

Virtually Similar? Considering the Potential for Virtual Jury Trials in Canada During and After the Pandemic

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The World Health Organization declared COVID-19 as a global pandemic on March 11, 2020.¹ Naturally, the health crisis resulted in a number of jurisdictions reacting to and adjusting their criminal justice processes in a fastidious manner; the US, UK, Brazil, China, India and Singapore, all, for example, embraced immediate technological adjustments.² In

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¹ World Health Organization, “WHO Director-General’s opening remarks at the media briefing on COVID-19” (11 March 2020), online: *World Health Organization* <[who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020](https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020)> [perma.cc/P3TT-VURY].

² See Richard Susskind, “Covid-19 Shutdown Shows Virtual Courts Work Better”, *Financial Times* (7 May 2020), online: <[ft.com/content/fb955fb0-8f79-11ea-bc44-dbf6756c871a](https://www.ft.com/content/fb955fb0-8f79-11ea-bc44-dbf6756c871a)> [perma.cc/6DT9-ZNFW].

Canada, though, at the outset, virtually all jurisdictions paused in the context of criminal jury trials.³ Of course, the Canadian reaction makes sense, given that jury proceedings are plagued by a number of technical complexities in addition to the normal course of administration of criminal justice.

Jury selection itself is an exceptionally long process that takes time and requires state officials to engage in assessments of logistics. Further, jury trials notoriously take longer to complete than trials without a jury, including numerous applications and *voir dire*s that may well require juries to move in and out of courtrooms as part of the regular course of the trial. Much as is the case with regular trials, counsel and client will engage in close communications, and victims and families will want to attend. In more notorious cases, media will wish to be present and, in general, the “open court” ideals of the Canadian process would suggest that the process remain accessible and open to the public. Certainly, in a new world order of social distancing, quarantining, mask-wearing, disinfection, and infection pre-emption, criminal-jury processes serve as reminder of how personal, interactive and intimate these proceedings can be, and the initial Canadian response was a logical one.

Yet the longer the delays held, the more that justice officials and the judiciary would certainly worry about access-to-justice issues. Time-to-trial ceilings set in recent jurisprudence⁴ would certainly be troubled by a jury pause. Indeed, some scholars used the moment in time to raise issues about the necessity of jury trials at all,⁵ despite the codification of jury trials in the *Charter*.⁶

To take a snapshot of the state of Canadian jury trials is a somewhat complex matter. Jury trials do not result in reported decisions, except to the extent that they are mirrored in sentencing

³ See Michelle I Bertrand et al, “Dispensing Digital Justice: COVID-19, Courts, and the Potentially Diminishing Role of Jury Trials” (2021) 10 Ann Rev Interdisciplinary Just 38 [Bertrand et al, “Dispensing Digital Justice”].

⁴ See *R v Jordan*, 2016 SCC 27 [Jordan]; *R v Cody*, 2017 SCC 31.

⁵ See Michelle Bertrand et al, “‘We Have Centuries of Work Undone by a Few Bone-Heads’: A Review of Jury History, a Present Snapshot of Crown and Defence Counsel Perspectives on Bill C-75’s Elimination of Peremptory Challenges, and Representativeness Issues” (2020) 43:1 Man LJ 111 at 114 [Bertrand et al, “Centuries of Work”].

⁶ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 at s 11(f) [Charter].

decisions or appeals, and, on occasion, written *voir dire* rulings. Further, COVID has stalled access to court documents and transcripts ordered by researchers, such that any deep dive into the work of juries during COVID would be delayed by months and even perhaps as far as into the recovery phase of the pandemic. Further, ordering these transcripts would cost thousands of dollars of expenditure in court-mandated transcription fees, beyond what would be feasible in the service of an academic explication of the jury pause.

Fortunately, media and professional publications dutifully reported on the important events that occurred during the pause and subsequent slowdown of criminal jury trials, and when studied comprehensively, we can embark on the task of asking: What did the state of play of criminal jury work look like after the initial months of pandemic-induced lockdowns?⁷ In part, that is one of the questions we seek to answer in our analysis. The second question we seek to answer is: What challenges face jury work in a post-COVID justice landscape, one where the use of technology will likely lead to important questions about justice efficiency and the benefits of digital innovation in the criminal justice process?

Before engaging in these analyses, we briefly touch upon the importance of jury work in criminal law in Canada. Because jury work is less frequently used in Canada than jurisdictions like the United States of America, sometimes readers wonder about its importance in the Canadian context as a topic of study. After providing some context as to the fundamentals of the necessity and import of jury work in the Canadian context, we explain the methods we used in this paper, before ultimately discussing our findings and concerns about the future of Canadian criminal jury work. Ultimately, the use of videoconferencing technology for jury trials raises promising opportunities for service and representativeness, but the conception of jury trials being held through these means raises numerous concerns which represent significant barriers to an immediate videoconferencing revolution.

⁷ See Bertrand et al, “Dispensing Digital Justice”, *supra* note 3 at 1.

I. SIGNIFICANCE OF CRIMINAL JURY WORK

Jury work in Canada is a laborious enterprise, and while jury trials occur less frequently than trials by judge alone, hundreds of jury trials occur in Canada each year for serious criminal offences delineated in section 469 of the *Criminal Code* and for electable indictable offences when the accused chooses to be tried by a jury.⁸ Moreover, the right to trial by jury is given further content in s.11 of the *Charter* which provides that:

11. Any person charged with an offence has the right ...
(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

Jury trials in common-law English courts have roots that trace back almost 1,000 years.⁹ Historically, the jury protected against undue influence from the monarch and counterbalanced “the broad powers of the King and later the State.”¹⁰ In what now likely serves as a modern-day formulation of the importance of criminal jury work, the Supreme Court of Canada, in majority, in *R v Stillman* restated that:

The modern-day understanding of the nature and importance of the right to a trial by jury was explained in *R. v. Turpin*, [1989] 1 S.C.R. 1296, where Wilson J. wrote:

The right of the accused to receive a trial before a judge and jury of his or her peers is an important right which individuals have historically enjoyed in the common law world. The jury has often been praised as a bulwark of individual liberty. Sir William Blackstone, for example, called the jury “the glory of the English law” and “the most transcendent privilege which

⁸ *Criminal Code*, RSC 1985, c C-46, s 469 [*Criminal Code*]; Richard Jochelson et al, “Revisiting Representativeness in the Manitoban Criminal Jury” (2013) 37:2 Man LJ 365.

⁹ See *R v Bryant* (1984), 48 OR (2d) 732, [1984] OJ No 3404 (CA) at 742, citing William Holdsworth, *A History of English Law* 5th ed (London, UK: Sweet and Maxwell Ltd, 1931) at 312-50; *R v Stillman*, 2019 SCC 40 at para 24 [*Stillman*].

¹⁰ See *Stillman*, *supra* note 9 at para 24, citing William Holdsworth, *A History of English Law* 5th ed (London, UK: Sweet and Maxwell Ltd, 1931) at 312-50; *R v Trépanier*, 2008 CMAC 3 at para 75.

any subject can enjoy”: Blackstone, *Commentaries on the Laws of England* (8th ed. 1778), vol. 3, at p. 379.

The jury serves **collective or social interests** in addition to protecting the individual. The jury advances social purposes primarily by acting as **a vehicle of public education and lending the weight of community standards** to trial verdicts. Sir James Stephen underlined the collective interests served by trial by jury when he stated:

. . . trial by jury interests large numbers of people in the administration of justice and makes them responsible for it. It is difficult to over-estimate the importance of this. It gives a degree of power and of popularity to the administration of justice which could hardly be derived from any other source...

In both its study paper ...and in its report to Parliament ...the Law Reform Commission of Canada recognized that the jury functions both as a protection for the accused and as a public institution which benefits society in its educative and legitimizing roles. (emphasis added)¹¹

In *R v Sheratt*, the Supreme Court also explained the importance of the jury in pithier terms:

The jury, through its collective decision making, is an excellent fact finder; due to its representative character, it acts as the conscience of the community; the jury can act as the final bulwark against oppressive laws or their enforcement; it provides a means whereby the public increases its knowledge of the criminal justice system and it increases, through the involvement of the public, societal trust in the system as a whole.¹²

Since *Sheratt*, the majority in *R v Kokopenace* has, in the context of defining juror representativeness, noted that the “right to be tried by a jury of one’s peers is one of the cornerstones of our criminal justice system.”¹³ The *Kokopenace* majority harmonized representativeness jurisprudence by noting that the representativeness guarantee for an accused in jury work could be undermined when impartiality or independence under section

¹¹ *Stillman*, *supra* note 9 at para 25.

¹² *R v Sherratt*, [1991] 1 SCR 509 at 523-24, 73 Man R (2d) 16; *Stillman*, *supra* note 9 at para 26; In some contexts, the jury’s role as conscience takes on even more significant importance – see *R v Krieger*, 2006 SCC 47 (It has been “well established that under the system of justice we have inherited from England juries are not entitled *as a matter of right* to refuse to apply the law – but they do have the *power* to do so when their consciences permit of no other course” at para 27).

¹³ *R v Kokopenace*, 2015 SCC 28; *Stillman*, *supra* note 9 at para 27.

11(d) of the *Charter*'s fair trial is at issue due to an absence of representativeness or when the issue undermines the jury's role as conscience of the community that maintains public trust in the system under section 11(f) of the *Charter*;¹⁴ sampling "a broad segment of society and giving them the opportunity to participate in jury service would suffice to meet this challenge."¹⁵

Most recently, the *Stillman* majority summarizes the purpose of criminal jury work in Canada, thusly:

First, at the individual level, it protects the accused by giving him or her the benefit of a trial by his or her peers. Since the right is held by the accused, this individual dimension is of utmost importance. Secondly, at the societal level, it provides a vehicle for public education about the criminal justice system and lends the weight of community standards to trial verdicts.¹⁶

Jury work has also been the site of recent legislative reform and Supreme Court jurisprudence in *R v Chouhan* which upheld a series of jury reforms legislated by the federal government.¹⁷ On March 29, 2018, the Government introduced 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*. On June 21, 2019, it received Royal Assent.¹⁸ The Bill made changes to the *Criminal Code*, specifically in areas related to jury selection, preliminary hearings, and bail provisions.¹⁹ The Bill proceeded after the controversial acquittal of Gerald Stanley (a Caucasian man) for the killing of Colten Boushie (a young Indigenous man).²⁰ As Bertrand et al noted:

¹⁴ See Michelle Bertrand, Richard Jochelson & Lauren Menzie, "The Jury Representativeness Guarantee in Canada: The Curious Case of Disability and Justice Making" (2017) 10:3 J Ethics in Mental Health 1 at 10.

¹⁵ See Bertrand et al, "Centuries of Work", *supra* note 5 at 114.

¹⁶ *Stillman*, *supra* note 9 at para 28.

¹⁷ *R v Chouhan*, 2021 SCC 26 [*Chouhan*].

¹⁸ Canada, Library of Parliament, *Legislative Summary of 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*, by Laura Barnett et al, Publication No 42-1-C75-E (Ottawa, 2018) at 16, online (pdf): Library of Parliament <lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/42-1/c75-e.pdf> [perma.cc/WP92-LQUM] [*Summary of Bill C-75*].

¹⁹ Bertrand et al, "Centuries of Work", *supra* note 5 at 130.

²⁰ *Summary of Bill C-75*, *supra* note 18 at 16; *Ibid* at 131.

The accused in *R v Stanley* (2018) was acquitted by an all-white jury after the defence challenged all five jurors who had an “Indigenous appearance.”...The change to Canada’s peremptory challenges legislation was introduced in Bill C-75 into Parliament forty-eight days after the Gerald Stanley decision. Suffice to say, while the Stanley verdict certainly played a role in the abolition of peremptories, there had, in fact, long been calls for the reform or abolition of peremptory challenges in Canada.²¹

Ultimately, the Supreme Court upheld the constitutionality of the law and noted that the application of the law was purely procedural and could proceed retrospectively.²² That the question of peremptory challenges, their constitutionality and retrospective application ascended to the Supreme Court, and that this was the second case that the Court heard about jury law between the years 2019-2020 indicates the importance of jury work in the Canadian constitutional and criminal order.

Nonetheless, it is critical to note that the administration of jury work in Canada is a complex endeavour encapsulating a common-law history and a modern constitutional order. Jury selection is matter of federal and provincial law. The constitutionalism of jury law has been described in terms of division of constitutional powers as follows:

Subsection 91(27) of the *Constitution Act, 1867* confers upon the Canadian Parliament jurisdiction over “[t]he Criminal Law ... including the Procedure in Criminal Matters.”...Subsection 92(14) of the same Act grants jurisdiction over “[t]he Administration of Justice” to the provincial legislatures...Consequently, the in-court process for selecting jurors for criminal trials is established by the provisions of the *Criminal Code*, but the eligibility criteria for potential jurors are established by provincial and territorial statutes. Jurisdictional conflict is avoided by subsection 626(1) of the *Criminal Code*, which recognizes that persons are qualified to serve as jurors in a criminal proceeding if they meet the requirements established by the law of the province where the trial is to be conducted... In addition to establishing eligibility criteria, provincial and territorial laws govern the initial stages of the jury selection process. These statutes authorize the annual preparation of a jury roll by an official (usually the sheriff) in each judicial district. The roll is a list of potential jurors for all of the trials to be held during the ensuing year.

²¹ Bertrand et al, “Centuries of Work”, *supra* note 5 at 131, citing Christopher Salahub, *Seen to be Done: A Graphical Investigation of Peremptory Challenge* (Master Thesis, Swiss Federal Institute of Technology - Department of Mathematics, 2019) [unpublished] at 8, online (pdf): <uwaterloo.ca>; *Summary of Bill C-75*, *supra* note 18.

²² See Chouhan, *supra* note 17.

The names which appear on the roll are generated in a random fashion from other pre-existing lists.²³

Canadian jury law thus reflects a rich common-law tradition but is constituted with a set of jurisdictional challenges. The challenges range from constitutional *Charter* issues as discussed above, through to issues of division-of-powers analysis. The challenges involve the administration of the *Criminal Code* and extends to the conduct and administrative work of local sheriffs' offices. The law involves a human enterprise, including identifying, contacting, assembling, remunerating, instructing and protecting the sanctity of jurors. The enterprise involves the ensuring of fair trial and representative guarantees under the *Charter*. The jury acts as the last line of protection against the oppressive state but also serves a public-education function, as it serves as the conscience of the community. In short, its historic role is essential to the functioning of the modern justice system, as it apprises the values of due process and other *Charter* values, such as the equality values that undergird the representativeness guarantee. Jury law continues to be a frequent subject of adjudication at the highest court levels and has also been a target of law reform in Canada's quest for truth and reconciliation with Indigenous persons.²⁴ How would the processes and law of jury work function during the challenges of the pandemic? We seek to begin understanding the answer to this question in the coming

²³ See Bertrand et al, "Centuries of Work", *supra* note 5 at 122; Cynthia Petersen, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" (1993) 38 McGill LJ 147 at 150-151. See also *Criminal Code*, *supra* note 8, s 626(1).

²⁴ See Mark Israel, "Juries, Race and the Construction of Community" (2000) 17:1 L Context: A Socio-Legal J 96 at 96-112; Mark Israel, "The Underrepresentation of Indigenous Peoples on Canadian Jury Panels" (2003) 25:1 Law & Pol'y 37 at 37-62; Aboriginal Justice Implementation Committee, *Final Report of the Aboriginal Justice Implementation Commission (AJIC)*, (Winnipeg, MB: 2001) online: <ajic.mb.ca/reports/final_toc.html> [perma.cc/75SY-AMY3]; Ministry of the Attorney General, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci*, (Ontario, 2013) online: <turtletalk.blog/wp-content/uploads/2013/02/english_fullreport.pdf> [perma.cc/A543-ZGUZ] (see specifically Karen Restoule, "Jury Roll Selection -Problems or Symptom?" (23 March 2012) Paper Commissioned by the Union of Ontario Indians); Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba*, (November 1999) online: <ajic.mb.ca/volume.html> [perma.cc/6FK3-PWV6].

pages. First, we briefly discuss our methods prior to engaging in our analysis.

II. METHODS

In order to document the response of Canadian courts after the initial closures due to COVID-19, we collected media articles released between July 1, 2020, and October 31, 2020, using Google Search and Google Alerts. Due to the constantly changing nature of the pandemic and the lack of academic writing on this topic, we chose media articles as the source of data to document the developments in Canadian courts' responses to jury trials as they happen. In addition, COVID caused major delays in obtaining court documents, and these documents proved to be unduly expensive across multiple jury trials. Jury trials are not reported even though *voir dire* and motions rulings, sentencing decisions, and subsequent appellate hearings may eventually be reported. We did not undertake a content analysis of the articles collected; instead, we used the collected articles as a "living literature" on the status of jury trials during the pandemic, focusing on the resumption of jury trials across the country. This allowed us to categorize certain trends and concerns that were raised in these media portrayals thematically.

Google Search uses web crawler software to find publicly available webpages and other information, such as books, using links from past crawls and sitemaps provided by website owners, with a focus on new and changing sites.²⁵ The rate of crawling of a webpage is determined by an algorithm and can be affected by various factors such as the webpage being blocked by the owner, being inaccessible to anonymous users, and being considered a duplicate.²⁶ The crawled webpages are then rendered and indexed using many indicators such as freshness of the website and keywords. The search algorithms sort through the Search Index

²⁵ Google Search, "How Search organizes information" (last visited 30 November 2020), online: <google.com/search/howsearchworks/crawling-indexing/> [perma.cc/5T6P-KTUN].

²⁶ Google Search Central, "How Google Search Works" (last visited 30 November 2020), online: <developers.google.com/search/docs/beginner/how-search-works> [perma.cc/VVA4-AZEE].

using a ranking system that considers many different aspects of the webpage and query including the keywords, the credibility and usability of the source, and the freshness of the webpage when the search query pertains to a current event.²⁷ We conducted a Google Search for the time period between July 1, 2020, and September 24, 2020, due to data collection beginning on September 25, 2020, and Google Alerts being unable to collect data retroactively. The Google Search terms were “Canada”, “jury”, and “trial.” We stopped the search once most of the webpages found were either duplicates or unrelated content such as spam links.

Google Alerts (www.google.com/alerts) is a free service that allows users to receive automated emails containing webpage links when new webpages matching the specified terms are indexed by Google Search. The service also allows users to specify how frequently they want alerts, if they want alerts for all the results or only the best matches, the type of source, the language and geographical region of the source.²⁸ Google Alerts has been used as a tool to collect and analyze digital media content in the fields of public health,²⁹ radiology,³⁰ and vaccination.³¹ We set up two Google Alerts for the terms “Canada”, “jury”, and “trial” as well as “Canada”, “COVID-19”, “jury”, and “trial.” These alerts were active between September 25, 2020, and November 1, 2020. The Alerts settings were customized to provide alerts for all English results matching the keywords, “As-it-happens”, from any region.

²⁷ Google Search, “How Search algorithms work” (last visited 30 November 2020), online: [<google.com/search/howsearchworks/algorithms/>](https://support.google.com/search/howsearchworks/algorithms/) [perma.cc/3Y7Z-ZZFY].

²⁸ Google Search Help, “Create an alert” (last visited 30 November 2020), online: support.google.com/websearch/answer/4815696?hl=en [perma.cc/NQL9-7RCC].

²⁹ See Mohammed Jawad et al, “Waterpipe tobacco smoking legislation and policy enactment: a global analysis” (2015) 24:1 Tobacco Control i60, online: doi.org/10.1136/tobaccocontrol-2014-051911 [perma.cc/8ZM4-7RYA].

³⁰ See Kamran Munawar, Mark Sugi & Vinay Prabhu, “Radiology in the news: a content analysis of radiology-related information retrieved from google alerts” (2020) Current Problems in Diagnostic Radiology 1, online: doi.org/10.1067/j.cpradiol.2020.09.010 [perma.cc/662G-BDUP].

³¹ See Heidi J Larson et al, “Tracking the global spread of vaccine sentiments: The global response to Japan’s suspension of its HPV vaccine recommendation” (2014) 10:9 Human Vaccines & Immunotherapeutics 2543 at 2543-50, online: doi.org/10.4161/21645515.2014.969618 [perma.cc/825T-YKJ8].

The types of sources included were news, blogs, and webpages. We monitored the alerts regularly and stopped the alerts once the number of hits had reduced, and most of the hits were either duplicates or unrelated content.

For the purpose of documenting the response of the courts, particularly their approach to resuming jury trials during the pandemic and the concerns that arise, only articles that matched all the terms “Canada”, “jury”, “trial”, and “COVID-19” were included. Articles reporting on both criminal and civil jury trials were included. Articles that detailed ongoing high-profile jury trials with no reference to COVID-19 were not included. From both the Google Search and the Google Alerts, a total of 56 articles were collected. Of this total, 75% ($n = 42$) of the articles were from general news sources, 14.28% ($n = 8$) were from professional/specialist sources such as legal magazines or blogs, followed by 7.14% ($n = 4$) from official government and 3.57% ($n = 2$) from non-text sources.

Articles reporting on federal developments represented 8.93% ($n = 5$) of articles. At the provincial/territorial level, Ontario was the most reported-on province being represented in 35.71% ($n = 20$) of articles, followed by British Columbia with 16.07% ($n = 9$), New Brunswick with 14.28% ($n = 8$), Nova Scotia with 12.50% ($n = 7$), Manitoba with 8.93% ($n = 5$), Alberta with 5.36% ($n = 3$), Saskatchewan with 3.57% ($n = 2$), and Newfoundland and Labrador, Quebec, and the Northwest Territories each with 1.17% ($n = 1$). None of the included articles reported on Prince Edward Island, Yukon, and Nunavut. The underrepresentation/no representation of some of the provinces and territories could be due to a lack of reporting/development on jury trials in these jurisdictions. In the case of Quebec, the lack of representation could be due to the language settings of the search and alerts being set to English.

III. RESULTS

We reviewed the various media representations related to jury work during the data gathering period and found seven basic categories that cohered thematically. Each category was further coded into subcategories. Table 1 shows the categories and subcategories and their percentages and frequencies out of the total

media instances gathered. Articles could include multiple themes and subthemes, and that is reflected in the numbers below.

Table 1. Categories and Subcategories of 56 Juror-Related Media Articles in Canada for July 1 – October 31, 2020

Category	% of Total	Freq- uency	Subcategory	% of Total	Freq- uency
Juror Experiences	29	16	Juror anxiety/hardship due to COVID-19 or lack thereof	11	6
			Juror physical security/wellbeing concerns	5	3
			Poor juror pay	12	7
			High-risk potential jurors will be granted deferrals	7	4
			Lack of willing jurors/running out of potential jurors	11	6
			Declaring jury duty an essential service (suggestion)	5	3
Location of Jury	61	34	Off-site jury selections	41	23
			Off-site jury trial	30	17
			On-site jury trial	16	9
Safety Measures for Individual Juror's Health	62	35	Physical distancing	54	30
			Masks/Face shields (not mandatory)	2	1
			Masks/Face shields (mandatory/highly recommended)	32	18
			Enhanced cleaning procedures	11	6
			Plexiglass barriers	16	9
			In accordance with public health orders/capacity limits	25	14
Selection of Jury	21	12	Tiered jury selection	5	3
			Online screening for potential jurors	9	5
			Online registration/check-in for potential jurors	9	5
			On-site screening of potential jurors	12	7
Jury Process Structural Changes During the Trial Including Safety for All Participants	43	24	Virtual trials for non-jury trials	9	5
			Increased discretion for judges (suggestion)	2	1
			Modifications/reconfigurations to courtrooms	18	10
			Jury deliberations in another courtroom/other large room	7	4
			On-site screening of all persons entering the courthouse/off-site courtroom	7	4
			Possible issue of not being able to see a potential juror/witness' face	5	3
			Virtual components in in-person jury trials	11	6
			Restrictions on public viewing of trials	7	4
			Possibility of virtual jury trials	5	3
Effect of Jury in COVID era on Other Legal Issues	62	35	Backlog of cases	30	17
			Jordan timelines	20	11
			Potential issues for lawyers from the reconfiguration of a courtroom	5	3
			A person involved in the trial being tested for/testing positive for COVID-19	14	8
			Delays/mistrials in resumed trials due to COVID-19	21	12
			Plea deals being offered to accused to reduce backlog of cases	2	1
			Possibility of having to move the trial to another jurisdiction to accommodate safety protocols	5	3
			Suspension of jury selections (second time)	4	2

**Note that while 56 media pieces in total were used, they frequently raised multiple issues so numbers and percentages will not equal 100%*

As discussed above, some of the media representations raised multiple different themes within a single work, and thus the

percentage figures do not add to 100%. Due to space constraints, we will only discuss the main four thematic areas we uncovered. Three of the four most frequently appearing categories unsurprisingly were: safety measures for individual juror health; location of the jury; and jury process structural changes during the trial, including safety for all participants. This is certainly to be expected as these three categories all directly relate to pandemic response, and it is to be expected that media representations would demonstrate this kind of response.

For example, a Manitoba newspaper article in July discussed the resumption of jury trials in the province.³² The article noted that Summons were sent out for jury selections scheduled for August 28-29 in Manitoba. The Chief Justice of what was then the Manitoba Queen's Bench [now King's Bench] was quoted as saying that on his observations only half of those who responded to the Summons expressed apparent anxiety over COVID-19, but he anticipated there would be related psychological concerns that need to be addressed as proceedings progressed. He also noted that the trial would be held at the Convention Centre in Winnipeg and other off-site locations in other parts of the province to accommodate social distancing while not compromising anything in the selection process. Masks (which would not be mandatory) and sanitizers would be available, and other precautions would be taken. For the trial, jurors would be separated into two full-sized jury boxes and deliberations would take place in a separate courtroom. Witnesses would possibly have to remove their masks while testifying so that the court could hear them clearly and allow the jury to see the witness's face for the purposes of assessing credibility. The article outlines how safety concerns, from personal juror health through to location and disinfection, would be accommodated in the jurisdiction.

Similarly, official notices about criminal jury trials were provided in the second half of July for the practicing bar in British Columbia.³³ Jury selections and trials were expected to resume in

³² See Dean Pritchard, "Jury trials to resume in September", *Winnipeg Free Press* (13 July 2020), online: <winnipegfreepress.com/local/jury-trials-to-resume-in-september-571750572.html> [perma.cc/HQ89-FGCR].

³³ See Supreme Court of British Columbia, *COVID-19: Criminal Jury Trials Resuming September 8, 2020* (Official Notice) (17 July 2020), online:

the fall of 2020 in that province. Courtrooms that could allow for physical distancing would be modified to be replete with plexiglass barriers, and face shields and masks would also be used. Jurors who had issues with the safety measures could ask to be excused at the selection. Where courthouses could not be modified, trials could either be held in off-site locations or in another court in the same judicial district. If any of the parties had issues with a change of location, the Court would consider whether the trial should proceed or be adjourned. Jury selection would take place in two stages: stage one would be the drawing and recording of random juror numbers without the potential jurors present. Stage two would be on another date where the jury panel will be divided into groups of fifteen according to the sequence of numbers drawn and called to the selection at different times during the day. The counsel and accused would be present and the judge would address the first group and then have individuals undergo the selection, and then repeat the process with the second group and so on. Jurors could leave after being selected while the selection continues. Stage two could be held in the courthouse, offsite location or a combination. Schedules would be revised as needed to accommodate the two-stage jury selection and only jury selection for one trial could transpire at any one time and place.

An Ontario account in late August spoke about juror anxieties related to COVID work.³⁴ The article noted that the justice system was under significant pressure to resume jury trials due to backlog of cases. The federal Department of Justice thus released “guidance documents” on the resumption of jury trials, drafted by an action committee. Prospective jurors, the article noted, will likely have to do a complete a pre-screening check-in process as required by relevant jurisdictions. Defence lawyer Sid Freeman was quoted that he was worried that jury representativeness would be further negatively affected by the pandemic, since marginalized and

<bccourts.ca/supreme_court/documents/COVID-19_Notice_No.38_Criminal_Jury_Trials_Resuming_September_8_2020.pdf
> [perma.cc/6E9F-H98W].

³⁴ See Betsy Powell, “Who wants to be a juror in a pandemic? Inside the push to resume jury trials in Ontario”, *OurWindsor.ca* (22 August 2020), online: <ourwindsor.ca/news-story/10144336-who-wants-to-be-a-juror-in-a-pandemic-inside-the-push-to-resume-jury-trials-in-ontario/> [perma.cc/SQ79-4E4Z].

racialized groups are routinely and disproportionately affected.³⁵ A number of advocates were quoted as expressing concerns over not being able to read the facial expressions of potential jurors/selected jurors due to masks and possible new distanced positioning of jury members in the courtroom. The health and safety of jurors and other participants in the trial process remained a paramount concern into Fall 2020.³⁶ For example, in New Brunswick, a jury of 12 and 2 alternates were selected for a manslaughter trial. The jury-selection process was altered to reduce the number of people gathering. An initial screening of potential jurors was held where each potential juror was asked whether they knew anyone involved in the trial. The shortened pool returned to the Trade and Convention Centre on another day where they were brought in groups of 150. They were then called individually to a smaller waiting area before being admitted into the modified courtroom.

The category tied for first-place in terms of number of mentions (62%) was the effect of the jury in the COVID era on other legal issues. This is simply a reflection on how any changes to routine processes during the pandemic have knock-on effects on legal issues and procedures. Obviously, a number of articles referenced virtual procedures and trials in a non-jury context.³⁷ We have already referenced above the concern that some counsel and judges had about not being able to see the jurors' faces.³⁸

In some cases, according to an article from Halifax, construction of off-site facilities seemed to add to delays in jury trials.³⁹ Jury trials in Halifax needed to be rescheduled due to the

³⁵ See *ibid.*

³⁶ See Mia Urquhart, "Saint John boardwalk manslaughter trial to begin Tuesday", *CBC Canada* (19 October 2020), online: <cbc.ca/news/canada/new-brunswick/manlaughter-trial-starts-tuesday-1.5768137> [perma.cc/5JF7-DTMV].

³⁷ See Katherine DeClerq, "Jury selection in Ontario COVID-19 hotspots suspended for 28 days", *CTV News Toronto* (10 October 2020), online: <toronto.ctvnews.ca/jury-selection-in-ontario-covid-19-hotspots-suspended-for-28-days-1.5140868> [perma.cc/5JF7-DTMV].

³⁸ See Powell, *supra* note 34.

³⁹ See Blair Rhodes, "COVID-19 creates further complications for jury trials in Halifax", *CBC Nova Scotia* (23 October 2020), online: <cbc.ca/news/canada/nova-scotia/more-delays-for-jury-trials-in-halifax-1.5774637> [perma.cc/V587-RRAS]; Steve Bruce, "Complications delay

construction of the off-site courtroom which would require delays until March 1, 2021. Associate Chief Justice Duncan said that he planned to schedule case management conferences for some of the cases and set trial dates for the rest in a virtual hearing. The Chief Crown Attorney objected to the court's approach and asked that older cases be prioritised to meet the *Jordan*-based timeline ceiling delays deadline. The Chief Justice said that this would have a "domino effect" on all pending cases, but has postponed setting any more trial dates until December so that the Crown and defence lawyers would have an opportunity to make submissions on which cases should get priority. Case management judges were assigned to 8 of the more complicated cases to smoothen the process.

Delays were a common theme mentioned in 21% the review of articles. In Quebec, a day after the selection of the first jury trial during the COVID era in the jurisdiction, a juror informed the court that he had been in contact with a person with COVID-19; this resulted in delays and the formation and utilisation of an eleven-member jury.⁴⁰ In some cases, lawyer illness delayed trial.⁴¹ The trial of Matthew Raymond, in Fredericton, was adjourned after a lawyer showed symptoms of COVID-19. The trial was being held at Fredericton Convention Centre which was big enough to allow social distancing. Precautions were being taken including use of masks, spaced out seating, and the cleaning of witness box after every witness finished testimony.

Indeed, delays were a common theme, even after our data collection period, as the pandemic worsened during the second wave. A Manitoba article explained that jury trials in November would be reduced since there was a Code-Red restriction and COVID-19 outbreak in the provincial jails, making exposure more

setting of dates for Halifax jury trials", *The Saltwire Network* (23 October 2020), online: <saltwire.com/news/provincial/complications-delay-setting-of-dates-for-halifax-jury-trials-512938/> [perma.cc/A7AD-K5N3].

⁴⁰ See "Jury Deadlocked, The First Trial Of The COVID Era Aborts", *ELECTRODEALPRO* (25 September 2020), online: <ici.radio-canada.ca/nouvelle/1735365/jury-dans-limpasse-le-premier-proces-de-lere-covid-avorte> [perma.cc/9C86-SPS3].

⁴¹ See Hadeel Ibrahim, "Trial of accused Fredericton shooter adjourned for the week", *CBC New Brunswick* (25 September 2020), online: <cbc.ca/news/canada/new-brunswick/matthew-raymond-trial-first-degree-murder-1.5737818> [perma.cc/BE4K-M2KK].

likely with an accused in attendance.⁴² Nonetheless, a jury trial was already underway and the presiding judge reassured parties that safety precautions were being undertaken. Similar scenarios were being reported in Ontario.⁴³ Similarly, the delays due to COVID seemed to be influencing defence requests for stays: for example, defendants in an animal abuse case in the Fraser Valley asked for a stay of proceedings due to delay.⁴⁴

Some articles, including ones reported after our data collection ended, indicated innovative processes for trials to proceed, including jury processes – for example in Alberta.⁴⁵ Bill 38,⁴⁶ introduced in Alberta, and receiving royal assent with most parts coming into force on December 9, 2020, allows courts to send juror summonses by email and allows individuals to participate in trials by videoconference/teleconference, among other things. The Bill also allows Albertans to enter pleas, set trial dates, and request adjournments by telephone, email and other electronic means instead of having to go to court in person. The Bill also allows provincial offences tickets for more types of offences to be served by mail. Courts would also be able to enter pleas, set trial dates, etc. by email, telephone or videoconference. According to an article in

⁴² See Dean Pritchard, “Courts curtailing in-person hearings as COVID surges”, *Winnipeg Free Press* (2 November 2020), online: <winnipegfreepress.com/special/coronavirus/courts-curtailing-in-person-hearings-as-covid-surges-572954372.html> [perma.cc/6TNU-9ZWA].

⁴³ See John Schofield, “New jury selection and jury trials suspended as Ontario COVID-19 cases soar”, *The Lawyer’s Daily* (11 November 2020), online: <law360.ca/ca/articles/1753183/new-jury-selection-and-jury-trials-suspended-as-ontario-covid-19-cases-soar> [perma.cc/7TMZ-HBLT].

⁴⁴ See Paul Henderson, “UPDATE: Defence in Fraser Valley chicken abuse cases asks BC Supreme Court to drop the charges”, *The Chilliwack Progress* (28 September 2020), online: <theprogress.com/news/defence-in-fraser-valley-chicken-abuse-cases-asks-bc-supreme-court-to-drop-the-charges/> [perma.cc/FZ2W-N3PN].

⁴⁵ See Ian Burns, “Alberta bill would allow for electronic jury summonses, hearings, trials via videoconference”, *The Lawyer’s Daily* (2 November 2020), online: <law360.ca/ca/articles/1753056/alberta-bill-would-allow-for-electronic-jury-summonses-hearings-trials-via-videoconference> [perma.cc/27SM-6W8B].

⁴⁶ Bill 38, *The Justice Statutes Amendment Act*, 2020, 2nd Session, 30th Legislature, Alberta (2020) cl 5 (Royal Assent 9 December 2020); N.B. Bill 38 has now come into law: *Jury Act*, RSA 2000, c J-3 as amended by *Justice Statutes Amendment Act*, SA 2020, c C37, s 1-3.

The Lawyer's Daily,⁴⁷ the bill has been supported by many in the legal community.

Innovation was also being utilized in the juror-selection process in some cases. New Brunswick was the first jurisdiction in Canada to conduct both a jury selection and full jury trial since the pandemic began.⁴⁸ Pre-screening and registration through a computer and an assigned barcode for jurors was mandated in proceedings in Fredericton. Nonetheless, the provincial government made clear that such arrangements were temporary – a statement from the provincial justice minister reiterated the importance of jury duty and outlined provincial plans to resume in-person proceedings.

Innovation in jury trials was a topic raised in a popular law-focused podcast.⁴⁹ The views expressed in the podcast seemed to suggest that digital innovation would be difficult in the context of criminal jury trials. Mark Farrant, CEO of the Canadian Juries Commission and the host, Jordan Heath-Rawlings, discussed jury duty during the pandemic. They discussed the numerous court closures, the ways courts were resuming jury trials, including the use of alternate locations, and physical distancing. Farrant argued that in-person jury trials are difficult but necessary, even during times of COVID. He argued that the proceedings could not be conducted virtually. Farrant also advocated for minimum-wage juror pay, especially during the pandemic, and argued that jury duty should be declared an essential service during the pandemic. The reluctance to proceed with jury trials virtually was echoed by the official guidelines on resumption of jury trials by the Canadian Department of Justice.⁵⁰

⁴⁷ See Burns, *supra* note 45.

⁴⁸ See Bernise Carolino, “First jury selection and full jury trial in Canada since COVID-19 crisis proceed in New Brunswick”, *Canadian Lawyer* (27 August 2020), online: <canadianlawyermag.com/practice-areas/litigation/first-jury-selection-and-full-jury-trial-in-canada-since-covid-19-crisis-proceed-in-new-brunswick/332754> [perma.cc/6AWC-XSZ8].

⁴⁹ See Jordan Heath-Rawlings, “Would you do jury duty in a pandemic?”, *The Big Story* (2 September 2020), online (podcast): <thebigstorypodcast.ca/2020/09/02/would-you-do-jury-duty-in-a-pandemic/> [perma.cc/N9FD-9WYE].

⁵⁰ Department of Justice Canada, “New Key Guidance for Resumption of Criminal Jury Trials” (2 July 2020), online: <canada.ca/en/departement-

Some virtual innovation was practiced in jury trials, but in such cases, it was the witnesses who were allowed to participate through videoconferencing. In Saskatchewan, “virtual” platforms have been set up to allow witnesses to testify remotely.⁵¹ Jury deliberations took place in a separate room where jurors were socially distanced and provided with their own copies of exhibits or instructed on how to safely handle exhibits. Masks were required to be worn at all times. If a juror developed symptoms or was diagnosed with COVID-19, the trial judge would be notified and would exercise enhanced discretion in proceeding. Discretion for the trial judge would extend to considering exceptional circumstances which might justify some time-to-trial delays. Audience seating in jury trials was limited but respecting open court principles remained a concern – in high-profile cases, a live feed would be set up in an adjacent room.

Pilot virtual jury trials have been studied in other jurisdictions.⁵² A UK study had mock trials based upon one case

justice/news/2020/07/new-key-guidance-for-resumption-of-criminal-jury-trials.html> [perma.cc/DK4F-Z5WW].

⁵¹ See Heather Polischuk, “Queen’s Bench [now King’s Bench] courts forging ahead with jury trials”, Regina Leader-Post (7 October 2020), online: <leaderpost.com/news/saskatchewan/queens-bench-courts-forging-ahead-with-jury-trials> [perma.cc/TNM8-N7ES]; similar protocols were being called for in Thunder Bay – Karen Edwards, “Bushby trial expected to proceed at courthouse hotel on Nov. 2”, *The Star* (27 October 2020), online: <thestar.com/news/canada/2020/10/27/bushby-trial-expected-to-proceed-at-courthouse-hotel-on-nov-2.html> [perma.cc/A3M4-SUAS]; enhanced discretion for the judge was also advanced in other Ontario courts – see Schofield, *supra* note 43; similarly, in BC where a massive backlog of criminal cases had accrued due to the Pandemic, the AG has asked for increased discretion for judges around jury trials to cope with COVID-19 and leniency for the *Jordan* timelines for time to trials via the exceptional circumstances rules developed in *Jordan* – see Louise Dickson, “BC attorney general pushing for return of criminal jury trials”, *Times Colonist* (15 July 2020), online: <timescolonist.com/news/local/b-c-attorney-general-pushing-for-return-of-criminal-jury-trials-1.24170430> [perma.cc/CH25-RSQS].

⁵² See Linda Mulcahy, Emma Rowden & Wend Teeder, “Exploring the case for Virtual Jury Trials during the COVID-19 crisis: An evaluation of a pilot study conducted by JUSTICE” (2020) Centre for Socio-Leg Studies: Oxford Brookes U 1 at 147, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3876199> [perma.cc/6KJL-BG6B]; see also Sarah Lloyd, “Remote jury trials during COVID-19: what one project found about fairness and technology”, *The Conversation* (16 July

scenario, with the legal roles and members of the jury played by volunteers and experts. Jurors participated from their homes and some parts of the trial were abbreviated. Jurors, clerks and judge were assigned to private chat rooms via videoconference. A second pilot study made amendments to improve the proceedings including conducting test calls for videoconferencing in advance of the trial, and by providing a helpful advice crib sheet (which outlined all the points they needed to address to ensure that a virtual court hearing runs smoothly) for the judge and clerk.⁵³ Results from the pilots suggested that, with training, participants were comfortable with the process and that the technology worked relatively well. However, there were issues with bandwidth, and with the notion that the use of technology potentially excluded individuals who did not have technological proficiency. There was a concern raised that the informal setting of participants' homes might affect how seriously the trial and a juror's role would be taken. The authors contended that, with adjustments and technological training, short and medium-length trials could be successful when held remotely. The authors noted that confidentiality was an issue with jurors participating from their homes. The remote process and informal environment might cause the jurors to engage less with the trial and rush cases or not discuss the requisite deliberative issues in detail, thus increasing the potential of wrongful convictions. Training jurors in such contexts could be expensive and time consuming, and the authors expressed concern that the stress from the training process could affect juror decision making. A survey of lawyers showed that 67% of respondents agreed that remote trials would negatively impact communication between lawyers and defendants. Remote trials could also affect access to evidence, according to the authors.

The results of the pilot study do raise the question of whether there is a future for remote criminal jury trial processes in Canada. The pandemic response to criminal trials in Canada thus far has demonstrated good reason for scepticism. In the next section, we discuss the potential limitations and benefits for virtual criminal jury trials in Canada.

2020), online: <theconversation.com/remoted-jury-trials-during-covid-19-what-one-project-found-about-fairness-and-technology-142505> [perma.cc/7EA2-CP9M].

⁵³ See Mulcahy, Rowden & Teeder, *supra* note 52 at 16.

IV. POTENTIAL LIMITATIONS AND BENEFITS FOR VIRTUAL CRIMINAL JURY TRIALS IN CANADA

This section examines several aspects of jury trials and outlines possible limitations — as well as some conceivable benefits — in relation to the potential use of videoconferencing and other remote technology in the jury-trial context.

E. *Virtual Jury Selection*

As outlined above,⁵⁴ the typical jury-selection process is arduous. It often involves hundreds of prospective jurors (those individuals who received summonses in the mail) taking time away from work, or otherwise out of their days, to attend at the courthouse for hours upon hours, while a large complement of court staff engage in a series of toilsome administrative duties. In some regions, the amount of travel involved in order for prospective jurors to attend the courthouse for jury selection is significant and can result in a jury that is ultimately not representative of the broader community.⁵⁵

The jury-selection stage is one component of the criminal jury trial that feasibly could be done virtually — though there are some important factors to consider and issues to address.

From the outset, the previously-discussed Alberta Bill 38,⁵⁶ which allows for electronic jury summonses, is a move to attempt to modernize court processes, but this risks limiting the jury pool to only those individuals who use computers. Granted, the vast majority of Canadians regularly use the internet and email, but rural Canadians, low-income individuals, and seniors are less likely to use the internet and email regularly.⁵⁷ Moreover, videoconferencing software requires high-speed internet service in order to function effectively; therefore, using videoconferencing technology for *any* aspect of a jury trial risks precluding lower-

⁵⁴ See the section entitled “**Significance of Criminal Jury Work**”, *above*.

⁵⁵ See generally Kent Roach, *Canadian Justice, Indigenous Injustice: the Gerald Stanley and Colten Boushie Case* (Montréal, QC: McGill-Queen’s University Press 2019).

⁵⁶ See the section entitled “**Results**”, *above*.

⁵⁷ See Statistics Canada, *Evolving Internet Use Among Canadian Seniors*, by Jordan Davidson & Christoph Schimmele, Catalogue no. 11F0019M – No. 427 (Research Paper) (Ottawa: Statistics Canada, 2019) at 17.

income and rural individuals (as well as possibly others) from serving as jurors.⁵⁸ As a related point, an individual receiving a jury summons may possibly claim (legitimately or otherwise) internet-connection difficulties in order to be excused from jury duty.

Another significant issue at the jury selection stage is the need to ensure that juror identities remain confidential.⁵⁹ Due to the ease of individuals at their homes surreptitiously recording the proceedings and/or using social media to post information about the proceedings, steps would need to be taken to protect jurors' identities (including perhaps by using anonymous numbers instead of account/screen names in the videoconference). At the same time, there must be a mechanism whereby court staff are able to confirm the identities of prospective jurors.

However, there are some potential benefits to using a virtual approach to jury selection, including lower costs (and opportunity costs) for the courts and a reduction in travel costs as well as less lost time and pay for prospective jurors. Moreover, there are feasible workarounds in relation to the limitations listed above, including offering the opportunity for individuals not willing or able to connect from their houses to attend at a public centre (such as a town hall, which would presumably have high-speed internet) in their home community in order to participate in the jury-selection process.

Jury selection is the most promising aspect of the criminal jury trial with regard to the potential use of videoconferencing technology – and this change could conceivably persist post-pandemic.

F. Virtual Trial Proceedings

During the bulk of a virtual trial itself, a number of possible issues could arise that would significantly detract from the integrity of a virtual jury trial. Perhaps most importantly, it would be vital to ensure that jurors are paying close attention to the proceedings and that they do not access media coverage or social media discussions about the case. While these are potential issues with regard to every jury trial, they become particularly problematic in the virtual context. This is because when jurors “appear from their homes the

⁵⁸ See Mulcahy, Rowden & Teeder, *supra* note 52 at 10, 30.

⁵⁹ See *Criminal Code*, *supra* note 8 at s 631(6).

rooms that they are in become part of the virtual court.”⁶⁰ This means that all of the typical goings-on of a household – including interruptions from children, pets, and partners as well as phone calls, text messages, and emails – would be brought into the virtual courtroom. Additionally, individuals would be able to access news sites, social media, work software, cell phones, etc. during the trial (without necessarily being detected); it would be impossible to ensure that a virtual juror’s attention is completely focused on the trial. In the virtual realm, unlike in a typical jury trial, there is no physical control of the environment or direct monitoring of the conduct of jurors (other than through the view provided by a single fixed camera, which does not provide information about what a juror is actually doing). Moreover, the overall solemnity of the proceedings is greatly diminished in the virtual context,⁶¹ meaning that important social cues meant, at least in part, to convey the gravitas of the trial would be lacking via videoconference.

Aside from these fundamental concerns, there are other practical challenges with regard to a move toward virtual jury trials. For instance, as anyone who has conducted videoconferencing meetings, classes, or presentations during the COVID era can likely relate to, internet connectivity issues are bound to arise in the context of a virtual jury trial. Any instance of a connection failure resulting in a juror missing any aspect of the trial significantly impacts upon the integrity of the justice system.⁶² While court recordings could, in theory, be replayed, this detracts from the flow of the trial and may give witnesses an opportunity to reconsider their responses prospectively. It would also be vital to ensure that *voir dire*s and objections are dealt with in the absence of the jury – and in such a manner that jurors do not learn of what has been discussed in their absence.⁶³ Additionally, jurors would have to be able to ask questions of the trial judge. While videoconferencing software may be adjusted for this purpose, no conceivable use of technology could properly substitute for a view of a scene, if one were to be ordered.⁶⁴

⁶⁰ See Mulcahy, Rowden & Teeder, *supra* note 52 at 5.

⁶¹ See *ibid* at 5, 26.

⁶² See *ibid* at 5.

⁶³ See *Criminal Code*, *supra* note 8 at s 648.

⁶⁴ See *ibid* at s 652.

The most significant practical challenge involves the tendering of evidence. How should exhibits be received by the court, put to witnesses, and reviewed by jurors in a virtual-trial context? While photos and videos would likely be relatively straightforward, real evidence (such as a weapon or a piece of clothing) would seemingly pose an insurmountable challenge in this respect.

G. Virtual Jury Deliberations

In Canada, jury deliberations must, by law, remain confidential. Unlike in the United States, where it is common for jurors to explain their decision-making processes in the media following the return of a verdict, in Canada, it is a criminal offence for any juror to “[disclose] any information relating to the proceedings of the jury when it was absent from the courtroom that was not subsequently disclosed in open court.”⁶⁵ While this provision is quite clear in prohibiting the intentional disclosure of jury deliberations, a virtual trial would bring with it the significant risk of jury deliberations being improperly – and potentially inadvertently – accessed or disclosed. Typically, a sheriff would be responsible for maintaining the sanctity and security of the jury room. However, this approach would not seem to be practical in a virtual context, meaning that some of these responsibilities would likely fall to the jurors themselves. Any jury trial that relies upon individual jurors to also play the role of court staff (in this situation, by attempting to ensure the security of their residences and videoconferencing accounts, which become part of the virtual courtroom) is on an unsure foundation.

Additionally, as mentioned above in the section of this paper dealing with trial proceedings, it is imperative to guard against jurors having access to improper extraneous materials throughout the trial – and especially during deliberations.⁶⁶ Moreover, it must be acknowledged that true jury sequestering, as contemplated by s 647 of the *Criminal Code*,⁶⁷ would be impossible to achieve in the virtual-jury-trial context. By design, jurors would not be together in the normal sense; instead, they would presumably be having

⁶⁵ See *Criminal Code*, *supra* note 8 at s 649.

⁶⁶ See generally *R v Pannu*, 2015 ONCA 677; *R v Farinacci*, 2015 ONCA 392.

⁶⁷ *Criminal Code*, *supra* note 8 at s 647.

interactions with other members of their households (and possibly people outside their residences as well).

Practically, it would also be challenging for jurors to review pieces of evidence from the trial and also to potentially ask questions of the trial judge. These are common – and often necessary – requests in deliberations, and it is possible that jurors would be disinclined to ask for these in a virtual context, due to the complexities involved. This may mean that decision-making is not done as carefully as would ordinarily be the case.

H. General Privacy and Security Concerns

If the criminal-justice system ultimately transitions to relying upon home internet connections of private citizens, there are significant privacy and security risks at play. In addition to individuals having variable internet connection quality, jurors – just as with all members of society – would have variable internet and computer security settings, which could create vulnerabilities throughout the trial process.

It has been suggested that courts could provide jurors with hardware (which allows access only to the software needed to serve as jurors in a virtual jury trial) and, in some cases, high-quality internet service for the duration of the trial.⁶⁸ While this may deal with some concerns, it overlooks more basic concerns relating to the privacy and security of internet-based communications. Although courts have used limited “live” video in relation to witness testimony for decades (primarily to facilitate the taking of evidence from vulnerable witnesses), these video connections with the court have been via closed-circuit systems.⁶⁹ This is for good reason; communications that take place via the internet typically cannot be considered truly private or secure.⁷⁰ Zoom, a videoconferencing platform that has been used by the Supreme

⁶⁸ See Mulcahy, Rowden & Teeder, *supra* note 52 at 5.

⁶⁹ See *Criminal Code*, *supra* note 8 at s 486.2(5).

⁷⁰ See generally Michael Geist, *Law, Privacy, and Surveillance in Canada in the Post-Snowden Era* (Ottawa, ON: University of Ottawa Press, 2015); Rob Larson, *Bit Tyrants: the Political Economy of Silicon Valley* (Chicago, IL: Haymarket Books, 2021).

Court of Canada⁷¹ and the US federal court⁷² during the pandemic, is an excellent example of unsecure internet-based communications.⁷³ Despite claims of end-to-end encryption with regard to communications, it has been revealed that Zoom communications in fact were not properly encrypted – and, in fact, Zoom communications are routinely routed through servers based in mainland China, making these communications susceptible to interception and monitoring by Chinese government agencies.⁷⁴

China is certainly not the only state actor that has an interest in monitoring data passing through servers based in the country. In 2018, the United States enacted the *Clarifying Lawful Overseas Use of Data Act*,⁷⁵ which purports to allow American law enforcement agencies to compel US-based companies to disclose data (including communications data) “regardless of whether such communication, record, or other information is located within or outside of the United States.”⁷⁶ Since the vast majority of online communications services are operated by American companies, this means that even if an American company’s servers are based in Canada (or in another non-US country), the US government has given itself the ability to potentially monitor the stored or transmitted data. While it is doubtful that the US government would typically take an interest in Canadian criminal matters, it is certainly not inconceivable that there could be instances where this would be the case.⁷⁷ Therefore, it would be problematic for

⁷¹ See Rt Hon Richard Wagner CJC, “The Court’s first-ever hearing fully by video-conference” (9 June 2020), online: *Supreme Court of Canada* <scc-csc.ca/judges-juges/spe-dis/rw-2020-06-09-eng.aspx> [perma.cc/Z3ED-GFE3].

⁷² See Herbert B Dixon Jr, “Pandemic Potpourri: The Legal Profession’s Rediscovery of Teleconferencing” (2020) 59:4 *Judges J* 37 at 38.

⁷³ See Bill Marczak & John Scott-Railton, “Move Fast and Roll Your Own Crypto”, *The Citizen Lab* (3 April 2020) online: <citizenlab.ca/2020/04/move-fast-roll-your-own-crypto-a-quick-look-at-the-confidentiality-of-zoom-meetings/> [perma.cc/6JQ6-PT6E].

⁷⁴ See *ibid.*

⁷⁵ See Secil Bilgic, “Something Old, Something New, and Something Moot: The Privacy Crisis Under The Cloud Act” (2018) 32:1 *Harv JL & Tech* 321 at 323.

⁷⁶ See *ibid* at 334.

⁷⁷ See Jason Proctor, “Meng Wanzhou’s lawyers claim extradition would violate

Canadian courts to rely upon mainstream videoconferencing platforms offered by US-based companies to facilitate virtual criminal jury trials, given the strict requirements related to jury secrecy in Canada.

Aside from state actors, there are significant concerns related to cybersecurity on a more prosaic level. Judge Herbert Dixon Jr. refers to cybersecurity as “an 800-pound gorilla”⁷⁸ with regard to virtual hearings and described two recent examples that “demonstrate the concern of [those] who oppose virtual hearings because of cybersecurity and hacking vulnerabilities.”⁷⁹ The first example involves the disruption of a Georgia federal court hearing, wherein, on September 11, 2020, “an ongoing virtual hearing involving nearly 100 participants was interrupted when the screen of all video participants received a message that Osama was sharing his screen and displayed images of a swastika, a man and woman engaging in a sex act, and airplanes striking New York’s World Trade Center on September 11, 2001.”⁸⁰ The second example involved a hearing at the state-level court in Florida, wherein “hackers broke into the virtual proceedings and levied insults at the judge.”⁸¹ Because of the additional participants in jury trials (and the related fact that proceedings are occurring virtually across many different locations), there are increased security vulnerabilities in comparison to judge-alone virtual trials.

In addition to cybersecurity and privacy concerns, there are more basic physical security and privacy concerns stemming from having jurors participate in trials from their residences. For instance, jury deliberations in a virtual trial could be overheard by other members of the household or neighbours. Additionally, jurors may be subject to verbal or physical threats – or otherwise have undue pressure placed on them by people with an interest in the outcome of a given case – in the course of a case, as there would be no sheriffs present at their residences (again, considered to be

international law”, CBC *British Columbia* (18 December 2020), online: <cbc.ca/news/canada/british-columbia/meng-wanzhou-extradition-international-law-1.5848546> [perma.cc/8VWS-JQ37].

⁷⁸ Dixon Jr, *supra* note 72 at 39.

⁷⁹ *Ibid.*

⁸⁰ *Ibid* (ironically, the focus of the hearing was determining whether Georgia’s electronic voting system was sufficiently secure...).

⁸¹ *Ibid.*

part of the virtual courtroom) in the way that there otherwise would be for a typical trial in a physical courtroom.

J. *Criminal Code Adherence*

In reviewing the provisions of the *Criminal Code*, two significant difficulties arise with regard to the prospect of virtual jury trials. Specifically, s 648(1) states: “no information regarding any portion of the trial at which the jury is not present shall be published in any document or broadcast or transmitted in any way before the jury retires to consider its verdict.”⁸² The livestreaming of a *voir dire* or other proceeding during a trial when the jury is excluded would seem to be in violation of this provision. However, judicial interpretation clarifying that court broadcasting or transmitting of proceedings is not captured by this provision could potentially resolve this particular issue. Otherwise, a *Criminal Code* amendment may be required.

Additionally, s 650(1) requires that an accused be present in court for the whole of the trial. Although the *Criminal Code* features some limited exceptions for video links,⁸³ these likely would not account for an entirely virtual jury trial.⁸⁴ However, it is possible that courts could use a more general exception⁸⁵ more expansively than originally contemplated. After all, this exception seems to have been drafted in such a way as to permit a court to grant an accused’s request to be physically absent from the courtroom during trial rather than allowing a court to, on its own motion, transform a trial into a virtual endeavour. Nevertheless, it is important to bear in mind that the courts have found that a defendant’s right to be present at his trial is not absolute.⁸⁶

⁸² *Criminal Code*, *supra* note 8 at s 648(1).

⁸³ *Ibid* at s 650(1.1), 650(1.2), 650(2).

⁸⁴ *Criminal Code*, *supra* note 8 at s 650(1.1), 650(1.2), 650(2) (for instance, s 650(1.1) contains: if the court so orders, and if the prosecutor and the accused so agree, the accused may appear by counsel or by closed-circuit television or videoconference, for any part of the trial other than a part in which the evidence of a witness is taken).

⁸⁵ *Ibid* (“[t]he court may (b) permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper” at s 650(2)(b)).

⁸⁶ See generally *R v R (ME)* (1989), 90 NSR (2d) 439, 71 CR (3d) 113 (NSCA).

V. FINAL THOUGHTS

Our review of the various ways that courts have begun using COVID-centric distance technologies and videoconferencing-based means in attending to work during the pandemic presents a brief snapshot of the strategies that Canadian courts have undertaken in dealing with jury work. As our study demonstrates, most of the innovations to the process have focused on health-related concerns and are generally at the procedural end of forming a jury pool. Once empaneled, the Canadian response has been quite conservative in the use of videoconferencing. Though virtual jury trials have been piloted by some studies in the United Kingdom, there seems to be little appetite for the approach in Canada, despite the benefits for access to justice, inclusion and improved jury-representativeness outcomes.

When one considers the bars facing the use of such technologies in Canada, it is clear that the words of the *Code*, together with concerns related to trial integrity and digital privacy, raise significant obstacles. If courts were to embrace more digital innovation in carrying out criminal jury trials, legislative amendments would be necessary, but, just as importantly, truly secure videoconferencing technology must be used. Adhering to open court principles makes the use of mainstream technologies tantalizing, but it is certain that a double-pronged approach may be the best alternative – an open channel to view proceedings, and separate but secure videoconferencing technologies for participants and finders of fact would be a starting point. How one could enforce the strictures of jury work in this environment remains one of the most significant challenges if one were to proceed towards digitizing the criminal trial. The conservative pace of legal change and the hopeful abatement of the pandemic may forestall the reconciliation of such tensions for the foreseeable future.