Imagining Resilient Courts: from COVID-19 to the Future of Canada’s Court System

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The coronavirus disease 2019 (COVID-19) pandemic has challenged an array of democratic institutions in complex and unprecedented ways. Little academic work, however, has considered the pandemic’s impact on Canada’s courts. This article aims to partially fill that gap by exploring the Canadian court system’s response to COVID-19 and the prospects for administering justice amid disasters, all through the lens of resilience. After taking a forensic look at how the court system has managed the challenges brought on by COVID-19, we argue that features of resilience such as self-organization, flexibility, learning, and reflexive planning can contribute to the administration of justice during future shocks. We propose that the business of judging during shocks can become more integral to the business as usual of court systems. Imagining such a resilient court can be a way to step from COVID-19 to the future of Canada’s court system.

Keywords: COVID-19, court administration, resilience, disasters, access to justice, rule of law

Introduction
The coronavirus disease 2019 (COVID-19) pandemic of 2019–2021 has challenged democratic institutions in complex and unprecedented ways. Researchers have documented impacts on areas such as income security (Petit and Tedds 2020; Robson 2020), labour markets (Jones et al. 2020; Lemieux et al. 2020), the education system (Haeck and Lefebvre 2020), and homeless shelters (Jadidzadeh and Kneebone 2020).

Researchers have also begun considering COVID-19’s impacts on the legal system. For example, Block and Goldenberg (2021) consider the substantive statutory
emergency powers used to address the pandemic, and Van Praagh and Sandomierski (2020) consider the impact on legal pedagogy. Flood and Thomas (2021) generally review Canada’s legal response to COVID-19, and King (2021) discusses changes in Ontario procedural law. The Osgoode Hall Law Journal devoted an issue to these impacts, with articles on topics ranging from rights of asylum seekers (Mercier and Rehaag 2021) to access to justice for survivors of domestic violence (Koshan, Mosher, and Wiegers 2020) and court administration (Haigh and Preston 2020).

We add to this research by using the concept of resilience to consider the effect of COVID-19 on the Canadian court system and exploring how insights from this concept can contribute to more disaster-resilient Canadian courts in the future. We begin by introducing the concept of disaster resilience and providing an overview of Canadian court administration. We then consider how resilience can be applied to courts and review previous literature on disaster risk management in courts. We continue by outlining a framework for assessing court resilience and apply that framework to the courts’ responses to the pandemic. Finally, we look at how traits identified in the resilience literature—including self-organization, flexibility, learning, and reflexive planning—can contribute to improved administration of justice during shocks. We argue that although the Canadian courts displayed latent resiliency during COVID-19, more conscious engagement with these traits can lead to improved resilience to future shocks.

**Resilience**

The importance of planning for disasters is gaining increased recognition, spurred by the growing frequency, intensity, spatial extent, and duration of weather and extreme events (Field et al. 2012), climate change, and the wide-reaching risks of epidemics (Government Office for Science 2012). Disaster risk management is becoming a mainstream consideration across a range of institutional and governance domains (e.g., United Nations 2015; United Nations International Strategy for Disaster Reduction 2005). Perceptions are shifting from framing disasters exclusively about resisting shocks. Beyond maintaining the status quo during a disaster, resilience encompasses accommodating change, incrementally adjusting to new allocations of resources, and even transforming to novel risk equilibriums (Matyas and Pelling 2015).

Resilience has been given many definitions (Carpender et al. 2001; Cutter 2016; Keck and Sakdapolrak 2013; Manyena 2006; Matyas and Pelling 2015). For present purposes, we build on the UK Department for International Development (DFID; 2011, 6; see also Burgess and Sparrey 2015) working definition. It describes resilience as follows:

Disaster Resilience is the ability of countries, communities and households to manage change, by maintaining or transforming living standards in the face of shocks or stresses—such as earthquakes, drought or violent conflict—without compromising their long-term prospects.

As a *boundary object*—a term used across numerous disciplines with varied and, at times, vague meanings (Baggio, Brown, and Hellebrandt 2015; Brand and Jax 2007)—resilience can be wrongly conflated with other system attributes. Notably, resilience is often in tension with efficiency: system characteristics that improve resilience to a shock may make that system less efficient when not under a stress or shock. Nor is resilience equivalent to a policy paradigm such as sustainability, although the two are interrelated (Marchese et al. 2018). We elaborate on how this concept can be applied to the courts. Before we do that, however, we first describe court administration in Canada.

**Administering the Canadian Court System**

Responsibility for the administration of Canada’s courts is, legally and practically, shared among the judicial, executive, and legislative branches of state. The Constitution Act (Canada 1982) assigns most matters to the control of the provincial legislatures (section 92[4]), with exceptions related to superior court judges, criminal procedure, and the federal courts (sections 96, 99, 100, 91[27], and 101). The legislatures then grant the executive branch authority to manage the courts’ budget, accounting, human resources, buildings, furnishings, and technological support systems. Most Canadian courts feature this concentration of nominal power in the executive branch and have been described as following an executive (governance) model. Of the other courts, some follow the limited autonomy model, and the federally administered courts follow the executive-guardian model (Benyekhlef, Iavarone-Turcotte, and Vermey 2013).

Despite these powers, the importance of the executive branch should not be overstated. Judicial independence is constitutionally guaranteed by Section 99 of the Constitution Act and, for criminal matters, by Section 11(d) of the Canadian Charter of Rights and Freedoms.
Such independence reserves the “assignment of judges, sittings of court, . . . court lists, . . . allocation of court rooms and direction of the administrative staff” to the judiciary (Valente v. The Queen 1985, para. 49). Superior court justices also have constitutionally protected inherent jurisdiction, which allows them to, at least (MacMillan Bloedel Ltd. v. Simpson 1995, para. 33), ensure convenience and fairness in legal proceedings; prevent steps being taken that would render judicial proceedings ineffectual; prevent abuse of process; and act in aid of superior courts and in aid or control of inferior courts and tribunals. This means that, in practice, few if any decisions about court operations are made without the consultation and approval of the Chief Justice (Benyekhlef et al. 2013; Green 2017). The actual governance of Canadian courts is thus more nuanced than the formal allocation of power—with significant administrative power concentrated with chief justices, chief judges, associate chiefs, assistant chiefs, or regional senior justices, where applicable. They wield many of the Valente powers, control the court’s public communications, issue Practice Directions (which their colleagues follow), and are often an interface with other branches of state and the bar. Because each court is essentially independent of the others, court governance can be seen as decentralized as between courts but concentrated within each court.

Resilience in Court Systems
Having introduced the concept of resilience and described Canadian court system administration, this section combines the two in examining resilience in the Canadian court system. We first review prior studies of disaster risk management generally, and resilience in court systems more specifically, and then define a framework for assessing court resilience.

Prior Literature on Disasters in the Courts
Before COVID-19, literature on disaster risk management and the court systems was sparse (Matyas 2020). From a historical perspective, one analysis shows that the English court system reacted to a series of devastating urban fires by creating specialist “fire courts” (Tidmarsh 2016). Another shows that the Black Death led to an expansion of “chancery” in the English courts (Palmer 1993). Moreover, during the Spanish influenza pandemic of 1918–1919, the US Supreme Court postponed the start of its term by a month, with Justice Oliver Wendell Holmes writing in personal correspondence, “[W]e have been adjourned on account of the epidemic as it was not thought right to require lawyers to come, often across the continent, to a crowded and infected spot” (Walsh 2020). In anticipation of war in 1939, the UK Parliament altered the size, eligibility requirements for, and necessity of certain jury trials in England and Wales (Administration of Justice [Emergency Provisions] Act 1939 1939; Ryder 2021).

More recently, disaster risk management and the court system have been discussed in several practice guides and principles, particularly in the United States. The American Bar Association (ABA), for instance, has approached disaster preparedness and response by creating resources for courts, including a model court rule for providing legal services (inspired by Hurricane Katrina) (ABA 2007a). This rule outlines a template to allow out-of-state lawyers to provide pro bono legal services in a jurisdiction affected by a disaster. The ABA (2007b) has also created a set of principles for the maintenance of the rule of law in times of major disaster. The principles include proactive planning before a disaster, collaboration among those involved in the court system to ensure the system’s ongoing integrity, respect for constitutional guarantees—particularly those related to criminal prosecutions—ensuring compensation for insurable losses incurred from the disaster, and encouraging attorneys to provide emergency pro bono services (ABA 2007b). Other resources focus on facilitating business continuity (Boland 2007–2008; National Association for Court Management 2000). Recommendations include taking an all-hazards approach to planning for disasters and developing interagency coordination agreements before a shock (Boland 2007–2008).

The COVID-19 pandemic has prompted further scholarship on the relationship between disasters and court administration. Some has been descriptive, detailing the impact of COVID-19 on court systems (Baldwin, Eassey, and Brooke 2020; Byrom, Beardon, and Kendrick 2020), including quantitative analysis (Castelliano, Grajzl, and Watanabe 2021). Other scholarship has used COVID-19 as a lens through which to discuss structural access to justice issues—with COVID-19 being seen not as the problem but as a symptom of deeper-rooted instabilities (Engstrom 2020). Another group of articles has focused on COVID-19 as an opportunity to implement long-contemplated court system reforms, such as virtual hearings and electronic filings (McIntyre, Olijnyk, and Pender 2020; Puddister and Small 2020; and, more cautiously, Bermann 2020 and Warner 2020). Although this scholarship advances the discourse on disasters and courts, it has not yet connected the study of court systems to the disaster studies literature generally or the resilience literature specifically. Although some editorial work identifies resilience as an important feature for future court administration, the treatment is cursory and does not discuss in depth what might constitute a “resilient court” (e.g., McLachlin 2021; Newberry et al. 2020; Simmons and Simmons 2020). Some recent works, however, take further steps in this direction.

Haigh and Preston (2020), most notably, consider the impact of COVID-19 on the Canadian court system, focusing on court emergency (or business continuity) plans. They find that, when plans existed before COVID-19, they were “woefully inadequate to address a pandemic
that caused institutional resources to be inaccessible for a period of time” (885). Moreover, they observe that “the process of planning for a pandemic becomes almost more important than the plan itself” (885). Both the merits of contingency plans and the value of the planning process are themes in the field of disaster risk management (e.g., International Federation of Red Cross and Red Crescent Societies 2012). Although Haigh and Preston do not explicitly invoke disaster or resilience studies, their analysis illustrates an opportunity to delve more deeply into insights that these fields of inquiry can offer court systems confronted with shocks and stresses.

Other recent scholarship has discussed court resilience in the transitional justice context. The Leiden Journal of International Law, for instance, published a special symposium issue that considered the resilience of hybrid tribunals in post-conflict societies (Ainley and Kersten 2020; Fichtelberg 2020; McCaffrie 2020; Vagias 2020; Wiebelhaus-Brahm 2020). Similarly, Kastner (2020) contemplates how a resilient framing might lend itself to transitional justice.

Resilience as an Assessment Framework

On the basis of our definition of resilience, we frame our resilience assessment framework around three questions:

1. When confronted with a shock, was the court able to maintain or enhance its ability to do justice?
2. When confronted with a shock, was the court able to maintain or enhance its ability to ensure that justice was seen to be done?
3. Did the court’s response compromise its long-term prospects for ensuring justice was done or seen to be done?

The first two questions peg a court’s resilience to conventional elements of a well-functioning court system. As such, we can look to established underlying principles such as the rule of law, access to justice, and the open courts principle to assess courts’ responses.

For justice to be done, it must be done in accordance with the rule of law. The rule of law has been defined as “all persons and authorities within the state, whether public or private, [being] bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts” (Bingham 2011). As Wood (2020a) writes, court systems are “never more important than in times of crisis” for “ensur[ing] that the rule of law prevails,” even if non-court protections, such as impartial public servants, political leadership, and Senate oversight, should not be forgotten (MacDonnell 2020). Responses to crises may concentrate power in the hands of a limited number of executive or legislative officials, who are expected to wield it rapidly, increasing the risk that new laws or regulations themselves violate the rule of law (Webber 2020). Moreover, physical shocks can create second-order social shocks if the crisis is exploited for social or political ends.

Moreover, justice can only be done when there is access to justice. A court system provides access to justice when, as Lord Woolf (1996) writes, it is just in its results, fair in how it treats litigants, able to offer appropriate procedures at reasonable costs, expedient in dealing with cases, understandable to its users, responsive to its users, able to provide certainty, and sufficiently resourced and...
organised (see also Farrow 2014). Assessing courts’ responses to COVID-19 with respect to these themes helps in understanding courts’ resilience.

Justice can be seen to be done when courts are open and their processes transparent. Here, Canadian courts valorize the open courts principle, a principle that grants the public and media the right to observe court processes (Endean v. British Columbia 2016). Openness is integral to public confidence in the justice system. As a manifestation of the rule of law, it exists “to maintain and to enhance public confidence in, and . . . as a guarantee [of] the integrity of the court system” (CBC v. Canada (Attorney General) 2011, para. 28). Moreover, justice can also be seen to be done when judges can be scrutinized and the public has confidence in those individuals. As Jeremy Bentham once wrote,

[When] there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to the exertion and surest of all guards against improbity. It keeps the judge himself [sic] while trying under trial. (cited in McLachlin 2003, 1)

In assessing the perception that justice is done, we can consider the impact of COVID-19 on court openness and factors such as the transparency of judicial processes and appointments.6

The third question looks across these themes and asks how the courts’ point-in-time responses may have affected their long-term prospects. Did the court maintain or enhance its ability to do justice in the present but compromise its ability to do justice in the future? Have present decisions about court openness planted seeds of distrust that may eventually erode public confidence and the perception that justice is done? Such questions help assess this intertemporal dimension of resilience.

We examine how Canadian courts have responded to COVID-19 with this framework in mind.

Canadian Court Responses to COVID-19

The Canadian court system faced challenges before the COVID-19 shock (Chiodo 2021; Farrow and Jacobs 2020; Haigh and Preston 2020; Ontario Ministry of the Attorney General 1976). A Canadian Senate committee found delays to be a considerable problem in the criminal justice system (Runciman and Baker 2017), and the Supreme Court of Canada (SCC) majority in R. v. Jordan described a “culture of complacency within the system” (paras. 4, 40), which effectively “causes great harm to public confidence in the justice system” (para. 40, citing LeSage and Code at 61). On the civil side, cost, delay, and access to justice more generally have been recognized as significant problems for the court system (Action Committee on Access to Justice in Civil and Family Matters 2013; American College of Trial Lawyers 2008; Hryniak v Mauldin 2014). Concerns such as these have been felt particularly acutely among marginalized communities, especially First Nations peoples (Iacobucci 2013). Examining the resilience of the Canadian court system requires understanding this context.

In this section, we describe how the courts responded to COVID-19. We then assess that response on the basis of the resilience framework described earlier.

Describing Canadian Court Responses

Across Canada, court responses to COVID-19 were generally consistent, with some variations between provinces and the courts of various jurisdictions. Even if the judiciary were “relatively passive” in challenging government COVID-19 management policy (Daly 2021), they have been quite active in addressing COVID-19 in their own house. Court approaches included

• Implementing preparedness and business continuity plans;
• Limiting physical contact on court premises;
• Slowing down and suspending court processes;
• Transitioning to remote versions of court and legal procedures; and
• Limiting dockets to matters deemed urgent.

These approaches have supported an overall strategy of reducing physical contact among judges, court staff, lawyers, litigants, witnesses, and the media. As in many fields, swift and strict initial COVID-19 policies have been variously relaxed and reinforced since March 2020, an iterative dance of easing and tightening restrictions (Pueyo 2020).7

Implementing Preparedness and Business Continuity Plans

Broad pandemic plans have existed at the federal and provincial levels in Canada for some time (Haigh and Preston 2020). However, these plans have historically focused on the health care sector and have not contemplated court administration (Haigh and Preston 2020). One exception is the Provincial Court of Newfoundland and Labrador (NLPC), which had developed a plan to respond to pandemics in 2010 (NLPC 2010). In 2020, with the onset of COVID-19, Canadian courts began developing pandemic plans (e.g., Provincial Court of Alberta [ABPC] 2020b) and business continuity plans (e.g., Ontario Court of Justice [OCJ] 2020a, 2020c). The federal Courts Administration Service (CAS; 2020) developed its own business continuity plan in March 2020. Moreover, CAS’s 2021–22 departmental plan noted that in response to the pandemic, “a layered risk-management approach will be adopted, with a combination of preventative and mitigation measures” (CAS 2021).

Limiting Physical Contact on Court Premises

Courts reacted to the initial spread of COVID-19 by limiting access to court premises. Court buildings have both a public side, which includes courtrooms, registry...
offices, and outreach initiatives such as public tours, and a private side, which includes office space for judges and court staff. On the private side, one of the first actions by courts was to have fewer staff in the building. On the public side, although some public-facing operations initially continued, non-essential visits were restricted. For example, the SCC suspended guided tours (SCC 2020a), and various courts limited public attendance at hearings (Court of Appeal for British Columbia and Supreme Court of British Columbia (BCCA & BCSC) 2020; Ebacher 2020; Junker 2020; Pritchard 2020; SaltWire Network 2020). Eventually, many of these operations were also adjusted to reduce physical contact on court premises.

Later, as courts began expanding the number of people allowed on court premises, physical distancing measures were introduced, including plexiglass barriers in courtrooms (Petras 2020), physical spacing of judges on multi-panel benches (SCC 2020b), limiting the number of counsel and litigants allowed in courtrooms at one time (Bauman 2020b; Morawetz 2020d), and even guidance on elevator usage (Ministry of the Attorney General Recovery Secretariat 2020). Mandatory masking was also implemented (Court of Appeal for Alberta 2020; Manitoba Court of Appeal, Manitoba Court of Queen’s Bench, and Manitoba Provincial Court 2020). Reducing physical contact was more easily accomplished at appellate courts than trial courts, there being fewer people involved—experts, witnesses, juries, and so forth—and an absence of many of the preliminary hearings and motions—such as discovery, disclosure, bail, and case management conferences—that require oral submissions.

Slowing Down and Suspending Court Processes
With reduced court staff, limited access to courtrooms, and concerns about COVID-19 exposure, courts’ capacity to provide a full docket of hearings was reduced. Courts thus faced a prioritization problem. To solve it, courts principally took two initial actions: they adjourned existing hearings (e.g., Bauman 2020b; OCJ 2020d; McInnes 2020), and they extended deadlines for filings (e.g., Bauman 2020b). Adjourning existing hearings cleared courts’ queues, allowing them to reallocate their hearing capacity to the most urgent cases. Extending deadlines freed up court staff resources (by pushing into the future the processing of submitted files) and counsel resources (which may also have been constrained by the pandemic). These court actions were further supported, in some jurisdictions, by other parts of government suspending limitation periods as courts, counsel, and society at large adjusted to the pandemic (Nadeau 2021).

Another tactic used by trial-level courts for both criminal and civil matters was to suspend jury trials. Whereas jurors sitting in ongoing trials were instructed to come to court, many future jury trials were suspended from mid-March 2020 with immediate effect (Chartier, Joyal, and Wiebe 2020; Holmes 2020a; Popescul 2020c). These suspensions applied to both trials that had not then been started and upcoming jury selection processes.

Transitioning to Remote Versions of Court and Legal Proceedings
Courts of all levels implemented alternatives to in-person filings (Douglas 2020), takings of affidavits (Bauman 2020a; Chartier 2020a; Moreau, Rooke, and Nielsen 2020; Popescul 2020b), and hearings (Bauman 2020c; Chartier 2020b; Court of Appeal of Alberta 2020; Hinkson 2020a; Popescul 2020a). Implementing (and later, requiring) e-filing reduced the need for court staff to come into the court building and allowed lawyers to do more work remotely (Puddister and Small 2020). Allowing affidavits to be commissioned remotely enabled lawyers to avoid physical contact with many clients. Many in the profession who had advocated for e-filing before COVID-19 welcomed these developments (Douglas 2020).

Courts also widely adopted teleconferencing and videoconferencing for certain proceedings, which helped address concerns from reporters about attending court (Franklin 2020; Helmer 2020; Powell 2020; McLachlin 2020; for more information, see Chiodo 2021). However, remote hearings were not a complete solution. Certain types of hearings were seen as unsuitable for remote operation, especially those at trial level involving witness testimony, language interpretation (e.g., Hinkson 2020a), mediation, and some criminal matters (ABPC 2020a; Holmes 2020b; Kotsis 2020; Pritchard 2020).

Limiting Dockets to Urgent Matters
Although many matters were adjourned, the trial courts proceeded with cases and motions they deemed to be urgent. In Nova Scotia, this approach was referred to as an “essential services model” (SaltWire Network 2020). Family court matters, including emergency child protection, adult protection, and family division, tended to be considered urgent (Pritchard 2020), as did judicial matters related to COVID-19 (Hinkson 2020b; Morawetz 2020b), in-custody proceedings such as bail and sentencing hearings, and peace bond applications (SaltWire Network 2020). Some courts issued practice directions detailing what matters would be considered urgent (ABPC 2020a; Provincial Court of British Columbia 2020). Other courts identified some categories in which they expected urgent matters might arise, without indicating in advance whether all cases fitting in the category would be considered urgent. For example, when the Ontario Superior Court of Justice (ONSC) was restricted to urgent matters, these were defined to include “urgent . . . requests for judicial review related to COVID-19” (Morawetz 2020b). Similarly, the BCSC defined matters with prima facie urgency to include “urgent orders in the nature of habeas corpus,
certiorari, mandamus, and prohibition” (Hinkson 2020b, 3). Throughout, individual judges retained discretion to hear a matter even if it was not included in an urgent category (e.g., Morawetz 2020b).

Assessing the Response

We now apply the framework described earlier to preliminarily assess the response of the Canadian courts. This assessment is not intended to be a comprehensive evaluation of the Canadian courts but rather a survey, based on available data, of how such a framework could be applied to discuss a court’s resilience when confronted with a shock. Overall, we assess the courts’ response as mixed from the perspective of rule of law, access to justice, and perceptions of justice and as it relates to the courts’ long-term prospects.

Ensuring Justice Was Done

Rule of Law

Although some would argue that when “courts are unavailable or unable to function . . . little stands between the citizenry and the breakdown of the rule of law” (Wood 2008, 748), the reality of courts being unable to function for a time during COVID-19 was less dire, at least to the extent that the rule of law is about maintaining shared expectations of the consequences of illegal conduct (on this, see Waldron 2008, 6–7). The courts’ delay strategies effectively time-shifted labour from time of crisis to a future, non-crisis world. There were no reports of rampant lawlessness occasioned by this delay; in other words, the shadow of the law continued to loom large (Mnookin and Kornhauser 1979).

SUSPENDING THE USE OF CIVIL JURY TRIALS WAS ALSO NOT SIGNIFICANTLY HARMFUL FROM A RULE-OF-LAW PERSPECTIVE. Unlike in the United States, there is no constitutional right to a civil jury in Canada. Suspending them thus did not violate higher-level laws, nor did it work a major injustice — there being no consensus that civil jury trials are advantageous to litigants even in normal times (Mandel v. Fakhim 2016; Osborne et al. 2007). Moreover, shifting away from civil jury trials helped mitigate delay (Belton v. Spencer 2020; Louis v. Poitras 2021).

Still, some chinks in the rule of law could be seen in the time it took courts to respond to the facts of the pandemic. Although courts responded relatively quickly to the additional harms of incarceration posed by COVID-19 (see, e.g., McCulloch v. Canada (Attorney General) 2020), they did not do so for victims of intimate partner violence, according to Koshan, Mosher, and Wiegers (2020) and Houston et al. (forthcoming). Moreover, it has taken courts some time to respond to new laws and regulations passed in response to the pandemic. Beaudoin v. British Columbia, a case concerning religious liberties, took 48 days to resolve (from time of filing) in favour of the BC government, and Taylor v. Newfoundland and Labrador (2020), concerning provincial travel restrictions, took 136 days (from the alleged infringement) to the delivery of trial reasons. Although the time taken to resolve these matters does not appear to have been increased by the measures courts took to mitigate the pandemic, delay in offering clear guidance is problematic given, as discussed earlier, crises are a time when a breakdown in the rule of law becomes more likely.

Delay in responding to the facts of COVID-19, however, should not be overstated. Many cases prompted by COVID-19 laws were handled expeditiously. Moreover, when the Ontario government attempted to get an ex parte reference opinion without an opposing party and without following its own procedures, the court blocked that attempt (AG for Ontario v. Persons Unknown 2020).

Another risk to the rule of law comes from direct judicial action. Although, as we discuss in greater depth later, inherent jurisdiction provides the courts with immense flexibility, it also risks being used in ways that are inconsistent with the rule of law. One ruling that will likely engender future analysis is Chief Justice of the ONSC (CJONSC) Morawetz’s 2020 decision to grant an ex parte application by the Ministry of the Attorney General to suspend all writs of eviction (Morawetz 2020a). The emergencies legislation in Ontario did not allow the executive branch to make such an order (Emergency Management and Civil Protection Act 1990, section 7.0.2[4]). Accordingly, through this ruling, the CJONSC appears to have stepped into the legislature’s shoes. Although potentially inconsistent with the rule of law, the ruling shows the tension of that principle with other values. As the CJONSC explained in another action, “These are exceptional times” wherein he was “dealing with the unknown and a just and practical response must be found” (Stephen Francis Podgurski [Re] 2020, para. 51).

Access to Justice

The court’s resilience with respect to access to justice was also mixed, particularly with respect to delays, physical access, and how understandable the courts are to their users.

As Lord Woolf (1995, Chap. 3, para. 30) wrote in his Interim Report,

Delay is an additional source of distress to parties who have already suffered damage. It postpones the compensation or other remedy to which they may be entitled. It interferes with the normal existence of both individuals and businesses. In personal injury cases, it can exacerbate or prolong the original injury. It can lead to the collapse of relationships and businesses. It makes it more difficult to establish the facts because memories fade and witnesses cannot be traced.

With the pandemic more than a year old at time of writing, the available data show a significant exacerbation of delays (particularly at the trial level) and thus a negative
impact on access to justice. These harms can be separated into pre-hearing and trial delays and judgment delays. Not all courts report the relevant data, but those that do show a near-universal negative trend in pre-hearing and trial delays. In the Provincial Court of Saskatchewan, for example, the average number of days until the next trial date (across all courthouses) rose from 96 to 125 between 1 March 2020 and 1 March 2021. 

The family cases disposed of declined by 20 percent. The family cases disposed of declined by the same amount, but the criminal cases disposed of declined by approximately 40 percent, making for a significant increase in pending criminal cases by the end of 2020. In the BCSC, 12–15 percent fewer civil and family trials and 50 percent fewer criminal cases were begun during the pandemic period. The BCSC’s capacity to hear cases also declined, with long chambers applications heard declining by approximately 20 percent and trials declining by 30 percent. The BCCA, meanwhile, had almost 40 percent fewer cases filed, and it disposed of 30 percent fewer cases.

Overall judgments produced by the courts also suffered. In the BCSC, for example, 15 percent fewer reasons for judgment were issued, mostly because there were fewer oral judgments (down by 27 percent) rather than fewer written judgments (down by 7 percent). The decrease in judgments held across the country, with overall 17 percent fewer judgments being issued in the in the first year of the pandemic as in the one-year period before the pandemic. One notable outlier on this metric was the Ontario Divisional Court, which reported 200 (153 percent) more reasons in the pandemic year. This increase, however, appears to be driven by that court reporting endorsements related to case management during the pandemic. Outliers in the other direction include the Small Claims Courts of Ontario and Nova Scotia (which reported 92 percent and 71 percent fewer reasons during the pandemic year), and the Federal Court (FC) and Tax Court of Canada (TCC), each of which approximately halved their production. One reason for the decline of the TCC’s production of reasons is that it did not “have the technological capability to operate remotely” (Meghji et al. 2020). The TCC operated primarily with paper files, and TCC staff were not permitted to take these files off site or to work on site once the pandemic began (Novoselac and Sorensen 2020).

As far as physical access is concerned, the courts’ move to remote and virtual hearings also had varied effects. This move demonstrates that courts were not only resisting the shock but were incrementally adjusting their normal operations. Virtual hearings had advantages for some counsel, by eliminating travel time between courtrooms (Hasham 2021). Counterintuitively, a system that works better for counsel may work worse for courts: to give counsel a clear video-call time may require allocating more time than needed for each case, thus leading to fewer cases heard in total. For example, the OCJ has been scheduling proceedings in 30-minute blocks, leading to only 10–15 cases being heard per day (Mosleh 2021).

The move to remote hearings also created novel challenges, particularly for marginalized groups (Puddister and Small 2020). Anecdotes have emerged in the administrative tribunal context of parties lacking home phones or computers “standing at payphones in a rainstorm trying to dial in” and legally blind parties being “unable to navigate the online hearing room” (Dingman 2020; see also Baxter 2021). Similar problems have affected self-represented parties without access to video or teleconferencing, for whom “access to justice now means access to technology” (Houston et al. forthcoming, 17). Even represented parties who may need to participate in court, or who ought to be able to see the justice system in action (such as criminal accused or complainants), may find their access limited (McIntyre et al. 2020; Muia 2021). Flood and Thomas (2021) note that analysis of the “digital divide between users accessing court proceedings through video links” (para. 40) has been limited.

Regarding how understandable the courts have been to their users, the helpful role of adjacent actors including lawyers, provincial bars, and attorneys general is noteworthy. For instance, in Quebec, the Ministry of Justice coordinated with the Barreau du Quebec and the Center for Access to Legal Information to provide a telephone legal clinic to answer questions related to Quebeckers’ rights and obligations during the crisis (David-Pelletier 2020). In Ontario, the Law Society set up a hotline that allowed callers to speak with a family lawyer to discuss whether their matter was urgent (Loriggio 2020). Initiatives such as these likely eased pressure on the courts by clarifying shifts in the administration of justice to the court-going public.

### Ensuring Justice Was Seen to Be Done

The courts’ overall strategy of reducing physical contact among judges, court staff, lawyers, litigants, witnesses, and the media meant reduced courthouse attendance and, eventually, increased remote and virtual hearings.

These shifts had mixed impacts on justice being seen to be done, particular with respect to the open court principle.

Various courts restricted physical public access to courtrooms but allowed media access (Chartier et al. 2020; SaltWire Network 2020). Accordingly, in these instances, the public could not see justice being done, except via the media. As “surrogates for the public” (Richmond Newspapers Inc. v. Virginia 1980, 573), the media are vital for ensuring that the public can access information about the courts” (Endean v. British Columbia 2016, para. 94). Although open access to courts “is the public’s right . . . practically speaking, this information can only be obtained from the newspapers or other media” (Endean v. British Columbia 2016, para. 94, quoting Edmonton Journal v. Alberta
Virtual hearings presented an opportunity to overcome media reluctance to attend courts in person. These hearings, however, posed a different set of challenges. For instance, media access to court documents, exhibits and hearing lists has sometimes been limited (Franklin 2020). Moreover, in Ontario, only a limited number of virtual courthouses were at first accessible to reporters (Hasham 2020). Hasham (2020) reported that in April 2020 only two courthouses in Toronto permitted media access to telephone hearings.

COVID-19 could also be perceived as undermining judicial independence through controversial legislation passed in the name of increasing access to justice. In Ontario, for instance, the government in 2020 proposed increasing the number of judicial candidates presented to the attorney general to fill provincial court vacancies, a move “widely seen as an attempt to restore [political] patronage to judicial appointments” (Addario 2021). Legislation to establish this increase was passed in early 2021, ostensibly to address the backlog of cases caused by COVID-19 (Loriggio 2021). Groups including the Criminal Lawyers’ Association viewed the legislation as an attack on the appointment committee’s independence (MacNab 2021), whereas others described the legislation as “using the pandemic as a cover for partisan changes to the judicial appointments process” (Spratt 2021). Efforts such as these will have negative effects on justice being seen to be done in that province.

Long-Term Prospects

As the preceding analysis demonstrates, court decisions related to COVID-19 had mixed effects on justice being done and being seen to be done. Although negative effects were certainly experienced by actors throughout the court system, these decisions did not have catastrophic acute impacts on the court system, from either a rule-of-law or an access-to-justice perspective. As detailed earlier, resilience is not just about resisting or bouncing back from a shock. It is also about doing so in a manner that does not jeopardize long-term prospects. Have the courts’ decisions during COVID-19 sown negative impacts that will affect their long-term ability to do justice or ensure that justice is seen to be done?

To begin to answer that question, maintaining an efficient and well-functioning court system in non-crisis times may create a reserve of credibility that can be drawn on during shocks. That reserve, however, is finite. As indicated earlier, the Canadian court system had established challenges, particularly with access to justice, before COVID-19. Thus, if the courts had a surplus of resilience before the pandemic, it was a slim one, which COVID-19 has further depleted.

An implication of a diminished resilience reserve is that court coping tactics such as delays, although relatively effective in the short term, will not continue being viable in the case of repeat or protracted shocks. A court can only delay so much and so many times—it is not a viable long-term, or even medium-term, approach. Given the protracted nature of the pandemic, the medium- and longer-term knock-on effects of delays and backlogs caused by this shock are yet to be fully understood. For instance, it continues to be unclear to prosecutors how institutional delay occasioned by COVID-19 will be treated when assessing a defendant’s right to trial in a reasonable time (Paciocco 2020). What is beginning to emerge, however, is the role that COVID-19 is playing in widening inequalities in areas such as family law and worsening access to family justice for already vulnerable individuals (Houston et al. forthcoming).

A related implication of tactics such as delaying proceedings is a possible impairment of the “injunctive and guiding” function of civil liability (Zipursky 2003, 721). Existing limitations periods would have made for a multi-year lag between the occurrence of a harm and the last permissible filing date in court. The extension of limitations periods exacerbates that lag, undermining courts’ ability to enunciate how people ought to behave, and it may prevent shared expectations from cohering. For example, only one of the 70 class proceedings listed in the Canadian Bar Association’s (2020) National Class Action Database that mention COVID have been certified as of June 2021. Class proceedings are a key mechanism relied on by the Canadian courts to ensure access to justice.

Moreover, the delays occasioned by the response to COVID may create a future shock. In British Columbia, for example, the government suspended limitation periods for an entire year, starting 26 March 2020. The limitation period for all BC causes of actions that would have started during that year are instead deemed to have started on 26 March 2021. Concomitantly, the limitations periods of a year’s worth of causes of action will expire on the same day: 26 March 2023 (Law Society of British Columbia 2021). Both lawyers’ offices and court registries may be overwhelmed with 365 times the average number of causes of action coming due the same day.

Beyond delays and backlogs, the long-term impacts of other decisions taken by the courts are also unknown, including the risks arising from increased reliance on virtual systems. Lawyers and judges both depend on legal source materials for their work, which they access virtually. Although the legal system can continue without access to physical materials by replacing them with virtual materials, the legal system may be less able to function if counsel and the judiciary lack access to electronic databases or records, internal filing systems, or in-progress
judgments. Courts’ responses to COVID-19 may have increased their vulnerability to a shock that interfered with access to computing or to the Internet (perhaps by the destruction of part of the electrical grid or Internet infrastructure or from a significant cyberattack).

With this overview of how the courts responded to COVID-19, we now look to how we might conceptualize a more resilient court system.

**Imagining More Resilient Canadian Courts**

The preceding analysis describes a Canadian court system that has been relatively resilient to COVID-19. Resilience to this hazard, however, is not an assurance of resilience to other hazards. In this section, we build on learning from the resilience literature about features and principles that contribute to resilience (Field et al. 2012; Pelling 2011). These features include self-organization, preparedness and planning, learning, and reflexive decision making.

Self-organization is the capacity to make decisions with some level of autonomy. It permits one to make choices on the basis of up-to-date and high-resolution information, to independently adjust when communication with central authorities is impaired, or to coordinate with other actors in responding to a shock. Flexibility is about recognizing that change happens and being able to alter plans and processes when confronted with that change. It can be facilitated through redundant ways of achieving similar outcomes. Learning contributes to resilience (Field et al. 2012) by allowing actors to adapt behaviour and do things differently — be it by learning from successful initiatives (Sharma and Singh 2016) or sharing experiences and planning across sectors (Komendantova et al. 2016; Scolobig, Komendantova, and Mignan 2017). Preparedness and planning involve developing approaches for managing shocks in advance so that “break-downs happen gracefully, not catastrophically” (Rockefeller Foundation 2009).

Finally, reflexive decision making considers different risk management pathways, critically assesses competing goals (Matyas and Pelling 2015), and uses an iterative process to plan for decisions that might have to be made before, during, and after a shock. Formal methods of policy analysis can provoke such reflexivity, as we discuss later (Keating and Hanger-Kopp 2020; Kull, Mechler, and Hochrainer-Stigler 2013; Mechler 2016). Preparedness, planning, and reflexive decision making often go hand in hand, in what we refer to here as reflexive planning.

Courts already have latent capacities in many of these features. We review these capacities and explore how deeper engagement can further their contributions to more resilient courts.

**Self-Organization Through Governance Structure**

Courts’ self-governance and coordination with adjacent actors helped them successfully respond to COVID-19. They could build on these attributes when planning for future shocks.

Courts at all levels were generally able to make changes to their own operations, unencumbered by further-removed decision makers. As we discussed earlier, although much of the formal power over courts is held by the executive branch, in practice, judges with administrative responsibilities can steer the day-to-day court management. This emphasis on the value of local, context-sensitive decision making also manifested in case law. As *Louis v. Poitras* (2021)—a COVID-period case concerning whether ONCA should overrule a superior court’s discretionary court management decision—explains, “Local judges are best positioned to understand the availability of resources and the appropriate approach in the circumstances of a given case” (para. 26). Still, that capacity had limits. For instance, without being prioritized as an essential service (Haymour, Croft, and Bauer 2020), the TCC was unable to transition smoothly to use digital files, effectively halting its operations for months.

Concentrated decision-making power does not always contribute positively to resilience (Pelling and Manuel-Navarrete 2011). However, there may be characteristics distinct to judges and judicial reasoning that make such concentration more beneficial. For instance, judges are accustomed to processing large amounts of competing information and making informed decisions in short periods of time. Even so, human capital could be enhanced by, for example, ascribing greater value to a prospective appointee’s flexibility to changing circumstances.

Another feature of self-governance that may be relevant for court system resilience is superior courts’ power to sit outside of their home province. The inherent jurisdiction of the superior courts allows them to sit outside their home province when appropriate (*Endean v. British Columbia* 2016). This power gives courts the ability to continue even if a hazard prevents the court from sitting in its home jurisdiction. The courts have also used their inherent jurisdiction to hold written “hearings,” albeit with criticism (*Gelowitz and Rankin 2020*).

Although much of courts’ adaptability flows from imminent institutional characteristics and decisions, court systems are also buoyed by the adaptability of adjacent actors such as lawyers, provincial bars, and attorneys general. Beyond the help these actors provided to increase the understandability of COVID-period court processes, government and legal initiatives provided courts with other support as well. In Nova Scotia, Chief Justice of Nova Scotia *Wood* (2020b) recognized a remarkable and unprecedented level of cooperation and collaboration . . . among the Judiciary, the Nova Scotia Department of Justice, the provincial and federal prosecution services, Nova Scotia Legal Aid, private counsel, corrections services, law enforcement agencies and public health officials.
In British Columbia, the Ministry of the Attorney General established two advisory groups: one to advise government on urgent issues emerging in the justice system—involving parties such as the BC Association of Chiefs of Police, the BC Civil Liberties Association, the Royal Canadian Mounted Police, and the First Nations Justice Council—and the other to consider ways to manage the backlogs produced by the crisis. In Alberta, the bar self-organized to minimize the number of criminal defence and prosecution lawyers who had to go to court (Martin 2020).

Still, lawyers and bar associations did not follow the courts’ decisions and guidelines uncritically. As discussed later, groups of Ontario lawyers protested the OJC’s initial determination to maintain in-person operations. Further into the pandemic, lawyers and government attorneys in jurisdictions such as British Columbia began advocating for physically distanced courtroom reopening to mitigate a growing backlog of cases (Rankin 2020). Against this backdrop, the existence of a cooperative yet independent bar emerges as an important feature of a resilient court, specifically in relation to self-governance. Having a cadre of lawyers willing to support the courts in the administration of justice through a shock, but also willing to critique them without fear of recrimination, both eases pressure on the courts and helps identify suspect policies. The bar’s role also underscores how court resilience is interrelated with that of the broader justice system.

**Court Flexibility**

Flexibility in procedural law, practice directives, hearing locations, filing requirements, and judge fungibility can provide courts with important means of bolstering resilience. From the ability to shift to e-filings to the establishment of emergency courts, flexibility can dampen the effect of a shock on the administration of justice. During COVID-19, the courts displayed a latent flexibility, which could be advantageous during other shocks and built upon to address future crises.

The utility of altering procedural rules was demonstrated repeatedly during the pandemic. One of the most significant changes was the forgoing of civil jury trials, which would have been one of the most difficult features of standard judicial procedure to maintain during the pandemic. In-person jury trials would have posed significant risk for spreading COVID-19, absent considerable logistical adjustments (e.g., physical distancing, enhanced ventilation, frequent testing). Virtual jury trials were also infeasible. They would have required high-speed Internet access for jurors and would have posed logistical and privacy challenges for jury deliberations.

This source of resilience could be further strengthened if courts, working in concert with federal and provincial legislators, developed pre-specified emergency guidance on civil procedure, akin to crisis standards of care in medicine (National Academies of Sciences, Engineering, and Medicine 2020). This guidance could provide a range of options to the courts when responding to a shock, such as empaneling smaller juries, easing selection and administration—either locally (fewer people in physical proximity lessens the risk of disease transmission) or remotely (fewer people who need to be connected lessens the risk of at least one necessary person’s connection failing)—or shifting to a more civilian procedural approach that grants investigative powers to judges to call witnesses, seek out experts, and develop the case (Jukier 2015). Having a judge in greater control could be helpful during a shock to expedite case management, level the field for self-represented litigants, or create a more conversational environment for witnesses already under stress as a result of the shock. For this “backup” procedural system to be functional during a shock, however, amendments to rules of civil and criminal procedure would need to be enacted beforehand, and judges and lawyers would require prior training on the different approaches—neither of which would be quick to accomplish.

The courts also displayed flexibility in their ability to take proceedings remote and virtual. This flexibility to move between in-person and remote or virtual proceedings can be advantageous to a court confronted with other kinds of shocks. Many crises arising from natural hazards will be geographically limited, so measures that allow for the continued administration of justice outside those affected areas are valuable. Hazards that affect courthouses or courtrooms (such as an earthquake, flood, or fire) could be mitigated by taking proceedings online or to alternative locations—such as courthouses in unaffected areas or unaffected public spaces nearby.

One area in which flexibility would be advantageous but for which further inquiry is required is in the fungibility of judicial resources. In a country as geographically vast as Canada, few shocks would affect the entire national judiciary. An ice storm might be limited to Ontario and Quebec or an earthquake to British Columbia. In this regard, COVID-19 was exceptional. Still, with judicial resources concentrated in large urban settings, there are risks that a crisis in a city such as Toronto or Montreal could affect a significant proportion of the national judiciary. The consolidation of courts and judicial resources in single buildings such as the Palais de Justice de Montréal or the Law Courts building in Vancouver exacerbates this risk. These shocks could be somewhat mitigated by reassigning judicial resources from elsewhere, but such mitigation would not be wholly effective. Although judges are largely fungible before a case is heard, judges are difficult to replace (without restarting a case) once a hearing has begun and before a judgment is rendered. This situation would be most problematic in the superior courts—where trials can already take years—and in Quebec—which has a distinct legal system and is thus less able to accept judicial support from other provinces.
Courts could also increase their flexibility by developing procedures to shift proceedings out of the court system altogether. Some parties did so unilaterally in the pandemic, by being more willing to settle (Schmidt 2020; Churchill 2020) or by preferring forms of alternative dispute resolution, such as mediation or arbitration (Churchill 2020). The latter was even encouraged by the Alberta superior trial court (Court of Queen’s Bench of Alberta 2020). Whether further encouraging settlement or requiring alternative dispute resolution would significantly affect court caseloads is another matter; both are already incentivized by the current cost and delay associated with court proceedings. The legislatures might also consider redirecting some disputes from courts to administrative tribunals, as occurred (in non-crisis times) for condo disputes in British Columbia (Salter 2017). They should be cautious of relying on a backup system that is, however, already exposed to similar harms as the main system.

Social Learning
Courts can gain insights and lessons from other courts’ responses to shocks and from how parallel processes operate. As with flexibility, Canadian courts demonstrated latent social learning capacities, which could be built on to improve court resilience to future shocks.

The array of largely self-governed provincial, superior, federal, and appellate courts in Canada creates considerable latitude for some to act as “learning laboratories” for the system as a whole (e.g., Reference re Code of Civil Procedure 2021, para. 248, per Wagner C.J. and Rowe J; New State Ice Co. v. Liebmann 1932, 311 per Brandeis J.). With COVID-19, some courts experimented with procedural changes, virtual platforms, and physical distancing. Other courts, more tentative in adopting measures, became convinced of their merits by seeing them in action elsewhere. Although courts across the country did not define formal objectives or measures of success, they seem to share an understanding of what success looks like and a willingness to be swayed by their peers. For instance, whereas the ONSC suspended in-person operations on 15 March 2020 (Morawetz 2020c), the OCJ initially declined to do so. After protest from Legal Aid staff and the Criminal Lawyer Association (Gallant 2020; Spratt 2020), however, the OCJ reversed this position and suspended in-person operations on 20 March 2020 (OCJ 2020b).

With so many courts in Canada, consolidating lessons learned can be difficult, particularly during a shock. Learning can be further facilitated by centralized platforms that collate best practices. The Action Committee on Court Operations in Response to COVID-19—a collaboration between the SCC Chief Justice and the Minister of Justice of Canada—illustrates how such a platform could be developed (Canada, Department of Justice 2020). This collaboration provides resources to actors involved in court administration and operations, including guidance on protecting court personnel; perspectives on restoring court operations in northern, remote, and Indigenous communities; and recommendations on jury summons and selection (Canada, Department of Justice 2020). It could be used as a template for a more permanent platform for assembling best practices on disaster risk management in courts.

In addition, parallel external systems can offer insights and opportunities for policy shifts (Hall 1993; Hecho 1974). For instance, even if conducting virtual hearings existed only in theory, the ability to learn from existing virtual processes in other fields, we suggest, allowed for an easier transition to virtual hearings during COVID-19 than had it never been considered. As one judge noted, “[O]nly the silver linings [of the COVID pandemic is that] . . . we have been booted into the 21st century of technology by this crisis” (Powell 2020). The full extent of the shift to virtual hearings and processes remains to be seen, that is, whether it will be limited to digitizing existing systems or result in a potentially transformative shift to online courts (Chiodo 2021).

However, not all shocks are amenable to the use of virtual hearings. A failure of the electric grid because of a solar storm, for instance, would make both a courtroom and a virtual courtroom inaccessible (MacAlester and Murtagh 2014; National Academies of Sciences, Engineering, and Medicine 2017). Identifying non-web-based alternatives to courtroom proceedings could help in such circumstances. As an alternative to virtual hearings, Canadian courts could learn from the itinerant circuit courts relied on by many systems to serve remote communities (Matyas 2018). These courts travel to remote communities and hold court in school gymnasiums, houses of worship, or town halls. In the wake of a disaster, the ability to create mobile justice in flexible locations might be a useful alternative when conventional in-court proceedings are not possible.

Finally, further inquiry can look at learning from feedback—be it formal surveys of court users or media critiques. In June 2021, the Courts of British Columbia (2021) disseminated a public survey on its modified procedures during COVID-19, asking users about virtual hearings, e-filings, and issues such as satisfaction with the courts’ communications during the pandemic, ease of access, and clarity of information on modified procedures. Such surveys could be a useful way for courts to incrementally adjust during a shock. In addition, future research could examine how media analysis was involved in court adjustments during the pandemic and the role that it could play in helping courts to learn and adjust when confronted with future shocks.

Reflective Planning
Court planning for COVID-19 (and for shocks more generally) has been limited in Canada. The business continuity plans that do exist have been more reactive than anticipatory. There is a significant opportunity for more critical
and reflexive disaster planning in courts, which we propose can be greatly facilitated through explicit analytical frameworks for analyzing and choosing among trade-offs.

There are many such analytical frameworks for policy-making (Morgan 2017). They are usually characterized by some mix of narrative and computational approaches (Fischhoff et al. 2006): as an example of the first, scenario planning might use expert guidance to describe plausible futures; as an example of the second, modelers might compute the expected cost of policy alternatives. Benefit–cost analysis (BCA) is one set of methods that describes decision alternatives by their (often uncertain) benefits and costs (Fischhoff 2015), and it can add to more reflexive disaster planning and ultimately resilience.

In its tradition informed by behavioural science, BCA subdivides a decision problem—including at the level of public policy—into three related components (Fischhoff 2010). The normative component asks what decisions someone should make, given a particular set of values. The descriptive component asks what decisions people currently make and that they define their preferences for the alternatives and possible outcomes. The prescriptive component asks how to bridge the normative and the descriptive when the status quo does not align with the normative analysis. There is a long history of applying the normative–descriptive–prescriptive and similar approaches to addressing a variety of complex, societal, public-facing problems (Fischhoff 2015; Stern and Fineberg 1996). COVID-related problems are no exception, with recent analyses of pandemic public policy issues, such as the distribution of scarce medical resources (Fischhoff 2020; White and Lo 2020), developing policies for workplace COVID-19 testing (Directors Guild of America, Screen Actors Guild–American Federation of Television and Radio Artists, International Alliance of Theatrical Stage Employees, and Teamsters’ Committees for COVID-19 Safety Guidelines 2020), the public’s preferences about restricting economic activity (Bruine de Bruin, Saw, and Goldman 2020), and the reopening of previously closed public and private spaces (McCarthy et al. 2021).

In the legal context, BCA is already a commonly used framework for evaluating the overall impact of broad policies in the law of jurisdictions such as the United States (Business Roundtable v. SEC 2011; Executive Order 12,563 2011; Executive Order 12,866 1993; Sunstein 1996; Viscusi 1992). Regarding law and COVID-19 specifically, there has been some preliminary BCA work. Priel (2020), for instance, reviews BCA’s use as a tool of public policy-making during the pandemic for a legal audience, whereas Susskind (2020) focuses on the courts’ use of information technology during the pandemic. Although Susskind’s analysis is not strictly in BCA terms, he uses a similar lexicon, describing the advantages and difficulties of courts’ use of digital technologies.

In terms of the resilience framework described earlier, a BCA-like approach could contribute to reflexive planning because of the finite financial and human resources each risk management decision entails. Because each adaptation is a trade-off—the resources spent to implement a new practice could have been spent in some other way—a systematic approach such as BCA, applied to the problem of the resilient court, would enumerate the benefits and costs of alternative strategies used to manage disruptions and help us choose among them.

Explicit frameworks for crafting public policy take a systemic and methodical approach to policy-making that is especially useful for describing complex policy alternatives and their possible outcomes, all the while accounting for the uncertainty of those outcomes. In contrast, when a decision process does not describe the benefits and costs of the possible outcomes of policy options, the likelihoods of those outcomes, and the priorities that guide decision making, a shock will force policy-makers to make decisions and experience trade-offs with little knowledge of whether the decision process or the alternative chosen accord with a society’s values.

Alongside the courts’ inability to meet demands during normal times, there will inevitably be trade-offs during a shock. BCA is one tool among the many available from policy analysis to make sure that those trade-offs are made deliberately rather than haphazardly.

**Conclusion**

COVID-19 has revealed a Canadian court system that possesses latent shock management capacities but that also has still underexplored avenues to become a more resilient court. In an age of increasingly frequent and severe natural hazards, growing risks of global virus contagions, and mounting susceptibilities to technological crises, we propose that the Canadian court system can shift from one responding predominantly reactively to large shocks to one better prepared for them.

Improved planning, reflexive decision making, and more systematized learning, we propose, can help transform these shocks from exceptional externalities to more commonplace or dull (Clarke and Decon 2016) events. Moreover, tools commonly used in other areas of public policy-making, such as BCA, could be useful for designing the resilient court, given the need to choose among priorities competing for the same pool of resources. Our hope is that this article can provoke a conversation on developing a more resilient court system.

With the prospects of a riskier future ahead—caused by climate change, cybersecurity threats, novel pandemic diseases, and social and political unrest—we propose that the business of judging during shocks can become more integral to the business as usual of court systems. Imagining such a resilient court can be a way to step from COVID-19 to the future of Canada’s court system.
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Notes

1 DFID’s definition is a good starting point, drawing from other mainstream definitions of resilience, including those of the United Nations International Strategy for Disaster Reduction and the Intergovernmental Panel on Climate Change.

2 We note that the Canadian court system is but one component of the broader justice system—which additionally includes the ministries of the attorneys general, correctional services, forms of alternative dispute resolution, and administrative tribunals. This article focuses on Canada’s provincial-territorial and federal branches and omits consideration of the military courts.

3 Unlike superior courts, provincial courts do not have inherent jurisdiction, being creatures of statute. However, they also maintain independence in decision making (Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I. 1997; Ref re Remuneration of Judges of the Prov. Court of P.E.I.1997).

4 See also Wyman and Warner-King (2017), who consider the child welfare court system and how a court can foster resilient outcomes in the population it serves.

5 King (2021) also considers access to justice and the rule of law as themes through which to explore the response of the legal system to COVID-19, discussing them as values of assessment related to Ontario’s pandemic procedural law changes.

6 The Canadian Judicial Council (2004) lists the qualities of the ideal judiciary: independence, integrity, diligence, equality, impartiality, transparency, competence, accountability, and diversity.

7 The materials in this section are drawn from court practice directives, notices, and media reporting.

8 In the Ontario family courts, “triage” emerged as a formal judicial concept to assist with this prioritization. A body of triage jurisprudence developed that featured within the larger body of “urgent matters” directions and case law. Although Ontario family courts eventually stopped triaging in the formal legal sense, scheduling and case prioritization remain issues of concern. For more, see Deveau (2021).

9 Saskatchewan even originally allowed unsworn affidavits to be filed but, after government regulations were amended to explicitly permit remote commissioning of affidavits, clarified that hearings should generally proceed only with sworn affidavits (Popescul 2020a).

10 Other provinces simply had interpreters appearing remotely as well (e.g., ABPC 2020c).

11 For example, the challenge to the statutory definition of “hardware store” took eight days from the application (17 from the first notice of contravention) to resolve (Canadian Appliance Source LP v. Ontario (Attorney General) 2020); a judicial review of Hudson’s Bay of Ontario regulations took all of 13 days from their filing of motion material to the delivery of reasons (Hudson’s Bay Company ULC v. Ontario [Attorney General] 2020); an injunction to enforce restrictions against a recalcitrant barbecue restaurant took 17 days to issue from the barbecue’s breach (Her Majesty the Queen in Right of Ontario v. Adamson Barbecue Ltd 2020); an injunction against a church took 18 days to issue from its first breach and five days to find it in contempt when it breached (R v. The Church of God (Restoration) Aylmer 2021); and an injunction to restrain enforcement of a public health order took 23 days from the order to be dismissed (The Fit Effect v. Brant County Board of Health 2021).

12 Calculations on file with authors. Calculated by finding the average number of days to the next available trial date for all courthouses listed in the Next Available Trial Date Report Jan–Mar 2021 and the Next Available Trial Date Report Jan–Mar 2020. No weighting was done by courthouse.

13 Calculations on file with authors. Family cases were calculated by comparing numbers for April–December 2019 with those for April–December 2020. Criminal cases were calculated by comparing 2019 and 2020 total numbers, with the added assumption that the first quarter of 2020 (up until pandemic restrictions began around 13 March 2020) was the same as 2019.

14 Calculations on file with authors. These data were calculated from the 2020 Annual Report of the Supreme Court of British Columbia (2021), using the same adjustment for yearly data as described earlier.

15 Calculations on file with authors. These data were calculated from the 2020 Annual Report of the Court of Appeal for British Columbia (2021), using the same adjustment for yearly data as described earlier.

16 Calculations on file with authors. These data were calculated from the number of CanLII search results for cases reported between 13 March 2019 and 13 March 2020 compared with the number of cases reported between 14 March 2020 and 14 March 2021.

17 Additional endorsements appear to fully explain the Divisional Court’s increased number of cases reported. Excluding cases with the term endorsement in the text, the number of cases reported by the Divisional Court is approximately the same in the pandemic year (221) as in the previous year (233). Many of the endorsements relate to e-filing; see, for example, Tallman Truck v. KSP Holdings (2020).

18 For instance, the Ontario Landlord Tenant Board—an administrative tribunal—faces the prospect of what is anticipated to be a considerable caseload after a five-month shutdown combined with a legislated ban on enforcing evictions (Dingman 2020). In England and Wales, the backlog of unheard criminal cases has already reached 54,000, meaning it will be 2022 before some criminal cases go before a jury (Casciani 2021).

19 Roshan Holdings v. Aviva, related to Aviva’s insurance policy for hotels.

20 Other Canadian governmental institutions have already been affected by ransomware, as have various non-Canadian courts (see, e.g., George 2020; Gooding 2020; Goud 2020).

21 Other relevant features that we do not discuss in detail here are redundancies and a multi-risk approach. Redundancies are backups that, although not strictly necessary for efficient operation in normal times, provide alternatives in the event of a shock. A multi-risk approach involves being
responsive to numerous shocks and stresses, rather than focusing solely on individual hazards (Komendantova et al. 2016; Scolobig et al. 2017).

Q2. Quebec is one jurisdiction in which some emergency decision making is shared, with Article 27 of the Code of Civil Procedure designating certain emergency procedural changes as within a joint purview of the chief justice of Quebec and the minister of justice (Quebec 2014). Intended to ensure the proper administration of justice during exceptional circumstances such as natural disasters or pandemics, Article 27 is a substantially modified article in the new Code of Civil Procedure that had not been invoked before COVID-19 (Ministère de la Justice and Société québécoise d’information juridique 2015). Although the scope of the joint decision making is limited to suspending or extending prescription and procedural periods or changing the means of communication, it is unclear what would occur were the Chief Justice of Quebec and Minister of Justice to disagree on the emergency measures to take.

See, for instance, the Nightingale Courts of England and Wales, temporary courts set up to address backlogs in the justice system caused by the pandemic (Her Majesty’s Courts & Tribunals Service, Ministry of Justice, and Buckland 2020).

Virtualization of legal practice involves similar considerations. For instance, many law firms were hampered by power outages after tornadoes hit Ottawa in September 2018. One firm of virtual lawyers, however, with key systems in the cloud and hot sites elsewhere across Canada, was able to continue accessing documents and serving clients throughout the shock as long as some lawyers in some locations had power and Wi-Fi (Careless 2018).

In such a circumstance, one might imagine the federal government cross-appointing members of the judiciary of one province as members of the judiciary of another province as well.

A reduction in the capacity of lawyers would be similarly problematic. Although lawyers are regularly replaced in cases, a shock affecting a major portion of a provincial bar would pose significant challenges for the system as a whole. The limited capacity of lawyers working in shock-free periods has already been described as a major contributor to the ongoing access-to-justice crisis (British Columbia [Attorney General] v. Christie 2007; McMurtry 2005). In terms of a resiliency analysis, however, courts can think of lawyers as similar to the judiciary, with geographic dispersal of lawyers able to mitigate the effect of geographically concentrated shocks. Again, in provinces outside Quebec, the relative consistency of the common law could enable resources to be drawn from other provinces.

Others include decision analysis, risk analysis, and scenario planning (Morgan 2017). Although these approaches all have their proponents and detractors, they also all have the virtue of making trade-offs among policy alternatives explicit. In this article, we have used BCA as an exemplar approach given its wide usage in public policy research and applied economics. Our intention is not to favour BCA over these related approaches but rather to emphasize the value that a systematic methodology can add.

Although the phrase cost–benefit analysis is used in Canadian law, it appears to be used there as a synonym for balancing various interests in a particular case (e.g., Bruff-Murphy v. Gunawardena 2017, para. 36; Hoy v. Medtronic Inc. 2003, para. 54) rather than as the systematic economic analysis described in US law.

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