Ontario family justice in “lockdown”: Early pandemic cases and professional experience

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Abstract
The COVID-19 pandemic has profoundly affected families and children involved in Ontario’s family justice system as well as family justice professionals in the province. In a span of two years, Ontario’s family justice system has been fundamentally transformed, from a paper-based, in-person system to a paperless system in which many services, including judicial proceedings, continue to be largely delivered remotely. We report on the findings of two studies on the impact of the COVID-19 pandemic on Ontario family justice: (1) an analysis of early pandemic court decisions; and (2) a survey of family justice professionals about their experiences during the early pandemic. We describe how the pandemic has exacerbated access to justice issues for certain groups, including families experiencing high conflict, victims of intimate partner violence, families involved in child welfare proceedings, and self-represented litigants, while improving access to justice for others by improving efficiency and reducing legal costs. As Ontario moves past the pandemic, the family justice system will need to ensure that technological advances improve access to justice for all court-involved families.

KEYWORDS
Access to justice, COVID-19, high conflict, intimate partner violence, self-represented litigants, technology
Key Points for Practitioners

- The pandemic disproportionately affected families experiencing high conflict, victims of intimate partner violence, self-represented litigants, and families in the child welfare system
- Virtual courts and electronic document filings improve efficiency and reduce costs for those with lawyers, but increase barriers in access to family justice for those without representation
- Closure of court-based legal information services and summary advice from Legal Aid lawyers significantly impact access to justice for self-represented litigants
- Access to technology may improve access to justice but more must be done for the self-represented litigants who may need face-to-face support

INTRODUCTION

The COVID-19 pandemic has profoundly affected families and children involved in Ontario’s family justice system as well as family justice professionals in the province. On March 17, 2020, Ontario went into “lockdown”: a state of emergency was declared, “stay at home orders” were issued, non-essential businesses were closed, and schools shifted to remote learning. Courthouses were closed, and judges dealt with cases remotely under an evolving set of procedures and Notices to the Public and Profession posted on the internet. During this period only “urgent” matters were heard, and a “triac” process for identifying urgent matters was quickly implemented. Hearings were conducted by telephone or video-conference or based only on e-mailed documents. There was a temporary, dramatic reduction in access to family lawyers and various services such as mediation and Legal Aid Ontario, and most child protection agencies suspended in-person contact between children in care and their parents/guardians. On July 6, 2020, the Ontario Superior Court began to “reopen” courts in some locations, with priority given to criminal cases for in-person hearings.

More than one year later, family cases are proceeding, but almost all court attendances are still being done virtually, and there is a growing backlog of cases waiting for trial. More in-person hearings are not expected until later in 2022. The Ontario family court filing system is going through a major transformation, from one that was based totally on the filing of paper documents at courthouses to one that will be totally electronic; however, the transition has been bumpy. Courthouses are largely closed to the public and lawyers and judges are encouraged to work from home. Law firms and various service agencies, including mediators and children's lawyers, have also largely shifted to providing remote services, some more quickly and fully than others. Child protection services have shifted to a

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hybrid model, and visits between children in care and parents have generally resumed, although they are less frequent and there is considerable use of virtual visits for older children.

The pandemic has reduced access to family justice in a system already plagued by access to justice concerns, including delay, inaccessibility, complexity, and the rise of self-representation associated with the high costs of legal representation. Some of those involved in the family justice process have been more affected by the pandemic and access to justice concerns, including self-represented litigants (SRLs), victims of intimate partner violence (IPV), children of separating parents, and families with children in the care of child welfare agencies, many of whom are racialized or Indigenous. At the same time, the pandemic has forced the family justice system to implement changes, such as electronic filing, long advocated as a means of improving efficiency in the system.

This article documents the early impact of the COVID-19 pandemic on Ontario’s family justice system and the families it serves. We report on two studies undertaken as part of a larger research project to understand the impact of the pandemic on Ontario’s family justice system and to consider how innovations adopted during the pandemic might be tailored for future use. The first study involved an analysis of all 930 reported family law decisions in Ontario from mid-March to the end of October 2020. The second study involved a survey of 93 family justice professionals, including judges, lawyers, and mental health professionals, who were asked about their experiences and perceptions in the first stages of the pandemic. The two studies discussed in this period both divided responses between the “lockdown” period (March 17, 2020 – July 5, 2020), and the later “reopening” period in the summer and fall of 2020. Our findings suggest that the pandemic has had disparate, medium-term impacts on family justice and has also widened inequalities. For many already disadvantaged members of Ontario society, the pandemic has increased challenges in accessing family justice, causing economic difficulties, increased stresses for parents and children, and risks for victims of family violence. However, for some family justice professionals and some of their better-resourced clients, the pandemic has resulted in a less stressful and more cost-effective form of home-based family dispute resolution.

STUDY OF REPORTED CASES

Methodology

The case law study was a mixed-method analysis of all family law judgments in Ontario reported on Westlaw decided between March 17, 2020, and October 31, 2020 (n = 930). These included domestic and child protection cases.

The “lockdown cases” were decisions rendered between the date the courts suspended all regular operations (March 17, 2020) and the date when the courts began the process of “reopening” (July 6, 2020). The “reopening cases” were decisions rendered July 6, 2020-October 31, 2020. There were 506 lockdown cases and 424 reopening cases.

Data analysis

The 930 cases were coded according to quantitative and qualitative variables. The quantitative variables included legal representation, nature of the proceeding, judicial identification of “high conflict,” and allegations of intimate partner violence. The qualitative variables included language on how judges identified “urgent” matters, language about the pandemic and “high conflict,” and language about the pandemic and the administration of justice.

See also Meaningful Change for Family Justice: Beyond Wise Words, ACTION COMMITTEE ON ACCESS TO JUSTICE IN CIVIL AND FAMILY MATTERS (Apr. 2013), https://www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf. The pandemic has affected all of Canada’s justice system, though with some geographic variation and greater effects in trial courts than appeals courts. For more details see David Matyas et al. (2021), Imagining Resilient Courts: From Covid to the Future of Canada’s Court System, SSRN: CANADIAN PUBLIC POLICY (Feb. 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3778869
Results

Types of cases: Parenting disputes, access interference, and schooling

At the beginning of the pandemic, parenting cases dominated the family court docket. Approximately 70% of the lockdown cases ($n = 506$) involved only a parenting dispute, and an additional 5% involved both a parenting dispute and an economic dispute (i.e., family property, child, or spousal support). Around 20% involved only an economic dispute. More than half (56%) of the parenting cases in the lockdown period involved access difficulties.

From the beginning of the pandemic, courts were clear that parents should not assume that the existence of COVID-19 would result in the suspension of in-person parenting time. In the early (March 24, 2020) and widely cited decision in *Ribeiro v Wright*, Pazaratz J. stated there was a “presumption that existing parenting arrangements and schedules” would continue, subject to any modifications required by COVID-19 precautions (para. 11). Judges were especially critical of parents who resorted to “self-help” and unilaterally suspended contact between a child and the other parent due to the pandemic.3

As the pandemic continued and courts heard more than just “urgent” matters, the proportion of parenting cases declined while the number of economic cases heard by the family courts increased. During the reopening period, 42% of cases involved only a parenting dispute, while 9% of cases involved a parenting dispute and an economic dispute. Cases involving only an economic dispute accounted for 26% of cases, while cases involving “other” issues – such as procedural matters – were 20% of the reopening cases. Access difficulties were present in 35% of the parenting cases.

By the reopening period, which spanned the late summer and early fall of 2020, courts were being asked to resolve disputes over schooling: “There is a common theme to all of the cases currently before the Court: parents disagree about whether their child should attend school in-person, or online” (Chase v Chase, 2020, p.21). Courts set down a number of principles for resolving these disputes. First, courts were not in a position to second-guess the public health implications of the Ontario government’s decision to re-open schools for in-person education in the fall of 2020. Second, no educational plan could guarantee a child’s safety in the midst of a pandemic. Finally, whether a child should attend school in person or remotely was ultimately a matter of what was in the “best interests” of the child, having regard to the risks and benefits of in-person schooling versus those of online learning.4 Some decisions held that, based on the circumstances of an individual child, an “unreasonable risk of harm” from in-person learning could warrant online learning.5

Triage and urgency

In March 2020, regular court operations were suspended, and courts were instructed to “triage” cases to only hear “urgent” matters. According to the March 15, 2020 Notice to the Profession, these included requests for “urgent relief” relating to the safety of a child or parent; urgent issues relating to the well-being of a child, including essential medical decisions or issues relating to the wrongful removal or retention of a child; dire issues regarding the parties’ financial circumstances; and urgent or statutorily mandated events in child protection cases.6 The family courts in most locations in Ontario implemented a “triage” system to determine which matters were urgent, and the reported decisions of triage judges helped define “urgency.” For example, *Ribeiro v Wright* (2020) determined that a motion to suspend or reduce parenting time without clear evidence of breach of COVID-19 protocols was not urgent, and

3See also Duffitt v. Graham, 2020 ONSC 2845, para. 9 (Can. Ont.); See also McCumber v. Barnes, 2020 ONSC 2706, para. 14 (Can. Ont.).

4See also Chase v. Chase (2020), 151 O.R. (3d) 422, para. 39 (Can. Ont.); Zinati v. Spence, [2020] ONSC 5231 (Can. Ont.).

5See also Chase, 2020 ONSC 5083; Joachim v. Joachim, 2020 ONSC 5355 (Can. Ont.); Kaszap v. Volk, 2020 ONSC 6129 (Can. Ont.).

6Notice to the Profession, the Public and the Media Regarding Civil and Family Matters, SUPERIOR COURT OF JUSTICE (Mar. 15, 2020), https://www.ontariocourts.ca/sci/notices-and-orders-covid-19/notices-no-longer-in-effect/covid-19-suspension-fam/
hence the prior parenting arrangement remained in effect, but a unilateral suspension of contact with a parent would be regarded as urgent. Similarly, in *Thomas v Wohleber* (2020, para 38), Kurz J. explained that urgency would only be met where the concern was immediate, serious in that it significantly affected the health or safety or economic well-being of the parties or children, definite and material rather than speculative, and clearly particularized in the evidence.

Triaging of cases was more important at the beginning of the pandemic when courts were forced to quickly pivot to remote hearings. During the lockdown period, most cases were triaged: the question of whether a matter was sufficiently urgent to proceed to a hearing arose in 355 of the 506 cases (70%). Most of these “triage” cases involved a parenting dispute (80% of the 355 cases). In the majority of triage cases, the matter was found to be urgent (83% of 355 cases).

By the reopening period, fewer cases were being triaged: only 163 of the 424 reopening cases considered whether the matter was sufficiently urgent to proceed to a virtual hearing (38%). Of these 163 triage cases, 45% involved a parenting dispute, while 36% involved an economic dispute. The majority of cases in the reopening period did not involve a triage decision. In neither period was there a correlation between a finding of urgency and the presence of factors such as high conflict or family violence.

**High conflict**

One significant finding from the early pandemic period is the proportion of cases described by a judge as “high conflict.” During the lockdown period, 40% of Ontario family law decisions used the term “high conflict” or other similar words to indicate a high level of conflict between the parties (e.g. “warfare,” “battle”). During the reopening period, 30% of family law cases used the term “high conflict” or similar terms. This represents a significant increase in the proportion of cases described by judges as high conflict as compared to the pre-pandemic period. In 2019, 9.3% of Canadian family law decisions reported on Westlaw used the term “high conflict” or similar terms. In 2018, 6.1% of Canadian family law decisions reported on Westlaw used the term of “high conflict” or similar terms.

It is clear that during the pandemic there was a continued need for those involved in higher conflict cases to continue to seek access to the family courts, while those with lower conflict cases were more likely to “hang on,” or try to resolve their disputes outside the courts.

Judges described how the pandemic was increasing conflict and creating new opportunities for conflict for parents experiencing high conflict separation. In *Hermanus v Laurin* (2020, para 26), Neill J. acknowledged how the stress of the pandemic amplified existing conflict between parents: “This case has a long and acrimonious litigation history, which is exacerbated by these very concerning times amid the COVID-19 crisis.” In *Chase v Chase* (2020), Himel J. remarked: “for some separated and divorced parents [school attendance] is another battleground; one more arena where their child may become the prisoners of the war” (para. 22).7

In the face of higher levels of parental conflict, judges implored parents to cooperate, even if temporarily, given the increased vulnerability of children and limited judicial resources in the pandemic. Justice Pazaratz in *Ribeiro* urged parents to “act responsibly and try to attempt some simple problem-solving before they initiate urgent court proceedings” (2020, para. 22). Justice Himel, noting the “tremendous burden” the pandemic had placed on the family justice system, encouraged parents to “engage in mediation with a professional or third-party trusted family member or friend” (*Chase v Chase*, 2020 paras 26, 24). In *Eden v Eden* (2020), Maddelena J. directed the “dueling parents” that “[d]uring these times that are difficult and unprecedented, both should ‘stop the litigation’ and move towards a resolution that is [in] their children’s best interests” (para. 13).

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7 See also *Reiche v. Reiche*, 2020 ONSC 6087, para 33 (Can. Ont.).
Family violence

Allegations of family violence were made in a significant number of cases during the lockdown and reopening periods. During the lockdown period, intimate partner violence (IPV) allegations were present in approximately 24% of cases. During the reopening period, IPV allegations were present in around 21% of cases. Allegations of child abuse or neglect were made in approximately 13% of the lockdown cases and approximately 17% of the reopening cases. At least one judge acknowledged that the stress of the pandemic combined with isolation placed women and children at risk of violence (Venditti v Adorno, 2020, paras 18–20).

Self-Representation

Most litigants appearing before family courts during the lockdown and reopening periods had lawyers. Women were slightly more likely to be represented than men. During the lockdown period, women were represented in 84% of cases in which representation information was available (92% of all cases), while men were represented in 73% of cases in which representation information was available (90% of cases). During the reopening period, women were represented in 88% of cases in which representation information was available (97% of all cases), while men were represented in 77% of cases in which representation information was available (97% of cases).

This low rate of self-representation raises serious concerns about the difficulties faced by self-represented litigants to access the family courts during the pandemic. In Mohamed v Osman (2020), a case heard at the beginning of the pandemic, Justice Sherr acknowledged that the physical closure of courthouses, triaging of cases, and stay-at-home orders created “considerable obstacles” for self-represented litigants (para. 23). In Native Child and Family Services v SD (2020), Justice O’Connell noted how the closure of courthouses limited the ability of unrepresented parents in child protection proceedings to receive documents, obtain government-funded, court-based summary legal advice, and get help finding a legal aid lawyer, challenges which made it “more difficult for parents to participate in [child protection] hearings” (para. 30).

It was estimated that before the pandemic only 20%–50% of litigants in Canadian family cases had lawyers.8 The much higher rates of representation in this study clearly indicate that in the pandemic the vast majority of those without lawyers having family disputes were unable to even get before a judge for a hearing.

SURVEY OF PROFESSIONALS

Methodology

The respondents were recruited in November and December of 2020 using an online survey of members of the Ontario Chapter of the Association of Family and Conciliation Courts and the Family Dispute Resolution Institute of Ontario. The combined membership of these two organizations is about 750, but there is overlap in membership, so we estimate that the survey was sent to 500 to 600 professionals. There were 93 respondents to the survey.

The survey consisted of 24 questions that explored the effect of the pandemic on: (1) high conflict families; (2) self-represented litigants; (3) intimate partner violence; and (4) child abuse and neglect. Respondents were asked to compare experiences during the “initial lockdown period” from March 2020 to early July 2020, and the “reopening period” from July to November 2020.

8Just Facts: Self-Represented Litigants, DEPARTMENT OF JUSTICE (June 2016), https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/fl-pf/srl-prn.html. A Statistics Canada study undertaken in 2019–20 found that 42% of family litigants had lawyers. For further details see Lyndsay C. Burns, Profile of family law cases in Canada, 2019/2020, STATISTICS CANADA (June 28, 2021), https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00011-eng.htm
Respondents were also asked about the impact of the pandemic on: their workload; their experiences with the courts only hearing “urgent” cases during the initial lockdown period; use of technology during the pandemic; and the pandemic’s impact on mediation. In addition, respondents were also asked how the pandemic affected: families and children involved in the family justice system; high conflict families; self-represented litigants; victims of intimate partner violence; and the work of child protection agencies.

Data analysis

The survey included both closed-ended and open-ended questions. Given the exploratory nature of the survey, descriptive statistics and thematic findings are being presented. All closed ended responses were entered into the statistical software SPSS (v24) to explore frequencies and percentages. Qualitative analysis followed a process for identifying, analyzing and reporting qualitative data using thematic analysis (Braun & Clarke, 2006). First, the comments by the respondents were read and reread so that the first author could fully immerse and actively engage with the text (data). Once the data was familiar, preliminary codes and themes were identified by the team to assure agreement and quality control (Gibbs, 2008).

Results

Description of sample

A total of 93 professionals completed all or part of the survey. A majority of respondents identified as lawyers (53%); followed by mental health professionals, including social workers and psychologists (23%); other professionals, including mediators and child protection workers (20%); and judges (4%). More than half of the respondents indicated they had 16 years or more experience in the family justice sector (57%), with most of the remaining respondents indicating they had 1–5 years of experience. Nearly half of the respondents indicated they had worked in the family justice sector for more than 21 years (41%). Approximately 80% of respondents identified as female, and 20% identified as male.

Themes

Workload: Changes in volume and complexity

Respondents were asked about the impact of the pandemic on the number of cases or amount of work they performed in the family justice sector during the initial lockdown from March–July 2020, and nearly all responded to this question (n = 91/93).9 Half of the respondents reported that their family justice work decreased considerably during the initial lockdown period (n = 46/91), and a number (n = 6/91) reported that it disappeared completely. Respondents attributed this decline to the limited number of cases being heard by the courts, a perception among clients and potential clients that the courts and offices providing professional services were closed, clients "holding off" on proceeding with their matters, and clients focusing only on “safety issues." Of the respondents who described a reduction in workload, a third described returning to pre-pandemic workloads in the summer of 2020. The remaining respondents described their workload in the lockdown period as staying the same (n = 21/91), or increasing in volume and complexity (n = 18/91). Those respondents who reported their workload staying the same nonetheless described changes in the nature of their work. For example, one lawyer reported spending more time on

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9As with all surveys, not every participant answered every question, therefore the percentages are based on the number of respondents who did respond
“urgent matters,” including “fielding calls about what to do about access.” Similarly, a child protection lawyer explained that, “The number of cases... varied, but the complexity and number of risk factors increased.” A very common experience for professionals who reported no change or an increase in their workload was having the same number of cases but shifting to virtual work. According to one lawyer: “The number of cases has stayed the same. The amount of work has increased in magnitude – adjusting to electronic files, electronic filing and virtual courts has been a huge adjustment.” While only a few judges completed the survey, one judge described the period after the shutdown as “the busiest of my judicial career,” providing some insight into the experience of those working in the family court system. Finally, a few professionals described leaving practice due to loss of employment or the need to care for children.

Mixed views of “triage”
Most respondents reported on their experiences with the family courts only hearing “urgent” matters during the initial shutdown period (n = 86/93). Nearly half of these respondents viewed this triage system negatively, describing it as difficult and confusing (n = 40/86). Respondents noted difficulties obtaining information from the courts, including about hearing dates, struggling with new technology, preparing materials that were not going to be supplemented by oral presentations, and obtaining signed court orders.

Respondents also reported inconsistencies in how triage judges determined which matters were urgent. One lawyer commented: “There was a wide spread in what was deemed urgent, and it was difficult to give clients advice without knowing if the court would accept a matter.” Another mental health professional thought this inconsistency was hard on families: “Very stressful for clients with most having concern about what defines emergency.” One lawyer also questioned whether the triage system was making a good use of limited judicial resources: “[the] Judge spent time reading materials and writing decisions as to why the case was not an emergency, when they could have spent the same time making a decision on the merits.”

Other respondents, however, believed that the courts performed well, given the circumstances (n = 25/86). These respondents described the courts as being “fairly responsive” and “adapt[ing] relatively quickly.” One lawyer described the family court judges as “excellent in dealing with [urgent] matters and promoting resolution despite the impediments.”

Some respondents had mixed views of the family courts only hearing urgent matters (n = 15/86). These respondents applauded the implementation of the triage system, while noting limitations, including: delay (“As the pandemic progressed and motions increased, the timeline for having the motion heard was more like 2-3 weeks, even when urgent”); inconsistency in determining urgency (“What was designated as ‘urgent’ seemed to depend on the day and the mood of the judge”); and the “far too narrow” definition of “urgency.” Respondents described the challenges for families operating within the triage system. Lawyers described family cases remaining “at a stand-still” if they did not meet the urgency threshold. Other respondents complained that limited access to court allowed some parents to “ignor[e] their responsibilities to existing orders or [parenting] timetables” or refuse to negotiate.

One lawyer saw the lack of access to courts as particularly troubling for victims of violence: “I have many [intimate partner violence] clients where the issues they were experiencing were not ‘emergencies,’ but the ex-partner was utilizing the court shut-down to drag matters out and refuse to reasonably negotiate/conclude matters because there was no judicial pressure to do so.” Another lawyer complained how the triage process forced counsel to consider alternative methods for resolution, but that this did not always lead to settlement: “In my experience, even given increased cooperation and purposive focus on resolution, there are limits to what can be dealt with without the court.”

Virtual mediation opportunities
Approximately two-thirds of respondents described how the pandemic affected mediation (n = 64/93). According to a number of respondents, individuals involved in family disputes were faced with the choice of attempting virtual mediation or waiting longer for a court to hear their case (n = 41/64). Some professionals saw this as a Morton's
Fork, as one lawyer explained: “Mediation in a pandemic is arguably not voluntary. Courts are not functionally available. It is a matter of the public picking a poison to resolve the most important matters of their lives...”

Many individuals opted for virtual mediation rather than waiting for mediation to be available in-person, with professional respondents variously describing mediation as “busier,” “increased,” “preferred method of resolution,” “recommended,” “re-invented,” “work[ed] relatively well,” and clients “more willing to engage in it.” However, in some places in Ontario, access to publicly-subsidized mediation services was “almost non-existent” during the lockdown period of the pandemic, and opened only slowly on a virtual or in-person basis thereafter.

Respondents generally reflected on the pros and cons of virtual mediation (n = 23/64). Respondents described the benefits of virtual mediation in terms of shorter sessions (“allows [clients] time to think over their agreements”), accessibility, cost-effectiveness (lower travel costs and lawyers’ fees), ease of engaging clients, safety, and efficacy. As one mental health professional explained: “I have found couples are generally more likely to reach a resolution via virtual mediation. Perhaps because they are not in the same room during mediation, the emotions are lessened, and they are more able to attend to the business at hand.” However, other respondents noted drawbacks of virtual mediation, including difficulties screening for implicit biases, decreased safety (where clients may be continuing to reside in the same dwelling because of difficulties moving during the pandemic, especially in the lockdown period), inaccessibility (especially for poor families), challenges engaging clients, and fewer “side-channel” negotiations.

Pandemic’s impact on children and parents

Respondents were asked to describe the effect of the pandemic on children and parents involved in the family justice system and most (n = 85/93) responded to this question. Respondents identified a number of concerns, including impacts on the health and safety of families, increased barriers to seeking justice and the protection of the courts, interference with parenting time, and challenges of new technologies. As discussed below, many of these themes were also identified in response to other survey questions.

Compromised health and safety of children and their families. A number of respondents raised concerns about the impact of the pandemic on the health and safety of families involved in the family justice system (n = 34/85): “Many families outside of the family court system are stressed. Those within it do not have the schools and broader social community available to maintain stability and more normal kinds of contact with others.” Respondents perceived court-involved children as struggling from increased mental health challenges, educational challenges due to online schooling, and increased exposure to parental conflict. Parents were also perceived to be struggling from increased mental health problems, higher stress, and more conflictual relationships. Yet despite these increased challenges, respondents noted that there were limited services available to assist children and parents, such as mental health services, child protection, and legal services.

More barriers to justice. Respondents also suggested that the pandemic had created more barriers to justice for families (n = 29/85). These included longer wait times for hearings, lack of in-person access to legal services, in particular Legal Aid, and limited access to judges. Some respondents noted these barriers were more acute for marginalized families, including those of color and Indigenous families. These barriers left parents feeling frustrated, hopeless, and more stressed, and created a “lack of closure for children and parents.” Respondents worried about the long-term consequences, especially for children: “those matters that are high conflict or that require a trial (or the threat of a trial) in order to conclude are just dragging on – with the impacts to be felt by children down the road.”

Interference with access. Some of the respondents described the negative impact of the pandemic on visitation or access with parents (n = 19/85). According to one respondent: “Child access is a huge issue.” Respondents noted the challenges of co-parenting in the face of quarantine requirements, online schooling, and fears around the virus. A number of respondents described cases with primary residential parents who unilaterally canceled or suspended parenting time with non-residential parents because of concerns about the non-residential parent not following public
health guidelines. Some respondents saw this interference as tactical. According to one respondent, there had been a “very significant increase in dubious denials of access for ‘COVID-related reasons.’” Another explained: “The pandemic has been used by those who have children in their care to their advantage to create or extend a status quo.”

“Access to justice now means access to technology”. Respondents also identified the impact of new technologies, including remote hearings, being used in the family justice system on children and parents (n = 12/85). Some of the respondents were concerned about new technologies inhibiting access to justice for those with limited resources, including self-represented litigants: “Unrepresented parents are not connecting with [Legal Aid] duty counsel and are not adequately prepared or represented at virtual court attendances. Many lack sufficient access to technology to participate in virtual appearances. Virtual court does a disservice to lower income clients.”

Other respondents spoke of the benefits of new technologies. One lawyer commented: “I haven’t had any client feel the experience [of a remote hearing] was worse than court.” Similar themes also emerged in respondents’ responses to a question about technology, discussed below.

More parental cooperation in some cases. A few respondents described the pandemic as improving cooperation between parents (n = 8/85). As one lawyer described: “I have a remarkable number of family law cases [where I have] seen increased parental cooperation and child-focused decision making.” Another lawyer explained that the pandemic left few options other than cooperation for parents: “Parents have done their best to negotiate through these periods – some separated parents have had no choice but to rely upon each other.”

Self-represented litigants
Respondents were asked to compare the number of self-represented litigants (SRLs) during the initial lockdown period (March to July, 2020) and reopening period (post-July 2020) to the number of SRLs prior to the pandemic. Many respondents commented on the increased number of individuals without access to legal services during the pandemic. A number of respondents raised concerns about the ability of those without lawyers to access the courts during the pandemic, while a few described how the pandemic helped to improve access to justice for some SRLs.

More self-represented litigants. Many respondents indicated that there were “more” or “much more” individuals without lawyers during the initial shutdown period as compared to before the pandemic (n = 32/69), while only a small number (7/69) reported a decrease in self-representation. Mental health professionals were more likely than lawyers and judges to indicate that they saw an increase in the number of individuals without lawyers. A similar number of professionals reported that there continued to be “more” or “much more” SRLs during the re-opening period in July to November 2020 as compared to before the pandemic (n = 33/71).

Taking into account the data from reported court cases, it is clear that survey reports of increased numbers of individuals without legal representation did not translate into more SRLs appearing in court. Instead, the survey reports combined with the reported case data suggest that there were more individuals without access to lawyers and courts, and hence totally without a legal response to their vulnerability and needs, or the needs of their children.

Self-represented litigants disadvantaged by changes to service and procedure. A common theme among respondents was concern that SLRs were disadvantaged by pandemic-related changes in the family justice system. Respondents noted that the physical closure of courthouses meant SRLs were forced to navigate the system without the assistance of court staff, publicly-funded duty counsel, or Family Law Information Centres, all of which have offices in courthouses. A couple of respondents observed that reduced access to Legal Aid Duty Counsel hampered settlement in cases involving SRLs. “I miss the days of in person court,” said one judge, “where duty counsel could assist and provide summary advice... it is more difficult to broker settlements without assistance.”

The lack of in-court services was perceived as especially problematic for SRLs, given increased complexity in accessing courts. As one lawyer explained, “the number of practice directions that have been issued were...
overwhelming to me and my office. I cannot imagine how a self-rep would navigate the constantly changing rules.” Other respondents described SRLs failing to receive login information for court, being excluded from e-filing portals, and not receiving Zoom call information for virtual hearings. Said one respondent: “Underprivileged self-reps are so overlooked in the new practices and procedures that are coming out...” Another respondent thought new procedures made it “impossible for self-reps to function in our system.”

Benefits to some self-represented litigants. A few respondents noted that new technologies in the family justice system benefited some SRLs. Virtual court made it easier for SRLs without transportation or with childcare responsibilities to be heard by a judge. Relaxed procedures may have also made it easier for some SRLs to participate in the court process. One respondent said of the impact of the pandemic-related changes on SRL: “Empowered them. No sworn affidavits. No implementation of the [Family Law] Rules or evidentiary rules.”

High conflict families
Respondents were also asked about the number of high conflict families during the pandemic as compared to before the pandemic, and how the pandemic had impacted these families. There was a general sense that the number of high conflict families had increased during the pandemic. Respondents also described more conflict among high conflict families, greater interference with parenting time, lack of services for high conflict families, delay in the resolution of high conflict cases, and particular challenges for high conflict families in the shift to new technologies.

More high conflict families. A majority of respondents who responded to the question indicated that there were “more” or “much more” high conflict families during the initial lockdown (n = 41/80) and subsequent reopening periods (n = 47/81) as compared to before the pandemic. Around one-third of respondents thought the number of high conflict families was “about the same” during the initial lockdown period (n = 30/80), while slightly less than half thought the number was “about the same” during the re-opening period (n = 32/81) as compared to before the pandemic.

More conflict among high conflict families. Nearly half of the respondents believed the degree and nature of conflict increased among high conflict families during the pandemic. As one lawyer observed: “The pandemic has thrown gasoline on high conflict families.” Respondents described how the pandemic has exacerbated pre-existing conflict, especially around parenting time or access, while creating new sources of conflict, including disagreements over virtual schooling versus in-person learning and financial support. One respondent said that for high conflict families, “[r]ules and restrictions about Covid and exposure or potential risks has become one more thing to fight about.”

Using the pandemic to interfere with parenting time. More than one quarter of respondents’ responses suggested that many parents in high conflict cases had “taken advantage of the COVID-19 [court] delays” or used public health guidelines to gain a “tactical advantage” in their parenting disputes (n = 24/87). “These are families that utilize the restrictions to their benefit.” Respondents described one parent refusing contact with the children on the basis that the other parent might expose the child or a member of the child's family to COVID. According to some respondents, these refusals were often baseless: “For some high conflict families, the pandemic was seen as an opportunity to restrict or prohibit parenting time.”

High conflict families experienced delays and lack of services. Some respondents described how the pandemic reduced publicly funded and subsidized services for high conflict families and delayed resolution of high conflict files (n = 19/87). Respondents noted that high conflict families were impacted by the suspension of services at supervised access centres and counseling programs. A number of respondents were concerned about delays in the resolution of high conflict cases because of limited access to judges. One lawyer claimed this was a violation of constitutional rights: “The court is the only alternative for resolving high conflict files... It is a significant Charter Right
infringement for files that must be adjudicated by trial.” Others mentioned the impact on children: without “access to a judge to settle their dispute... it goes on and on without resolution. This negatively impacts the children.”

Technology challenges for high conflict families. Some respondents described particular technological challenges faced by high conflict families (n = 6/87). One respondent commented that limited time for remote court hearings prevented judges from understanding the issues in high conflict cases and promoting resolution. Another respondent described the challenges of virtual visitation, where the residential parent may listen to or interrupt the visit.

Intimate partner violence
Respondents were also asked to comment on the amount of intimate partner violence (IPV) during the pandemic and the impact of the pandemic on IPV victims. A significant majority of respondents were concerned about an increase in IPV during the pandemic. Respondents described increases in both the amount and severity of IPV combined with fewer resources for IPV victims. A number of respondents mentioned particular challenges for IPV victims accessing legal services remotely. A few respondents thought the pandemic had not impacted IPV victims.

More intimate partner violence. A significant number of those respondents who responded indicated that there was “more” or “much more” IPV during the initial shutdown (n = 42/62), and “more” or “much more” IPV during the reopening period (n = 45/65) than compared to the period before the pandemic.

Victims experienced more stress, more violence, with no escape. Respondents described increased stress and violence experienced by IPV victims while also noting new barriers victims face in leaving abusive relationships, especially during the lockdown period (n = 44/68). There was a perception that IPV victims have experienced increased “depression,” “isolation,” and “stress,” along with more “victimization,” “intimidation,” and “physical harm.” Two respondents highlighted the increased vulnerability of Black and Indigenous victims, and male victims of female abusers. Respondents thought victims were staying in abusive relationships because of full shelters, fears of contracting COVID-19 in congregate living, rising housing costs, and government stay-at-home orders. As one respondent explained, victims of IPV and their children have “nowhere to go.” Tragically, two respondents reported incidents of IPV victims being killed by their abusers which they linked to the pandemic and an inability to leave abusive situations.

Lack of services, including legal services. Some respondents (n = 12/68) described how a lack of services for IPV victims during the pandemic left them more vulnerable to abuse: “the intimate partner violence during the pandemic may not be ‘more’ in the sense of numbers, but may be ‘more severe’ or ‘higher risk’ because of the lack of access to legal advice, the court system, social services, or support of family and friends.”

A number of respondents spoke about IPV victims’ difficulty accessing legal remedies: “There are more incidents [of IPV] and little ability to get substantive help from the Court, for things like restraining orders there have been 5-to 6-week delays in getting motions heard. It is a crisis.” A few respondents thought victims were staying in abusive relationships because they could not get access to the courts. One respondent explained: “There is also a fear to begin the court process as the delay is enormous and this can leave a woman in a dangerous situation for much longer.”

Issues with remote legal services. Some respondents identified problems for IPV victims accessing legal services remotely. One lawyer described victims not having access to computers, which impeded their ability to communicate with counsel and attend virtual court appearances. Another lawyer spoke of the challenge for victims in accessing services from a home shared with the perpetrator: “We’ve had clients call from cars and from cupboards in the basement, trying to find privacy within the home.” Another professional described how virtual parenting time made victims uncomfortable because of hearing the perpetrator’s voice in their home or having the perpetrator see where
they lived. This professional also described how virtual parenting time could lead to further violence: “In some cases the judges ordered virtual access to be facilitated by [the residential parent] even though a no-contact order exists. In a couple of cases this has led to more allegations of IPV.”

No impact on victims. Only a few respondents indicated that they did not think the pandemic had impacted IPV victims or the rate of IPV (n = 5/68). This could suggest regional differences in court handling of IPV cases or variation in professional practices. One lawyer suggested that they may not have seen an increase in IPV cases because the pandemic could be preventing victims from leaving abusive relationships and seeking professional assistance.

Child protection

More maltreatment. Over half of the respondents responded to scaled questions about the rate of abuse and neglect during the initial shutdown period (n = 49) and reopening period (n = 56). A small majority of these respondents reported “more” or “much more” child abuse and neglect during the initial shutdown period as compared to before the pandemic (n = 27/49). Mental health professionals were more likely to notice an increase in maltreatment while lawyers and other professionals were more likely to say rates of child abuse and neglect were “about the same.” A similar percentage of professionals reported “more” or “much more” child abuse and neglect during the re-opening period as compared to before the pandemic (n = 30/56). There were no differences in reporting according to profession for this period.

Children at greater risk. Most respondents commented on how the pandemic has hindered the work of child protection agencies, which was perceived as placing children at increased risk of maltreatment (n = 38/63). Many respondents worried about a decrease in reporting to child protection agencies because of children being at home. As one lawyer explained, “my one biggest concern is that with kids not being in school in person, the ‘eyes’ and ‘ears’ (i.e., teachers, principals, school staff) who report concerns to [child protective services] in normal times and provide a safe space for kids during their waking hours of the day aren’t there right now...” Other respondents described the challenges for agency staff in monitoring at-risk children: “It has been difficult for workers to stay well connected to the families and especially the children as in-home visits were cancelled or greatly reduced.”

Increased child protection workloads. A number of respondents thought child protection workloads had increased during the pandemic (n = 25/63) despite fewer reports of abuse and neglect from community professionals. Some respondents described an increase in reports to child protective services (CPS) due to “child abuse,” “neglect,” “partner violence,” “police involvement,” “substance misuse,” “tensions between parents,” and “withholding” of children. Some respondents described CPS agencies “in crisis mode,” leading to agencies prioritizing the “most urgent cases,” while “other cases stayed on the backburner until they erupt[ed].” A few respondents tied the increased workload of CPS agencies to a reduction in staff due to workers needing to take time off to care for their own families or deal with health issues, and some noted how the increased workload was “increasing pressure and stress” on workers.

Technology

Most respondents described their experience using technology to work in the family justice system during the pandemic (n = 86/93). Respondents identified improvements in the delivery of legal services, as well as challenges and concerns with using technology in the family justice system. Respondents also noted a “learning curve” to using new technologies.

Improvement in delivery of legal services. About one third of respondents viewed the significant increase in the use of technology in Ontario’s family justice system during the pandemic as a positive development (n = 35/93). Respondents described the implementation of new technologies for electronic document filing, electronic document signing, and virtual hearings as “accessible,” “efficient,” and “a dramatic improvement over the old way of doing things.” As
one lawyer proclaimed: “The only good thing to come out of the pandemic in family law is the technology advances.”

Many respondents described the benefits of virtual hearings, especially for some clients. These benefits included cost-effectiveness and convenience. Explained one lawyer: “[Clients] no longer have to put aside a ½ day to a full day to see me or attend court. I can see them on a lunch break or from home.” Other respondents thought virtual hearings worked as well or better than in-person hearings for resolving disputes. One lawyer expressed that, “[m]any of the judges at conferences seem to feel ‘closer’ to the litigants when talking to them and converse with them more naturally and their comments make a bigger impact.”

One judge also described “how well [virtual hearings have] worked”, explaining, “I feel that I can generally connect with people through Zoom and establish a working rapport...” This particular judge thought there were “many benefits [to virtual hearings] that should be retained after we return to in-person hearings, saying litigants should be able to attend court virtually for “simple matters or where childcare, distance or work commitments make calling in better than spending a day at the courthouse.”

Challenges and concerns with technology. Other respondents described challenges and concerns surrounding the adoption of new technologies (n = 32/93). Some respondents identified confusion with new systems. For example, one lawyer commented that “e-filing in particular has led to some hiccups, as the explanations provided by the Court for rejecting the documents are unclear and can lead to confusion and multiple re-submissions.” This confusion was exacerbated by limited access to court staff to assist lawyers and self-represented litigants. Other respondents described concerns around access to technology. These respondents highlighted how access to technology determines access to legal services and justice, and how access to technology depends on resources. One mental health professional explained: “For those who do not have access to technology, they are left to wait out the pandemic. However, those who are able, have access and can use technology, they are benefitting.” Respondents specifically identified those living in poverty and “rural families” as being negatively impacted by the implementation of new technologies and lack of internet access.

Some respondents saw virtual meetings as inferior to in-person contact. One mental health professional thought it was “[h]arder to build relationships” virtually. Another mental health professional described not being able to identify non-verbal signals, such as body tension or agitation, as easily. One lawyer worried about the possibilities of “witness coaching” and “evidentiary abuses” in virtual hearings, also describing virtual hearings as “reduc[ing] the human experience of being in a room altogether to address these very serious issues.” Another lawyer thought “accountability” was lost when court proceedings were not observed by the public.

A “learning curve”. A number of professionals described a “learning curve” to using technology during the pandemic (n = 20/94). As one lawyer exclaimed: “Oh wow! I have never been so technically challenged in my life!” This learning curve was identified for the respondents themselves as well as for their clients. A few respondents indicated that older individuals may have experienced greater challenges in adapting to the new technology, such as the observation: “Huge learning curve, especially for older lawyers and litigants.” In fact, both professionals with more than 21 years of experience and professionals with 1–5 years of experience were more likely to note this steep learning curve. For “younger” respondents, learning new technologies may have been especially challenging while also learning a new profession, while a more senior professional observed: “Old dogs can learn new tricks.”

Limitations

As with all studies there are limitations to the methodology of our two studies.

First, although Westlaw has more family law decisions than any other service, and Ontario has a good method of circulating written trial and appellate decisions to computer services, unreported decisions and decisions
published only by other reporters were not analyzed. Second, the decisions reported did not always provide consistent data so that some variables were missing or not possible to identify in particular cases. For example, data such as the race, ethnicity, or Indigeneity of parties is not generally reported in decisions. Thus, there are important questions that remain about understanding the possible disproportionate impact of the pandemic on racialized and other marginalized litigants. Future work in this area must include more of a focus on these important issues.

Third, the survey sample was purposive and not random. Therefore, the findings may not be representative of the population of all family justice professionals in Ontario. It does, however, represent an experienced subset of family law professionals who wished to respond about their experiences with family justice during the pandemic.

Fourth, the respondents were self-reporting about their experiences. There are others who did not participate and who may have other perceptions and experiences that may be different, or the same. As well, while online surveys can reach larger numbers of respondents, the surveys must also be limited in the number of questions that can be asked due to survey fatigue. Therefore, other questions were not included that could have been explored such as the impact of the pandemic on parent–child relationships and the effects of the pandemic on the most vulnerable, for example, whether there are differential impacts based on race or Indigeneity.

Finally, the sample size is small compared to the total number of members recruited from each organization. However, we purposely used a multi-method approach to obtain information from different sources to enrich the data gathering and findings, thereby still yielding a rich set of complimentary and overlapping findings.

**DISCUSSION**

The results of our two studies identify the myriad ways the pandemic has impacted parents and children involved in the family justice system in Ontario, as well as family justice professionals themselves. For vulnerable or disadvantaged families, the pandemic's impacts have been largely negative. However, for many lawyers and their more economically advantaged clients, the technological advances brought by the pandemic have improved efficiency and reduced costs, and may even have reduced stress.

Our case analysis and survey results suggest that high conflict families have been negatively impacted by the pandemic and associated disruptions to the family justice system. Case analysis data reveal that a much greater proportion of cases in the family courts were high conflict, especially during the early stages of the pandemic than before the pandemic, likely also making judicial experience during this period especially stressful. A majority of survey respondents also indicated that they saw an increase in the number of high conflict cases, and many reported an increase in the levels of family conflict during the pandemic, especially around contact with children, while having less access to the courts to help resolve disputes. This very likely increased stress on other family justice professionals during the pandemic.

Ontario judges urged parents, including high conflict parents, to attempt to resolve their disputes outside of court during the pandemic. In *Ribeiro v Wright*, a case involving an “urgent” motion to suspend the non-residential parent’s access and one of the first cases to define “urgency” during the lockdown period, Justice Pazaratz directed: “Right now, families need more cooperation. And less litigation.” While some separated parents were able to rise to this challenge and increased their levels of co-operation during the pandemic, many did not. For high conflict families unable to resolve their disputes without judicial intervention, the delay in proceedings caused by the pandemic means that conflict will likely be prolonged, likely with particularly negative impacts for children.

Respondents also described how the pandemic increased risks for victims of family violence, including IPV victims and child victims of abuse and neglect, while reducing access to services and, in the case of IPV victims, increasing barriers to leaving abusive relationships. The case analysis reveals that a not insignificant number of cases heard during the lockdown and reopening periods involved allegations of IPV. These findings are consistent with other studies and reports suggesting an increase in the prevalence and severity of violence during the pandemic (Koshan, Mosher & Weigers, 2021; Trudell & Whitemore, 2020) and the effect of stay-at-home orders on victims' ability to
access support, including child protection services (Anurdran et al., 2020; Usher et al., 2020; Mosleh, 2021). Consistent with other research, some respondents noted that the risk of violence was higher for racialized and Indigenous victims (Drew, 2020; Moffitt et al., 2020; Native Women's Association of Canada, 2020). Our survey study also raises concern about the risks to victims of family violence of new technologies implemented during the pandemic, including remote hearings and virtual legal services.

One of the most significant impacts of the pandemic on the family justice system has been the move to virtual services. For many professionals, the introduction of new technologies such as e-filing, e-signing, and virtual hearings has been the “silver lining” of the pandemic. With “the courts... now up to the early 21st century in terms of adopting technology,” many lawyers and their clients are experiencing greater access to justice in terms of efficiency and cost-savings.10 However, the abrupt shift to virtual court services, in which “growing pains are definitely occurring,” along with the closure of physical courthouses and continuously changing practice directions, have left self-represented litigants attempting to navigate a more complicated family justice system without in-person access to court staff, Family Law Information Centres, and limited access to Legal Aid Duty Counsel. Those without access to technology or the ability to use these new technologies effectively and safely face additional challenges accessing justice in a family justice system where “access to justice now means access to technology.”

CONCLUSION

The family justice system in Ontario has suffered significant impacts from the pandemic. The abrupt move to electronic filing of court documents and remote hearings, the initial restriction of hearings, and reduced access to services like legal aid, mediation, and child protection, has severely disrupted a system already suffering from access to justice issues. For some families, including those experiencing high conflict or violence, self-represented litigants, and those with limited resources, the pandemic has increased the complexity, cost, and delay associated with a family law dispute. However, for many lawyers and their better resourced clients, the pandemic has improved access to justice through increased efficiency and cost savings. These disparate impacts are not individual failings, but rather the product of larger systemic issues and problems.

As innovations like as e-filing and virtual hearings become part of the “new normal,” more research is necessary to understand how pandemic-related changes to the family justice system impact different families and how particular innovations can be tailored to meet the justice needs of more families. Canada has been slower to move out of the pandemic than the USA or the UK, but as we move towards a “new normal,” it will be important to understand the longer-term impacts of the pandemic on family justice, and even more importantly on children and parents.

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