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Ethics, Justice, and the Impact of COVID-19 on the Courts in Canada

Bruce Preston*

Abstract: Canadian courts have struggled with delay for decades. The advent of the COVID-19 pandemic added to an already difficult situation. Courts were required to take swift action, which they did. Despite this, they have faced criticism concerning the approach taken. I will argue that this criticism is not warranted and has more to do with the perceptions of the courts' past performance than it has to do with their response to the pandemic. Regardless, the systemic delay in Canadian courts has become an issue of ethics which overshadows any success they have had in the current pandemic.

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Key Words: caseload management, courts in Canada, COVID-19, diligence, ethics, judicial conduct, justice

Introduction

Canadian courts have been facing challenges with backlog and delay for almost three decades. One need only look at the plethora of decisions intended to address delay in the criminal justice system, rendered by the Supreme Court of Canada since 1990.¹ Notably, the decision of the Supreme Court of Canada in *R v Jordan* addresses Barrett Jordan's right "to be tried within a reasonable time"² under section 11(b) of the *Canadian Charter of Rights and Freedoms* and sets specific timelines for the criminal trials in Canada. Yet the problem continues. In fact, as will be seen, the courts' inability to remedy the situation has created an ethical dilemma for the courts. Then, unexpectedly, the COVID-19 pandemic hit. Over the last eighteen months, the pandemic has had a profound impact on all aspects of society; the courts are no exception. Professor Palma Paciocco suggests that the Courts have experienced a discrete

¹ The most noteworthy decisions are, *R v Askov*, [1990] 2 SCR 1199, accessed July 11, 2021, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/670/index.do>. *R v Morin*, [1992] 1 SCR 771, accessed July 11, 2021, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/857/index.do>. *R v Cody*, 2017 SCC 31, accessed July 11, 2021, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16693/index.do>. *R v Jordan*, 2016 SCC 27, accessed July 11, 2021, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16057/index.do>.

² *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, section 11(b).

- I would like to thank Ian Greene and Richard Haigh for their insightful comments on early drafts.

systemwide event³ which affects all cases flowing through the system. In “The Court System in a Time of Crisis: COVID-19 and Issues in Court Administration,”⁴ Richard Haigh and I examined the impact of COVID-19 and found that the pandemic exacerbated an already stressed system. Further, as will be seen, many in the media and the public have been critical of our Courts’ COVID-19 performance. However, that is not necessarily justified. As we indicated, the rapid response of the courts “to close, adjust, and reset... should be commended.”⁵ In order to understand this contradiction between the courts’ actions and the public’s perceptions, one must examine the courts’ performance in the pre-COVID environment.⁶

Pre-COVID Environment

The Final Report of the Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice*,⁷ states that delays in criminal proceedings have become a significant problem. It takes too long for many criminal cases to reach final disposition. The report goes on to suggest that lengthy trials and multiple adjournments are particularly hard on victims, their families, and the accused, as the time between the laying of charges and the end of the trial stretches out month after month. Further, in “Crisis”, we found that, since the *Jordan* decision, the processing of criminal cases in Canada has become less efficient.⁸ On the other

³ Palma Paciocco, "Trial Delay Caused by Discrete Systemwide Events: The Post-Jordan Era Meets the Age of COVID-19," *Osgoode Hall Law Journal* 57.3 (2021): 835, <https://digitalcommons.osgoode.yorku.ca/ohlj/vol57/iss3/10/>.

⁴ Richard Haigh and Bruce Preston, "The Court System in a Time of Crisis: COVID-19 and Issues in Court Administration." *Osgoode Hall Law Journal* 57.3 (2021): 869-904; hereafter "Crisis". <https://digitalcommons.osgoode.yorku.ca/ohlj/vol57/iss3/11/>.

⁵ Haigh and Preston, 901.

⁶ There are many indicators of ethical performance by individual judges (bias, sexism, racism to name but a few), however; that is a topic for another paper. For the purposes of this article, performance relates to the effectiveness and efficiency of courts as institutions.

⁷ Senate Standing Committee on Legal and Constitutional Affairs. *Delaying Justice is Denying Justice*. Ottawa: Senate, Canada, 2017/ The Honourable Bob Runciman, chair; The Honourable George Baker, deputy chair.: Senate, Canada, 2017, accessed July 11, 2021, https://publications.gc.ca/collections/collection_2017/sen/yc24-0/YC24-0-421-19-eng.pdf.

⁸ Haigh and Preston, 881.

hand, this does not appear to have resulted in a dramatic increase of cases being stayed. Also, in 2018, the CBC reported that Canada's courts were struggling with massive delays in civil cases and suggested that that this was partially due to the Supreme Court decision in *Jordan* which determined hard limits on prosecutorial and institutional delay in criminal cases.⁹ Although the *Jordan* decision related to criminal cases, its consequences also had an impact on the civil caseload of many courts.¹⁰

The delay in civil justice has not attracted the same level of attention as the criminal justice system; however, there has been some acknowledgment of the problem. As it is difficult to locate detailed statistics relating to delay and backlog in civil matters,¹¹ these impressions are based on anecdotal impressions.¹² Also, while it is difficult to determine without detailed statistical analysis, in a report of the American College of Trial Lawyers, it was suggested that the civil backlog in Canadian courts may be attributed to a lack of judicial case management by the courts.¹³

⁹ "Civil cases facing delays in Canada's Courts," CBC, 28 March 2018, accessed July 11, 2021, <https://www.cbc.ca/player/play/1197472835525>.

¹⁰ Although further research is required, there appears to be increased pressure on civil cases due to the fact that an increased proportion of limited resources are focused on criminal matters as courts grapple with the requirements of the *Jordan* decision.

¹¹ Available statistics relating to civil matters in the Superior Court of Justice in Ontario consist of those listed in the Annual Report and are limited to new proceedings instituted.

¹² Allan Rouben, "Extreme Delays in civil trials an urgent matter" in Speakers Corner, *Law Times*, September 23, 2013: "Civil cases in Ontario run the gamut of disputes that affect the daily lives of Canadians. Whether it be a claimant injured in an accident, an employee let go from work or a commercial claim, the courts are there as an outlet to declare the rights of the parties and resolve the dispute. It is axiomatic that timely conclusion of the matter is of importance. Yet in many jurisdictions in Ontario, the parties must wait anywhere from two to three years to obtain a trial date. This is after all pretrial steps in the proceeding are complete and the parties have certified to the court that they are ready for trial." accessed July 11, 2021, <https://www.lawtimesnews.com/author/na/speakers-corner-extreme-delays-in-civil-trials-an-urgent-matter-10776/>.

¹³ American College of Trial Lawyers, *Working Smarter but not Harder in Canada: The Development of a United Approach to Case Management in Civil Litigation*, 2016, accessed July 11, 2021, https://www.actl.com/docs/default-source/default-document-library/newsroom/working_smarter_not_harder_canada_finalaa532c0c4a8867689490ff0000aa0c0c.pdf?sfvrsn=64654168_10.

In February 2008, the Chief Justice of Ontario, Warren Winkler, conducted an evaluation of civil case management in the Toronto Region of the Superior Court of Justice,¹⁴ and found that by mid-2003, it was widely accepted that it was in a state of crisis, due to problems which had arisen in the implementation and operation of former *Rule 77* of the *Ontario Rules of Civil Procedure*. The Winkler Report suggested that *Rule 77* (as it was then), created a system whereby civil cases were aggressively and intensively case managed. The downfall of this rule was that it did not institute a system of judge-led case management but was more accurately described as “rules-led” case management, based on a rigid structure of steps which caused adjournments. This was true, even though in 1981 Millar and Baar suggested that, “It would be naïve to formulate detailed prescriptive rules governing caseflow coordination for all situations.”¹⁵ In response to the crisis, a modified form of case management was introduced¹⁶ in the form of a three-year pilot project in Toronto. The approach to case management changed from “universal and intensive management of every case”¹⁷ to “case management where necessary, not necessarily case management.”¹⁸ The Report suggested that *Rule 77* be amended and that “the principal purpose of the reforms...was to introduce flexibility into the case management system by returning the control of the flow of the litigation to the parties.”¹⁹ Further, the Consolidated Practice Direction for Civil Actions, Applications, Motions and Procedural Matters in the Toronto Region, effective June 15, 2018, suggested that the “parties are required to assume the greater share of responsibility for managing their own actions” and

¹⁴ Chief Justice Warren K. Winkler, *Evaluation of Civil Case Management in the Toronto Region*, Toronto, February 2008, accessed July 11, 2021, <http://www.ontariocourts.ca/coa/en/ps/reports/rule78.pdf>.

¹⁵ Perry S. Millar and Carl Baar, *Judicial Administration in Canada*. Kingston and Montreal: McGill-Queen's University Press, 1981, 195.

¹⁶ Winkler, ii.

¹⁷ Winkler, ii.

¹⁸ Winkler, ii.

¹⁹ Winkler, 24.

that the Court will provide “light touch” case management on an “as needed/as requested” basis.²⁰ This amended rule, brought into being after the pilot project, instituted “party-led” case management, not judge-led caseflow management.²¹ It continues to this day. Given that Millar and Baar identified one of the main elements of caseflow management as judicial control of the flow of all cases from commencement to disposition,²² the case management system utilized in the Superior Court of Justice is not, strictly speaking, caseflow management. Thus, more than the “light touch” case management currently in place seems to be required.

Caseflow Management

In comparison to the light touch approach in place in Ontario, the central elements specifically constituting caseflow management are:

- Judicial control of the flow of all cases from commencement to disposition.
- Firm and credible trial dates which minimize scheduling conflict for lawyers.
- Standardized time expectations for case processing.
- Monitoring of the status of cases from filing to disposition.
- Accurate, timely and well-presented information (statistics) that is reported and used to achieve accountability.²³

In addition to these factors, David Steelman suggests the importance of ensuring differentiated case management. Under differentiated case management, there are three

²⁰ Superior Court of Justice, Ontario, “Consolidated Practice Direction for Civil Actions, Applications, Motions and Procedural Matters in the Toronto Region,” effective June 15, 2018, accessed July 11, 2021, <https://www.ontariocourts.ca/scj/practice/practice-directions/toronto/t/>.

²¹ Although this requires much more elaboration than my brief overview allows, suffice it to say that “party-led” case management is a return to the traditional adversarial practice of courts which remained unchanged for centuries and judge-led case management is a practice which has been gathering increased international acceptance (cf. *Working Smarter but not Harder in Canada* above),

²² Millar and Baar, 202.

²³ This is a synthesis of elements of caseflow management found in publications by David Steelman, Perry S. Millar and Carl Baar, and Geoff Gallas

categories of cases: 1) cases which proceed quickly with only a modest need for court oversight; 2) cases with contested issues which require conferences with the judge or court hearings, but otherwise do not present great difficulties, and 3) cases which require ongoing and extensive judicial involvement due to the size and complexity of the matter, the number of attorneys and other participants, or the difficulty or novelty of legal issues presented.²⁴ In all instances, however, caseflow management must be flexible, responsive, and judge-driven. The importance of this is illustrated in *Working Smarter but not Harder in Canada*, where it is suggested that the most effective civil case management tools used by judges in the United States include:

1. *Assess a case and its challenges at the outset.* Use active and continuing judicial involvement when warranted to keep the parties and the case on track.
2. *Convene an initial case management conference early in the life of the case.* Discuss with the parties anticipated problems and issues, as well as deadlines for major case events.
3. *Reduce and streamline motions practice to the extent appropriate and possible.* Rule quickly on motions.
4. *Create a culture of collegiality and professionalism* by being explicit and up front with lawyers about the court's expectations, and then holding the participants to them.
5. *Explore settlement with the parties at an early stage* and periodically throughout the pretrial process, where such conversations might benefit the parties and move the case toward resolution.²⁵

Although the processes for civil and criminal matters are vastly different,²⁶ the elements of caseflow management are equally applicable to both civil and criminal matters as they relate to the flow of cases generally and not the specific steps in a process. The common element is the

²⁴ David C. Steelman, *Improving Caseflow Management: A Brief Guide*. National Center for State Courts, 2008. Accessed on July 11, 2021, 19, accessed on July 11, 2021, <https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/1022/>.

²⁵ American College of Trial Lawyers, 9.

²⁶ Although not the focus of this paper, a review of the Criminal Proceedings Rules for the Superior Court of Justice (Ontario) and the Rules of Civil Procedure (Ontario) clearly confirms quite different approaches.

importance of judicial conduct in the control of the litigation process from institution to final disposition.

Judicial Conduct

What do I mean by “judicial conduct”? Justice T. David Marshall defines it as conduct (or misconduct) both on and off the bench.²⁷ Although there have been situations when judicial conduct off the bench has led to the removal of a judge,²⁸ for the purposes of this article, I am only interested in judicial conduct of judges while on the bench.

Reviewing the recommendations of the Canadian Judicial Council, as they relate to complaints about the conduct of judges on the bench, it is noted that, between 2000 and the present, there have been two situations where the Council produced recommendations for removal. First, the Council recommended the removal of Justice Camp, after determining that “the judge’s misconduct was manifestly serious and reflected a sustained pattern of beliefs of a particularly deplorable kind, regardless of whether he was conscious of it or not.”²⁹ Second, the Council recommended the removal of Justice Cosgrove, after his “failure in the due exercise of

²⁷ David T. Marshall, *Judicial Conduct and Accountability*, Toronto: Carswell Thomson Professional Publishing, 1995, 67.

²⁸ The Canadian Judicial Council did not recommend the removal of Justice Flynn, of the Superior Court of Quebec, after he made comments to a journalist relating to a political and legal issue which was likely to go before the Court of which he was a member.

https://cjc-ccm.ca/sites/default/files/documents/2019/conduct_inq_flynn_ReportIC_200303_en.pdf.

The Canadian Judicial Council agreed to adjourn the inquiry relating to Associate Chief Justice Douglas on condition that an “irrevocable letter electing retirement” be submitted to the Minister of Justice, after “extremely distasteful sexually explicit photos” appeared on the internet. https://cjc-ccm.ca/cmslib/general/Douglas_Docs/2014-11-24%20Ruling%20of%20the%20Inquiry%20FINAL.pdf.

At a second inquiry into the conduct of Justice Girouard, of the Superior Court of Quebec, the Canadian Judicial Council recommended his removal, after his testimony at the first inquiry was found to include “‘contradictions, discrepancies and improbabilities,’ raising ‘deep and serious concerns’ about his credibility and integrity.” <https://cjc-ccm.ca/sites/default/files/documents/2019/2018-02-20%20Girouard%20Report%20Minister.pdf>.

²⁹ Canadian Judicial Council, In the matter of Section 65 of the Judges Act, R.S., 1985, c.J-1, and of the Inquiry Committee convened by the Canadian Judicial Council to review the conduct of the Honourable Robin Camp of the Federal Court, presented March 8, 2017, accessed July 11, 2021, <https://cjc-ccm.ca/sites/default/files/documents/2019/2017-03-08%20Report%20to%20Minister.pdf>

his office by abusing his powers as a judge”, resulting in “a reasonable and irremediable apprehension of bias.”³⁰

Turning back to Marshall, he found three values which must be upheld for judicial conduct on the bench: “first, to refrain from any action or activity that might compromise a judge’s independence or impartiality; secondly, judges must always act with civility; thirdly and simply, judges must be diligent in the performance of their duties.”³¹ Of these, the latter value, diligence, is the most significant to this analysis.

It is interesting to note that neither of the Canadian Judicial Council decisions relating to judicial conduct on the bench resulted from a lack of diligence on the part of a judge. Nevertheless, in the same period there have been a Senate Report, multiple Supreme Court of Canada decisions, and the American College of Trial Lawyer publication, all of which address the issue of delay and backlog in the court of Canada.

Furthermore, just this year, the Canadian Judicial Council published a revised version of *Ethical Principles for Judges*.³² This is a revision of the *Principles* published in 2004.³³ The Council considers judicial ethics from five perspectives which are intended to guide judicial conduct: 1) judicial independence, 2) integrity and respect, 3) diligence and competence, 4) equality, and 5) impartiality.³⁴ Although judicial independence and integrity have been broad topics of discussion for many years, and equality and impartiality have become increasingly

³⁰ Canadian Judicial Council, In the matter of Section 65 of the Judges Act, R.S., 1985, c.J-1, and of the Inquiry Committee convened by the Canadian Judicial Council to review the conduct of the Honourable Paul Cosgrove of the Ontario Superior Court of Justice, presented March 30, 2009, accessed July 11, 2021 https://cjc-ccm.ca/sites/default/files/documents/2019/Report_to_Minister_Justice_Cosgrove.pdf

³¹ Marshall, 67.

³² Canadian Judicial Council, *Ethical Principles for Judges*, 2021, https://cjc-ccm.ca/sites/default/files/documents/2021/CJC_20-301_Ethical-Principles_Bilingual%20FINAL.pdf.

³³ Canadian Judicial Council, *Ethical Principles for Judges*, 2004, https://cjc-ccm.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf.

³⁴ Canadian Judicial Council, 2021, 4.

important in the last decade, diligence has largely been overlooked in the discussion of judicial conduct. Perhaps this is because diligence has been considered as “artless,”³⁵ requiring no further analysis. On the other hand, in the post-*Jordan* environment, when a difficult situation has been made increasingly problematic by a pandemic, perhaps it is time to give diligence its due consideration.

Diligence

In the Foreword to the 2004 version of *Ethical Principles for Judges*, Former Chief Justice of Canada, The Right Honourable Beverley McLachlin states: “The ability of Canada’s legal system to function effectively and to deliver the kind of justice that Canadians need and deserve depends in large part on the ethical standards of our judges.”³⁶ The Foreword continues by suggesting that the ethical principles outlined are intended to ensure that both judges and the public “are aware of the principles by which judges should be guided in their personal and professional lives.”³⁷ The Former Chief Justice suggests that judges “should” be guided by these principles. As The Right Honourable Richard Wagner, Chief Justice of Canada and Chairperson of the Canadian Judicial Council, states in the Foreword to the 2021 *Ethical Principles for Judges*, the principles are a framework “to which all judges aspire.”³⁸ Put another way, they are instructive, not prescriptive, principles. Understood as prescriptive principles, they may be considered as having an adverse impact on judicial independence and interpreted as fettering a judge’s discretion. On the other hand, one must not lose sight of the fact that the ethical standards of judges have a large part to play in the effectiveness of the legal system and the public’s confidence in its ability to administer justice.

³⁵ Marshall, 68

³⁶ Canadian Judicial Council, 2004, iii.

³⁷ Canadian Judicial Council, 2004, iii.

³⁸ Canadian Judicial Council, 2021, 2.

Chapter Four of the revised *Ethical Principles for Judges* sets out four principles to guide judges in their conduct:

- A. Judges devote themselves to their judicial duties, broadly defined, which include presiding in court and making decisions, as well as those duties essential to court operations and to the administration of justice. Judges do not engage in activities incompatible with the diligent discharge of judicial duties.
- B. Judges perform all judicial duties, including the delivery of reserved judgments, with punctuality and reasonable promptness, having due regard to the urgency of the matter and other special circumstances.
- C. Judges maintain and enhance their knowledge, skills, sensitivity to social context and the personal qualities necessary to perform their judicial duties.
- D. Judges strive to maintain their wellness to optimize the performance of judicial duties.³⁹

In the commentary relating to diligence, it is suggested that diligence is not solely concerned with being expedient but that “[d]iligence is concerned with the performance of judicial duties in a skillful, careful, attentive and timely way.”⁴⁰ The commentary continues by suggesting “[w]hile judges strive to be diligent in the performance of their judicial duties, their ability to do so may be affected by various factors, including illness, exceptionally heavy burdens of work, or the inadequacy of resources supporting their work.”⁴¹ The significance of these factors cannot be overstated. Unfortunately, as we suggested in “Crisis”, adequate resourcing, especially in technology, has been noticeably absent from the justice system for decades.⁴² On the other hand, diligence in the performance of judicial duties is the sole responsibility of judges. Put another way, the timely disposition of cases is a judicial responsibility, not the responsibility of lawyers, parties, or court administrators.

³⁹ Canadian Judicial Council, 2021, 27.

⁴⁰ Canadian Judicial Council, 2021, 28.

⁴¹ Canadian Judicial Council, 2021, 30.

⁴² Haigh and Preston, 898.

Courts have struggled with efficiency and effectiveness for decades. As we indicated in “Crisis”, the Statistics Canada Criminal Court Workload Indicators⁴³ suggest that, between 2008/09 and 2017/18, the number of criminal cases in Canada declined; however, the completion rate also declined, and the median case processing time increased from 102 days to 121 days. Furthermore, although the completion rate increased from 90.4 percent in 2015/16 to 94.4 percent in 2017/18 in the post-*Jordan* years, the median processing time also increased from 111 days in 2015/16 to 121 days in 2017/18 (See Table 1 in Appendix A).

This is borne out by examining specific courts. When the statistics for the Ontario Court of Justice⁴⁴ (notably, the most complete statistics available) are considered for the years 2016 and 2019, the average number of days to disposition, the average number of appearances to disposition, and the number of cases pending have all increased (see Table 2 in Appendix A). Furthermore, the clearance rate⁴⁵ in 2016 was 94.8% while in 2019 it was 91.6%, suggesting that productivity has declined. (see Table 3 in Appendix A). Although this may be explained by the increase in cases received between 2016 and 2019, it is not the entire story.

As may be seen in Table 2, the average number of appearances to disposition increased between 2016 and 2019 from 7.1 to 8.0. Although this increase does not appear to be substantial, when one considers that 220,548 cases were disposed of in 2019, an increase of 0.9 translates into approximately 200,000 additional appearances. Also, if steps were taken to further reduce

⁴³ Haigh and Preston, 880. Also, Statistics Canada, *Court workload indicators, adult criminal courts, by cases initiated, cases completed, completion rate and case processing time, Table 35-10-0124-02 (2020)*, online: <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510012402> [perma.cc/G895-BX24].

⁴⁴ Ontario Court of Justice, Criminal Statistics, <https://www.ontariocourts.ca/ocj/stats-crim/>.

⁴⁵ Bruce Preston, *Case Management Statistics Manual*, Bruce Preston International Justice Consultancy Inc., (unpublished). The Clearance rate is a measure of a court’s productivity. It is used to determine whether a court is keeping up with its incoming workload. The clearance rate is the number of outgoing (disposed) cases as a percentage of the cases awaiting disposition.

the number of appearances to 6.0, the overall number of appearances could be reduced by an additional 200,000.

An increase in appearances, resulting from a combination of an increase in number of cases received and a lack of resources, still do not tell the entire story. The increase in appearances also suggests that there is a “culture of complacency”,⁴⁶ leading to the adjournments which pervade the justice system. One argument is that these adjournments are a necessary aspect of the administration of justice. However, it may also be argued that not all adjournments are thoroughly justifiable. It is within the jurisdiction of judges to control the proceedings within their courtroom, including the granting of adjournments. Perhaps additional diligence is required to reduce the average number of adjournments, thereby reducing the number of appearances to disposition.

Although further research in all sectors of the justice system is required, from this brief analysis, it is apparent that diligence should be awarded the same level of importance as judicial independence, integrity, equality, and impartiality.

The result of this situation is that, prior to COVID-19, the courts were struggling with delay and backlogs in both criminal and civil proceedings. The evidence of this is clear. The various decisions of the Supreme Court of Canada and the Senate Report previously mentioned point to a systemic problem in criminal matters and the report of the American College of Trial Lawyers suggests a similar problem in civil matters. This leads one to wonder whether the decision by the Ontario Superior Court of Justice to revert back to party-led case management has been as effective as anticipated.

⁴⁶ Senate Standing Committee on Legal and Constitutional Affairs, 1.

Enter COVID-19

On March 15, 2020, the world effectively shut down. The same day, Chief Justice Morawetz of the Superior Court of Justice, Ontario, issued an order adjourning criminal proceedings until June 2, 2020.⁴⁷ He also issued a Notice to the Profession, the Public, and the Media Regarding Civil and Family Proceedings⁴⁸ stating that, effective March 17, all regular operations were suspended until further notice. Similarly, courts throughout Canada issued notices to the profession and/or practice directions within days of the shutdown.⁴⁹ Courts also provided frequent updates on the state of court operations. By way of an example, the archive of COVID-19 announcements by the Supreme Court of British Columbia contains forty-five statements issued between March and December 2020.⁵⁰

Through these notices and orders, Canadian courts exhibited a desire to be responsive to the exigencies brought about by the pandemic and an ability to pivot quickly to respond to changes as they emerged. The most significant changes resulting from the pandemic are the

⁴⁷Chief Justice Morawetz, Chief Justice Court Order – Adjourning Criminal Matters, March 15, 2020, <https://www.ontariocourts.ca/scj/by-order-of-chief-justice-morawetz/>.

⁴⁸Chief Justice Morawetz, Notice to the Profession, the Public and the Media Regarding Civil and Family Proceedings, March 15, 2020, accessed July 11, 2021, <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/notices-no-longer-in-effect/covid-19-suspension-fam/>.

⁴⁹ While not an exhaustive list, the following indicate the approach generally taken by the courts in Canada: Supreme Court of Canada, March 2020 - Filing of all documents by email, March 19, 2020, accessed July 11, 2021, <https://www.scc-csc.ca/ar-lr/notices-avis/20-03-eng.aspx>.

Federal Court of Appeal, *Update on Court operations in light of COVID-19*, March 16, 2020, accessed July 11, 2021, https://www.fca-caf.gc.ca/fca-caf/pdf/Notice_COVID_19_March_16_2020_EN.pdf.

Federal Court, *Practice Direction and Order*, March 17, 2020, accessed July 11, 2021, [https://www.fct-cf.gc.ca/content/assets/pdf/base/Covid-19%20Practice%20Direction%20and%20Order_FINAL%202020-03-17%20\(for%20release\).pdf](https://www.fct-cf.gc.ca/content/assets/pdf/base/Covid-19%20Practice%20Direction%20and%20Order_FINAL%202020-03-17%20(for%20release).pdf).

Tax Court of Canada, *Practice Direction and Order*, March 16, 2020, accessed July 11, 2021, https://www.tcc-cci.gc.ca/Content/assets/pdf/base/Practice%20Direction%20and%20Order_EN.pdf.

Manitoba Courts, COVID-19, March 13, 2020, accessed July 11, 2021, <http://www.manitobacourts.mb.ca/news/covid-19-manitoba-court-schedule-changes/>.

Court Of Appeal for Saskatchewan, *Notice to The Profession and The Public Concerning COVID-19*, March 20, 2020, accessed July 11, 2021, <https://sasklawcourts.ca/index.php/home/court-of-appeal/covid-19>.

⁵⁰ Supreme Court of British Columbia, March – December 2020 (COVID-19 Announcements), accessed July 11, 2021, https://www.bccourts.ca/supreme_court/archived_announcements/2020/Mar_Dec_20_COVID-19.aspx.

increased use of videoconferencing (Zoom) for hearings⁵¹ and an increase in the use of electronic filing for documents. For example, on August 5, 2020, the Superior Court of Justice, Ontario, announced that the Caseline Pilot Project was to commence on August 10, 2020, and that Justice Services Online was being expanded to include portals for both family and civil matters.⁵²

On the other hand, it should not be a surprise that the greatest challenge faced by the courts during the pandemic has been the need to operate while suspending in person hearings. In the Ontario Court of Justice, this has resulted in a dramatic decrease in the Court's ability to dispose of cases. In fact, the clearance rate in 2020 declined to 73.2 percent, from 91.6 percent in 2019 (see Table 3 in Appendix A). Given the presence of a global pandemic and extended stay-at-home orders, this is not unexpected. In fact, I would have feared that it could have been much worse. On the other hand, the average number of appearances to disposition had a slight increase to 8.1. This increase is somewhat surprising. Given the challenges surrounding holding hearings during a pandemic, I would have expected this number to be greatly reduced.

The lengths the courts have gone to hold hearings and remain as open as possible are clear from the Notice to the Profession and Public Regarding Court Proceedings issued by the Superior Court of Justice, Ontario, on June 18, 2021.⁵³ The opening paragraph of the Notice outlines the difficulty the courts face:

The Ontario Superior Court of Justice will increase the number of in-person non-jury hearings effective June 21, 2021. As indicated in the May 12, 2021, Notice, some locations may resume jury selection and jury trials commencing July, August, or

⁵¹ Haigh and Preston, 894.

⁵² Superior Court of Justice, Ontario, *Supplementary Notice to the Profession and Litigants in Civil and Family Matters – Including Electronic Filings and Document Sharing (Caselines Pilot)* (August 5, 2020), accessed July 11, 2021, <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/notices-no-longer-in-effect/supplementary-notice/>.

⁵³ Superior Court of Justice Ontario, *Notice to the Profession and Public Regarding Court Proceedings*, June 18, 2021, accessed July 11, 2021, <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/court-proceedings-notice/>.

September. The increase of in-person hearings as well as resumption of jury selection and jury trials will be subject to the discretion of the Regional Senior Justice and the public health situation provincially and regionally.

With the level of uncertainty surrounding the public health issues created by the pandemic, even after more than a year, the courts are not able to provide definitive directions and must consider the local and provincial public health situation, which continues to be in flux.

It is possible to conclude that the pandemic has done insurmountable damage to the ability of the courts to provide a disposition with reasonable promptness. This is a direct assault on the notion of judicial diligence. On the other hand, one must understand the exigencies of the pandemic and recognize that it is a discrete systemwide event⁵⁴ which will reach a natural conclusion. What we must recognize is that, despite these circumstances, the courts have, as we found in “Crisis”, exhibited a willingness to change which is “arguably greater than the sum of all changes made over the last forty years.”⁵⁵ In the webinar, “Virtual Advocacy--Best Practices for Navigating the Courts in the Post-COVID-19 Era”, The Honourable Robert Bauman, Chief Justice of British Columbia, suggested that the silver lining of COVID-19 is that it is giving the courts across Canada a common vision for moving forward with innovation.⁵⁶

Yet still there is the sense that more needs to be done. On July 4, 2021, the CBC reported that “COVID-19 has delayed criminal trials across Canada. Is the justice system doing enough to address the problem?”⁵⁷ The story relates to the case of Greg Fertuck, accused in the murder of his wife, Sheree, who disappeared on December 7, 2015, and has never been located. According

⁵⁴ Paciocco, 835.

⁵⁵ Haigh and Preston, 899.

⁵⁶ “Virtual Advocacy - Best Practices for Navigating the Courts in the Post-COVID-19 Era” (Webinar delivered by Canadian Lawyer, Canada, 21 May 2020), [unpublished] [“Virtual Advocacy Webinar”]. Note that a transcript of this webinar is not available; we are basing our discussion from notes made at the time.

⁵⁷ “COVID-19 has delayed criminal trials across Canada. Is the justice system doing enough to address the problem?”, CBC, July 4, 2021, accessed July 11, 2021, <https://www.cbc.ca/news/canada/saskatchewan/covid-19-delays-justice-system-jordan-rule-fertuck-canada-1.6087923>.

to Global News, on June 24, 2019, Greg Fertuck was arrested and “charged with first-degree murder and offering an indignity to a body in Sheree’s disappearance”.⁵⁸ Mr. Fertuck’s trial was scheduled to commence on March 29, 2021 but was adjourned “at the last minute because of public safety concerns stemming from spreading variant coronavirus cases.”⁵⁹ According to the Saskatoon Star Phoenix, the trial is currently scheduled to commence on September 7, 2021.⁶⁰

In the media stories mentioned above, the undertone is that the Saskatchewan Court of Queen’s Bench could have done more to move the matter along to trial. On the other hand, Mr. Fertuck’s trial is currently scheduled to commence on September 7, 2021, approximately 26.5 months after his arrest. This is well within the presumptive ceiling provisions in *R v. Jordan*, which suggests that “[f]or cases going to trial in the superior court, the presumptive ceiling is 30 months from the charge to the actual or anticipated end of trial.”⁶¹ Moreover, it must be remembered that defence delay and exceptional circumstances must be deducted from any calculation of the presumptive ceiling.⁶² Under these circumstances, it is highly likely that Mr. Fertuck’s trial will conclude within the presumptive ceiling set by *Jordan*, as some delay seems certain to be attributable to exceptional circumstances such a pandemic. As suggested by Paciocco, “[b]ecause the presumptive ceilings were not calibrated with COVID-19 in mind, they cannot account for COVID delay.”⁶³ This would suggest that, as is the case with a multitude of circumstances surrounding COVID-19, there is no clear indication as to whether Mr. Fertuck’s

⁵⁸ “Murder trial delayed for Greg Fertuck, accused of killing his estranged wife, Sheree”, Global News, March 26, 2021, accessed July 11, 2021, <https://globalnews.ca/news/7722482/murder-trial-delayed-greg-fertuck-sheree/>.

⁵⁹ “High-profile murder trial adjourned at last minute because of COVID-19 concerns in Sask.”, CBC, March 26, 2021, accessed July 11, 2021, <https://www.cbc.ca/news/canada/saskatoon/sheree-fertuck-greg-fertuck-murder-trial-1.5964210>.

⁶⁰ “Greg Fertuck murder trial, expected to begin Monday, adjourned over COVID-19 variant concerns”, Saskatoon Star Phoenix, March 26, 2021, accessed July 11, 2021 <https://thestarphoenix.com/news/crime/greg-fertuck-murder-trial-begins-with-admissibility-hearing-into-mr-big-sting>.

⁶¹ *Jordan*, para. 49-59.

⁶² *Jordan*, para. 60-81.

⁶³ Paciocco, 835.

trial will exceed the presumptive ceiling; however, as mentioned, there is no reason to assume it will not.

So why have the media and, one could argue, the general public been critical of the courts' response to COVID-19? Although this requires significantly more research, I would suggest that the public's reaction is not due to the courts' response to the crisis but 1) to the continued systemic delays and backlog in both the criminal and civil justice sectors prior to the pandemic and, quite possibly, 2) to the misconduct of judges as evidenced by the findings of the Canadian Judicial Council referenced above. In other words, even though the courts have been more responsive and diligent during the pandemic than in the past, the public's perception does not reflect this reality.

Conclusion

Canadian courts have struggled with the issues of backlog and delay for decades. It would appear from the statistics and literature that the situation has not improved since the Supreme Court of Canada rendered its decision in *Jordan* in July of 2016. It is time to start discussing these issues from the perspective of ethics and recognize the importance of judicial conduct and diligence in ensuring that there is a reasonably prompt conclusion to all proceedings. Put differently, with the publication of the revised version of *Ethical Principles for Judges*, it is time to return to first principles of moral conduct and commence a re-examination of all the principles that guide our judges, including diligence.

The issues related to judicial conduct are complex at the best of times. During a global pandemic, these issues, especially as they relate to diligence, get more complicated and more relevant. It may be argued that courts have responded to the pandemic in a manner which

recognises the need for immediate action while being nimble and able to pivot as the crisis unfolds. Despite this, there continues to be a perception that the courts are not doing enough.

Centuries ago, Leonardo da Vinci said: “All our knowledge has its origins in our perceptions.”⁶⁴ This quote remains relevant today as people’s perceptions take on the status of fact or knowledge. Although it is always possible that more could have been done by individual judges, this will only be evident after the pandemic is over, the crisis has subsided, and in-depth research can be undertaken. At present, the courts continue to act relatively quickly, addressing the pandemic as it continues to unfold.

What will ultimately be the test? What will ultimately determine the impact the pandemic had on the courts? Will it be increased delay and backlog? Will it be a return to pre-pandemic ways? Or will it be that the courts embrace the changes which the pandemic has forced upon them and emerge from it better equipped to deal with the delays and backlog which have plagued them for decades? Only time will tell.

⁶⁴ “Famous Leonardo da Vinci's Quotes”, *Leonardo da Vinci Paintings, Drawings, Quotes, Biography*, accessed July 11, 2021, <https://www.leonardodavinci.net/quotes.jsp>.

Appendix ATable 1

NATIONAL CRIMINAL COURT WORKLOAD INDICATORS, 2008–2018

Reference Period	Cases Initiated	Cases Completed	Completion Rate	Median Case Processing Time Days
	Number	Number	Percent	
2008 / 2009	385,839	376,027	97.5	102
2009 / 2010	407,668	383,493	94.1	97
2010 / 2011	391,031	383,579	98.1	99
2011 / 2012	378,156	355,608	94.0	99
2012 / 2013	375,446	344,896	91.9	99
2013 / 2014	350,261	334,934	95.6	106
2014 / 2015	335,364	308,628	92.0	107
2015 / 2016	358,494	324,072	90.4	111
2016 / 2017	366,796	338,847	92.4	120
2017 / 2018	358,529	335,986	93.7	121

SOURCE: Statistics Canada, *Court workload indicators, adult criminal courts, by cases initiated, cases completed, completion rate and case processing time*, Table 35-10-0124-02 (2020), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510012402&pickMembers%5B0%5D=1.1&pickMembers%5B1%5D=2.2&cubeTimeFrame.startYear=2008+%2F+2009&cubeTimeFrame.endYear=2017+%2F+2018&referencePeriods=20080101%2C20170101>.

Table 2OFFENCE BASED STATISTICS - ALL CRIMINAL CASES
ONTARIO COURT OF JUSTICE

PROVINCIAL OVERVIEW

Date	Cases Received	Cases Disposed	Avg Days to Disposition	Avg Appearances to Disposition	Cases Pending
2016	218,181	207,160	142	7.1	99,154
2019	240,736	220,548	150	8.0	120,999
2020	205,635	150,474	156	8.1	176,202

SOURCE: Ontario Court of Justice, *Criminal Statistics*, online: <https://www.ontariocourts.ca/ocj/stats-crim/>.

Table 3

CLEARANCE RATE STATISTICS - ALL CRIMINAL CASES
ONTARIO COURT OF JUSTICE

PROVINCIAL OVERVIEW

Date	Cases Received	Cases Disposed	Total Cases Pending	Clearance Rate
Jan - Dec 2016	218,181	207,160	99,154	94.90%
Jan - Dec 2019	240,736	220,548	120,999	91.65%
Jan - Dec 2020	205,635	150,474	176,202	73.20%

SOURCE: Ontario Court of Justice, *Criminal Statistics*, online: <https://www.ontariocourts.ca/ocj/stats-crim/>.

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