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• The COVID-19 Crisis as a Catalyst for Change: Advancing Ontario Family Justice •

Joanna Radbord

In mid-March 2020, life changed due to the COVID-19 pandemic. Schools closed. The courts suspended regular operations. People lost their jobs. Guidelines were published about who lives and who dies when there are not enough ventilators to go around.

We were forced to pause. We paused the relentless busyness of waking, working, sleeping, and starting the cycle again. We stopped, read the news, spent some time with our children. We thought about how our life might well be shorter than expected. With a debilitating virus lurking in our midst, we started thinking about what matters. We wondered how to explain the news to our children. We started to think about what kind of world we'd be leaving our children when we died.

The pandemic exposed glaring inequalities and starkly revealed the intersections between poverty, health, pollution, and discrimination. Millions have fallen ill; hundreds of thousands have died. The virus has disproportionately killed racialized people.[1] Following the deaths of George Floyd, Breonna Taylor, and Ahmaud Arbery, mass protests erupted over anti-Black racism in the criminal justice system.[2] Extreme poverty is increasing dramatically, and in the wealthiest nations, millions have been thrown out-of-work.[3] Scientists had warned, for years, that environmental destruction would lead to viruses crossing from wildlife to humans.[4] Pandemic lockdowns have dramatically

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reduced the carbon emissions that cause climate change, but the same reductions would need to occur, year after year, for a decade, to keep global warming to 1.5 degrees, the target of the Paris Climate Agreement.[5] As Greta Thunberg, the teenaged Swedish environmental activist writes, our house is on fire.[6] COVID-19 is our blaring fire alarm. Hopefully, we have been knocked out of complacency. We need to stop doing business as usual. We need to find an exit.

We need drastic change in family law too. For years, the family justice system has been described as a "system in crisis".[7] Pre-pandemic, at some courts, over 70 per cent of litigants were self-represented.[8] There were significant delays, as courts strained with overburdened dockets and too few judges. The World Justice Project's Rule of Law Index rated Canada as 56th in terms of justice being accessible and affordable and 54th in timeliness out of 128 countries.[9] Litigation was simply out of reach for most people, with the average cost of a seven-day trial reaching $124,000.[10] As former Chief Justice McLachlin recently noted, courts worked for the few but were failing many.[11]

Now, with the pandemic, the family courts will face even more challenges. During the suspension of regular operations, hundreds of conferences were adjourned,[12] many of which will now need to be rescheduled. There will likely be an abundance of motions to change, given the number of people suffering job losses and salary reductions. There may be an increased number of separations as weak relationships have buckled under the strain of lockdown.[13] We may soon be facing a "tsunami" of litigation.[14]

As I write, residents of Ontario are still required to maintain physical distance from people from other households. Most Canadians expect a second wave of the virus in the Fall; many think this second wave will be worse than the first.[15] At this time, we cannot speak about a world post-COVID; we remain in a state of emergency. We have no idea when a vaccine will be widely available.[16] Still, we have a target date of July 6, 2020, for the re-opening of bricks-and-mortar courthouses, with plastic shields installed. How do we emerge better, stronger, and more resilient as the courts re-open? How do we facilitate equal and effective access to the family justice system during these uncertain times? I suggest we should not just scramble back, wearing masks, to business as usual, until the next lockdown. This emergency, in all its facets, must ignite systemic change. We should revisit long-standing practices and innovate for the future. As former Chief Justice McLachlin has written:

> COVID-19 is highlighting for us what we already knew — that the justice system needs to be revamped and reformed. The system has been running on the edge of viability for years, struggling to maintain backlogs and reasonable hearing times. Now, with courts shutting down, things will only get worse. People will have even less opportunity to find support for their life challenges and cases will either be foregone or pile up. If we care about accessible justice, we must stop living on the edge and make our procedures and hearings more efficient… Our court system must be sufficiently funded to be able to function in a modern fashion — no longer reliant on paper, a bricks-and-mortar-only approach to the courthouse and a mode of interaction that requires people to be physically in the same space.[17]

This article discusses some of the changes that Ontario courts have made during the pandemic. Which of these new practices should be retained indefinitely? Should case conferences continue to be held over Zoom, rather than requiring in-person attendances? What motions could still be appropriately addressed based on the written record alone, without oral argument? The paper briefly surveys innovations in

online dispute resolution from other jurisdictions, including an integrative mediation platform for family law, and suggests that more creative family law solutions may be necessary in cases involving children.

After canvassing these procedure points, the paper explores structural inequalities that have been exacerbated during the pandemic. How is family law implicated in perpetuating rather than remedying discrimination? The paper discusses the importance of default property-sharing protections for all spouses; highlights the disproportionate number of Black and Indigenous children involved in the child welfare system; and reflects on the gendered impacts of the crisis. While a full discussion of all these important topics is beyond the scope of this short survey, my hope is to prompt a wider conversation. We have been talking about family law reform for years. COVID-19 means that there is no choice but to act.

1. Court Administration

Electronic Filing

Ontario family court processes have changed, by necessity, during the pandemic. Ontario courts were ill-equipped for the remote operations required by physical distancing, but judges, lawyers, and court staff valiantly adapted. Counsel are emailing documents to court staff, who make the materials available to the judge. This needs to evolve into e-filing in Ontario, with full case management online. Digital court files provide hyperlinks to cases and documents, which makes the court's preparation easier. There are international models: the Crown Courts in England and Wales have been paperless for the last four years.[18] Around the world, and in this province, documents are being signed with e-signatures, including affidavits with remote verification of identity.[19] Justice Morawetz remarked, "If there is one positive that is going to come out of this crisis [it] is that we have been forced, and the Ministry has been forced, to accelerate its plans on moving to electronic hearings and also electronic filings and we cannot go back".[20] Although there will be an initial cost outlay for technology, it appears that clients, firms and government will achieve significant efficiencies and long-term cost savings from digitization relative to paper-based administration.

Scheduling

Conferences are being scheduled using an online calendar tool. It seems that any in-person motions will now be heard at fixed times to promote physical distancing. All these measures will save time and money. Clients will no longer need to pay for process servers or anxiously watch the clock as counsel wait in a packed courtroom for their motion to be heard (if the judge manages to get through the motions list that day). My law partner, Martha McCarthy, recently wrote to government and judges to propose judicial triage at an early stage of each case. It may be that the first appearance process could be repurposed to this end. Earlier intervention may lead to earlier settlements.

2. Video and Telephone Conferences

Although e-filing and online scheduling are welcome steps in the right direction, the suspension of regular operations invites us to more radically re-imagine the family justice system. What does it mean to resolve family law disputes "in a modern fashion", as former Chief Justice McLachlin has suggested? Ontario judges have been successfully conducting virtual family law conferences. Should these return to in-person attendances as the province "re-opens for business"?

Most family law cases are resolved through the case conference process; it is vitally important

that these remain a highly effective path to resolution. The Honourable Justice Stevenson, Senior Judge of the Family Court, has urged that family law conferences must be conducted in-person once the court resumes regular operations. Her Honour noted that, since family law cases are frequently driven by emotions, "looking people in the eye" helps achieve settlement.[21]

While this perspective holds intuitive appeal, research suggests that online mediation may be *more* effective than in-person mediation, particularly if the mediator has sufficient training in using the technology.[22] In cases involving domestic violence and power imbalance, the benefits of online mediation may be even more dramatic. Access is enhanced for rural and remote families. The online environment creates a sense of safety and emotional distance; this improves focus on the issues and helps reduce reactivity. Perhaps, if judges were provided appropriate training and access to resources, online conferences would *promote* the settlement of many family law cases.

I suggest that online conferencing should be the preferred option, certainly in cases in which both parties have lawyers. Pre-COVID-19, many judges would meet first, and sometimes only, with counsel when the parties had representation. This allowed the lawyers and judge to speak candidly, without posturing for the client's benefit. It also saved time, with the judge quickly getting to the heart of evaluating the relevant legal issues. For represented litigants, the court should be able to rely on counsel to help distraught clients to maintain their composure and to focus on resolution. Lawyers have a professional obligation to advise clients to settle cases when it is possible to do so reasonably.[23] After virtually meeting with a conference judge to discuss the parties' respective positions, counsel should be able to work through the issues with their clients and return having narrowed or fully resolved the issues.

Online conferences are much less expensive for clients and likely for the government. They minimize wasted time. With in-person conferences, the judge, lawyers and parties drive to the courthouse, deal with snarled traffic and hazardous weather, and contribute to air pollution. On arrival at the courthouse, in some locations, there was no private meeting space. Sometimes it was impossible to find a table on which to write. Counsel were often found in courthouse hallways scribbling minutes of settlement, without access to a computer and a printer. This invited mistakes and future skirmishes.

In contrast, online conferencing allows counsel and the judge to meet from the comfort of their respective homes or offices. The parties can make themselves available to participate by phone or video link but do not necessarily need to dedicate their entire day to a process which often involves lengthy waits. For parties without suitable private space or technology to participate online, these could be made available in physical courthouses. During an online conference, lawyers and the judge have the means to review and edit documents together, synchronously. Counsel have easy access to their entire file, the relevant case law, and support calculation software. The tools available during an online conference make it easier and faster to resolve cases on a final basis, with confidence.

Many parties are more comfortable online. One self-represented litigant preferred his video hearing before the B.C. Court of Appeal, suggesting "I feel this format should be an option available to litigants regardless of physical-distancing requirements. It is progressive and conducive to access to justice".[24]

Many survivors of intimate partner violence are terrified to come to court. In the bricks-and-mortar courthouse, some survivors would be stuck in the hallway with their abuser glaring at them. Through audio-visual conferencing technology like Zoom, a judge can control the conference process in an inclusive and respectful manner. The judge can mute parties who are speaking inappropriately. A litigant who requires time to cool-down can easily be placed in a virtual breakout room. The physical distance between the parties ensures everyone's safety.

While family justice professionals generally have far more experience resolving cases in-person, research and experience are starting to show that, with proper technology training, settlement may be easier to achieve online. There is no reason that in-person conferences should be required or even be the default process. Online conferencing by secure audio-visual link may be faster, easier, less expensive, and more successful at achieving settlements.

3. Online Access Following Re-Opening

As a result of the pandemic, courts have been operating remotely all around the world.[25] Ontario is now re-opening businesses and services, but remote assistance must continue to be available to family litigants. This is a human rights and access to justice issue. In the U.S., about four in 10 adults (37.6 per cent) ages 18 and older have a higher risk of developing serious illness if they become infected with COVID-19, due to their advanced age (65 and older) or health condition.[26] The numbers of people at increased risk is probably similar in Canada. Whatever the number of people affected, many parties, counsel, court staff and possibly judges will not be able to effectively participate at in-person hearings.[27] In New York, numerous judges, court staff and lawyers fell ill as a result of the virus; Judge Johnny Lee Baynes died of complications of COVID-19 on March 26.[28] Some people with mobility challenges already had difficulty accessing courthouses; now, many more people will require online services to safely access the courts due to health circumstances. Online access should not be a matter for debate or discretion. Family justice participants and professionals should not have to divulge personal health information to engage the justice system. Online family court services should be available to all.

Online access is nearly universal in Canada, but true universality will need to be assured. According to Statistics Canada, 94 per cent of Canadians have home Internet.[29] Government will need to provide technology to people who cannot afford it and will have to expand Internet infrastructure in remote communities. Both these developments will be necessary to facilitate online education and health resources. Until Internet access is available to all, the Family Law Information Centres at select courthouses are expected to provide a private room, computer, phone, webcam and microphone, with a stable Internet connection available for public use. There is no reason that online court services cannot be used, widely, as key mode of engaging court services, with appropriate investment in technology. This would offer huge long-term cost savings to government, as well as users.

The court has only become more open and transparent in transitioning to remote hearings. Public engagement skyrocketed when more than 20,000 people watched, live, as Justice Di Luca read his verdict in *R. v. Theriault*, convicting an off-duty white police officer of assaulting a young Black man.[30] The four-hour reading of the verdict offered a clear explanation of the court's decision-making process, and viewers were better able to

see the faces of the judge, accused, and counsel simultaneously than would ever have been possible at an in-person hearing.

As dispute resolution has started to move online, justice system participants are rightly asking whether we should be making even more profound shifts to enable cost-efficiencies. The British Columbia Civil Resolution Tribunal ("CRT") has continued to operate, uninterrupted, throughout the pandemic.[31] The Tribunal is the mandatory route to address four types of cases: motor vehicle injuries up to $50,000; small claims disputes up to $5,000; and condo and property disagreements. The system can be accessed by website, email, telephone, fax, mail and at Service B.C. locations. It is available on a smartphone or tablet, from the comfort of the living room couch. The CRT provides legal information and tools, such as customised letter templates. If these mechanisms do not resolve the dispute, the CRT is available for online dispute resolution; first through direct negotiation, then facilitated mediation, and finally, an adjudicator can make a final determination which is enforceable as a court order. The CRT operates independently from government, offers interpretation services in over 200 languages, and provides fee waivers for people with low income.

In the Netherlands, the Rechtwijzer offered an Internet dispute resolution platform for separating couples.[32] The platform gathered information, guided people through a series of questions about their preferences and looked for points of agreement between the spouses. It offered tools for calculating support and drafting agreements. The platform also provided online interest-based mediation and adjudication. The service was simple and very inexpensive. Over 70 per cent of participants found the process fair to a great or very great extent and 70 per cent believed the platform led to effective and sustainable solutions. On average, users rated the experience at 7.7 out of 10. With an insufficient number of users, in March 2017, the Rechtwijzer partnership between a legal-aid board, a commercial software company and a not-for-profit came to an end. A related organization is developing a new online dispute resolution tool limited to the domestic market.

Currently, in Ontario, the Family Law Guided Pathways website provides practical legal information and assistance in form completion. The Family Law Portal is another free offering which provides information about the process of separation. Consumers may welcome increased access to Ontario legal information online, but these tools are not highly sophisticated. For example, "date of cohabitation" is treated as an entirely straight-forward concept that requires no further exploration instead of asking the user about the seven factors relevant to its determination.[33] A mobile app, Thistoo, was intended to inexpensively prepare separation agreements;[34] it appears to have failed at the start up stage.[35] Family lawyers have yet to become obsolete.

Still, technology could offer considerable efficiencies to family law consumers. With artificial intelligence tools, we will be able to review documents faster and more accurately, better gauge the cost of upcoming steps in a case, and even predict outcomes at trial more accurately based on caselaw databases.[36] In the employment law context, for example, currently available software is able to predict reasonable notice periods with considerable accuracy using machine learning.[37] Similar technologies will allow family lawyers to focus on our core human competencies: listening, advising, negotiating, advocacy.

A focus on children's rights and best interests also requires that we reconsider our traditional

approach. "Family breakdown can victimize children in many ways. It can effectively deprive them of a parent. It can have them living in poverty. It can result in abuse. And it does all this without allowing them an adequate voice".[38] Young people have a right to participate in a family justice system that is truly responsive to their needs.[39] This would require more involvement of children and youth in the family justice system, using supportive, flexible and individualized processes. Jean-Paul Boyd argues in favour of a specialized, interdisciplinary system, writing:

> Family law can no longer be treated as just another species of civil dispute, subject to the same rules and principles despite its special nature and many critical differences. We, as a modern, industrialized society, must put an end to the bizarre situation of spending the vast majority of our family justice dollars supporting the dispute resolution mechanism that is the least efficient, most time-consuming and most destructive to families and children.[40]

4. Written Hearings

For civil cases in Ontario, Justice Myers has proposed written hearings as the default procedure, advocating that "the judicial system in the province can be improved, streamlined and made considerably more efficient through a paradigm shift away from in-person oral hearings". His Honour's "List of Rules Potentially Affected by Reforms to Civil Justice System" also proposes the increased use of videoconferences and teleconferences.[41]

Hearings in writing have expanded as a result of COVID-19 physical distancing protocols. On March 12, 2020, the Chief Justice of Norway suspended all oral hearings due to the pandemic and permitted written hearings instead. The court even issued a sexual assault sentencing decision following a fully written hearing.[42]

Appeal hearings in Ontario have sometimes been heard in writing alone. The Ontario Court of Appeal decided an appeal based solely on the written record over the objection of one party.[43] The court indicated it would schedule a teleconference only if the panel wanted counsel to "respond to any questions". Justice Paciocco held that the written record "presented the issues with clarity" and "the issues are, by their nature, capable of being adequately addressed in writing". The delay occasioned by an adjournment would have been prejudicial.

Earl Cherniak, an esteemed appeal lawyer, roundly critiqued this decision, arguing that:

> [C]ounsel can and do influence the result of appeals by their oral advocacy. The parties and the public benefit by that advocacy. Add to that the principle of open courts, so that what occurs is available to public scrutiny, and the opportunity for the parties to see that their case was fully considered by an interested, prepared, unbiased, inquisitive and independent court, and the importance of oral advocacy in an open forum, preferably in person but at least by video conference, is obvious.[44]

Respectfully, the principles of fundamental justice do not require an oral hearing in all circumstances. Sometimes, a written hearing will be sufficient; in other contexts, a video or telephone hearing will be appropriate,[45] and sometimes, perhaps, only an in-person hearing will satisfy the right to fair process.[46] The Family Law Rules allow 14B motions in writing for "procedural" and "uncomplicated" matters.[47] These motions are rarely used except for consent orders, and when attempted, they are often refused with an instruction that the matter should be brought as a regular motion. In my view, the use of written hearings could be expanded, without compromising fairness and while achieving significant cost savings.

In *Singh v. Minister of Employment and Immigration*,[48] the Supreme Court held that refugee claimants had the right to a full oral hearing because these cases implicated their personal security. There are numerous family law hearings, daily, which affect fundamental rights and freedoms; these matters should be argued in open court to maximize public scrutiny and facilitate correct decisions. Addressing issues of legal or factual complexity, oral argument can be vital to avoiding errors and achieving a just result. But there are other family law cases in which the stakes are not so significant and the dispute not complex. Examples of matters which might readily be determined in writing alone include the issue of which professional should prepare an agreed s. 30 custody and access assessment, the determination of interim child and spousal support in straightforward cases, claims for interim disbursements, and refusals motions. For hearings in writing, public access is maintained through access to the written record and making available the court's decision.

Many cases are suited to abridged oral argument. When the lawyer is responsible and well-prepared, and judges have the time and research assistance to review written materials in advance, oral hearings do not need to be lengthy. Fundamental issues of national importance are decided with limited oral argument at the Supreme Court of Canada. There, counsel acting for public interest interveners receive, if they are lucky, five minutes[49] to make submissions on the most profound and difficult issues facing our country. Effective counsel in our highest court prepare well-honed, razor-sharp arguments and adroitly deal with the concerns of the panel. The case of an individual family litigant deserves equal care in its preparation but does not need vastly more time for argument if the facts are well-organized for the court. Efficient oral hearings require a sufficient roster of judges, with appropriate supports. Counsel have a responsibility to narrow issues and assist the court effectively.

Families require access to timely, cost-effective hearings. If the default is a written hearing for appropriate matters, the court will be able to more quickly deal with cases which legitimately require oral argument. The primary objective of the Rules requires that the court decide cases "justly" — this means there should be written adjudication whenever that is fair to the parties, appropriate and proportionate. There could be significant time and cost savings with written hearings, which will expand, not compromise, access to justice.

5. Discrimination in Default Property Protections under the *Family Law Act*

In 1986, Rosa Becker killed herself following a Pyrrhic victory seeking to share property acquired during the relationship as an unmarried spouse.[50] In 1993, Ontario's Law Reform Commission proposed that property-sharing should be extended to unmarried spouses.[51] Now, 25 years later, nothing has been done in Ontario. The pandemic has made the need for the change more acute.

The different definitions of "spouse" for the purposes of support versus property and exclusive possession give rise to confusion and unfairness. Unmarried spouses are unable to access the default property protections that safeguard against economic dislocation at separation. Many provinces and territories have eliminated discriminatory treatment in relation to default property-sharing: British Columbia, Alberta, Saskatchewan, Manitoba, Northwest Territories, and Nunavut.[52] Public consultations about the issue have

been conducted in Quebec and Nova Scotia.[53] Ontario, New Brunswick, Newfoundland & Labrador, Prince Edward Island, and the Yukon appear to be taking no steps to protect unmarried spouses through access to property protections.

Increasing numbers of children are born to unmarried parents.[54] Family courts are overburdened. Confusion and uncertainty in the law means longer and more costly hearings. The common law trust remedies available to unmarried spouses require lengthy trials which clog up the court system. In contrast, married spouses settle property issues with relative speed using the clear framework of equalization provided by the Act. Indeed, dependent unmarried spouses with children may be forced to rely on the public purse, because they cannot readily share the property accumulated during the relationship.

During the pandemic, many people have been unable to marry; friends and family cannot cross borders and wedding celebrations have been cancelled.[55] Couples may reschedule their planned events or may not have the time and economic resources to do so. It should not matter, as it should never matter, whether spouses have a marriage certificate in sharing the economic repercussions of a long-term relationship following separation. This is a statutory amendment that is long-overdue and constitutionally required.[56]

6. Racism and Systemic Inequalities

In the U.S., COVID-19 has killed Black people at twice the rate of white people.[57] Blacks represent 30 per cent of the population of Chicago but account for more than 70 per cent of the COVID-19-related deaths.[58] In the midst of the loss of so many Black lives during the pandemic, George Floyd was killed. Police kill Black men at more than twice the rate than they do white men.[59] In early June, the judges of the Washington Supreme Court issued an open letter:

> We are compelled by recent events to join other state supreme courts around the nation in addressing our legal community… As judges, we must recognize the role we have played in devaluing black lives… We call on every member of our legal community to reflect on this moment and ask ourselves how we may work together to eradicate racism.[60]

Canadian Law Deans similarly issued a statement on anti-Black racism, writing, "we must play a role in ameliorating the damage caused by racist practices in the Canadian legal system".[61]

How will the Ontario family justice system respond to the challenge of anti-Black racism and other forms of systemic discrimination? COVID-19 has disproportionately affected marginalized populations: people living in poverty or experiencing homelessness; people in congregate settings like nursing homes, prisons and group homes; and racialized and Indigenous people. Indigenous communities are more often exposed to environmental health hazards and have higher rates of chronic medical conditions.[62] People with disabilities are put at risk by being denied contact with support workers and parents.[63] The Canadian Civil Liberties Association commenced litigation against the City of Toronto for its failure to urgently protect the lives of those experiencing homelessness during the pandemic. The proceeding was settled with the City agreeing to make available such beds as necessary to achieve physical distancing standards across the shelter system.[64]

A popular slogan during the pandemic is "we are all in this together" but the most privileged are the best able to protect themselves from the impacts of the virus. In family law, the courts have held "there should be a presumption that

existing parenting arrangements and schedules should continue, subject to whatever modifications may be necessary to ensure that all COVID-19 precautions are adhered to".[65] Parenting was regarded as an essential service. Children involved in the child welfare system, however, were denied in-person contact with their parents. Most agencies completely suspended in-person parent-child visits, across the board, in response to the pandemic. The courts have ruled "that there is no presumptive authority extended to the Society to suspend all in-person access to parents without formulating some alternative measures".[66] Still, as businesses re-open, some children continue to await the resumption of parenting time.[67]

Black and Indigenous children continue to be over-represented in the child welfare system.[68] Indigenous children make up seven per cent of the total number of children in Canada but represent 48 per cent of all children in care.[69] There are more Indigenous children in care today than there were in residential schools at the height of their use. A report by Toronto Children's Aid Society indicated that 41 per cent of the children in the care of their agency were Black, while Black children made up only eight per cent of the city's population.

Colonialism, anti-Black racism and white supremacy contribute to the overrepresentation of these children in the child welfare system. As we confront systemic discrimination in the criminal justice system, the family justice system must respond to systemic discrimination in child protection. As Dr. Teresa Tam has said, "This is not just someone else's problem or someone else's sorrow. Inequities touch us all," she said. "They affect the health and social well-being of all Canadians just as they diminish our humanity".[70]

7. Gender Inequality

The pandemic has also deepened women's inequality, with implications for family justice. The UN Human Rights Office notes, "The dramatic increase in women's caregiving responsibilities, the rise in what was already an epidemic of sexual and domestic violence, the continued feminization of poverty, the proliferation of barriers to healthcare, especially pregnancy-related healthcare, will profoundly jeopardize women's safety and well-being, economic security, and participation in political and public life, both during and after the pandemic".[71]

Statistics Canada data shows women among the hardest hit by COVID-19 job losses. In March, the rate of decline in employment for women in their core earning years, aged 25 to 54, was more than twice that of men (19.2 per cent of women in this group lost all or most of their usual hours).[72] Women continue to disproportionally provide care for children.[73] During the pandemic, schools and daycares have closed, and the caregiving burden most often falls on women in different-sex relationships. Women still tend to earn less than male partners, so for privileged families, the financially rational choice is that the female partner will curtail her paid employment if necessary. Between February and March, the number of women exiting the Canadian labour market grew by 10.5 per cent.[74]

The COVID-19 pandemic is likely to reinforce the gendered division of labour, with serious long-term economic consequences for women. Many intelligent, well-educated women continue to limit their work hours and forego career opportunities to care for their families. At separation, these women should not be immediately imputed with higher income when they have difficulty earning what might otherwise be expected given their education. Women's lower earnings follow-

ing years of caregiving *demonstrate* their entitlement to compensatory support. The pandemic will likely exacerbate women's economic disadvantage arising from marriage and its breakdown and bring compensatory factors to the fore in determining the quantum and duration of spousal support.

Conclusion

During this crisis, we have often seen people at their best. There was the story of Crystal Blair at the Glenholme Loop Petro Pass near Masstown, Nova Scotia, offering free meals and a hot shower to the truckers who transport essential supplies.[75] Tom Moore, the 99-year-old British war veteran, completed 100 laps of his garden, raised $22.9 million for the British health service, and wisely counseled, "For all those people who are finding it difficult at the moment: the sun will shine on you again and the clouds will go away".[76] Health care workers, grocery store clerks, and other essential workers are helping to keep people healthy and safe; there is pot-banging and horn-honking in appreciation for them every night. Children and youth are showing their resilience. Rates of clinically significant depression and anxiety are down from 2019 levels among students.[77]

This time of crisis has required generosity of spirit and patience. We have been asked to prioritize community well-being over self-interest. Day-to-day, we lawyers contribute to the public good. But during the pandemic, each one of us was offered the opportunity to *save lives* by staying home. And collectively, we helped plank the curve. This is wonderful.

At our best, family lawyers have offered free legal help by phone,[78] worked cooperatively with opposing counsel to arrange access and deliver disclosure and engaged in online alternative dispute resolution to move matters forward. Family court judges have worked hard to maintain parenting relationships and to address dire financial circumstances. They have penned dozens of new family law cases to guide the bar and the community at large. Throughout the pandemic, the Ontario family justice system has continued to help families navigate one of the most stressful times of their lives, all during a time of collective grief.

Unfortunately, we have also seen people at their worst. There have been institutional failures and collective tragedies. In Ontario, Regis Korchinski-Paquet and Ejaz Choudry both died after the police attended at their homes.[79] According to a military report, Ontario long-term care residents were mistreated: "bullied, drugged, improperly fed and in some cases left for hours and days in soiled bedding".[80] The U.S. President mused about injecting disinfectants as a possible means to kill the virus.[81] Profiteers tried to purchase vast quantities of hand sanitizer and sell it at extortionate prices. Some people took advantage of the suspension of regular court operations to withhold access and to impose punitive financial arrangements. Throughout, we have seen the deep fissures of inequality grow even deeper.

Now, the courts are re-opening their doors for in-person hearings starting July 6th. This will be a time of reckoning, as judges assess how parties and counsel conducted themselves during the suspension of regular operations. There will be a backlog of cases, and possibly a flood of new ones, that require our attention. But we should not miss this opportunity to radically rethink the future of family law. It is more important than ever that we ensure a fair process for all parties, save expense and time, and deal with cases in a proportionate way, recognizing that the court has

limited resources. We can harness technology, while fostering the best human qualities during the crisis: care, creativity, hope and resilience. This is not the time for business as usual, but an opportunity to reimagine family justice for the 21st century.

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3. <https://www.weforum.org/agenda/2020/06/world-bank-coronavirus-covid19-extreme-poverty/>.
4. <https://www.theguardian.com/world/2020/mar/25/coronavirus-nature-is-sending-us-a-message-says-un-environment-chief>, Professor Cunningham states that we "got a bit lucky" with COVID-19 given its lower fatality rate than other diseases from wildlife, such as 50% for Ebola and 60-75% for Nipah virus.
5. <https://www.cbc.ca/news/technology/pandemic-climate-change-covid-emissions-1.5579232>.
6. <https://www.theguardian.com/books/2020/mar/04/our-house-is-on-fire-review> (release August 4, 2020).
7. Chief Justice Warren K. Winkler, Presentation to County of Carleton Law Association – Civil Litigation CLE Program (November 19, 2010).
8. <https://representingyourselfcanada.com/wp-content/uploads/2015/07/nsrlp-srl-research-study-final-report.pdf> at 33.
9. <https://worldjusticeproject.org/rule-of-law-index/country/2020/Canada/Civil%20Justice/>.
10. The Action Committee on Access to Justice in Civil and Family Matters: Crisis. Change. Reform, June 23, 2020. A Conversation Between Beverley McLachlin, Bob Rae and Megan Longley.
11. *Ibid.*
12. <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/notice-to/#B_Family_Matters>. In Toronto Family Superior Court of Justice alone, more than 400 conferences were adjourned in March, April, and May.
13. <https://www.psychologytoday.com/ca/blog/singletons/202004/more-babies-or-more-divorces-after-covid-19>.
14. Christopher Dyess, "The Coming Tsunami of Employment-Related COVID-19 Litigation" New York Law Journal (Web Page, 21 April 2010) <https://www.law.com/newyorklawjournal/2020/04/21/the-coming-tsunami-of-employment-related-covid-19-litigation/?slreturn=20200328194613>.
15. <https://www.thestar.com/news/canada/2020/06/09/cautious-canadians-increasingly-wearing-masks-fear-second-wave-of-covid-poll.html>.
16. Chief Justice Morawetz noted, "There is no real return to full-scale, what I'll call normal operations, to pre-March operations, until such time that there's a vaccine that's generally available". <https://www.ottawamatters.com/coronavirus-covid-19-national-news/ontario-courts-wont-return-to-normal-until-vaccine-is-readily-available-2404061>.
17. <https://www.thelawyersdaily.ca/articles/18386/access-to-justice-justice-in-the-time-of-social-distancing-beverley-mclachlin>.
18. <https://gowermodernlaw.com/2020/04/virtual-hearings-happening-in-canada/>.
19. Courts in Australia and the U.K. are also permitting electronic signatures on documents. The Law Society has provided direction that, until further notice, "the Law Society will interpret the requirement in the Commissioners for Taking Affidavits Act that "every oath and declaration shall be taken by the deponent in the presence of the commissioner or notary public" as not requiring the lawyer or paralegal to be in the physical presence of the client. Instead, alternative means of commissioning such as commissioning via video conference will be permitted".
20. "'Paper-based system is not going to exist anymore,' Chief Justice Morawetz says of post-COVID-19 court", *The Lawyers Daily*, April 15, 2020, <https://www.thelawyersdaily.ca/articles/18576>.
21. Ontario Bar Association, Fireside Chat with the Superior Court of Justice webinar, May 28, 2020.
22. Susan Raines, "Mediating in Your Pajamas: The Benefits and Challenges for ODR Practitioners" 23:3 Conflict Resolution Quarterly 359-369 <https://onlinelibrary.wiley.com/doi/abs/10.1002/crq.1

43>; Elisabeth Wilson-Evered, Christina Maxwell, and John Zeleznikow, "Online Family Dispute Resolution: A Systematic Review of Current Research and Practice" British Academy of Management 2019 Conference Proceedings (Birmingham, UK) September 3-5, 2019.

23. *Rules of Professional Conduct*, Rule 3.2-4: A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing or continuing useless legal proceedings.
24. <https://representingyourselfcanada.com/presenting-from-your-home-one-srls-experience-at-a-video-hearing/>.
25. <https://remotecourts.org/news.htm>.
26. <https://www.kff.org/coronavirus-covid-19/issue-brief/how-many-adults-are-at-risk-of-serious-illness-if-infected-with-coronavirus/>.
27. <http://med.stanford.edu/news/all-news/2020/06/stanford-scientists-contribute-to-who-mask-guidelines.html>. According to Stanford scientists, "If two people are wearing masks, the viral particles can travel about 5 feet away from each individual. When an infected person is not wearing a mask, those particles can float through the air 30 feet or more and stay alive for up to 30 hours".
28. <https://www.nydailynews.com/coronavirus/ny-coronavirus-brooklyn-supreme-court-civil-covid-19-judges-attorneys-20200409-byebigdbpbcv3he7wf5hxombju-story.htm>; <https://www.nydailynews.com/coronavirus/ny-coronavirus-brooklyn-supreme-court-civil-covid-19-judges-attorneys-20200409-byebigdbpbcv3he7wf5hxombju-story.html>.
29. <https://www150.statcan.gc.ca/n1/daily-quotidien/191029/dq191029a-eng.htm>. The UN has called on member states expand access to the Internet as an issue of human rights. <https://www.article19.org/data/files/Internet_Statement_Adopted.pdf>.
30. <https://www.thestar.com/news/gta/2020/06/25/more-than-20000-watch-dafonte-miller-decision-in-unprecedented-live-stream.html>.
31. <https://www.canadianlawyermag.com/practice-areas/adr/b.c.s-civil-resolution-tribunal-keeps-doors-open-during-pandemic/328037>.
32. <https://law-tech-a2j.org/odr/rechtwijzer-why-online-supported-dispute-resolution-is-hard-to-implement/>.
33. *Molodowich v. Penttinen*, [1980] O.J. No. 1904 (S.C.J.), cited with approval *M. v. H.*, [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3.
34. <https://www.countertax.ca/bnlpodcast/s01e07-sam-witherspoon>.
35. <https://tracxn.com/d/companies/thistoo.co>.
36. <https://familylawyermagazine.com/articles/artificial-intelligence-and-the-future-of-family-law/>.
37. See, for example, <https://www.bluejlegal.com/ca/blog/predicting-reasonable-notice-using-machine-learning>.
38. Rt. Hon. Beverly McLachlin C.J.C., "Reaction and Pro-action: Bringing Family Law Advocacy Into the 21st Century" Family Law Dinner, Ontario Bar Association, January 24, 2002, Toronto.
39. <http://www.iicrd.org/sites/default/files/resources/Meaningful_Child_Participation_0.pdf>.
40. <https://www.nationalmagazine.ca/en-ca/articles/law/opinion/2019/family-justice-in-canada-is-at-a-breaking-point>.
41. <http://www.drla.ca/covid19/scjreforms.pdf>.
42. <https://ssrn.com/abstract=3595910>, fn. 71; 'Written hearing of a criminal case', Supreme Court of Norway (Web Page, 2020) <https://www.domstol.no/en/Enkelt-domstol/supremecourt/arkiv/2020/written-hearing-of-a-criminal-case/>.
43. In a recent case, *Carleton Condominium Corp. 476 v. Wong*, [2020] O.J. No. 1439, 2020 ONCA 244.
44. <https://www.canadianlawyermag.com/news/opinion/oral-advocacy-is-under-attack/329935>.
45. *Association of Professional Engineers v. Rew*, [2020] O.J. No. 1806, 2020 ONSC 2589.
46. <https://www.natlawreview.com/article/pros-and-cons-zoom-court-hearings>: some judges apparently find that Zoom hearings allow them to better assess witness credibility than a traditional courtroom. But see, <https://www.hindawi.com/journals/jcrim/2013/164546/> at fns. 27-34. "[O]bservers tend to achieve higher accuracy rates [in judging deception from truth-telling] when they attend to speech content (written transcripts) or vocal cues (audio recordings), compared to exposure to the full audiovisual presentation of the target (audiovisual recordings)".
47. Family Law Rules, R. 14(10): If a motion is limited to procedural, uncomplicated or unopposed matters, the party making the motion may use a motion form (Form 14B) instead of a notice of motion and affidavit.
48. [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177.
49. <https://www.scc-csc.ca/ar-lr/notices-avis/17-03-eng.aspx>.
50. <https://dspace.ucalgary.ca/bitstream/handle/1880/47951/Bowal_Famous2009_LawNow.pdf;jsessionid=1F9B811C4FF7FAF893CC185C23FA642?sequence=1>.
51. <https://collections.ola.org/mon/27010/165724.pdf>.
52. J. Robinson, "Statutory Access to Property for Unmarried Cohabiting Couples: A Province-by-Province Summary" paper presented at 11th Annual AFCC Ontario Conference – The Changing Landscape in Family Law, October 18, 2019 (Hamilton, ON).
53. Law Reform Commission of Nova Scotia, Division of Family Property, Discussion Paper – May 2016 (Halifax: Law Reform Commission of Nova Scotia, 2016), online: <https://static1.squarespace.com/static/5bc6671f0490795182e54b80/t/5bc6826a0852299b5cd0e3c0/1539736176559/Division+of+Family+Property+-

+Discussion+Paper+2016.pdf>: Common law partners should be entitled to make a claim for division of family property on substantially the same basis as married spouses. <https://www.justice.gouv.qc.ca/en/issues/family/submitted-briefs/>:The rules on conjugal relationships would be based on the principles of autonomy of will and freedom of contract.

54. <https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/anlsc-elnej/p2_01.html>.
55. <https://www.cbc.ca/news/canada/kitchener-waterloo/waterloo-region-weddings-on-hold-covid-19-1.5519326>; <https://globalnews.ca/news/6953058/coronavirus-ontario-wedding-refund-credit/>.
56. *Quebec (Attorney General) v. A*, [2013] S.C.J. No. 5, 2013 SCC 5 can be distinguished from the Ontario context because it was not possible to "opt-out" of key terms of Quebec's matrimonial regime. Note at paragraph 338 of the *Quebec v. A* decision that the approach in *Walsh v. Bona*, [2002] S.C.J. No. 84, [2002] 4 S.C.R. 325, is no longer good law given the development of the equality analysis under *Kapp* and *Withler*.
57. <https://www.theguardian.com/us-news/2020/jun/10/black-doctors-coronavirus-frontlines-join-protests-fight-racism>.
58. <https://www.cbc.ca/news/canada/toronto/race-coronavirus-canada-1.5536168>.
59. <https://www.theguardian.com/us-news/2020/jun/10/black-doctors-coronavirus-frontlines-join-protests-fight-racism>.
60. <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf>.
61. <https://ccld-cdfdc.ca/wp-content/uploads/2020/06/Anti-racism-declaration-24June2020-bilingual-1.pdf>.
62. <https://www.hrw.org/news/2020/06/09/systemic-inequities-increase-covid-19-risk-indigenous-people-canada>.
63. <http://archdisabilitylaw.ca/press-release-hrto-application-against-visitation-ban/>.
64. <https://ccla.org/coronavirus-update-case-homeless-agreement/>.
65. *Ribeiro v. Wright*, [2020] O.J. No. 1267, 2020 ONSC 1829.
66. *Durham Children's Aid Society v. Quinn*, [2020] O.J. No. 1562, 2020 ONSC 1761; and *Children's Aid Society of Toronto v. T.F.*, [2020] O.J. No. 1377, 2020 ONCJ 169, at para. 10.
67. <https://www.reuters.com/article/us-health-coronavirus-canada-children/even-as-canada-reopens-children-in-foster-care-endure-long-separations-idUSKBN2321EI>.
68. <http://www.ohrc.on.ca/en/interrupted-childhoods>.
69. Doret Phillips and Gordon Pon, "Anti-Black Racism, Bio-Power, and Governmentality: Deconstructing the Suffering of Black Families Involved with Child Welfare". <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1298&context=jlsp>.
70. <https://globalnews.ca/news/6874314/coronavirus-canada-vulnerable-communities/>.
71. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25808&LangID=E>.
72. <https://www150.statcan.gc.ca/n1/daily-quotidien/200409/dq200409a-eng.htm?HPA=1>; <https://www.ctvnews.ca/canada/women-disproportionately-bearing-the-brunt-of-coronavirus-crisis-advocates-say-1.4907309>.
73. <https://faculty.wcas.northwestern.edu/~mdo738/research/COVID19_Gender_March_2020.pdf>.
74. *Ibid.*
75. <https://www.cbc.ca/news/canada/nova-scotia/free-hot-meals-for-truck-drivers-nova-scotia-1.5514211>.
76. <https://canoe.com/news/good-news/its-unbelievable-british-war-vet-captain-tom-99-raises-22-9-million-with-coronavirus-walk>.
77. <https://www.macleans.ca/society/health/covid-19-pandemic-coronavirus-canada-children-effects/>.
78. <https://lso.ca/news-events/news/corporate-statement-re-covid-19>.
79. <https://www.camh.ca/en/camh-news-and-stories/camh-statement-on-police-interactions-with-people-in-mental-health-crisis>.
80. <https://www.cbc.ca/news/politics/long-term-care-pandemic-covid-coronavirus-trudeau-1.5584960>.
81. <https://globalnews.ca/news/6871768/coronavirus-donald-trump-disinfectant-poison/>.