

The Canadian Justice System's Response to Covid-19

Catherine Piché, Professor, Faculty of Law, University of Montreal, email: catherine.piche@umontreal.ca

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In light of the outbreak of COVID-19, governments across Canada have had to respond to the pandemic and impose emergency measures in each jurisdiction, specifically impacting the judiciary and the judicial systems of each of the provinces. This note will provide an overview of some of the measures that have been taken in some provinces in the past few weeks. Obviously, the situation changes every day and there are bound to be additional noteworthy responses to discuss on a continuing basis.

The organization of Canada's judicial system is provided in Canada's *Constitution Act, 1867*. By virtue of that Act, authority for the judicial system in Canada is divided between the federal government and the ten provincial governments. The federal government has the exclusive right to legislate criminal law and the provinces have exclusive control over much of civil law, including over the administration of justice in their territory. Almost all cases, whether criminal or civil, are heard in courts that have been established provincially or territorially. Federal courts only hear cases concerned with matters which are under exclusive federal control, such as federal taxation, federal administrative agencies, intellectual property, some portions of competition law and certain aspects of national security.

Canada's 10 provinces and 3 territories have responded to the pandemic in similar ways. They have limited their operations, and access to the court system, in order to help contain the spread of COVID-19 and protect the health and safety of those using and working in the courts. Filing deadlines have also been suspended or modified, and limitation periods have been modified in two provinces. This note will provide an overview of changes to court services, filing deadlines, and limitation periods in respect of civil matters principally in the provinces of Quebec and Ontario, as well as the Federal courts level.

What must be underscored at the outset, however, is how terribly unprepared the Canadian justice system was to face this crisis, technology-wise. Court staff and judges to this date are not equipped to work remotely, and almost everything – filing and pleadings-wise – is done in-person or by paper. The Covid-19 pandemic has forced every province and territory to halt its court operations almost completely. At this point in time, court administrators are tremendously preoccupied with the horrendous backlog and the future challenges associated with it. Perhaps this pandemic will provide the impetus needed to modernize our civil justice system?

Quebec

On March 13, 2020, the Minister of Health and Social Services of the province of Quebec issued an order in council 177-2020 declaring a state of health emergency for a duration of 10 days, due to the outbreak of Covid-19. The government used these powers to adopt

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various measures affecting the justice system. Thus, in the wake of the order in council, two days later, the Chief Justice of Quebec and the Minister of Justice jointly adopted another order which took effect immediately, thereby suspending time limits pertaining to extinctive prescription and forfeiture in civil matters as well as civil procedure time limits, the whole for the entire duration of the health emergency. The order also set out certain conditions for serving pleadings in civil matters on the Attorney General of Quebec. Deadlines for filing notices of appeal or applications for leave to appeal as well as the time limits for filing briefs, memoranda and books of authorities in civil matters were notably suspended. Urgent matters such as proceedings in habeas corpus and child abductions continued to progress notwithstanding the suspension of civil procedure time limits. Time limits in criminal matters were not suspended.

In the Court of Appeal non-urgent filings are urged not to be filed. If the Court considers the situation urgent, it contacts the parties to schedule the hearing either in person or using technology. Importantly, the Court of Appeal has accelerated its pilot project regarding the electronic filing of notices of appeal in civil matters, and on April 9, 2020, opened its digital Court office, which allows parties to digitally file notices of appeal, as well as proofs of service and notification, in civil matters which may be appealed as of right. Parties are strongly encouraged to use e-filing in these cases. As for the Superior Court and Court of Quebec, their court offices remain open for the filing of urgent proceedings, and non-urgent proceedings are encouraged to be filed by mail.

Hearings in the Court of Appeal were postponed, and urgent matters may still be decided at the discretion of the court. In the Superior Court of Quebec and Court of Quebec, urgent civil applications may be heard – including injunctions and other matters judged urgent. Insolvency matters and others heard before the Commercial Division of the Superior Court of the District of Montreal may be heard on a case by case basis at the discretion of the court. Telephone conferences and video conferences are preferred to allow urgent hearings to proceed at a distance. In late March, a first trial on the merits was heard entirely by videoconference. Access to court buildings where court services are provided has been restricted since the first order in council. All in all, priority was given to maintaining essential services justice services throughout the province of Quebec.

Interestingly, a Covid-19 Legal Aid Clinic was created. The telephone hotline offers free legal assistance thereby clarifying rights and obligations during the current pandemic.

Finally, it is important to explain that on March 15, 2020, the Chief Justice of Quebec and the Quebec Minister of Justice jointly exercised – for the first time ever! – the emergency powers conferred to them by the Quebec Code of Civil Procedure to suspend certain limitation periods and procedural deadlines. The order suspends all extinctive limitation periods, periods of forfeiture of rights and civil procedural deadlines – except for urgent matters – until the public health emergency is lifted, and unless otherwise ordered by the Chief Justice of Quebec and the Quebec Minister of Justice. Accordingly, limitation periods and filing deadlines for prescription, forfeiture and civil procedure will be extended by the number of days of the suspension.

Ontario

The Ontario Superior Court and Court of Appeal have temporarily suspended normal court operations. On March 17, 2020 all ongoing trials were adjourned until a date after June 1, 2020, and even if those hearings were scheduled to be heard by videoconference or phone.

Furthermore, no new trials are to be held until May 29, 2020 unless otherwise ordered. The same is true for other Ontario tribunals such as the Landlord and Tenant Board and Human Rights Tribunal of Ontario.

Ontario courts consider it a constitutional responsibility to ensure access to justice remains available. To promote access to justice, and to maintain the effective administration of justice in Ontario, the Superior Court of Justice has expanded its operations for “time sensitive and urgent matters”. For civil matters, at a minimum, urgent cases are those where “immediate and significant financial repercussions may result if there is no judicial hearing”.

On April 6, the Superior Court started to hear other matters remotely by way of telephone or video conference, including pre-trial conferences and select motions. Judges require lawyers to act co-operatively and to be flexible to achieve a timely, just and fair hearing. On the Superior Court website is a promise that “Counsel, accused persons and all court participants can anticipate that the judiciary will, in turn, make every effort to respond with flexibility and creativity, where feasible and appropriate.” The Court of Appeal similarly suspended all scheduled appeals, except urgent ones. There are to be no in-person hearings conducted during the emergency. Instead, hearings will occur either remotely through videoconferencing or teleconference, or in writing.

Ontario courts recognize that strict compliance with the rules might be difficult and that rules in general were not drafted to apply to virtual court hearings conducted in a pandemic. Thus, given the state of emergency, the inherent jurisdiction of the Superior Court of Justice may be relied upon, as it is entrenched in s. 96 of the *Constitution Act, 1867* and as confirmed in s. 11(2) of the *Courts of Justice Act*. This jurisdiction provides a unique power that may be relied upon sparingly and with caution to relieve compliance with procedural rules, regulations and statutes when it is just or equitable to do so, reasonable and necessary to control the Court’s own process during this time of emergency, required to render justice between litigants, essential to prevent obstruction and abuse of the Court, or necessary to secure convenience, expeditiousness and efficiency in the administration of justice. The open court principle remains applicable throughout the COVID-19 pandemic, which means that efforts will be made to provide Ontarians with information on how they may hear/observe the proceeding.

As for as additional adjustments to regular administration of justice go, the requirement to gown for an appearance in the Superior Court of Justice is suspended, and replaced by an appropriate business attire. This rule is applicable to counsel and judges. Additional directions were enacted regarding email communications with court staff.

Interesting measures specific to criminal proceedings have been taken as well. Effective April 2, and until further notice, electronic filing is applicable and dispenses with the requirement to file documents personally and in hardcopy in criminal cases. The Superior Court of Justice accepts electronically signed documents where a signature is required and dispenses with the requirement for personal service where personal service is required. In place of personal service, it directs service of all materials to be done by email to the opposing party with proof of service.

Finally, the Government of Ontario issued an order suspending the operation of any provision of a statute, regulation or rule that sets out either a limitation period, or the time within which a step must be taken in a proceeding before a court, tribunal or other decision-

making body. The Court of Appeal similarly issued a practice direction stating that time periods for filings are suspended until further notice, except for urgent family-law matters and matters that have already been scheduled for a hearing and have not been adjourned.

Federal Courts

The Federal Court of Canada and the Federal Court of Appeal have suspended their operations except for urgent matters. Hearings scheduled through to May 15 have been adjourned, but case management hearings and a few other matters are handled through telephone and video conferences. Of course the Federal Court remains available for urgent matters, which include those “where hardship or substantial financial consequences are likely to result from delay.”

The Federal Court issued a revised practice direction on April 4 suspending the operation of all timelines under the court rules and in any court order until May 15. Filing deadlines are suspended in the Court of Appeal until May 15. Those suspensions do not apply to statutory deadlines for commencing actions, applications, judicial reviews, or appeals.