of a criminal offence to serve as a juror, unless they had been convicted of an indictable offence. Amendments under Bill 46 also sought to address long-standing issues regarding juror compensation, which was woefully inadequate when compared to other Canadian jurisdictions.[86] The Bill amended sections 42 and 53 of *The Jury Act* to eliminate previous limits on juror payments and to allow the Lieutenant-Governor-In-Council (LGIC) to set compensation rates under regulations.[87]

To allow Manitobans to meet more routine legal needs without requiring the assistance of a formal lawyer, lawmakers ratified Bill 24, the *Legal Profession Amendment Act*.[88] Although the *Legal Profession Act*[89] already allows specified non-lawyers to perform legal functions that are defined in the Act, Bill 24 allows the Law Society to make rules that permit such persons to provide additional legal services that are defined in Society rules, as well as to define conditions and restrictions regarding individuals who can be authorized to provide these supplementary services.[90] To operationalize these new powers, the Bill allows the Law Society of Manitoba to issue limited practice certificates, which authorize non-lawyers to engage in limited legal practices, subject to conditions and restrictions that are defined by the LGIC in regulations.[91] To receive such a practice certificate, the applicant must meet certain educational and training requirements, which are regulated by the Law Society of Manitoba directly. The amendments put in place under Bill 24 were a result of a consultation that was conducted by the Law Society of Manitoba that began in 2018.[92]

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85 *The Jury Act*, RSM 1987, c J30, ss 2, 3, 3.1, 26, 34, 42, 53.

86 Badre Law, "Juror Pay – Not Enough!" (4 August 2020), online: *Badre Law Employment Law* <badrelaw.com/juror-pay-not-enough/> [perma.cc/3A63-ND94].

87 *The Jury Act*, RSM 1987, c J30, ss 42, 53.

88 Bill 24, *The Legal Professional Amendment Act*, 3rd Sess, 42nd Leg, Manitoba, 2021 (assented to 12 May 2021).

89 *The Legal Profession Act*, SM 2002, c 44, ss 20 – 25, 26 – 29.

90 *Ibid*, ss 25.1 – 25.5.

91 *Ibid*, ss 25.4, 25.5, 25.2.

92 The Law Society of Manitoba, "Consultation Document: Alternative Legal Service Providers" (31 January 2021), online (pdf): *Law Society of Manitoba*

The *Alternative Legal Services Providers Consultation Document* describes the outcomes of this consultation, which was engaged to meet the organization's Strategic Plan Objective regarding their leadership in terms of advancing, promoting, and facilitating the increase of access to justice. The document explains the interest of Law Society Benchers in allowing non-lawyers to deliver prescribed legal services in family law, so long as such authorized individuals acted under the supervision of a person with a limited licence or a formal lawyer. After the consultation came to a close and the results were reported to the profession and to government officials, the Law Society posted a notice that highlighted the intentions of the consultation, as well as the government's favourable response to their recommendations; which culminated with the introduction of Bill 24.[93] The Bill was introduced on October 14, 2021 and received Royal Assent on May 12, 2021, meaning that the Law Society of Manitoba is now authorized by law to designate non-lawyer service providers to perform routine legal tasks.[94] Although unmentioned in Bill 24, it appears that the Law Society is most interested in authorizing such service providers to assist with the delivery of legal services related to the area of family law.[95] The amendments made under Bill 24 align with a national movement to permit paralegals and other non-lawyers to deliver legal services in the spirit of access to justice.[96]

Because of the sweeping nature of public safety guidelines and their implications for workers in a variety of sectors, as well as their potential to conflict with the constitutional limits of governmental powers, legislators in Manitoba also introduced legislation to authorize administrative tribunals

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<lawsociety.mb.ca/wp-content/uploads/2020/12/Consultation-Paper-Alternate-Legal-Service-Providers.pdf>.

93 The Law Society of Manitoba, "Alternative Legal Services Providers: Exploring Options for Persons who are not Lawyers to Provide a Limited Scope of Services – Background Information" (1 November 2020), online: *LSM Initiatives* <lawsociety.mb.ca/about/lsm-initiatives/alternative-legal-services-providers/>.

94 Legislative Assembly of Manitoba, "Status of Bills: Third Session, Forty-Second Legislature, 2020-21" (7 October 2020 to 14 October 2021), online (pdf): *Legislative Assembly of Manitoba* <web2.gov.mb.ca/bills/42-3/billstatus.en.pdf>.

95 Bill 24, *supra* note 88.

96 Ontario Bar Association, "Non-Lawyer Legal Services: An International Round-Up" (16 June 2017), online: *Just. For People With a Calling* www.oba.org/JUST/Archives_List/2017/June-2017/Non-lawyer-global-3 [perma.cc/KM2K-E5PY].

to decide questions of constitutional law.[97] The *Administrative Tribunal Jurisdiction Act* permits the LGIC to issue regulations that would grant jurisdiction to any administrative tribunal to make determinations regarding a question of constitutional law.[98] If an individual proceeds to raise a question of constitutional significance with an administrative tribunal with such authorization, they must give notice to the Attorney General of Canada, the Attorney General of Manitoba, all other parties to the proceeding, and the administrative tribunal that conducts the hearing; any notified party is permitted to make submission regarding the case.[99] While the motivations for Bill 27 did not explicitly mention the pandemic, David Said explains that similar actions are being taken across the country to permit regulatory agencies to determine the application, and exemption from, vaccination laws and mandates.[100] Writing about the new role that regulatory bodies like the Ontario College of Physicians and Nurses, and the College of Nurses of Ontario have in terms of regulating immunization expectations and their exemptions, he notes that such organizations are taking a much greater role in rendering decisions that hold constitutional significance. In the context of Manitoba, it is likely that Bill 27 is intended to allow regulators like the College of Registered Nurses of Manitoba, the Workers' Compensation Board of Manitoba, or other administrative agencies that issue decisions related to workplace matters to consider constitutional issues like vaccination requirements. Public organizations have already taken to challenging public safety measures in court, on the basis that the orders infringe on the rights enshrined under sections 2(a), 2(b), 2(c), 7, and 15 of the *Charter*.[101]

These Bills provide an illustrative example of the measures that are being taken by the Government of Manitoba to improve access to justice during the pandemic; they authorize a series of processes that can allow legal

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97 Bill 27, *The Administrative Tribunal Jurisdiction Act*, 3rd Sess, 4nd Leg, Manitoba, 2021 (assented to 20 May 2021).

98 *The Administrative Tribunal Jurisdiction Act*, SM 2021, c 28, s 2.

99 *Ibid*, ss 3, 4

100 David Said, "How regulatory agencies, not the courts, are imposing COVID-19 vaccine mandates" (24 October 2021), online: *The Conversation* <theconversation.com/how-regulatory-agencies-not-the-courts-are-imposing-covid-19-vaccine-mandates-169306> [perma.cc/5Q4G-ZVQJ].

101 *Gateway Bible Baptist Church et al v Manitoba et al*, 2021 MBQB 219 at paras 6-7, 361-362; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act,* 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ss 2(a), 2(b), 2(c), 7, 15.

processes to take place outside of court and lays the foundation for their application in formal judicial proceedings. Like the approval of various out-of-court measures by way of LGIC-issued regulation, the operationalization of measures to improve access to justice in processes that require formal adjudication must be declared in the Practice Directives and Notices of the Court of Queen's Bench, the Court of Appeal, and the Provincial Court. To meet these new expectations, leaders of the Provincial Court, Court of Queen's Bench and Court of Appeal unanimously issued new Practice Directions and Notices to update the procedural rules for participating in a hearing or other court process.[102] They published Notices that restricted physical court access to individuals whose presence was necessary for proceedings to occur. All who were permitted to attend court were required to meet standard pandemic safety protocols, such as wearing face masks, maintaining physical distancing and temperature screening.[103] To limit the number of people required to conduct a trial, jury trials were cancelled and rescheduled as a hearing by judge alone or delayed. Although the courts were closed to the public for a short period, processes were established to permit members of the public and the press media to virtually witness justice being done as a means of honouring the open court principle.[104] Aside from

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102 Chief Judge and Chief Justices of Manitoba, "COVID-19 – Manitoba Courts: Posted March 13, 2020", online: *Manitoba Court Notices* <www.manitobacourts.mb.ca/news/covid-19-manitoba-court-schedule-changes/> [perma.cc/Q49E-8L92]; Manitoba Court of Appeal, Manitoba Court of Queen's Bench & Manitoba Provincial Court, "Notice to the Profession & Notice to the Media – Re: COVID -19" (9 April 2020), online (pdf): *Manitoba Court Notices* <www.manitobacourts.mb.ca/site/assets/files/1966/notice_to_the_profession_and_media_-_covid-19_-_april_9_2020.pdf> [perma.cc/942E-4MLW].

103 Manitoba Court of Appeal, Manitoba Court of Queen's Bench & Manitoba Provincial Court, "Notice to the Profession: Re Use of Masks" (7 September 2020), online (pdf): *Manitoba Court Notices* <www.manitobacourts.mb.ca/site/assets/files/1966/notice_to_the_profession_-_use_of_masks_september_7_2020.pdf> [perma.cc/N3AL-MYZE]; Manitoba Court of Appeal, Manitoba Court of Queen's Bench & Manitoba Provincial Court, "Notice to the Profession" (28 September 2020), online (pdf): *Manitoba Court Notices* <www.manitobacourts.mb.ca/site/assets/files/1966/notice_to_profession_-_september_28_2020.pdf> [perma.cc/SY86-8UQN].

104 Manitoba Court of Appeal, Manitoba Court of Queen's Bench & Manitoba Provincial Court, "Re Response from the Courts Relating to Recent Changes to Public Health Orders" (6 August 2021), online (pdf): *Manitoba Court Notices* <www.manitobacourts.mb.ca/site/assets/files/1966/notice_-

general guidelines, each level of court published their own Practice Directives to ensure that every court process would be compliant with the guidelines issued by the Manitoba CPPHO.[105] A common theme among these publications is an acknowledgement that access to justice has been diminished during the pandemic, and the solution to those issues is the authorization of audio/video-conferencing technology for mandatory trial processes or the use of administrative or alternative dispute resolution measures for less-pressing matters.

Although lawmakers and decision-makers within the justice system have implemented a series of processes to allow administrative and other less-serious and less-formal legal matters to proceed using audio-video conferencing technology, measures have not been put in place to allow serious formal proceedings to take place, like violent criminal offences.

## VI. PART A – CONCLUSION

In Part A, we have thoroughly examined background motivations for and issues pertaining to the open court principle along with access-to-justice initiatives, informed by the work of leading scholars and jurists. We have also provided significant overview information about the COVID-19 response measures adopted in Manitoba. In Part B, we examine the pandemic response regarding serious criminal matters, specifically focusing on murder trials scheduled to take place during the midst of the pandemic. We proceed to detail the impact of the Manitoba courts' pandemic measures on the open court principle, access to justice, and *Charter* rights. We then provide four recommendations for addressing the concerns we identify in Part B, informed by the foundation we have outlined in Part A.

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