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RULE OF LAW IN ERA OF VIRTUAL HEARINGS: DOING JUSTICE?

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Like the rest of the world, the legal profession has spent the last eight months isolating or socially distancing and implementing countless other changes. As a result, the way in which the legal system operates has undergone a significant shift. A fundamental part of this shift, and the main subject of this small note, is the move to videoconferencing technology, such as Zoom or WebEx, now widely used as a substitute for in-person meetings.

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Let me begin by stating the obvious; I am not against videoconferencing in general and indeed if I was, it wouldn't matter. The legal profession needs to embrace these changes, especially because videoconferencing solutions such as Zoom can help provide access to justice to a wider audience by cutting costs and time and helping lawyers provide services to a wider clientele. Rather, what I am going to suggest is that in certain cases

videoconferencing can have deleterious effects on the rule of law and that we need to be judicious in when and how we use it. So, my plea is that we carefully assess when and how we move towards a greater use of video technology.

A lot has been said before both by Canadian courts (for example, *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177) and by various legal professionals in articles about the importance of non-verbal communication and the importance of in-person hearings where credibility of a witness is at stake, so I will not repeat these arguments here. However, I cannot understate the importance of these aspects of record creation. There is a fundamental distinction between advocacy and testimony that I fear is being ignored. The lack of a human connection in videoconference hearings is less than satisfactory and this problem is particularly acute while trying to examine or cross-examine a witness on a screen when defending a client in a criminal trial.

Many of my cases involve complex factual matrices which require several witnesses to provide testimony and to be cross-examined. Now imagine that the trial moves forward via videoconference and the videoconferencing platform breaks down just as the cross-examiner is about to challenge the witness after a long and careful foundation has been laid. Or suppose one of the key witnesses changes their testimony when asked the same question (central to the issue) twice because of an audio glitch in the midst of the trial. These problems will be particularly acute when defending a client in a criminal trial or a respondent in a government regulatory proceeding. Having cross-examined hundreds of witnesses over the last 40 years and a handful in the last 40 weeks I say that no trial lawyer ever wants to be hamstrung in their representation of their client by the limits and vagaries of videoconferencing technology.

In my own experience, in the last month alone, I have argued a motion at Investment Industry Regulatory Organization of Canada (IIROC), a motion at the Ontario Securities Commission about in-person hearings, a motion in front of the Ontario Superior Court of Justice, a case conference in the Ontario Superior Court of Justice and an appeal in the Ontario Court of Appeal, all via videoconference. I have also used videoconferencing technology for my meetings with the Law Society of Ontario, as well as for lectures delivered at the University of Toronto and the University of Manitoba. I encountered numerous technological issues throughout the course of all of these sessions including dropped connections, missing audio, interruptions, video lags, etc.

The good news is that there is no doubt that everyone in the legal profession is working hard to continue to provide access to justice as this terrible disease continues to tear a destructive path across the globe. I also do not believe that any of these mishaps will substantively affect the result of these proceedings. However, unfortunately, videoconferencing is simply not a substitute for in-person testimony when we are creating an evidentiary record.

Where a videoconference hearing is set to take place against the wishes of one party or where the accused has a complicated case and multiple witnesses need to be examined and cross-examined, not only would proceeding in such a way cast a shadow on the ability of the Canadian Charter of Rights and Freedoms to guarantee life, liberty, and security of a person under s. 7, but it would also violate traditional notions of fundamental justice and procedural fairness.

ACCESS TO JUSTICE: WILL COVID-19 JUSTICE BECOME THE NORM?

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Originally published in The Lawyer's Daily,

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I am an optimist. In previous columns I have expressed the hope that COVID-19 will reveal the inefficiencies and gaps in how we deliver justice to Canadians and allow us to build a better justice system that combines the strengths of the current system with new thinking on how to run our justice institutions more efficiently and humanely.

This is still my hope. But two other possibilities have increasingly preoccupied me, as the never-ending pandemic grinds on and on and on. One is that we will emerge from the pandemic too fatigued for bold new thinking and settle for what we had before. That would be a shame. But the other possibility is even more chilling — that the incursions on justice that have accompanied COVID-19 will settle in and become permanent. As information on its impact on our justice system accumulates, a new question has emerged: Will COVID-19 justice become the new norm?

> "Emergency edicts and laws have pushed the courts and institutions that monitor fair process to the side."

My early concern that we would fail to build a better justice system post-COVID-19 and settle for the previous status quo with a few jigs here and there, has morphed into the worry that we may actually emerge from the pandemic with a permanently weakened justice system — what Andy Richardson of the Inter-Parliamentary Union described on a

recent webinar sponsored by the World Justice Project as “minimalized justice,” a phrase calculated to send a chill down the spine of anyone who cares about rights and democracy.

It cannot be denied that throughout the world COVID-19 has made society less just than it once was in myriad ways. Emergency edicts and laws have pushed the courts and institutions that monitor fair process to the side. In parts of the world, free expression has been curtailed. Canadians have seen their right to move in Canada, guaranteed by s. 6 of the Charter, truncated. People understand that individual rights must sometimes yield to the greater public good and accept these curtailments as temporary intrusions on liberties they hold dear as inevitable.

But COVID-19 has inflicted harms not only on individual liberties writ large, but more broadly on the justice system and the institutions that sustain it.

One problem is funding. Courts and the myriad institutions that support just outcomes in family law, criminal law and civil disputes, have seen funding reduced in some countries. Courts that were operating on inadequate budgets before COVID-19 fear the new cuts will become permanent, further impoverishing their justice systems. Who needs new courthouses when people can meet online, the politicians will ask? Except that not everyone can access online solutions, and not everything required for justice can be done or done well remotely. One result of the pandemic could be an impoverished and consequently diminished justice system.

> “COVID-19 has meant increased delays in resolving people’s legal problems, as courthouses have reduced capacity and justice support agencies have been silenced as non-essential.”

Coupled with diminished funding is the problem of diminished expectations. COVID-19 has meant increased delays in resolving people’s legal problems, as courthouses have reduced capacity and justice support agencies have been silenced as non-essential. We know that pre-pandemic, many people had given up on courts and tribunals as a way to resolve their legal problems. The curtailments and closures caused by COVID-19 has exacerbated this situation.

This is a dangerous situation. When people give up on the justice system, they also stop believing

in the rule of law. Unable to use the law to obtain the benefits it accords them, they view the system as alien and elite. The law is not their law; it is the law of a privileged and empowered class. This in turn, undermines trust in all our democratic institutions.

Compounding the potential problems of diminished funding and diminished expectations, is the fact that COVID-19 has worsened the lot of many people. Around the world, domestic violence has spiked. Already disadvantaged minorities have seen their situation grow even more bleak. Coming out of the pandemic, we will need a strong and robust justice system to address the breakdowns and losses the epidemic has wrought.

People who think about justice have a new name for all these COVID-related impacts — the justice debt. COVID-19 will leave us with economic debts and social debts. But it will also leave us with a justice debt — court backlogs, legal advice backlogs, backlogs of unresolved disputes, of rights denied and harms inflicted.

We can write the backlogs off in an act of collective denial, when the trauma of the pandemic is over. To do this would leave our justice system and our society permanently diminished. Or we can resolve to erase the justice debt COVID-19 has produced, just as we are resolved to pay back the economic debts the epidemic has run up. There is a real danger that justice will take a back seat as fatigued and overspent governments work to restore society when this is all over. Instead of building a better post-COVID-19 justice system, we will end up with a worse justice system, providing minimized justice.

Justice is vital to society and a well-functioning democracy. Let's make sure that as we emerge from this epidemic, we keep it alive and well.

TAKEAWAYS FROM MINASSIAN

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Ontario is watching Alek Minassian being tried for the Toronto van attack where 10 people were killed and 16 were injured. In the midst of the trial, Dr. Alexander Westphal, the most important witness for the defence's theory, that underpins not criminally responsible on account of mental disorder is of the view that autism prevented Minassian from knowing it was wrong to proceed with his actions. The doctor declined to testify unless the judge restricted public view of Minassian's five-hour video assessment.

This is an unprecedented event. The balancing of rights against potential concerns for society were placed on the scale of justice. The court balanced the open court principle and the freedom of press. Ultimately, and most importantly, rights, principles and concerns were balanced against right to a fair trial, outlined in s. 11(d) of the Canadian Charter of Rights and Freedoms.

Defence counsel Boris Bytensky specified: "The right to a fair trial would be seriously damaged if Dr. Westphal did not testify." Referring to Minassian, counsel said: "I'm not conceding that he cannot make out the defence that I'm advancing without Dr. Westphal, but I am saying it would be infinitely more difficult to do that."

The various officers of the court brought their own perspective on the request made by the expert witness. The defence stated that without the psychiatrist, there is almost no defence, which would infringe on Minassian's right to a fair trial.

One of the Crown prosecutors suggested that restrictions were requested in an effort to "hijack this process." He also added that public proceedings

enhanced society's "need to know." Lastly, lawyer Brenden Hughes, on behalf of the media, added: "It can't be the case that witnesses are allowed to dictate their terms."

After considering all positions, Justice Anne Molloy came to a sound decision, given the circumstances. She accepted the restriction. As she has previously stated, "either I do it or proceed directly to sentencing." She said: "That's my ruling. Not happy about it." She went further, "[It's] the least wrong thing to do in all the circumstances."

"She said: "That's my ruling. Not happy about it." She went further, "[It's] the least wrong thing to do in all the circumstances."

There are multiple concerns offered by defence counsel to support the request for restriction: 1) Allowing the video of the interview to be seen may lead to negative stereotypes for people with autism. 2) It could be a catalyst that could encourage further crime. 3) There might be undesirable fame and notoriety for Minassian. The psychiatrist clearly addressed the first concern by concluding that Minassian was an exceptional case. He emphasized that he was not implying that all persons with autism had a propensity to violence. The last two concerns are basically referring to notoriety.

Since mass murders are incomprehensible to society, it is no surprise that, for many different reasons, they capture the attention of humanity at large. We are left with different societal conceptions on the issue. Some are of the view that those who commit these types of crimes should not be provided with the opportunity of becoming "celebrities."

The need for fame that many murderers seek should be interrupted. Anonymity to some extent would be welcomed by some. Plausibly, this would disable crime copycats who might be encouraged by the level of media these cases receive. Not to mention, there is immense emotional turmoil that crimes of this nature, with trails of death and violence, bring to society. The manner in which they affect the community and specifically the victims and their loved ones, is immeasurable.

Others claim, that serial murder has a direct impact on society, and as such, it should be worthy of societal attention. Even though, those who commit mass murder, on occasions, are puzzlingly elevated to having a “celebrity like” status.

Historically, mass murder, as an act, is nothing new. Yet, there has been, in the last few decades, a cultural shift on crime. As a society, we display a high degree of interest towards true crime documentaries, Netflix docuseries, crime books, etc. This is all due to the fact that people are attracted to nefarious crime cases, to some degree. Many people find these cases to be a source of both distress and fascination, even if they feel a moral duty to condemn the crimes.

Frequently, this leads to a misinformed popular culture. As true crime sells, producers and publishers are willing to give the public what it wants. Murderers are presented as almost enigmatic. Understandably so, since society finds the murderer’s acts deviate from community standards. The collective curiosity to comprehend why individuals choose to commit these types of odious acts has a luring effect.

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Hence, we should be cautious to show apprehension and detainment towards acknowledging the human nature of people who commit what society rightly considers to be a heinous crime. A contemporary society that is opposed to public information in regards to these crimes, dangerously, may run the risk of denying the opportunity for the wrongdoer to be humanized. If society does not know basic information about the perpetrator, it would be easy to chastise them into a dark place where they become less than human and more of an isolated, faceless monster who society has exiled.

Our justice system and society are better than that. Justice Molloy admirably upheld the rule of law and safeguarded the right to a fair trial. As Fyodor Dostoyevsky famously claimed: “A society should be judged not by how it treats its outstanding citizens but by how it treats its criminals.”

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