Part B
Drawing the Curtains in the House of Justice: Analyzing the Impact of Pandemic Measures within Manitoba Courts on the Open Court Principle, Access to Justice, and *Charter* Rights

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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"). These papers are intended to be read in conjunction. In Part B, the authors apply the observations and recommendations of the federal Action Committee on Court Operations in Response to the Pandemic, discussed in Part A, to the pandemic-response approach taken in Manitoba to evaluate whether the measures achieved the access movement's objectives. Particular attention is paid to outcomes for

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individuals charged with murder, who are guaranteed the right to a jury trial under the *Charter of Rights and Freedoms*. The authors examine the various Practice Directions and Notices that were issued by the leaders of the court system to identify the subtle disregard for the *Charter* rights of these individuals. Informed by various reports, the authors offer four recommendations to improve the state's response to the pandemic, including on a prospective basis.

Keywords: Open Court Principle; Publicity; Access to Justice; Pandemic Measures; Pandemic Response; Court Digitalization; Court Technology; Pandemic Court Operations; Virtual Court; Manitoba Courts; Justice System Oversight; Judicial Accountability; Judicial Independence; Marginalization

I. INTRODUCTION

In Part A (*Setting the Stage*),[1] we outlined the importance of the open court principle and access to justice considerations. We also briefly summarized legislative, regulatory, and practice changes meant to facilitate continued access to justice—specifically, for ordinary administrative functions, civil matters, and less-serious criminal matters—in the face of pandemic concerns. In Part B, we examine the pandemic impacts regarding serious criminal matters—with a particular focus on murder charges—before Manitoba courts.

In Part B, first, we will examine the measures taken in Manitoba trial courts. To illustrate the connection of these measures to broader trends in criminal justice reform, we will return to the positions taken by the Right Honourable Beverley McLachlin and Judith Resnick, discussed in detail in Part A, to project their long-term effects, as well as to guide our recommendations to justice system decision-makers regarding state action that can address the most pressing challenges in access to justice. To start, we now turn to the law regarding murder charges, as well as their status as a s. 469 offence, where accused persons have a right to be tried by a jury of their peers.

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[1] See page 171 in this Issue.

II. Measuring Policy Effects Towards Formal In-Court Process

As noted in Part A, legislative amendments were made and judicial Practice Directions and Notices were issued to allow routine proceedings to continue amid the COVID-19 pandemic, as well as less-serious matters, using digital-technology options while public safety guidelines remained active. When contemplating these measures in the context of socio-economic marginalization, it becomes apparent that such measures act to the benefit of those with greater knowledge of navigating the legal system, who are typically the more affluent in society. In contrast, formal court proceedings involving violent offences have yet to benefit from the measures being taken to broaden access to justice. In considering the movement's interest in expanding access for Canada's marginalized populations this disparity is concerning, primarily because such populations are disproportionately affected by violent offences, both as victims and as accused persons. Law enforcement practices disproportionately create criminal outcomes for people of colour and economically disadvantaged individuals in Canada, particularly in Manitoba. For example, Indigenous peoples in Manitoba are statistically more likely to be arrested, charged, detained in custody without bail, convicted and imprisoned.[2] In a similar

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[2] See *Report of the Aboriginal Justice Inquiry*, Chapter 4 - Aboriginal Over-Representation (Manitoba: AJIC, 2001), online: <www.ajic.mb.ca/volumel/chapter4.html> [perma.cc/VX47-QN9Z] [*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/7SMM-AFE9] [*Boyce*]; 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*].

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/T6WN-XQMG] 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/2VX2-V3X5] [CSC].

fashion, women, people of colour and the poor also suffer from higher rates of victimization in both property and violent crime.[3] Considering these realities along the access to justice movement's traditional objectives of improving the delivery of justice services for these communities, this section reviews the effect of pandemic response measures in murder proceedings for the accused, and for victims, as well as the processes that have been followed under the jurisprudence of Manitoba's courts. Our analysis focuses on the effects that recent policy changes have had towards the open court principle, as well as its impacts towards broader access to justice principles like publicity and judicial accountability.

Individuals charged with indictable offences (or hybrid offences, where the Crown elects to proceed by way of indictment) typically benefit from the right to elect their mode of trial under s.536(2) of the *Criminal Code*, but this election is not available for adults charged with murder because it is an exclusive jurisdiction offence under s. 469.[4] This means that such hearings presumptively proceed by way of a judge and jury trial in superior court.[5] In any case, an adult murder trial cannot proceed in provincial court.[6] While a trial by jury is presumed for murder charges, s. 473 permits an accused who is charged with a s. 469 offence to opt-out of a jury trial in favour of a trial by a superior court judge sitting alone, if consent is secured from the Crown along with the accused. If consent is secured from the Crown and the accused, subsection (2) removes the parties' ability to withdraw consent, meaning their decision is irrevocable, regardless of whether the accused has a change of heart.

Criminal justice processes like these were established to ensure procedural fairness is provided to individuals accused of serious charges, though upholding them has been a challenge during the pandemic. From the declaration of the Chief Provincial Public Health Officer (CPPHO)'s first COVID-19 Prevention Orders, public safety protocols limited access to any public process that required the gathering of individuals, including

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3 See 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/EDZ4-X4QB] at 1-8, 36-40.

4 *Criminal Code*, RSC 1985, c C-46, s 536(2).

5 *Criminal Code*, *supra* note 11, s 471

6 *Ibid*.

court processes like jury trials that make use of members of the community to try the facts of the case.

Although Manitoba's courts limited formal proceedings that carried such requirements during the pandemic, internal procedures were established to allow hearings which made use of technology to proceed, such as civil matters that focused on the executions of oaths, affirmations, declarations, and affidavits, as well as other routine functions of the legal system. General court functioning rapidly resumed because court executives authorized the use of remote technologies, in partnership with elected officials; and were able to quickly do so because many of the necessary technologies were already in place. To these ends, the Chief Judge of the Provincial Court, the Chief Justice of the Court of Queen's Bench, and the Chief Justice of the Court of Appeal unanimously issued new Practice Directions and Notices to update the procedural rules regarding participation in trials, hearings, or other court process.[7]

To maintain public safety, Practice Directions and Notices were issued that strictly limited physical access to the courts to those that are required to attend. Aside from general guidelines, each level of court also published their own Practice Directives to ensure that every court process would be compliant with the guidelines issued by the Manitoba CPPHO.[8] These Directives established expectations regarding the use of personal protective equipment and acceptable behaviours in order to be granted continuing access, such as wearing face masks and maintaining physical distancing.[9]

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7 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/P93F-QLB8]; 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/A7BE-SM2U].

8 Manitoba Court of Queen's Bench, "Court of Queen's Bench COVID-19 Notices and Practice Directions" (1 September 2021), online: *Manitoba Courts* <www.manitobacourts.mb.ca/covid-19/court-of-queen-s-bench-covid-19-info/>[perma.cc/LG84-8WTR]; Manitoba Court of Appeal, "Court of Appeal Court COVID-19 Notices and Practice Directions" (last modified 1 March 2022), online: *Manitoba Courts* <www.manitobacourts.mb.ca/covid-19/court-of-appeal-covid-19-information/> [perma.cc/XF7X-SFMX].]

9 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):

Although the courts were completely closed for a short period, the processes established allowed formal hearings to proceed and allowed members of the public and the press media to attend to honour the open court principle.[10] While these measures were sufficient in providing confidence that COVID-19 would not be transmitted through the courts, processes that carried a higher expectation of public participation remained on hold; jury trials were cancelled and proceedings would go forward by judge-alone only, at least until jury processes could adequately be executed using audio-video conference or the pandemic came to an end.

While access to justice has generally broadened during the pandemic by way of remote access and digital delivery, the measures taken by Manitoba's courts appear to be at odds with the statutory expectations of those accused with murder as a s. 469 offence.[11] As previously noted, murder charges are presumptively tried by judge and jury, but the accused can consent to proceed as a judge-alone hearing, with the combined consent of the Crown under s. 473.[12] Proceeding under s. 473 offers the accused the option to be heard by a judge alone, but activation of this process requires their prior informed consent as the choice to do so cannot be withdrawn once the decision to proceed is accepted. In other words, the consequences regarding the outcome of the decision must be accepted by the accused once they accept a hearing by a superior court judge alone.

Section 11(f) of the *Charter* guarantees any person charged with an offence the benefit of a trial by jury where the maximum punishment for

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Manitoba Court Notices <www.manitobacourts.mb.ca/site/assets/files/1966/notice_to_the_profession_-_use_of_masks_september_7_2020.pdf> [perma.cc/VQG4-8CH4]; 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/H6AR-KGEW].

10 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_-_response_of_the_courts_to_recent_changes_to_public_health_orders.pdf> [perma.cc/STF7-9JRJ].

11 *Criminal Code*, *supra* note 4.

12 *Criminal Code*, *supra* note 5.

the offence is imprisonment for five years or a more severe punishment.[13] In the context of Manitoba, the right to a trial before an impartial jury was most recently contested before Justice Bond in *R v Kon and Duke*.[14] This pre-pandemic trial involved a challenge to the federal repeal of s. 634 under 2019's Bill C-75, which eliminated peremptory challenges during the selection of jury members.[15] As part of Justice Bond's decision, it was confirmed that s. 11(f) of the *Charter* promotes fair and impartial trials, which acts to encourage public confidence in the administration of justice.[16] In a separate decision that followed *Kon and Duke*, the Supreme Court of Canada (SCC) considered the constitutionality of amendments to s. 634, as per Bill C-75. While confirming that the elimination of peremptory challenges is, in fact, constitutional, the *R v Chouhan* Court confirmed the value jury trials provided in encouraging public confidence in the sound administration of justice. [17] Although these decisions confirm the constitutionality of Parliament's decision to remove peremptory challenges to jury membership, they also confirm that the expectations set under s. 11(f) of the *Charter* provide valuable benefits to an accused, as well as to broader public expectations regarding confidence in the administration of justice in Canadian courts.[18]

Although individuals accused of murder are guaranteed the right to a jury trial under s. 11(f) of the *Charter* and its ensuing jurisprudence, the Practice Directions and Notices that were first issued by court executives may have persuaded accused individuals held in custody to consensually waive these rights under s. 473 because they would quite possibly be detained until they could be tried, as per s. 515(11).[19] This means that those accused of murder, along with other s. 469 offences, who had not obtained judicial interim release would have otherwise been detained in custody until

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13 *Canadian Charter of Rights and Freedoms*, s 11(f), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

14 *R v Kon and Duke*, 2019 MBQB 161 [*Kon and Duke*].

15 Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2019, c 25 (assented to 2019 June 21).

16 *Kon and Duke*, *supra* note 14 at paras 8-9.

17 *R v Chouhan*, 2021 SCC 26 at paras 44, 47, 85 [*Chouhan*].

18 *Chouhan*, *supra* note 17 at paras 85; *R v Kokopenace*, 2015 SCC 28 at paras 61, 70 [*Kokopenace*].

19 *Criminal Code*, *supra* note 4 , s 515.

their right to a jury trial could be met. Said differently, those accused of murder, who had not obtained judicial interim release, would have been forced to remain in custody until jury trials could be facilitated using digital (or other) means, until the end of the pandemic, or until they relinquish their right to a jury trial; overall, this significantly served to heighten the accused's risk of contracting COVID-19 and, by extension, their risk of death or serious injury as a consequence of the disease while in custody.[20] Such exposure would consequently be a result of state decisions.

In line with other institutional measures to prevent disease transmission, justice system executives cautiously implemented measures that allow hearings to proceed while also minimizing the physical presence of individuals in attendance using audio-video technology, but such measures were not been extended to jury trials. Updates to court policies regarding admission and participation have focused on digitalizing routine civil matters and criminal proceedings of a less-serious nature, while suspending other hearings that are viewed as "unessential." Ultimately, the approach taken by the Manitoba Court of Queen's Bench (MBQB) and other levels of court claimed to prioritize the movement of lesser charges through court while remote systems or other alternatives were implemented to meet the constitutional expectations of individuals accused with serious charges like murder, as stipulated under s. 11(f).

The first Practice Directions that were issued by Manitoba's courts informed all stakeholders that in-custody hearings would be considered based on counsel's submissions to determine if the proceeding would be heard or if the accused would be released. While less urgent cases were adjourned in the beginning and subsequently scheduled using remote-access procedures, more serious cases that required adjudication by a jury were cancelled until they could be organized through digital means.[21] To

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20 See Terry Skolnik, "Criminal Law During (and After) COVID-19" (2020) 43:4 Man LJ 145 at 162-170; Richard Warnica, "The Hidden Pandemic: Social Distancing is Nearly Impossible in Care Homes, Prisons and Shelters" (25 April 2020), online: *National Post* <nationalpost.com/news/canada/the-hidden-pandemic-social-distancing-is-nearly-impossible-in-carehomes-prisons-and-shelters> [perma.cc/PHY5-755Z]; John Ivison, "John Ivison: Prisoners are Sitting Ducks as Ottawa Lets COVID-19 Sweep through Canadian Jails" (21 April 2020), online: *National Post* <nationalpost.com/opinion/john-ivison-prisoners-are-sitting-ducks-as-ottawa-lets-covid-sweep-through-canadian-jails > [perma.cc/BK4F-T22F].

21 See Manitoba Court of Queen's Bench, " Notice Re: COVID-19 Suspension and Restriction of Hearings" (2 April 2020), online (pdf): *Court of Queen's Bench COVID-19*

ensure that members of the public were informed about the new process, all levels of court issued a unanimous Media Notice on May 4, 2020. Although the Notice declared that hearings would generally proceed using digital media, it also informed justice system stakeholders that all judge and jury trials that were scheduled prior to June 30, 2020, would instead proceed by way of judge-alone trial; if the accused disputed this approach, their hearing would be rescheduled when jury trials could safely be conducted, either with the end of the pandemic or the availability of new technological resources to achieve these ends.[22] Leading up to the publication of the May 4, 2020, Notice, the courts took a lenient approach to releasing non-violent offenders when counsel presents a reasonable argument or bail plan, but those charged with violent crimes in Manitoba often remained in custody until their matter could be adequately heard in the appropriate level of court.[23] Other jurisdictions, such as Ontario, chose to release many individuals on bail that were charged with violent crimes instead of increasing the number of detainees that are held in custody before trial during the pandemic, although such decisions have sometimes challenged public confidence in the administration of justice.[24]

Notices and Practice Directions <www.manitobacourts.mb.ca/site/assets/files/1966/notice_-_covid-19_suspension_and_restriction_of_hearings_2020_april_2.pdf> [perma.cc/CZ9D-3ECG]; Joe Scarpelli, "Coronavirus: Manitoba's courts preparing for backlog, experimenting with new technology" (31 March 2020), online: *Global News* <globalnews.ca/news/6756845/coronavirus-manitoba-courts-backlog-new-technology/> [perma.cc/56NR-E2D9?view-mode=server-side&type=image]; Manitoba Court of Queen's Bench, "Re: Notice of COVID-19 Suspension and Restriction of Hearings" (16 March 2020), online (pdf): *Court of Queen's Bench COVID-19 Notices and Practice Directions* <www.manitobacourts.mb.ca/site/assets/files/1964/notice_-_provincial_court_-_covid-19_march_16_2020.pdf > [perma.cc/4PU6-F927].

22 Manitoba Court of Appeal, Manitoba Court of Queen's Bench & Manitoba Provincial Court, "Media Notice Re: COVID-19" (4 May 2020), online (pdf): *Court of Queen's Bench COVID-19 Notices and Practice Directions* <www.manitobacourts.mb.ca/site/assets/files/1966/notice_to_profession_-_may_4_20.pdf> [perma.cc/925R-CMQW].

23 See Will Reimer, "Manitoba's correctional centres making adjustments to prevent spread of COVID-19" (9 April 2020), online: *Global News* <globalnews.ca/news/6802835/manitoba-correctional-centres-adjustments-covid-19/> [perma.cc/F9D7-9F7B].

24 See Stewart Bell, "Canada: Judges release growing number accused of violent crimes due to COVID-19fears" (8 April 2020), online: *Global News*

Since the summer of 2020, subsequent scheduling notices reversed previous cancellations and expressed intentions to mandate the use of audio-video conferencing for all hearings except where oral testimony, or *viva voce* evidence, was being submitted.[25] As the severity of public health protocols ebbed and flowed, the courts limited the hearings that could proceed to those involving accused held in custody, but allowed other scheduled trials to proceed.[26] For example, a practice direction was issued on January 14, 2021, to inform members of the legal profession that MBQB would resume in-person judge-alone criminal trials commencing on February 1, 2021.[27] Even when judge-alone hearings for in-custody accused

<www.globalnews.ca/news/6788223/coronavirus-prisons-inmates-released/> [perma.cc/5GTY-JBFJ?view-mode=server-side&type=image].

25 See Manitoba Court of Queen's Bench, "Notice Re: Scheduling Protocols" (1 October 2020), online (pdf): *Court of Queen's Bench COVID-19 Notices and Practice Directions* <www.manitobacourts.mb.ca/site/assets/files/1966/notice_-_scheduling_protocols_october_1_2020-1.pdf> [perma.cc/5N9Q-LWKP].

26 See Hon Chief Justice Glenn Joyal, "Notice Re: Adjustments to Current Scheduling Protocols – November 16 to December 11, 2020" (10 November 2020), online (pdf): *Court of Queen's Bench COVID-19 Notices and Practice Directions* <www.manitobacourts.mb.ca/site/assets/files/1966/notice_-_adjustments_to_current_scheduling_protocols_-_november_16_to_december_11_2020_2020_nov_10.pdf> [perma.cc/4JZ8-HNTY]; Hon Chief Justice Glenn Joyal, "Notice Re: Adjustments to Current Scheduling Protocols – December 14, 2020 to January 8, 2021" (3 December 2020), online (pdf): *Court of Queen's Bench COVID-19 Notices and Practice Directions* <hwww.manitobacourts.mb.ca/site/assets/files/1966/notice_-_adjustments_to_current_scheduling_protocols_-_december_14_2020_to_january_8_2021_2020_dec_3__docx.pdf> [perma.cc/5X4S-8DDZ].

27 See Hon Chief Justice Glenn Joyal, "Practice Direction Re: Adjustments to Current Scheduling Protocols –January 11 to 29, 2021, Video Conference Civil Trials and the Continuation of other Remote Services" (18 December 2020), online (pdf): *Court of Queen's Bench COVID-19 Notices and Practice Directions* <www.manitobacourts.mb.ca/site/assets/files/1966/practice_direction_-_adjustments_to_current_scheduling_protocols_-_january_11_-_29_2021_video_conference_civil_trials_and_the_continuation_of_other_remote_services.pdf> [perma.cc/RKE6-LSXL]; Hon Chief Justice Glenn Joyal, "Practice Direction Re: Resumption of Judge-Alone Out-of-Custody Criminal Trials" (14 January 2021), online (pdf): *Court of Queen's Bench COVID-19 Notices and Practice Directions* <www.manitobacourts.mb.ca/site/assets/files/1966/practice_direction_-_resumption_of_judge-alone_out-of-custody_criminal_trials_docx.pdf> [perma.cc/GU8Z-36BS].

individuals were able to proceed, jury trials continued to be postponed until public health restrictions were virtually eliminated in summer 2021.

When the decision to use audio-videoconference technology became mandatory as a matter of court policy, Chief Justice Glenn Joyal of the MBQB recognized the obstacles the pandemic created for the delivery of justice services, and, in response, issued a sweeping Practice Direction that mandated the use of audio-videoconferences for all criminal proceedings in his courts.[28] Chief Justice Joyal made use of the MBQB's inherent jurisdiction to regulate its proceedings to ensure the proper administration of justice to mandate the application of s. 715.23 to all criminal proceedings in the MBQB for the duration of the pandemic. He explained that s. 715.23 of the *Criminal Code* authorizes the court to order an accused to appear by audioconference or videoconference, if the court is of the opinion that it would be appropriate in the circumstances. Such orders must be made with full consideration of the location and personal circumstances of the accused, the costs that would be incurred if the accused were to appear personally, the suitability of the location from where the accused will appear, the accused's right to a fair trial and public hearing, and the nature and seriousness of the offence.[29] Because Chief Justice Joyal's Practice Direction made s. 715.23 the formal policy of the MBQB during the pandemic, presiding judges who failed to order an accused to participate in their hearing by audioconference or videoconference were required to provide reasons to the Office of the Chief Justice, as per s. 715.23(2).[30] To provide clarity in terms of instances where such reasons would be acceptable, Chief Justice Joyal prescribed the procedures, presumptions, and relevant factors that would be considered when an accused submitted a request to postpone their trial until they could be heard in person. In essence, judges were expected to apply the process outlined in the Practice Direction in a principled sense to determine how the "proper

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28 Hon Chief Justice Glenn Joyal, "Practice Direction – Re: Criminal Trials: Accused's Remote Appearance by Video Conference" (17 November 2020), online (pdf): *Court of Queen's Bench COVID-19 Notices and Practice Directions* <www.manitobacourts.mb.ca/site/assets/files/1966/practice_direction_-_criminal_trials_-_accused_s_remote_appearance_by_video_conference_2020_nov_17.pdf> [perma.cc/5TVD-9T6Q].

29 *Criminal Code*, *supra* note 4 , s 715.23(1).

30 *Ibid*, s 715.23(2).

administration of justice" can be addressed, while balancing the "colliding interests" or "rights in tension" that must also be respected between the accused, the Crown, and the administration of justice. For example, Chief Justice Joyal noted that concerns regarding delay in the delivery of justice highlighted in *R v Jordan* were important but must be balanced against the prejudicial implications of rescheduling the trial if the only reason for delay was the accused's refusal to participate in a video-conference.[31]

To justify his use of the court's inherent jurisdiction to implement s. 715.23 as a matter of institutional policy, Chief Justice Joyal reviewed the relevant jurisprudence regarding the inherent jurisdiction of superior courts. He explained that the justice system's fundamental objective is to deliver a fair trial to secure public confidence regarding the proper administration of justice. He cited Justice McLachlin, as she then was, who explained that a fair trial upholds the s. 7 *Charter* rights of the accused by ensuring that their guaranteed right to make full answer and defence is upheld. This does not require perfect justice, but rather a practical balancing of the limits of the justice system, the interests of other parties, and the rights of the accused.[32] Building from her conclusions regarding the scope of a fair trial, Chief Justice Joyal explained that superior courts retain powers of inherent jurisdiction to ensure that essential aspects of the administration of justice is upheld, including the court's ability to amendment its own processes to allow the system to function in a regular, orderly, and effective manner. While superior court executives benefit from the superior court's inherent jurisdictional powers in this regard, they remain limited by other statutory and constitutional considerations.[33] In the context of the pandemic, Chief Justice Joyal interpreted factors to mean that safeguarding the proper administration of justice requires action from the MBQB executive team to ensure that both access to and delivery of justice could continue using new methods that still achieve a fair and equitable

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31 Hon Chief Justice Glenn Joyal, "Practice Direction – Re: Criminal Trials: Accused's Remote Appearance by Video Conference" *supra* note 28; *R v Jordan*, 2016 SCC 27 [*Jordan*].

32 Hon Chief Justice Glenn Joyal, "Practice Direction – Re: Criminal Trials: Accused's Remote Appearance by Video Conference" *supra* note 28 ; *R v O'Connor*, [1995] 4 SCR 411 at para 193, 1995 CanLII 51.

33 Hon Chief Justice Glenn Joyal, "Practice Direction – Re: Criminal Trials: Accused's Remote Appearance by Video Conference" *supra* note 28; *R v Anderson*, 2014 SCC 41 at para 58; *R v Cunningham*, 2010 SCC 10 at para 18; *Endean v British Columbia*, 2016 SCC 42 at para 60.

trial result, with due consideration of the other competing interested that are involved in providing a fair trial.

With these consideration in mind, Chief Justice Joyal argued that the Court's processes must be revised to allow fairs trials to continue while the justice system is faced with the unprecedented challenges imposed by the pandemic.[34] He explained that adjournment and rescheduling was the only available avenue in the early stages of the pandemic for criminal trials, but that digital alternatives progressively allowed court processes like pre-trial conferences, resolution conferences, case management conferences, bails, bail reviews, motions, summary conviction appeals, and sentences to resume. Noting that the adjournment of criminal trials typically occurs in only the most exceptional cases, he proceeded to outline several new procedures and factors that would allow criminal trials to proceed, which would be applied in situations where an accused was unable to physically attend court during their trial, whether in whole or in part. These considerations were made to determine if their appearance using audio-videoconference would be appropriate, and therefore necessary, in their circumstances.

If an accused was not willing to attend their trial using digital means, this Practice Direction allows the Crown to submit an application to proceed by audio-videoconference under the authority of s.715.22 and 715.23 of the *Criminal Code*. The presiding judge would engage a principled consideration of the application, including prevailing pandemic conditions, the rights of the parties, and the greater objectives of achieving the proper administration of justice, such as providing a fair trial to the accused. Their consideration must involve a contextual approach to the factors that balance several "rights in tension," such as the accused's right to a trial within a reasonable time and their right to be present at their own hearing, as well as constitutional principles of judicial independence,[35] at least in terms of the Court's control over its operations, resources, and administration.

To underscore the merits of authorizing the court to mandate the hearing of criminal trials by audio-videoconference, despite the lack of consent from the accused, Chief Justice Joyal used the *Jordan* case to highlight that allowing adjournments on this basis holds prejudicial

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34 Hon Chief Justice Glenn Joyal, "Practice Direction – Re: Criminal Trials: Accused's Remote Appearance by Video Conference" *supra* note 28.

35 See *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at paras 40-43.

implications to the Court's ability to properly administer justice, as well as to the other parties involved in the case.[36] Chief Justice Joyal asserted that unnecessary delays arising from unjustified or unpersuasive opposition, such as resistance to being heard using audio-videoconference technology, unduly prejudices the justice system's ability to adequately maintain public confidence in the administration of justice. To further justify the mandatory implementation of audio-videoconference under s.715.23 under the auspices of Parliamentary intention, Chief Justice Joyal made reference to the codification of such powers into the *Criminal Code*, which, in his view, was undoubtedly made to empower judges to make use of audio-videoconference technology when they became necessary in properly administrating the delivery of justice.[37] On the basis of this reasoning, Chief Justice Joyal issued his Practice Direction on November 17th, 2020.[38]

Although Chief Justice Joyal implemented these changes under the aforementioned Practice Direction, Manitoba's Court of Appeal chose to implement the same changes by way of regulatory amendment to *The Court of Appeal Rules*.[39] The rules were amended on April 17, 2020, to add s. 37.2 to the *Rules*, which empowers the court or a judge to issue a direction that a hearing of appeal, motion, or application would be conducted, in whole or in part, remotely by audioconference or videoconference.[40] Subsequent subsections of s. 37.2 outline several terms and conditions that must be

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36 Hon Chief Justice Glenn Joyal, "Practice Direction – Re: Criminal Trials: Accused's Remote Appearance by Video Conference" *supra* note 28; *Jordan*, *supra* note 31.

37 *Criminal Code*, *supra* note 4, s 715.23.

38 Hon Chief Justice Glenn Joyal, "Notice Court of Queen's Bench of Manitoba Re: Adjustments to Current Scheduling Protocols – January 10 to March 4, 2022, for the Courts of Queen's Bench General and Family Divisions" (24 December 2021), online (pdf): *Court of Queen's Bench COVID-19 Notices and Practice Directions* <www.manitobacourts.mb.ca/site/assets/files/1994/qb_notice_-_adjustments_to_current_scheduling_protocols_-_jan_10_to_mar_4_2022_for_the_court_of_queen_s_bench_gd_and_fd_2021_dec_24.pdf> [perma.cc/2NZN-PK8A]; Hon Chief Judge Margaret Wiebe, "Notice Provincial Court of Manitoba Re: COVID-19 Suspension and Restriction of Hearings" (23 December 2021), online (pdf): *Provincial Court COVID-19 Notices and Practice Directions* <www.manitobacourts.mb.ca/site/assets/files/1993/notice_77_-_provincial_court_-_covid-19_-_suspension_and_restriction_of_hearings_december_23_2021_-_e.pdf> [perma.cc/62VH-JF7N].

39 Man Reg 32/2020, s 2; Man Reg 555/88 R, s 37.2 [*Court of Appeal Rules*]; *The Court of Appeal Act*, RSM 1987, c C240, ss 33–35, 38.

40 *Court of Appeal Rules*, *supra* note 39.

upheld when conducting matters remotely, such as prohibitions on private recordings of court proceedings, as well as new operational requirements like the court's power to retain a permanent recording of the hearing. The approach taken by Chief Justice Richard Chartier was arguably more expeditious and provides a greater degree of certainty for parties to an action, but making such amendments to the *Court of Appeal Rules* was only possible because s. 33 of the *Court of Appeal Act* does not contain the comparable limits to its equivalents under *The Court of Queen's Bench Act* and *The Provincial Court Act.* Section 33 of *The Court of Appeal Act* permits judges of the Court to unilaterally make rules regarding the practice and procedure of the court, including alteration of substantive law, such as: rules respecting the Court's proceedings, specific cases that receive leave to appeal, establishing tariff of costs for services, forms that are required for court proceedings, and authorizing the registrar to act towards any process that falls under the court's jurisdiction.[41] In contrast to the Court of Appeal's broad rule-making powers, s. 92 of *The Court of Queen's Bench Act* permits the rules committee to make rules regarding their practices and procedures, in consultation with the Minister of Justice, subject to 28 limiting subsections, most relevant of which are limits against changes to the mode and conduct of trials under subsection 92(s).[42] *The Provincial Court Act* does not authorize the Provincial Court to make rules regarding their practices and procedures, but rather leaves these decisions to the Lieutenant-Governor-In-Council (LGIC), or, in other words, the legislative cabinet.[43] Considering the differences between the rule-making powers of Manitoba's courts, it is clear that issuing unilateral rule changes as was done at the Court of Appeal was not an available option for the MBQB and the Provincial Court, which necessitated the use of Practice Directions and Notices and the extensive justification process that Chief Justice Joyal undertook above. In the view of the authors, these powers are not available to trial courts to hold judges accountable in making significant changes to trial operations, as stipulated in s.92 of *The Court of Queen's Bench Act* and s.26.9 of *The Provincial Court Act.* This Practice Direction could have the effect of masking an erosion of judicial accountability for the duration of the implementation of pandemic-related public safety measures.

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41 *The Court of Appeal Act*, *supra* note 39, ss 33, 35.

42 *The Court of Queen's Bench Act*, CCSM c C280, ss 92, 92(s), 92(2).

43 *The Provincial Court Act*, CCSM c C275, s 26.9.

The Practice Directions and Notices issued by the MBQB therefore established the operative framework for trial operations during the pandemic, including the processes involved with trials involving charges of murder and decisions by a jury. The applicable rules in this regard were carried forward from the start of the pandemic: the courts postponed the hearing of jury trials until adequate audio-videoconference technologies were available or public safety measures would allow such gatherings to take place. Digital alternatives to in-person jury trials have not been put in place, but some cases have proceeded when public safety guidelines were lifted. Of the 48 cases related to murder charges that were heard from the start of the pandemic, only two MBQB decisions indicated intentions to schedule proceedings before a jury[44] and no reported decisions from the Manitoba Court of Appeal referenced a jury trial having taken place during the pandemic in the MBQB. Although two jury trials were presumptively scheduled in the MBQB, eight decisions were rendered at that level of court regarding charges murder, all of which were heard by a judge sitting alone.[45] (As well, there were seven Court of Appeal decisions related to murder cases during this time.[46]) As part of our research into murder jury trials in Manitoba during the pandemic period, two jury trial decisions were reported in the media in the last quarter of 2021.[47]

In line with the Government of Manitoba's #RestartMB Pandemic Response System plans for summer 2021, the two MBQB decisions that referred to jury trials were issued at a time that public safety measures were

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44 See *R v B (HEJE)*, 2021 MBQB 223 at paras 1–3, 39 [*B (HEJE)*]; *R v Jensen*, 2021 MBQB 139 at paras 1–4, 92–93 [*Jensen*].

45 See *R v Ducharme*, 2020 MBQB 177; *R v Moar*, 2021 MBQB 9; *R v Belyk*, 2021 MBQB 12; *R v Assi*, 2021 MBQB 36; *R v Weldekidan*, 2021 MBQB 164; *R v Williams*, 2021 MBQB 205; *R v McKay*, 2021 MBQB; *R v King and Laquette*, 2021 MBQB 274.

46 See *R v Kionke*, 2020 MBCA 32; *R v Castel*, 2020 MBCA 41; *R v Miles*, 2020 MBCA 45; *R v Overby*, 2020 MBCA 121; *R v Telfer*, 2021 MBCA 38; *R v Schuff*, 2021 MBCA 54; R v Linklater, 2021 MBCA 65.

47 See Shane Magee, "Rodney Levi inquest jury deliberates on cause of death, possible recommendations" (7 October 2021), online: *CBC News* <www.cbc.ca/news/canada/new-brunswick/rodney-levi-inquest-jury-1.6202896> [perma.cc/PPQ8-X2WR]; Riley Laychuk, "Brandon man found guilty of murdering his wife before 2019 house explosion" (10 December 2021), online: *CBC News Manitoba* <www.cbc.ca/news/canada/manitoba/robert-hughes-trial-brandon-deliberations-friday-1.6280653> [perma.cc/T3S6-U4Y5]. Please note that it is possible additional jury trial proceeded during the pandemic but were not reported publicly.

being lifted for vaccinated individuals.[48] All signs indicated that public institutions would be able to hold indoor gatherings as they had before the pandemic, as long as all members were vaccinated, so Manitoba's courts prepared to resume proceedings involving trial by jury. The first case the authors discovered where a trial by jury was scheduled was *R v Jensen*.[49]

In that case, the accused was charged with first degree murder of his girlfriend's young child. The couple lived together in a rented house shared with another family with teenage children. On October 29, 2019, the two parent-couples went out together and the teenagers babysat the toddler. While the parents were out at the Northern Hotel, the accused and the toddler's mother argued throughout the night; he later assaulted the mother outside of the hotel until bystanders intervened. Local video surveillance captured the accused walking home, where he was let in by one of the teenagers. He told the babysitter that he wanted to check on the child, proceeded to do so, then promptly left the residence at a running pace. The teenagers later discovered that the child was bleeding and called 911. He was taken to the Children's Hospital, where he was put on life support; he died several days later from brain damage that resulted from severe blood loss caused by six stab wounds to his head and neck.[50] Justice Remple considered the issue of whether the video surveillance evidence of the accused's assault of the child's mother and his previous threats to take the child admissible at trial. The issue was answered in the affirmative, meaning the evidence was taken forward for consideration of the jury at a trial that was scheduled for September 2021.[51] Brittany Hobson from *The Canadian Press* reported that the accused, Daniel Jensen, was ultimately found guilty of first-degree murder.[52] Hobson reported on the details of the case, which

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48 Government of Manitoba, "News Release: Province Continues State of Emergency Extension" (25 June 2021), online: <news.gov.mb.ca/news/index.html?item=51495&posted=2021-06-25> [perma.cc/7DY8-4E3L]; Christian Monnin, Dany Théberge & Christine Jeroski, "MB Caution (Yellow): Province Announces New Public Health Measures" (29 October 2021), online: *MLT Aikins COVID-19* <www.mltaikins.com/covid-19/mb-health-regions-caution-yellow-level/> [perma.cc/4J5V-CUWH].

49 *Jensen*, *supra* note 44.

50 *Ibid* at paras 5-12.

51 *Ibid* at paras 1-4, 13, 92-93.

52 Brittany Hobson, "Jury finds Daniel Jensen guilty of murder in stabbing of 3-year-old Hunter Straight-Smith" (29 September 2021), online: *CBC News Manitoba* <www.cbc.ca/news/canada/manitoba/daniel-jensen-murder-trial-verdict-1.6194081>

focused on the evidence that was admitted by Justice Remple. Prosecutors explained to the jury that Jensen fought violently with the child's mother throughout the night and became markedly upset after being informed that she would be leaving him to move northeast of Winnipeg. Video surveillance footage demonstrated the scope and scale of his assaultive behaviour, as well as his departure from the hotel. Based on this evidence, the prosecution told the jury that Jensen wanted to hurt the mother in the most "cruel and permanent" way possible by taking her only child. It was inferred that he stabbed the toddler before fleeing the house, which was corroborated with the child's blood that was recovered from Jensen's clothing. The jury convicted the accused with first-degree murder, which carries a life sentence with no chance of parole for 25 years.

The second case the authors located involved a trial by jury was for an Indigenous youth that was found guilty on two counts of second-degree murder that took place at a house party in Bloodvein, Manitoba, on January 30, 2019. The accused was 16 at the time of his offences and was held in custody until April 2021, where the Crown applied under s.64 of the *Youth Criminal Justice Act* for his sentencing as an adult.[53] The jury found him guilty on both murder charges on April 16, 2021; Justice Kroft considered the Crown's application on October 28, 2021, before his sentencing hearing.[54] He considered the evidence against the criteria defined under s.72(1) of the *YCJA* to determine whether an adult sentence would be appropriate. The provision explains that a youth court justice will impose an adult sentence if they are satisfied that the presumption of diminished moral blameworthiness or culpability of the young person is rebutted; and that a youth sentence would not be of sufficient length to hold the young person accountable for their offending behaviour, with due consideration of the purpose and principles set out in s. 3(1)(b)(ii) and s. 38, such as fair and proportionate accountability using just sanctions that have meaningful consequences.[55] Based on the evidence, the personal circumstances of the accused, and the arguments put forward by the Crown, Justice Kroft was

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[perma.cc/G8U2-LGN7]; Ian Froese, "Winnipeg man accused of killing 3-year-old boy wanted to hurt mother in the cruellest way, court told" (13 September 2021), online: *CBC News Manitoba* <www.cbc.ca/news/canada/manitoba/daniel-jensen-2nd-degree-murder-trial-wfpcbc-cbc-1.6172712> [perma.cc/PRN3-PFJL].

53 *Youth Criminal Justice Act*, SC 2002, c 1, s 64 [*YCJA*].

54 *B (HEJE)*, *supra* note 44 at paras 1-3.

55 *YCJA*, *supra* note 53 ss 72(1), 3(1)(b)(ii), 38.

satisfied that the Crown rebutted the presumption of diminished moral blameworthiness of HB and agreed with their arguments that an adult sentence would be most appropriate[56]. On this basis, Justice Kroft granted the Crown's application for an order that the accused be sentenced as an adult, meaning that he would serve a life sentence of imprisonment with no chance of parole for at least seven years.[57] While the details of HB's jury trial were not fully discussed as part of Justice Kroft's judgment, Dean Pritchard from the *Winnipeg Free Press* shared his observations of the jury trial on April 7, 2021.[58] The jury was told about one fatality caused by four critical stab wounds to the victim's chest and neck, as well as the death of the second victim as a result of 21 stab wounds in separate areas around their body. The accused plead not guilty to his two charges of second-degree murder, based on a self-defence claim. The brawlers came together at a Bloodvein house party, where they were drinking before an altercation arose. Several partygoers witnessed the fight and one witness saw the accused leaving while covered in blood. RCMP were called and two officers attended the scene around 4 am. They found the two victims alone and clearly deceased at the back porch of the residence. The RCMP major crimes unit investigated the following day and came to suspect the accused as the perpetrator; he was arrested later that day. Although the major crimes unit could not be certain, they suspected that methamphetamines played a key part in the altercation and subsequent killing. At Pritchard's time of writing, the trial was scheduled to proceed for another two weeks, but the Crown was confident of its ability to demonstrate the guilt of the accused beyond a reasonable doubt. Pritchard also wrote an article in follow up to Justice Kroft's decision on November 2, 2021, which provided greater detail about the offender and the incident that took place in Bloodvein.[59] The reports used in reaching his sentence revealed that the offender was entrenched in a gang life and

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56 *B (HEJE)*, *supra* 44 at paras 6-25, 26–38.

57 *Ibid* at para 39.

58 Dean Pritchard, "Murder trial for 2019 Bloodvein stabbing deaths gets underway" (7 April 2021), online: *Winnipeg Free Press* <www.winnipegfreepress.com/local/murder-trial-for-2019-bloodvein-stabbing-deaths-gets-underway-574151762.html> [perma.cc/5GNW-F7HF?view-mode=server-side&type=image].

59 Dean Pritchard, "Adult sentence for teenage gangster in Bloodvein slayings" (2 November 2021), online: *Winnipeg Free Press* <www.winnipegfreepress.com/local/adult-sentence-for-teenage-gangster-in-bloodvein-slayings-575662932.html> [perma.cc/SW5Y-TDFG?view-mode=server-side&type=image].

that he was at a very high risk of re-offending. While awaiting trial in custody, the offender planned an assault on another youth and tried to escape. Testimonials at trial explained that the victims arrived at the party uninvited and proceeded to bully the offender, and one notable witness attempted to ally with the accused by claiming that they were, in fact, the killer. Pritchard explained the Crown's theory that the offender stabbed the first victim four times in the chest and neck, then proceeded to the second, who tried to defend himself with a window frame. His attempt was unsuccessful: the offender continued to stab him 21 times, where the last laceration embedded the knife into his ear. Evidence showed that the offender was drinking and under the influence of drugs but was aware of his actions. He sent several text messages to others at the party to indicate that it was "them or me." In the view of the Crown, the severity of the accused's attack and his subsequent behaviour demonstrated that he was not defending himself but rather proceeded with substantiated intent to kill. The accused's counsel claimed that the offender was scared for his life and acted in response to that fear, in addition to the influences of alcohol, cocaine, and methamphetamines. Justice Kroft agreed with the Crown, which meant that the jury's finding of guilt regarding the two murder charges would proceed for an adult sentence of life in prison with no chance of parole for at least seven years.

Reporters like Dean Pritchard and Brittany Hobson were able to report the details of these cases and others because the Chief Justice of the Court of Queen's Bench and the Chief Judge of the Provincial Court issued Practice Directions and Notices to permit their attendance, via audio-videoconference when public safety guidelines were strict and subsequently in person when they were lifted. For example, Chief Justice Joyal issued a February 26, 2021, Notice that outlined governing expectations for public attendees at virtual court hearings, which expressed intentions of honouring the open-court principle as soon as reasonably possible, with a view to restore public participation to its former pre-pandemic glory.[60] Under the February Notice, members of the public could also request to attend virtual hearings being held at the Winnipeg Judicial Centre by contacting the clerk

[60] Hon Chief Justice Glenn Joyal, "Notice Re: Public Viewing/Attendance at Virtual Hearings" (26 February 2021), online (pdf): *Court of Queen's Bench COVID-19 Notices and Practice Directions*: <www.manitobacourts.mb.ca/site/assets/files/1994/notice_-_public_viewing_-_attendance_at_virtual_hearings_2021_feb_26.pdf> [perma.cc/3DHD-UH2C].

registry by email at least two business days prior to the hearing date of interest and sharing their personal information to confirm their request, such as their contact information, relevant file numbers, the nature of the hearing, and other miscellaneous identifying data regarding the case they would like to attend. The Notice also outlined several criteria that must be adhered to by public attendees when viewing a hearing by video conference, as well as for hearing conducted by teleconference. In addition to routine check-in protocols, the Notice prohibited dissemination of videoconference contents or teleconference details in any published manner. Importantly, this meant that members of the public were not permitted to discuss the case in a digital medium, like Twitter or other social media platforms, because doing so would constitute *de facto* publication of such information by virtue of its written form and public form of dissemination.

Considering the cumulative effect of the Practice Directions and Notices that were issued during the pandemic in the context of jury trials for charges of murder, it is clear that the s. 11(f) rights of accused were not being met in Manitoba's courts. While it is outside the scope of our discussion here, such extended delays in custody also implicate the rights these individuals hold to be tried within a reasonable time under s.11(b) of the *Charter*.[61] In similar fashion to the selective ignorance taken towards the right to be heard by a jury under s. 11(f), Manitoba's courts claim that delays caused by COVID-19 are not included in delay calculations under the SCC's *Jordan* framework because it "represents a discrete event which could not have been reasonably avoided."[62] Notably, other jurisdictions have chosen to respect the *Charter* expectations of individuals accused of violent crimes by releasing them until the justice system could reasonably meet their processing expectations or by constructing specially designed jury-trial facilities to allow for socially distanced jury trials during the pandemic.[63] In

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61 *Charter*, *supra* note 13, s 11(b).

62 *Jordan*, *supra* note 32 at para 105; *R v KCCF*, 2021 MBQB 253 at paras 2-5.

63 See Stewart Bell, "Canada: Judges release growing number accused of violent crimes due to COVID-19 fears" (8 April 2020), online: *Global News* <www.globalnews.ca/news/6788223/coronavirus-prisons-inmates-released/> [perma.cc/XM5W-7THM?view-mode=server-side&type=image]; Government of Nova Scotia, "First Purpose-Built COVID-19 Compliant Courthouse Opens" (30 March 2021), online: Government of Nova Scotia <https://novascotia.ca/news/release/?id=20210330004> [https://perma.cc/6UZS-NYWT].

essence, the policies and decisions of Manitoba's courts allowed individuals charged with violent offences like murder to languish in custody while public safety guidelines were in place, regardless of the rights they are guaranteed under the *Charter of Rights and Freedoms*.

Adding to the justice system's inability to recognize these rights, the commitment to the open court principle was also tenuous at best, when considering the traditional tenets the principle intends to uphold. Court policies were established to allow reporters and members of the media to observe justice being done, but many individuals were only granted access to virtual hearings after public safety guidelines were in place for nearly a year. Public observers were only permitted when they registered well in advance and know specific details about the case they would like to observe, understand how to navigate the necessary virtual technologies, and respect the heightened security rules involved with being present. Perhaps most importantly, members of the public were not permitted to disseminate their observations in any method that can be considered publication, which includes social media posts on platforms like Twitter and Facebook. These limits fly in the face of the fundamentals of Jeremy Bentham's publicity, which, in his view, serves as the bedrock of holding justice system decision-makers accountable.

This section has provided a fulsome review of the legal response measures put in place in Manitoba's justice system to allow the administration of justice to proceed during the pandemic. New processes were quickly put in place to allow routine and non-violent proceedings to continue almost immediately after public safety measures were put in place, which allowed most legal matters to proceed as needed. While that is the case, proceedings involving charges for violent offences were put on hold until, in most cases, the accused relinquished their entitlement to a trial by a jury of their peers. Policies were also implemented to eliminate the state's obligation to provide their hearings within a reasonable time, because the pandemic could not be reasonably avoided. Although their reasons for doing so express remorse that alternatives are not available to the justice system to meet these expectations, examination of the measures taken to allow routine proceedings to take place reveals that the real issue is the level of investment required to facilitate juror participation by digital means. Rather than make investments in the necessary infrastructure over the two years of the public safety crisis, justice system executives have simply chosen to wait until the risks associated with the pandemic largely dissipated before

delivering jury trials for those charged with murder and doing so within reasonable time, despite the risk to the personal security of accused held in custody[64] and the *Charter* implications involved. Considering the disparity between the justice system's approach and the rights that are guaranteed to the effected accused, the following analysis considers the Canadian Bar Association's review of access to justice during the pandemic, with particular focus on the open court principle.

III. Access to Justice – Canadian Bar Association

To monitor immediate and evolving problems regarding the delivery of legal services during the pandemic, the Canadian Bar Association (CBA) established its Task Force on Justice Issues Arising from COVID-19 ("Task Force"). This Task Force's mandate was to report on justice system changes and offer recommendations on how courts, tribunals, and other dispute resolution processes could change methods of service delivery to meet stakeholder needs during and after the pandemic.[65] Following consultation with CBA internal membership and external stakeholders in the justice sector, the Task Force published *No Turning Back*, an analytical report that builds on previous CBA initiatives that prioritize a wide-scale expansion of legal service delivery through justice system reform.[66] Its report recognized that commonwealth jurisdictions, including Manitoba, have adopted the

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64 See Valérie Ouellet & Joseph Loiero, "COVID-19 taking a toll in prisons, with high infection rates, CBC News analysis shows", CBC Investigates (17 July 2020), online: <www.cbc.ca/news/canada/prisons-jails-inmatescovid-19-1.5652470> [perma.cc/7QSU-DK72].

65 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/924F-H7MP] [CBA, "No Turning Back"].

66 Canadian Bar Association, "Reaching Equal Justice: An Invitation to Envision and Act – Equal Justice: Balancing the Scales" (Ottawa: Canadian Bar Association, August 2013) at 60, online (pdf): <www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf > [perma.cc/M8N8-6NJ4] [CBA, "Reaching Equal Justice"]; Canadian Bar Association Legal Futures Initiative, "Futures: Transforming the Delivery of Legal Services in Canada" (14 August 2014), online(pdf): <www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Futures-Final-eng.pdf> [perma.cc/UDU5-8Y43].

use of audio/video conferencing, virtual hearings, online dispute resolution mechanisms, and other emerging technologies to continue delivering judgments in courts, administrative tribunals, mediations, arbitrations, and other forms of adjudication.[67] Respondents told the Task Force that these measures were successful in the context of access to justice: remote proceedings were especially effective for appeals, simpler matters, and those with lower monetary values at stake. Feedback also highlights the benefits of removing travel and associated financial burdens that are typically bundled to accessing justice services. Court e-filing systems, authorization to remotely witness or commission important documents, and virtual fee payment portals were all reported as major improvements in every jurisdiction.

The significance of these improvements for majoritarian populations cannot be understated. Be that as it may, Task Force respondents also expressed several concerns that prejudice the ability of justice system users to effectively access satisfactory outcomes, particularly in criminal proceedings.[68] The report emphasised the heightened level of digital complexity that court proceedings now involve, which can make routine functions like participating as a party or being called as a witness much more difficult. Respondents indicated that counsel often struggled to support their clients through technological means and were prevented from supporting them in person by public safety guidelines. In addition to this, counsel commonly argued that assessing credibility was particularly challenging using online means, as opposed to being with the subject in person. Beyond the issues that digital participation presents in formal proceedings, accused persons regularly benefit from the informal supports that counsel provides while attending in person, such as walking to the prisoners' dock for a discrete conversation. Remote proceedings remove many, if not all, opportunities for informal interaction, which respondents found to be a barrier to building trust and, ultimately, providing effective counsel to their client.

In essence, *No Turning Back* illustrates that pandemic response measures have been effective at broadening access to justice services but fail to sufficiently address operational access issues like supporting users who lack digital literacy, connecting users with adequate legal assistance and funding, or addressing the myriad opportunities for personal and structural biases to

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67 CBA, "No Turning Back," *supra* note 65 at 6-8.

68 *Ibid* at 9.

affect justice outcomes. With these shortfalls in mind, the CBA calls for greater state investment to address the rising demand for legal services by creating the necessary infrastructure to help litigants navigate the system in ways that are accessible and understandable to the user.[69] By providing users with timely and relevant assistance, they are more likely to achieve resolution of their issues and can resume normal life, as opposed to becoming an extended burden on other government systems. By adequately resourcing support organizations like Legal Aid with digital and human assets, individuals facing literacy barriers can meaningfully access and participate in the justice system.

The Task Force highlights that marginalized communities are often the most affected by literacy barriers and these challenges are exacerbated with new procedural requirements that are now necessary to deliver justice digitally.[70] Heightening these concerns is the fact that many courthouses and registries were closed or had significantly limited access due to public safety reasons, which prevented individuals who cannot make effective use of technology from access the help they need to obtain legal information. To address these issues, the Task Force recommends greater state resourcing for technological support; funding that can be realized as operational efficiencies are created with the comprehensive implementation of digital justice processes. Doing so can empower disadvantaged individuals to access the justice outcomes they need.[71]

A key challenge of implementing support initiatives of this nature is creating delivery spaces and methods that are sufficiently accessible and are not an additional burden on public resources. Community Legal Education Ontario (CLEO) identified this barrier in *Community Justice Help*, a discussion paper that advocates for a collaborative approach to delivering justice services that leverages existing community organizations that are

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69 *Ibid* at 19 CBA, "Reaching Equal Justice," *supra* note 66.

70 See Joe McIntyre, Anna Olinyk, & Kieran Pender, "Civil Courts and COVID-19: Challenges and Opportunities in Australia" (May 2020) Alt LJ, online (pdf): <auspublaw.org/2020/05/courts-and-covid-19-challenges-and-opportunities-in-australia/> [perma.cc/VQX4-GR7G].

71 See HM Courts and Tribunal Service, "HMCTS online event, 15 July 2020: Use of remote hearings to maintain justice during the coronavirus outbreak" (15 July 2020), online (video): <www.gov.uk/guidance/hmcts-online-event-15-july-2020-use-of-remote-hearings-to-maintain-justice-during-the-coronavirus-outbreak> [HM Courts].

already providing assistance to disadvantaged individuals at no cost.[72] Julie Matthews' and David Wiseman's research confirmed that social disadvantage increases the risk and prevalence of experiencing legal problems, as well as the demand for legal assistance from non-legal community organizations.[73] Respondents to Matthews' and Wiseman's study indicated a common interest in receiving combined community services in a central location that could address both legal and non-legal issues in one place. Although Matthews and Wiseman conducted their research prior to the pandemic, they argued that collaborating with the community service sector can broaden access to the justice ecosystem, build into already existing relationships of trust and knowledge, and make better use of already allocated funding for justice system operations. In their view, people should be able to access justice services without the formality of trial. Rather, system processes should be aligned with the needs and capacities of users to ensure that outcomes meet their expectations and allow them to move on.[74]

Perhaps the most significant pitfall that has yet to be addressed in justice system reforms is the prejudicial risk that remote justice delivery presents in terms of individual and structural biases. Cognitive biases have plagued criminal justice system operations consistently and hold potential to exponentially disadvantage marginalized communities if applied using technologies like artificial intelligence and algorithmic decision-assistance.

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72 Julie Matthews & David Wiseman, "Community Justice Help: Advancing Community Based Access to Justice" (Toronto: Community Legal Education Ontario, June 2020), online (pdf): <cleoconnect.ca/wp-content/uploads/2020/07/Community-Justice-Help-Advancing-Community-Based-Access-to-Justice_discussion-paper-July-2020.pdf> [perma.cc/JJV9-59B3] [Matthews & Wiseman].

73 A Currie, "Nudging the Paradigm Shift, Everyday Legal Problems in Canada" (Canadian Forum on Civil Justice, 2016), online (pdf): <cfcj-fcjc.org/sites/default/files/publications/reports/Nudging%20the%20Paradigm%20Shift%2C%20Everyday%20Legal%20Problems%20in%20Canada%20-%20Ab%20Currie.pdf> [perma.cc/66U8-99C4] at 7-15 [Currie]; Trevor C W Farrow at al, "Everyday Legal Problems and the Cost of Justice in Canada: Overview Report" (Toronto: Canadian Forum on Civil Justice, 2016) online (pdf): <www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf> [perma.cc/KKQ8-WMCY] [Farrow].

74 See R Engler, "Opportunities and Challenges: Non-Lawyer Forms of Assistance in Providing Access to Justice for Middle-Income Earners" in M J Trebilcock, Lorne Sossin & A J Duggan, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 145 at 171; Matthews & Wiseman, *supra* note at 29-31.

To these ends, Bruce MacFarlane expressed grave concerns regarding the operations of cognitive bias in the justice system and its prejudicial effects for marginalized individuals. As one of Canada's leading scholars on the effect of bias on criminal justice outcomes, MacFarlane's literature continues to inform federal and provincial governments about the factors that can predispose biased operations, how they are used by actors within the system, as well as methods that can interrupt and limit functioning in the adjudication of law. Canadian governments have made use of MacFarlane's research in several reports regarding inquiries into wrongful conviction, which found that cognitive biases hold serious implications for the administration of justice across the country.[75] He defines cognitive bias as a psychological process that causes an individual to unconsciously select information that supports preferred conclusions while procedurally eliminating alternatives.[76] MacFarlane's research focused on sensationalized cases of wrongful conviction, which led him to conclude that cognitive biases can layer between actors in the justice system through information sharing and, in some cases, can taint the operations of entire teams as they accept the observations of their colleagues. [77] In similar fashion, Kate Robertson, Cynthia Khoo and Yolanda Song explain that biases of this nature can be built into the processes and outputs of algorithmic systems

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75 See *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada*, (Ottawa: Public Prosecution Service of Canada, 2019), online: <www.ppsc-sppc.gc.ca/eng/pub/is-ip/toc-tdm.html> [perma.cc/6Z4R-2UJW]; 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: <www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/policy_research/pdf/Macfarlane_Wrongful-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.

76 See MacFarlane, *Tunnel Vision*, *supra* note 75; MacFarlane, "Shifting Sands," *supra* note 75; Keith A Findley, "Tunnel Vision" in Bryan Cutler, ed, *Conviction of the Innocent: Lessons from Psychological Research*, 2nd ed (Washington, DC: APA Press, 2010).

77 See Keith A Findley & Michael S Scott, "The Multiple Dimensions of Tunnel Vision in Criminal Cases" (2006) Wis Law Rev 291 at 309; MacFarlane, *Tunnel Vision*, *supra* note 75 at 20–26; "Lawyer defends use of informant in Sophonow inquiry", *CBC News* (8 May 2001), online: <www.cbc.ca/news/canada/lawyer-defends-use-of-informant-in-sophonow-inquiry-1.257920> [perma.cc/TJD5-7FPM].

like artificial intelligence while remaining unseen by decision-makers in the criminal justice system. Algorithmically trained decision-supplementation systems present a prime opportunity for systemic biases to taint output results because of the technology's primary reliance on historical policing information, the "black-box" approach to generating its recommendations, and the lack of meaningful accountability measures in existing software. In other words, the system unilaterally generates output recommendations using self-generated formulas and methods, which are based on historical policing information; case details that the criminological literature tells us is rife with structural bias against marginalized groups like Indigenous communities, people of colour, women, and the poor. The recommendations generated by algorithmic systems are used by frontline officers to justify decisions to intervene with persons of interest, whether that suspicion is validly informed or not, all without active oversight mechanisms to ensure that recommendations are respecting the rights of such persons.[78] To these ends, Kate Robertson and her colleagues at Citizen Lab remark, "If systemic biases permeate data sets that are produced in Canada's criminal justice system, these biases may become embedded in and perpetuated by (algorithmic systems) to the further detriment of individuals and communities that have been the subject of historic discrimination."[79]

These observations are shared by the Task Force, which considers the implementation of algorithmic decision-making systems in the American criminal justice system. The Task Force explains that such processes carry serious implications for access to justice because they hold the potential to entrench and perpetuate discriminatory outcomes for the marginalized. Remarkably, Robertson, Khoo and Song note that algorithmic systems can already write like humans and will likely begin passing judgment in criminal justice settings soon.[80] Considering these risks, the Task Force echoes these recommendations to insist that measures be taken to build more inclusive

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78 Kate Robertson, Cynthia Khoo & Yolanda Song, "To Surveil and Predict: A Human Rights Analysis of Algorithmic Policing in Canada" (1 September 2020) at 31-32, online (pdf): *Citizen Lab: Transparency and Accountability in Research* <citizenlab.ca/wp-content/uploads/2020/09/To-Surveil and-Predict.pdf> [perma.cc/P6QX-MR39] [Robertson, Khoo & Song].

79 *Ibid* at 15.

80 Jared Council, "AI Can Almost Write Like a Human – And More Advances Are Coming" (11 August 2020), online: *Wall Street Journal* < www.wsj.com/articles/ai-can-almost-write-like-a-humanand-more-advances-are-coming-11597150800> [perma.cc/5C7J-NHEF]; CBA, "No Turning Back," *supra* note 65 at 16-17.

oversight structures in these technologies to ensure that marginalized communities are not left behind in during the digital transition.[81]

With the recommendations put forward by the CBA in mind, the following section reconsiders the pandemic response measures that were put in place in Manitoba to propose areas of improvement that can improve access to justice for all Manitobans, including the most marginalized.

IV. Recommendations to Improve Access to Justice and Honour the Open Court Principle

Applying the findings of the CBA reports to the Manitoba's justice system reforms in response to the pandemic, the benefits and pitfalls of Manitoba's approach appears to reflect experience in other Canadian jurisdictions. Decision-makers in Manitoba acted quickly to create avenues that would allow the administration of justice to continue, at least in terms of using existing resources and infrastructure. At the onset of the pandemic, lawmakers in Manitoba passed legislation to permit legal services to be delivered outside of court. Laws were passed or amended to allow for electronic witnessing and remote executions, to expand the range of service providers authorized to provide legal services beyond formal lawyers, and to permit administrative tribunals to decide questions of constitutional significance when authorized by the legislative executive. These changes allowed routine processes like land title transfers and other civil matters to continue with negligible interruption. To operationalize their application in court, Chief Justices and the Provincial Chief Judge issued Practice Directions and Notices to set expectations regarding court attendance and participation. Although these measures ebbed and flowed with the rigour of public safety guidelines, less-serious formal court processes were able to continue after a short hiatus. The success of these measures depended on existing digital infrastructure within the court system, the knowledge that court personnel built over their experience, and the level of understanding that parties could achieve with the support of counsel and staff. In essence, the legal system quickly shifted towards the digital delivery of services because operators knew how to navigate their use and the necessary hardware was already in place.

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81 CBA, "No Turning Back," *supra* note 65 at 16-18.

While these measures were largely successful, some legal processes were not able to benefit from the digital shift because users were not comfortable using electronic interfaces, the distribution of technological hardware was unequal, and the physical spaces that were available to the court system were not amenable to maintaining social distancing requirements. Our analysis focused on the implications of public safety measures on jury trials, which generally did not proceed during the pandemic. Rather than acting to facilitate jury trials via digital means or in alternative locations, executives of the court, and the justice system more generally, typically chose to postpone these hearings until public safety measures were lifted. This approach is clearly demonstrated by the timing of the two recovered jury trial decisions: both were ultimately scheduled to proceed when most Manitobans were vaccinated, and the provincial government was preparing for the shift into post-pandemic living. As previously noted, charges for violent offences are disproportionately laid against members of marginalized communities like Indigenous peoples, people of colour, and the poor—and members of these marginalized communities are also disproportionately victims of violent crime. On this basis, it is safe to assume that decisions to postpone hearings until public safety guidelines are lifted impact these communities the most, both as offenders and as victims.

Considering the extension of public safety guidelines and the ongoing infringement they hold in terms of the *Charter* rights of accused (especially those detained in custody pending trial), the authors believe that it is incumbent on the Government of Manitoba to invest in the necessary infrastructure to bridge these concerns for the future. Doing so can also address longstanding access to justice concerns for marginalized populations in metropolitan regions, as well as remote, northern, and Indigenous communities. Both the federal Action Committee on Court Operations in Response to the Pandemic ("Action Committee") and the CBA Task Force mentioned above suggest the amalgamation of socio-legal services into a single location, which can include the necessary infrastructure to deliver justice in local communities. *Community Justice Help* advocates for a collaborative approach to delivering justice services that is united with existing community organizations because their respondents are overwhelmingly interested in meeting their socio-legal needs in a single location that is nearby.[82] This approach can also reduce other government

[82] Matthews & Wiseman, *supra* note 72 at 29-31 "; see Currie, *supra* note 73 at 7-15; Farrow, *supra* note 73.

expenditures that fund different community organizations by eliminating space rentals and duplication of services, which can offset the necessary up-front investments to create such facilities over time.[83] The federal Action Committee agrees with the CBA Task Force's recommendations in this regard; it is suggested that the universal delivery of services in a single location can maximize the connection of justice system services for users, including access to secured premises with the necessary hardware to participate in remote hearings and dedicated support staff to effectively use such technology, as well as other social services like addictions and mental health treatment. The Action Committee acknowledges that nearly half of all adults Canadians will experience legal problems that will require formal resolution in every three year period, which means that implementing the right infrastructure now can drastically reduce overall state costs in the long run.[84] Beyond these cost efficiencies, the Action Committee notes that acting now to create local "houses of justice" can also meaningfully address the historic access to justice concerns for northern, remote, and Indigenous communities, as well as marginalized populations who reside in metropolitan regions.

Although these facilities have yet to be opened in Manitoba, it appears that legislators are taking action towards these recommendations. On April 28, 2021, the Government of Manitoba announced investments to improve access to justice and support the modernization of the justice system.[85] Nearly $3 million was set aside to hire more full-time judges, expand court administrative and judicial support resources, and hire two new Crown Attorneys; $2.3 million was provided to Legal Aid Manitoba to create a duty counsel position and expand on-call shifts to increase access to

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83 See HM Courts, *supra* note 71.

84 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/WSL3-PEUY]; see 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) online: CanLIIDocs 11069 <canlii.ca/t/t1lx>.

85 Government of Manitoba, "Province Providing More than $5 Million to Enhance Criminal Justice Supports" (28 April 2021), online: *News Release* <news.gov.mb.ca/news/index.html?item=51182> [perma.cc/CY5T-5H5S].

representation. Perhaps most relevant to these objectives, the provincial government committed $15 million to renovate the Dauphin courthouse, which was repurposed to "provide accessible and efficient justice services to those living in Dauphin and surrounding communities."[86] The renovations are intended to enhance security, create a video-conferencing area for lawyers and their clients, and to expand office spaces for court staff. While the connection of this project towards creating a "house of justice" is not clear, the authors remain hopeful that these investments are being made with the advice of the federal Action Committee and the CBA Task Force in mind.

Access to participatory functions for routine, administrative and less serious criminal matters expanded considerably with the use of audio-video technologies, but many of the informal benefits of in-person proceedings that helped disadvantaged populations were lost as part of the transition. Rather, new digital requirements create new barriers that users must overcome, which marginalized populations do not have the resources or the knowledge to navigate on their own. The CBA Task Force and the federal Action Committee recognized the lack of digital literacy as a pressing concern, both for users and court staff, in using technology to deliver services. Using remote technologies requires an understanding of the hardware that is being used to achieve connectivity, such as computers, cameras, and microphones, as well as various software applications, like Microsoft Teams, Zoom, PDF viewers, and others. Many of these technologies are relatively new and have taken a primary role during the pandemic in facilitating meetings, conducting work, and maintaining connection to broader organizational goals for the broader public. In the context of the justice system, the use of such technologies is further complicated by privacy and security concerns, as well as more traditional requirements like meeting court decorum, procedure, and confidentiality requirements, which must all be met by users as their issues are heard and decisions are rendered.

The CBA Task Force acknowledges the effective roll-out of digital access options during the pandemic to increase access to justice services, but CBA members believe that governments have failed to adequately bridge the

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86 Winnipeg Free Press, "Province adds $4M to now-$15M Dauphin courthouse renovations" (29 January 2022), online: *WFP Local* <www.winnipegfreepress.com/local/province-adds-4m-to-now-15m-dauphin-courthouse-renovations-576141032.html>.

digital literacy gap in terms of connecting users with the right support mechanisms to ensure that outcomes appropriately reflect their circumstances. In the view of the Task Force, marginalized communities are the most impacted by digital literacy barriers, arguably making these failures an extension of the structural or systemic biases that have traditionally effected their ability to access acceptable outcomes from the justice system.[87] These barriers were further heightened because public safety guidelines continued to restrict physical access to court facilities, which prevented marginalized individuals from getting the help they needed when seeking to obtain or submit legal information. The federal Action Committee echoes these observations and, to address them, it recommends the establishment of court liaison officers that can facilitate the use of technology in local communities at designated "houses of justice." The Action Committee believes that implementing court liaison officers within these central service centres will help users coordinate their experiences before, during, and after judicial verdicts to ensure that every service is used to its maximum potential, while also providing confidence to users as each of their socio-legal needs are met. The Action Committee believes that court liaison officers can also assist with the delivery of additional programming like victim services, court worker programs and legal aid, which can build trust with users, eliminate duplication, and reduce costs as part of delivering these justice system products in a single location.

Currently, limited action has been taken towards implementing a liaison officer in Manitoba's justice system. To facilitate public observation of court proceedings, the court clerk's office has taken a key role in scheduling individual requests to observe court proceedings, as well as to provide training in the use of video-conference platforms for parties to a trial. In addition to the support clerks are providing to users, legal counsel have also been asked to contribute their knowledge when preparing their clients to help them participate using virtual means. While these support measures are positive, they are woefully inadequate in providing a sense of confidence for users and fails to extend beyond formal proceedings. Considering these shortfalls in terms of digital literacy and broader support

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87 Joe McIntyre, Anna Olinyk, & Kieran Pender, "Civil Courts and COVID-19: Challenges and Opportunities in Australia" (May 2020) Alt LJ, online (pdf): <auspublaw.org/2020/05/courts-and-covid-19-challenges-and-opportunities-in-australia/> [perma.cc/KS98-ELX7].

in terms of accessing justice services, we recommend that justice system executives act towards the recommendations of the CBA Task Force and the federal Action Committee. However, it is possible that the Government of Manitoba intends to move in this direction after its repurposing of the Dauphin Courthouse is complete.

Stepping back from the recommendations offered by the CBA Task Force and the federal Action Committee, the Practice Directions and Notices that were published by Manitoba's courts also acted towards concerns regarding publicity and judicial accountability, as identified by Judith Resnick and Chief Justice McLachlin. As noted at the start of our discussion in Part A, the open court principle has played a key role in the research and recommendations offered by the CBA Task Force and the federal Action Committee. Its tenets of public participation and broadening access to justice services was a central focus in their proposals, primarily to safeguard public confidence in the administration of justice by ensuring that justice could continue to be seen as it was being done. Although these factors are important in the open court principle, Resnick referred to the work of Jeremy Bentham, the principle's progenitor, to identify the foundational role that "publicity" and judicial accountability play in terms of making such observations participatory for the public, while also serving to create avenues for issues to be raised when rights and expectations are not being upheld by system executives.

Resnick explained that Bentham constructed the original concept of publicity as a means of allowing the public to oversee the decisions of judges and other justice system decision-makers to ensure the system continued to meet their needs, as well as those of the community. Resnick summarized the purposes of publicity into the search for truth, public education regarding the justice system and its operations, and providing public oversight of justice system decision-making. Court openness supports the search for truth by allowing members of the public to identify issues by virtue of media reporting and individual observation, which could be called out and presumptively corrected. The dissemination of case details was also believed to serve a function of public education, in that media consumers would learn about the rule of law and their obligatory relationship with the state. Finally, public dissemination of such information was believed to impose a level of oversight regarding the operational and structural decisions being made by justice system executives, who risked reprimand through the political system if their decisions did not maintain focus on the

best interests of the community and the rule of law. By allowing simplistic interpretations of the law and its jurisprudence, the public would be protected from judicial errors and omissions, as well as from justice system operations that would serve state interests over those valued by local communities. [88]

With the traditional concept of publicity in mind, it is clear that the approach taken to public participation by Manitoba's courts did not provide adequate avenues to raise concerns about the judicial process for members of the public.[89] Chief Justice Joyal's Notice regarding the expectations that were mandatory to observe with regard to a proceeding expressed intentions to honour the open court principle, but in fact implemented a series of new requirements to attend, as well as limits on the ability of attendees to discuss their observations during and after the hearing.

Although these prohibitions had some potential merit, in the context of the privacy of the parties and the security of the proceeding, the blanket nature of the Notice's ban is problematic. It is common practice to share concerns about government processes on social media platforms like Twitter and Facebook, and more than ever during the COVID-19 pandemic. The Notice did not allow publication and dissemination in any form. To bring the publication ban in line with the open court principle and its foundational expectation of publicity, the authors recommend the amendment of these policies to establish reasonable limits in terms of when publication can take place. We believe that a measure of dissemination and publication is necessary to fulfill this facet of the open court principle. Although limits are necessary to balance the interests at stake, we believe it is equally important to provide a pathway that can allow public observers to share their views about a particular case, as well as its outcomes, to hold the justice system accountable, which is one of the most fundamental values of the open court principle.

As opposed to simply allowing public participation, adequate measures of publicity were also intended to hold judges and other justice system executives accountable for their decisions. Resnick acknowledged the

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88 Judith Resnik, "Bringing Back Bentham: 'Open Courts', 'Terror Trials' and Public Sphere(s)" (2011) 4 L & Ethics Human Rights at 6-18; see Trevor C W Farrow & Garry D Watson, "Courts and Procedures: The Changing Roles of the Participants" (2010) 49:2 SCLR 205.

89 Hon Chief Justice Glenn Joyal, "Notice Re: Public Viewing/Attendance at Virtual Hearings," *supra* note 60.

common criticisms of this approach: public perceptions could be manipulated by media influences and a lack of public engagement. Be that as it may, she argued that public commentary through research and the production of literature by academics and members of the legal profession could ensure that the decisions being made in the justice system remained focused on the best interests of society, as opposed to the convenience of system executives or administrators. Such discourse, in her view, would ensure that the outcomes of the system remained legitimate, efficient, and accurate, while also identifying shortcomings for corrective action in the future. She notes that these functions are most critical for populations differentiated on the basis of race, gender, and income, whose experiences with the justice system are often different from other, more-affluent communities.

The most salient issue that arose in terms of pandemic response measures taken in Manitoba's courts was Chief Justice Joyal's Practice Direction from November 17, 2020, which mandated the use of audio-videoconference as a matter of court policy.[90] Notably, Chief Justice Joyal proceeded to implement this policy under a Practice Direction, invoking the inherent jurisdiction of the MBQB, whereas the Court of Appeal issued new operational regulations using its powers under *The Court of Appeal Act*.

In the view of the authors, these powers are not available to trial courts to hold judges accountable in terms of making significant changes to trial operations as spaces of first instance, as stipulated in s. 92 of *The Court of Queen's Bench Act* and s. 26.9 of *The Provincial Court Act.* This approach to implementing this new process did not follow the prescribed procedure under *The Court of Queen's Bench Act* regarding changes to the trial process, but rather involved the issuance of a unilateral decision to implement the new process while simultaneously justifying a subtle closure of judicial accountability regarding the *Charter* rights of individuals accused of murder or other indictable offences with a punishment exceeding five years of imprisonment. Considering the *Charter* rights that were implicated by this Practice Direction, such as the s. 11(f) rights of individuals charged with murder, the authors believe this is an illustrative example of how justice system executives may occasionally act in favour of interests that are beyond their immediate roles. With this in mind, we recommend the review of this

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90 Hon Chief Justice Glenn Joyal, "Practice Direction – Re: Criminal Trials: Accused's Remote Appearance by Video Conference," *supra* note 28.

Practice Direction by the Minister of Justice and, if interested in carrying its contents forward, to articulate them in regulations through the LGIC. Doing so can allow the political and administrative processes to bring additional oversight to their infringement on *Charter* rights, including constitutional review.

In summary, the measures taken to allow the administration of justice to continue in Manitoba's courts were largely successful but also carried serious consequences for individuals charged with murder, as well as for the access interests of marginalized populations more generally. Considering these shortfalls, the authors offer four recommendations that can allow justice system operations to better adhere to the expectations of the open court principle and to objectives of the access to justice movement.

First, we recommend stronger state investments in infrastructure to establish houses of justice, which can also create operational efficiencies by reducing duplication and uniting the delivery of socio-legal services into one location.

Second, we propose further state investments to create court liaison officers in these houses of justice to help community members make use of digital technology when accessing the justice system, as well as to guide them through the various other services that can be delivered in the same location. Doing so can address long standing concerns regarding access to justice and ensure that community members benefit from a whole of justice approach to meeting their legal needs.

Third, we recommend the amendment of public participation policies to establish reasonable limits in terms of when publication can take place. We believe that a measure of dissemination and publication is necessary to adequately fulfill publicity expectations of the open court principle, while also balancing the security interests that are also at stake.

Finally, we propose a form of Ministerial action in light of Chief Justice Joyal's November Practice Direction regarding the mandatory use of audio-videoconferencing for criminal trials (regardless of the consent of the accused). The Practice Direction implicated the *Charter* rights of accused persons and did so outside of the unilateral powers of the court. By revising this process and codifying it into regulations, elected officials can be held accountable for their infringement on *Charter* rights, while also addressing the decisions of convenience that were made to facilitate the ongoing administration of justice during the pandemic.

V. CONCLUSION

The open court principle is a fundamental tenet of constitutional significance that is recognized throughout Canada. Although it was originally theorized by scholars like Jeremy Bentham as a means of oversight and accountability for the justice system, it has become part of a broader movement that focuses on improving access to justice services for the public, with particular focus on the marginalized, such as Indigenous communities, people of colour, and the poor. The onset of the COVID-19 pandemic brought access to justice to the forefront of legal reforms as executive leaders took action to allow the administration of justice to continue while public safety protocols were put in place to prevent disease transmission. The primary method of achieving these ends has been the implementation of digital technologies in legal processes, both inside and outside of court. Although the wholesale shift towards delivering justice using digital means is a novel phenomenon, the use of technology is not new to the justice system. Considering this, our discussion has outlined the scholarship of the Right Honourable Beverly McLachlin, former Chief Justice of the Supreme Court of Canada, as well as Judith Resnick to provide a foundational understanding of the open court principle and its relationship to the digital future. Building from their theories of the open court in modern times and its priorities of meaningful public participation, education regarding the rule of law, and maintaining accountability for judicial decisions, we examined its recent articulation by the federal Action Committee on Court Operations in Response to COVID-19 and its efforts to preserve the administration of justice in provincial justice systems using digital technologies. We applied the observations and recommendations of the Action Committee to the approach taken in Manitoba to consider whether the measures were achieving the access movement's objectives.

As part of our analysis of Manitoba's pandemic response measures, we paid particular attention to outcomes for individuals charged with murder, who are guaranteed the right to a jury trial under the *Charter of Rights and Freedoms*. In addition to reviewing the suite of laws that were introduced or amended by legislators in response to the pandemic, we examined the various Practice Directions and Notices that were issued by the leaders of the court system to identify the subtle disregard for the *Charter* rights of these individuals, who were rather allowed to languish in custody and were

unduly exposed to the novel coronavirus while decision-makers waited for public safety guidelines to be lifted.

In essence, the measures that were implemented were successful, primarily because they reoriented existing resources and infrastructure to address the challenges that were imposed by the public safety emergency. Perhaps most notably, our analysis revealed that justice system executives were issuing directives that arguably infringed on the *Charter* rights of individuals accused of murder as a matter of convenience, which spoke to the fears that were expressed by Judith Resnick in terms of the system's propensity to serve the state's interest instead of those of the community when avenues of publicity were reduced or eliminated.

With these deficits in mind, we compared the feedback that was received by the Canadian Bar Association regarding measures to further the objective of access to justice during the pandemic, as well as the recommendations offered by the federal Action Committee on Court Operations in Response to the Pandemic to the measures taken by legislators and justice system executives in Manitoba to draw conclusions about their successes and pitfalls.

Using these conclusions, we offered four recommendations that could align the outcomes being achieved with the state's responses with the traditional objectives of the access to justice movement. First, we recommended stronger state investments in infrastructure to establish houses of justice, which could also create operational efficiencies by reducing duplication and uniting the delivery of socio-legal services into one location. Second, we proposed further state investments to create court liaison officers in these houses of justice to help community members make use of digital technology when accessing the justice system, as well as to guide them through the various other services that could be delivered in the same location. Third, we recommended the amendment of public participation policies to establish reasonable limits in terms of when publication can take place. Finally, we proposed Ministerial action in light of Chief Justice Joyal's November Practice Direction regarding the mandatory use of audio-videoconferencing for criminal trials. By revising this directive-making process and codifying it into regulations, elected officials could be held accountable for their infringement on *Charter* rights, while also addressing the decisions of convenience that were made to facilitate the ongoing administration of justice during the pandemic.

In the view of the authors, implementation of these recommendations can ensure that the measures taken to respond to the pandemic address the long-standing concerns of the access to justice movement, rather than serving the short-term interests of delivering justice while public safety guidelines are in place. Beyond addressing these concerns, adequate investment at this time can significantly broaden the delivery of justice services so that marginalized communities, as well as individuals living in remote, northern, and Indigenous communities, can make meaningful use of the justice system to meet their legal needs, build trust with the state and, ultimately, approach parity with other Canadians, like the access-to-justice movement has traditionally sought to achieve.