

MAINTAINING THE WEARY GEARS OF THE CANADIAN CRIMINAL JUSTICE SYSTEM

BY WG

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Abstract

The criminal justice system in Canada is an enormous, dangerous system that handles thousands of cases every day. The case management part of the system protects the integrity of the results by, among other things, ensuring disclosure is provided and by scheduling meetings, hearings, pleas, and trials. For cases of every type and complexity this can take years and each case can upend the lives of the people involved for as long as the case continues.

This project studies the question: How can this part of the criminal justice system be made “better” and what does “better” mean? I observed thousands of case management appearances in Eastern Ontario and two weeks of case management appearances in Calgary to collect data on the status of the cases traversing those courts. I also single out two cases which were critical failures and examine at the underlying process that spawned those failure.

I find that case management is a stack of extremely complex and difficult problems that must balance an array of priorities. It is a congested system with little in-court time available to manage many of the issues that might arise as the case progresses.

This thesis argues that the case management process should be better maintained and that, because the complexity involved, the problems cannot be solved by investment alone. It suggests that other improvements, like simplification and modernization, could improve the system but that it will be a slow and iterative process.

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Statement of Originality and Disclosure of Use of Artificial Intelligence

The following work is my own and I certify the intellectual content of this thesis is the product of my own work. All references and contributions of other individuals has been cited and sourced appropriately, as defined by the Canadian Guide to Uniform Legal Citation (McGill Guide). I have not used a large language model or any other form of generative artificial intelligence in the preparation of this thesis.

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cadence latency The slack time caused by the disconnect between the actual time needed for the next step in the process and the regional cadence. For example, if the typical adjournment is 3 weeks and a case is adjourned to allow one day of email exchanges, there is a cadence latency of 3 weeks minus 1 day.

case management The practice of maintaining, and preparing cases after the charges have been laid.

churn An appearance made without any need of intervention or assistance.

descynchronization The removal of the requirement that necessary aspects of an event be in the same place at the same time. For instance, not requiring lawyers, judges, and staff to all be present for routine appearances. Colloquially: “This meeting could have been an email”.

grain The unit of collection for a data set. Typically the lowest atomic unit that can be rolled up into any other insight.

latency With regard to criminal cases it is the amount of time between a case being ready to be advanced and that next step being taken. If the trial is ready to be scheduled on the 1st of the month but is not scheduled until the 15th, there is 14 days of latency.

lead time The time between scheduling an event, for instance a trial, and when that event is scheduled to happen, for instance the trial date.

slack time The time between an event being ready to be scheduled and the opportunity to schedule it.

system A set of elements or parts that is coherently organized and interconnected in a pattern or structure that produces a characteristic set of behaviors, often classified as its “function” or “purpose”¹ .

¹Meadows, Donella H & Diana Wright, Thinking in systems: a primer (White River Junction, Vt: Chelsea Green Pub., 2008).

List of Abbreviations

ACMCO Action Committee on Modernizing Court Operations.

COVID-19 Coronavirus SARS-CoV-2.

DOJ Department of Justice.

SCC Supreme Court of Canada.

SCOPE Scheduling Crown Operations Prepared Electronically (System).

Part I

Introduction

Chapter 1

Introduction

The criminal pre-trial case management system in Canada sits at the awkward period between the charges being laid by police or the Crown and the case’s eventual conclusion. In spite of its awkward placement, the pre-trial case management system is crucial for protecting the integrity of Canada’s criminal justice system. The case management system ensures and facilitates the rights of accused people to have disclosure before making an election. It schedules all of the hearings, trials, pleas, and consultations; including those that test evidence before trials, and those designed to protect the rights of victims. A failure of this part of the criminal justice system means that scheduling trials takes longer, and risks unfair results. These critical processes within pre-trial case management are essential to maintaining a just criminal justice system in Canada. Meanwhile, it carries the largest case load of any part of the criminal justice system except for, perhaps, “concluded”. The criminal justice system’s pre-trial case management system is high-volume, important, and dangerous.

It is not a straight-forward challenge to build or navigate the essential processes within pre-trial case management. The criminal justice system in Canada is an adversarial one. The actors are adversarial to each other and, sometimes, to the system itself. Crown disclosure – its content and timeliness – is a constant issue that is only getting harder as digital technology and body cameras become more prevalent. This pushes back timelines and adds a heavy

burden to both sides of any case. The problems that the criminal justice case management system is confronting have tendrils that do not distinguish between the severity of the cases. The case management system cannot shut down. It cannot pause operations in order to design and implement a systematic renovation plan. It is a bus that must never stop. The people charged with offences and the victims of crime do not evaporate if the process gets stuck. The pre-trial case management system is as dangerous and complex as any other part of criminal justice. In *R. v. Jordan* the Supreme Court of Canada wrote about the public's frustration with the system's inability to provide the foundation for timely, fair trials:

[2] Moreover, the Canadian public expects their criminal justice system to bring accused persons to trial expeditiously. As the months following a criminal charge become years, everyone suffers. Accused persons remain in a state of uncertainty, often in pre-trial detention. Victims and their families who, in many cases, have suffered tragic losses cannot move forward with their lives. And the public, whose interest is served by promptly bringing those charged with criminal offences to trial, is justifiably frustrated by watching years pass before a trial occurs.

[3] An efficient criminal justice system is therefore of utmost importance. The ability to provide fair trials within a reasonable time is an indicator of the health and proper functioning of the system itself. The stakes are indisputably high.²

Much of that delay and much of that frustration is not found during the trials themselves – but with the machine that brought those cases to trial.

However, the term “machine” misses the mark for fully describing criminal case management. It may be complex and it may seem mechanical, but the pre-trial case management system is operated by a legion of people that are trying to manage this case load. They balance competing, sometimes unmeasurable objectives including speed, efficiency, and fairness, in courthouses located in every region of the country. There is a community of clerks

²*R v Jordan*, 2016 SCC 631 at para 2.

maintaining the files in courthouses, a colony of disclosure coordinators diligently wrestling papers in Crown offices, and herds of judicial officials sitting in routine courts trying to move cases in a packed docket along to the next stage. This is all while trial coordinators with red faux-leather scheduling books mark down the schedule for the most recent applications. These people do the hard graft of keeping this part of the criminal justice system working. The central message of this dissertation is that while these people are doing the work, the system they work with needs to be maintained and this system is not getting the maintenance it needs. *Jordan* was not maintenance; it defined a failure state. The follow-on decisions³, while making adjustments and clarifying edge cases, did little to reduce the on-the-ground complexity. *Jordan* defined an upper bound on a single dimension of how bad the pre-trial case management system could be before having failed⁴ but there are worse ways for this to fail than to be slow. If the case management system is forced to speed cases through, how will that impact fairness? How can the courts balance the need for efficiency and increasingly complex disclosure with that new upper bound? These questions are difficult, important, and nearly a decade after *Jordan* was decided, the answers are still not clear.

Continuous operation of an essential, and dangerous system where participants are incentivized to undermine it and complications are being compounded by modern technology makes for a sizeable universe of problems ripe for examination and study. And yet, the criminal case management system is remarkably understudied in Canada.

1.1 The Research Landscape

This space is typically reserved for a recitation of the state of the art and some reaction to the current academic conversation happening around the central themes of the dissertation. This summary would normally be a great way to frame the rest of the dissertation as a reaction to a broader conversation. Had I been writing this thesis a couple hundred kilometers

³There have been many appellate-level decisions that have refined the details since. For example: see eg. *R v KGK*, 2020 SCC 7 at para 5 regarding post-decision delay. See also *R v J.F.*, 2022 SCC 17 regarding retrial delay; See also *R v KJM*, 2019 SCC 55 regarding treatment of youth matters.

⁴*Jordan*, *supra* note 2 at para 46.

south, in New York State, that probably would have been the case. In Canada, however, the complexity and central importance of our case management system has not brought much *direct* academic attention. There is a notable void. But, because of its centrality, conversations about other aspects of the criminal justice system necessarily touch on this topic, though often only briefly or indirectly. It is possible that I am being too pedantic about boundaries that I drew around the topic. I would argue, instead, that pre-trial case management has not garnered the same attention and in-depth study here as it has in the United States because there has been another, more important and exciting development in the last 40 years, the Charter. The procedural consequences of which have, largely, snuck up on the Canadian justice system and its researchers.

This section will highlight a number of sources that helped me understand the current conversation on pre-trial case management in Canada and also those resources that helped me construct the study found in Part III. This is not an exhaustive list of the resources that I used. There is a more extensive bibliography in Appendix 11.5.

1.1.1 Academic Commentary

The scholarly conversation in this area is not entirely fallow. There are people working and commentating on this area. I will highlight two here: Professor Paciocco and Professor Myers. Professor Palma Paciocco wrote three papers in the wake of *R. v. Jordan* that responded to the changes this case should have brought about. Her summary of the challenge to find a balance for timeliness in justice should be etched into the walls of case management courts:

As criminal cases drag on, penological goals are undermined; presumptively innocent accused persons are left languishing in pre-trial detention or under restrictive bail conditions; victims and witnesses are further traumatized; evidence deteriorates; and the public loses faith in the criminal justice system.

At the same time, excessive speed poses its own threat to the integrity of the

criminal justice system: a rapid, “conveyor belt” approach to meting out justice hardly inspires public confidence, as illustrated by widespread antipathy towards rote plea-bargaining. Moreover, many of the rights of accused persons take considerable time to vindicate. In this light, finding the ideal balance between speed-up and delay is a challenging task.⁵

She goes on to note concerns about some of perverse incentives that *Jordan* brought about. Specifically those where, if two people, one in and one out of custody, are waiting for a trial date, there is now a risk that concerns of excessive delay would trump the consequences of that delay on the in-custody person in determining how to prioritize cases. She notes these concerns again with some additional vigour in a second paper that she wrote after the *R. v. Myers*⁶ decision was released⁷. The consequences and prejudice suffered by people in detention are excluded from the *Jordan* analysis and she is unconvinced that courts will prioritize those cases correctly under the deadline pressures.

She finally writes again about this phase of criminal justice during the COVID-19 pandemic⁸. This article was written in the early phases of the pandemic shortly after courts started to reopen. I discuss this timeline more in Chapter 10. Among other observations on the evolution of case law since *Jordan* she questions the absolute nature of the remedy of the stay. She suggests that, in the uncertain period of a global pandemic, resorting to a lesser sentence might be the best of bad options.

Professor Nicole Myers studies pre-trial detention and the bail process in Canada; the leading edge of the case-management phase. She studies of the effects and nature of bail courts and pre-trial detention. Her approach to these studies is especially notable for the similarity to the study conducted here: in-person observation of a routine court across many

⁵Paciocco, Palma. “The Hours are Long: Unreasonable Delay After Jordan” The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference 81 (2017) [The Hours are Long].

⁶*R v Myers*, 2019 SCC 18.

⁷Paciocco, Palma, “Killing Dead Time: Myers, Jordan, and New Responses to Pre-Trial Detention and Delay”, (2019) 53 C.R. (7th) 34.

⁸Paciocco, Palma, “Trial Delay Caused by Discrete Systemwide Events: The Post-Jordan Era Meets the Age of COVID-19” Osgoode Hall Law Journal 57.3 (2021) at 835-867 [Trial Delay and COVID-19].

cases. In an article titled “The bail process is both the trial and the punishment: Surveillance and control without the burden of conviction” she laments the absurd situation where the pre-trial process stands-in for punishment:

For many people, the pre- trial stage is the totality of punishment. Whether the accused person is detained or released, the bail process marks the accused person for punitive intervention and enhanced monitoring. How the accused person performs during this pre-trial assessment period influences the case outcome and any sentence imposed. By the time accused persons are processed through the criminal court, many have served sufficient time in custody and receive a sentence of time- served or a community sentence.⁹

Punishing legally-innocent people is unarguably unfair. There might be justification in narrow situations for pre-trial custody and for strict bail with restraint. She has noted, for the last decade or so, that this is also, unfortunately, extremely common¹⁰. These articles explain how fairness can be undermined in pre-trial case management well before there has been *Jordan*-amounts of time passing. When I argue below that this system is dangerous, pre-conviction punishment is one aspect of the danger.

There will likely be additional analysis from her on this topic since she is, as of writing, conducting another expansive study of bail courts in multiple jurisdictions.

There has been some recent long-form writing as well. *Wrongfully Convicted* by Professor Kent Roach, and *Indictment* by Professor Benjamin Perrin frame the conversation about the stakes of the criminal process while glossing over the awkward middle where case management resides. In *Wrongfully Convicted*, Professor Kent Roach writes about trial and procedural failures that lead to wrongful convictions. It is a stark reminder of the stakes and the potential failure modes when the pressure to convict, and convict quickly, is too high. For

⁹Myers, Nicole M, “The bail process is both the trial and the punishment: Surveillance and control without the burden of conviction” (2025) 58:3 Australian & New Zealand journal of criminology 466–484 at page 477.

¹⁰See also: Myers, Nicole Marie, “Eroding the Presumption of Innocence: Pre-trial Detention and the use of Conditional Release on Bail” (2017) 57:3 British journal of criminology 664–683.

instance, while specifically writing about wrongful convictions in sexual assault cases he worries about complexity and inefficiency leading to more wrongful convictions:

The procedural, evidential, and substantive complexity of sexual assault law is daunting. In 2019, preliminary inquiries were eliminated in sexual assault cases in a bid for increased efficiency. But efficiency and other reforms may come with unintended collateral damage of wrongful convictions.¹¹

He also details the case of *R. v. Catcheway*¹² where Mr. Catcheway made the rational choice to plead guilty for a time served sentence while it was impossible that he could have committed the offence. The Court of Appeal summary explains the problem:

The fresh evidence relates to information received subsequent to the accused's sentencing. It establishes that the accused could not have committed the offence to which he pled guilty because **he was in custody at the Brandon Correctional Centre** at the time the offence occurred in Winnipeg.¹³

Not all of the wrongful convictions he investigates find the root of their flaws so clearly in the process but it crystallizes the stakes for the people who are being moved along the case management machine.

In *Indictment*, Professor Benjamin Perrin writes extensively about the consequences on the humans that are captured in the criminal justice system. At the core, it is an argument for a trauma-informed criminal justice system but it also touches on how the pre-trial process can amplify trauma. The analysis is based on interviews and anecdotal data with people who are caught up in the criminal justice system. It relates their experiences with it over time. This is a contrast to my approach here. I entirely avoided interviews and tried to avoid anecdotes

¹¹Kent Roach, *Wrongfully Convicted: Guilty Pleas, Imagined Crimes, and what Canada must do to safeguard justice*, (Toronto, Ontario: Simon & Schuster Canada, 2024) at page 114.

¹²*R v Catcheway*, 2018 MBCA 54.

¹³*Ibid* at para 2 (emphasis added).

as the foundation of the analysis¹⁴.

1.1.2 Practice Reference

Next, I will highlight a handful of practice references because it shows how there is some hand-waving over the administrative portion of case management when talking about criminal procedure even in reference materials. In my view, the starting points for criminal procedure study in Canada are *Criminal Procedure in Canada*¹⁵ by Penney et. al and *Learning Canadian Criminal Procedure*¹⁶ which is a case book by Don Stuart and Tim Quigley. In *Learning Canadian Criminal Procedure*¹⁷, there are roughly 30 of 1100 pages dedicated to managing trial scheduling, bail hearings, and the right to trial in a reasonable time. It occasionally nibbles around the edges of the topic. For instance, when talking about plea-bargaining they note that: “the practice was widely accepted because of a firmly entrenched assumption that without considerably greater resources the criminal justice system would grind to a halt without it”¹⁸. It does not go further into the difficulty of scheduling or the crowding of the adjournment courts. Similarly, in the case book *Canadian Criminal Procedure*, there is a chapter of 25 pages¹⁹ devoted to the intake procedures and another 30 or 40 pages scattered throughout the text on how cases move through the system. Both books cover most of the issues that need to be ironed out during the period before the trial but very little on the machinery or timing of doing so.

This is not a criticism of those content choices. Both of these exceptional tomes are wonderful sources for information about the investigative process, the requirements for disclosure, and the structure of the elections but they each say little about the underlying

¹⁴I avoided interviews because I am likely incompetent to do them in such high stakes situations. I generally avoided relying on anecdotal data because in such high volume systems such as this there is a risk of there being an example for every possible argument.

¹⁵Penney, Steven, Vincenzo Rondinelli & James Stribopoulos, *Criminal procedure in Canada*, second edition.(Toronto, Ontario: LexisNexis, 2018).

¹⁶Don Stuart & Tim Quigley, *Learning Canadian Criminal procedure*, 14th edition (Toronto, Ont: Thomson Reuters Canada, 2023).

¹⁷*Ibid* at pages 790 to 820.

¹⁸*Ibid* at page 16.

¹⁹*Supra* note 15, chapter 5.

system that carries the case load between those phases.

*The Proactive Practitioner's Guide to Section 11(b) of the Charter*²⁰ by Tracy Kozlowski and Joanne Stuart explains section 11(b) and provides guidance for litigators that are litigating such cases. It does an excellent job of summarizing how the courts have decided 11(b) cases and how courts are viewing processes that broke down for not being timely enough. It is, as it is meant to be, from the perspective of a litigator looking backwards at a case file during 11(b) litigation. It is more of an operators guide than a maintenance manual.

Finally, *The Anatomy of Criminal Procedure*²¹ helpfully breaks criminal procedure stages into decision trees and flow charts. It describes the frameworks that operate behind the movement of cases between pre-trial phases as well as the chains of reasoning that goes into the decisions made day-to-day while managing criminal cases. While it is light on commentary about the nature and effect of these decisions, it is excellent for understanding the rules for making them.

1.1.3 American Study in Contrast

In contrast, there has been a stream of writing about this phase of criminal justice in the United States stretching back at least fifty years. Malcolm Feeley wrote *The Process is the Punishment*²² in 1979 which was a study of case management that argued, as the title suggests, that the case management process itself was sufficient punishment for most of the offences that it was being asked to manage. He conducted that study by being in the courthouses near his home in Connecticut. That book spawned other commentary that continued into the 21st century. In 2005 Steve Bogira sat in on adjournment court for a journalist's take on case management court and wrote *Courtroom 302: A Year Behind*

²⁰Kozlowski, Tracy & Joanne Stuart, *A proactive practitioner's guide to section 11(b) of the Charter*, (Toronto: Irwin Law, University of Toronto Press, 2025).

²¹Stephen Gerard Coughlan & Alex Gorlewski, *The Anatomy of Criminal Procedure: A Visual Guide to the Law* (Toronto, Ont: Irwin Law, 2019).

²²Feeley, Malcolm M, *The process is the punishment: handling cases in a lower criminal court* (New York: Russell Sage Foundation, 1979) [The Process is the Punishment].

*the Scenes in an American Criminal Courthouse*²³. Amy Bach, similarly, wrote *Ordinary Injustice: How America Holds Court*²⁴, with a similar approach and themes.

Two more recent examples of this family that inspired the structure of this study are *Misdemeanorland*²⁵ by Professor Issa Kohler-Hausmann and *Punishment Without Crime*²⁶ by Professor Alexandra Natapoff.

Misdemeanorland looked at the case management system in a New York borough by spending time in those courtrooms. The exploration of managerial justice where the courts are used to manage and mark accused people rather than prosecute offences by seeking truth is dire and inspired. The approach of being in the courthouse grounded the analysis.

Alexandra Natapoff, about a year earlier, wrote *Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal*²⁷. She similarly looks at the consequences of the underlying process of courts on the people accused of those offences and what it looks like when that system starts to break down. She writes of people without lawyers being pressured to plead guilty by judges and describes the system as a misdemeanor machine that processes poor and people of colour for almost nothing resembling justice.

I refer to all of the above sources with additional context as well as a litany of others in the dissertation below.

1.2 Thesis Structure

This thesis is broken into three parts. Part II: Foundations examines some of the fundamental information about case management. These chapters define the scope of the study and provides a base of understanding for the current problems with this complex system.

²³Steve Bogira, *Courtroom 302: a year behind the scenes in an American criminal courthouse*, (New York, NY: Alfred A. Knopf, 2005).

²⁴Bach, Amy, *Ordinary injustice: how America holds court*, (New York: Metropolitan Books, 2009).

²⁵Kohler-Hausmann, Issa, *Misdemeanorland*, (Princeton, New Jersey: Princeton University Press, 2018).

²⁶Alexandra Natapoff, *Punishment without crime: how our massive misdemeanor system traps the innocent and makes America more unequal*, (New York: Basic Books, 2019).

²⁷*Ibid.*

First, chapter 3 excavates a bit of the history of how the contemporary pre-trial system developed to this point. It was not a straight line and there was no mystical delivery of a fair process chiselled on stone tablets. It was generations of people and politicians trying to figure out how to make a fair criminal justice system work. There were compromises, delegations of authority, and even shady dealings. Chapter 4 lays out the current legislative framework for managing cases. It explains where the authority for these rules and process comes from and who is responsible for them. It argues that the statutory foundation is, from the Constitution to local practice, an exercise in passing as much discretion as possible to the judges that are sitting in their communities. Next, chapter 5 defines what it means for this case management system to be “good”. Aspiring to make a system “better” is useless unless there is some discussion about what “better” means. This part finishes with chapter 6 by explaining a particular way of describing complexity for problems like this. It specifically defines the class of complexity growth that this type of system experiences as it scales. It is essential to understand how problems scale exponentially to understand whether it is a system that can be maintained simply through investment or whether other options are necessary. This paper argues that, as a problem that grows exponentially, investment will eventually be insufficient. It then proposes a mental model for thinking about the pre-trial case management as a workshop rather than as a conveyor belt, since this more closely matches that complexity growth and will help explain some of the scaling problem.

The middle part of the dissertation, Part III: Studying the System, details a study of the pre-trial case management system as it is now. I took three approaches to getting a better picture of the how the system operates:

- In-court observation of case management court,
- In-depth analysis of pathologically flawed cases and,
- Evaluation of the effects and lessons of the COVID-19 pandemic.

Chapter 8 does a deep dive into two cases where case management guided the cases,

somewhat lackadaisically, toward their eventual failure for delay. I obtained court records and transcripts for all the court appearances as well as the written submissions to the courts about the nature of the delay.

Chapter 9 then reviews the in-person study of the system through one of the few windows available to the public, the case management courtroom. It details the process that I undertook to collect data from four courthouses: three courthouses in the Eastern Region of Ontario and one in Calgary. I then analyse this data. This chapter assesses how the case management measures up to the definition of goodness argued for in chapter 5.

The final chapter of this part, chapter 10, highlights an unusual opportunity to study how this pre-trial case management system broke down, changed, and survived during the COVID-19 pandemic. While the pandemic spawned incredible chaos and there were certainly problems, there was also evidence of resiliency and lessons to be learned about how the system breaks and how it can be made more resilient.

The last part of the dissertation, Part IV, lays out ways that could improve case management. First though, I argue that this study supports dismissing some presumptions that would be fatal to that improvement. Namely that the system works, that it has always been this way, it can be solved through staffing, or that it is a hopeless problem and always will be. I then suggest 5 specific evolutions for improving the system. I suggest that including resiliency as a measure of quality will help with the brittleness of the system. I suggest that simplifying the management of cases will reduce the burden on the Crown and courts while improving fairness for both represented and unrepresented people. I argue that providing more data to the decision makers will make case management appearances more meaningful. I argue that there is a conflict between finality and learning from failure that makes incremental improvement difficult. When the criminal justice system fails or nearly fails, it should learn more frequently from those failures. Finally, I suggest, somewhat selfishly, that the system should be easier for outsiders, like me, to study.

The pre-trial, case management aspect of the criminal justice system is important, com-

plex, and will continue to grow in complexity and importance. It is going to need to be maintained in order to meet the Supreme Court's challenge in *Jordan* of building a system that delivers timely, fair justice. Understanding its problems and examining ways that these problems can be mitigated, though, first requires understanding the system's nature and its history, which I expand on in the next part.

Part II

Foundations

In 2013, I fetched a file from the crypts tucked into the back of the Ottawa federal Crown's office. The room was unimaginably dusty and the files dated from the early 80s. The first striking thing about that file was that I recognized the names of the prosecutor, the defence counsel, and the judge etched into the front cover. One still worked in the Crown's office. I met the senior defence lawyer earlier in the day and the judge was still on the bench 30 years later. The second most striking thing was that I could decipher the arcane appearance notes on the front of the file. The process that brought this file from charges being laid to its trial nearly thirty years ago was similar enough to the current practice that even as a new lawyer I recognized it. Neither the players nor the process had changed dramatically in over thirty years.

In that time, advances in criminal procedure have largely gravitated around litigating and understanding the implications of the new Charter. Criminal justice in Canada has, for example, developed extensive checks for police abuse, and enhanced full answer and defence by requiring full and complete disclosure²⁸. The process for waiting for disclosure often takes up numerous appearances and can result in pre-trial arguments about its provision. The Charter sharpened the protection against self-incrimination²⁹ and continues to develop the right to communicate with counsel³⁰. These enhancements have created extensive requirements for court time and additional hearings while also amplifying relevant disclosure. These are but a sliver of the changes that the Charter brought to the criminal justice system and they are, almost universally, considered shifts in the right direction.

These laudable developments have made the Canadian criminal justice system more just, but they now rely on machinery that has changed very little. The Crown and the accused person, either alone or represented by counsel, appear routinely before a judicial officer to update the status and schedule any additional hearings. Depending on the charges, the region of the country, and the courthouse, it could be before a different judicial officer every

²⁸ *R v Stinchcombe*, 1991 326, [1991] 3 SCR 326.

²⁹ *R v Stillman*, 1997 CanLII 384, [1997] 1 SCR 607.

³⁰ *R v Grant*, 1991 CanLII 38, [1991] 3 SCR 139; *R v Brydges*, 1990 CanLII 123, [1990] 1 SCR 190.

time. Those additional hearings or trials could be set months in the future without major development in the intervening time. Fundamentally, the mechanism of this process has changed little – still requiring the scheduling of Crown, the accused, the judicial officer, and court infrastructure. The Charter created extensive requirements for disclosure and created a diverse array of peripheral hearings that might be required. In 2016, the Supreme Court famously established two hard deadlines in *R. v. Jordan*³¹ for completing the trial. To protect the right of an accused to timely justice they limited the time to 18 months for cases completed in provincial court and 30 months for cases completed in superior court³².

Although the extensive investment in discovering and describing Charter rights within criminal justice is important, the criminal justice system risks breaking down if it does not similarly maintain its underlying machinery. It has not done so. Increasingly complex criminal cases require a system that is sophisticated enough to handle complexity and nuance. The present process was defined during a different, pre-Charter era by a cascading array of sources starting from the Constitution down to local practice and regional directives.

I am not alone in saying that the process needs to be revisited. Justice Moldaver in a speech to the defence bar in 2005 noted the discrepancy between the enormous impact of the Charter and the lack of appreciation for the additional procedural complexity during trials:

The Charter, of course, has had an enormous impact on the criminal trial process. When it was proclaimed in 1982, I doubt whether those responsible fully appreciated just how enormous the impact was going to be. Perhaps the issue of process should have received greater attention.³³

So far, the issue of process has not received the “greater attention” that Justice Moldaver suggests either at trial or before. The consequences of that lack of attention are being felt in courthouses across the country. Court dockets are crammed full of cases that have languished

³¹ *Jordan*, *supra* note 2.

³² *Ibid* at para 20.

³³ Hon. Justice Michael Moldaver, “Long Criminal Trials: Masters of a System They are Meant to Serve” (2005) 32 C.R. (6th) 316.

in the case management stages for months or years. These are cases that have not yet been even set down for a trial. Newly scheduled trials in Ontario are likely going to be more than 10 months in the future. Lead times in Alberta are better but they still tend to schedule trials 6 months in advance. Trial judges are increasingly frustrated with these now-obvious problems:

[59] I cannot leave this Application without saying, in conclusion, that it is an embarrassment to the administration of justice that this serious “priority” case, involving alleged sexual abuse of a child, cannot be tried in accordance with the constitutional standard of trial “within a reasonable time”.³⁴

These quotes focus on cases that failed because of excessive delay but there are worse ways for a case management system to fail. There is a risk that they can prioritize absolute speed and efficiency of the process over fairness. In an era where complete disclosure can include thousands of messages or gigabytes of cell phone analysis there is going to need to be some delay. In *Misdemeanorland*³⁵, Kohler-Hausmann describes the state of a New York borough’s misdemeanour courts as one that implements managerial justice. These courts, overwhelmed by volume, focus on managing the person rather than seeking truth. Cases that have no chance of being tried are strung along until the person charged, who is often in-custody, either relents and pleads guilty or the charges are administratively stayed³⁶. This is not a justice system that is seeking truth, but a justice system trying to manage the people being caught in its net.

The case management process, especially the typically low-drama aspects written about here, lies at an awkward intersection between the law, organizational systems, Canadian history, operations management, math and another couple disciplines found in disparate corridors of university campuses or government office complexes. As someone who practised

³⁴ *R v Liu*, 2024 ONSC 2022 at para 59.

³⁵ *Misdemeanorland* supra note 25.

³⁶ *Ibid* at page 62.

criminal law in Ontario courtrooms and then also spent years developing large-scale, highly-resilient software systems, I am, at best, competent in one or two of these disciplines. The remainder of this part of the dissertation provides a foundation for some of these topics and helps explain my framing of the problems found in the pre-trial process. It also lays bare, I hope, some of my inadequacies so that those with other collections of competencies can apply their own projection to the issues that are encountered daily. It is fair to ask why, if I can only claim competence in a handful of the requisite disciplines, that I chose to undertake this sort of study, and the answer is that it makes me angry and the system needs to be better. The problems with case management in Canada are complex, deeply-rooted, and under-studied. As mentioned, there are worse ways that our pre-trial system can break down beyond taking too long. If I can nudge the understanding of this problem and illuminate the stakes then it is worth the spilled ink and explicit humility.

There are four questions that this part looks to answer:

- What is the scope of the process that this paper talks about?
- Where does this process come from?
- Why is this process worth understanding?
- Why is solving the problems with this process difficult?

The first chapter lays down the scope of this study and the borders that were drawn around the system to limit that scope. The second chapter looks back at the history of the pre-trial process and the common-law and statutory sources for it. Third, I argue that this process is important and lay down the desirable characteristics we should be looking for in evaluating it. Finally, I explain some of the fundamental reasons this problem is hard enough to warrant the study that I gave it. This will include a superficial explanation of algorithmic complexity and scheduling problems.

Chapter 2

Scope

This dissertation is focused on the portion of the criminal justice system that happens after the charges are laid but before the charges are resolved; between the investigation and the trial, withdrawal, or plea. When describing this scope to criminal law muggles, I typically use the line: “it is what happens during the second commercial break of an episode of Law and Order.” I feel the shame of leveraging an American television drama to isolate an aspect of the Canadian criminal system every time. It is also not lost on me that borrowing a British author’s term for the non-magical world when describing people unfamiliar with the machinery of the criminal justice system is equally shameful. They are, however, near perfect metaphors. The machinery of getting a charge through to completion is virtually invisible to those that are not exposed daily to those machinations – not unlike a flying Ford Anglia. It also garners about as much attention as the commercial break when the show transitions between Det. Lennie Briscoe and district attorney Jack McCoy. The largest failing of the commercial break metaphor is that in most jurisdictions the case management process is not finished after two minutes and thirty seconds; it can last for years.

It is not just that the criminal justice system spends a long time with cases in the pre-trial phase; most of the cases are in that state at any given time. In 2021 there were roughly 159,000 cases pending in Ontario. Of those cases that were not yet set for a preliminary inquiry or trial, roughly 142,000 of them, are in the case management process. That is **89**

percent of active cases that have not been yet set for a trial³⁷ In Ottawa, the jurisdiction that this dissertation centres around, 91% of cases are resolved before trial³⁸. This is a little lower than the provincial average which hovers around 93%³⁹. With that much of the volume being resolved during period, the quality of this part of the criminal justice process in Canada is a proxy for the quality of entire system. Since it can act as a proxy for the entire justice system and has roots that go back to the middle ages there needs to be some limit to the scope. This chapter draws a box around the focus of this thesis and explains the importance and rationale for those boundaries. There are two dimensions to this box. What part of the life cycle of a case and what type of cases.

2.1 Temporal Scope

Moving away from metaphors and motivation to concrete scope, this project focuses on how cases are managed between an information being sworn before a judicial official until that case is completed. Our system no longer schedules criminal trials for the next time the quarter sessions court rides through town. There are preparations made before any sort of resolution of the case: lawyers are often hired, legal aid is applied for and occasionally obtained, pleas are discussed, positions on sentencing might be exchanged, and disclosure of the evidence is made. This dissertation limits its scope to this period of time and these processes that happen after the charge and before the trial.

At risk of over-simplifying, an idealized flow of events for a single case might look as in figure 2.1. This figure shows how a single case might move through the pre-trial system to a single conclusion. This is often the perspective that the public presumes. This conveyor belt-like abstraction is useful for defining the scope of the paper but as I mention in chapter 6 below, it under-appreciates the actual complexity of having hundreds or thousands of cases proceeding in the same courthouse. It also views the problem from a single perspective.

³⁷Ontario, Ministry of the Attorney General, *Ontario Court of Justice Criminal Justice Modernization Committee Dashboard* online at: <https://www.ontariocourts.ca/ocj/statistics/>.

³⁸*Ibid.*

³⁹*Ibid.*

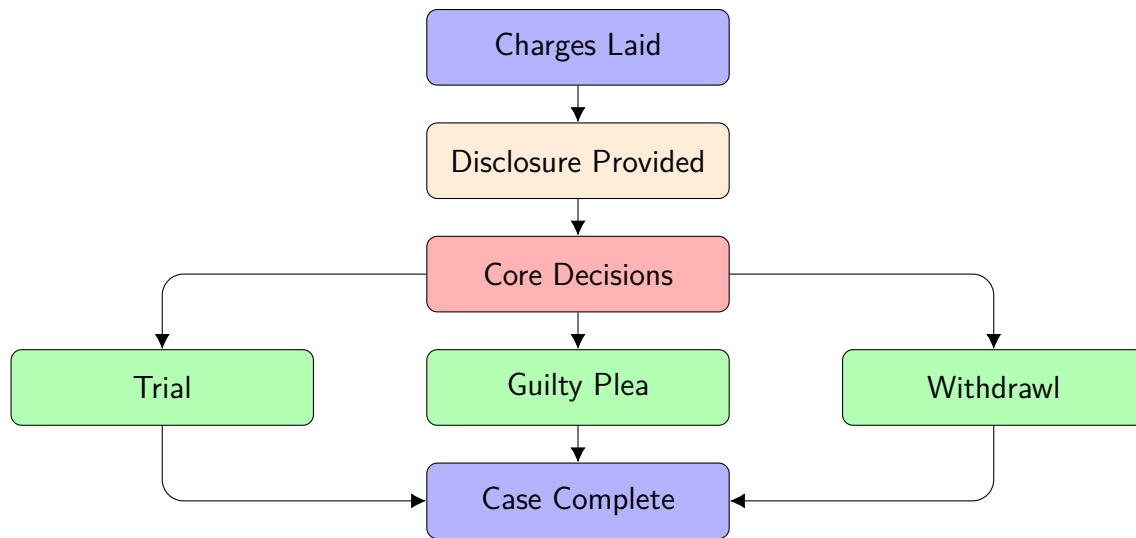


Figure 2.1: Essential Case Management System Flow

Much of the development of the case happens outside these court appearances. The behind-the-scenes situation is often much different. There are the behind-the-scenes interactions that happen between the court appearances. These interactions are also inspected as much as possible in this dissertation but there is less visibility into them than for in-court appearances. The visibility that I do have is from emails that were filed as part of any section 11(b) applications. The open-court principle quite sensibly does not apply to all emails between counsel.

It is difficult to draw a bright line around that period of time because of the parallel nature of these processes. An investigation can reach forward after the charge is laid up until resolution. Likewise, hearings can occur mid-process. A preliminary inquiry for instance, might take place in the provincial court before the matter is transferred to the superior court where the process of managing that case starts again. The operation of that preliminary inquiry is not in scope but the process of managing the case in superior court is. The investigative steps that took place during the case management phase are not studied but the effects of the investigation continuing after charges are laid are.

2.2 Lateral Scope

Besides limiting the scope to a specific period of time in the life-cycle of a case, I have also limited the scope in other dimensions. The concept of “case management” appears in a whole universe of legal domains and in an entire planet-worth of jurisdictions. I have limited this paper for brevity as well as resources. I am one researcher in one jurisdiction with a single perspective. Rather than trying to boil the ocean, I have made explicit choices about where to draw the boundaries. These boundaries include focusing on the criminal law, maintaining Canadian law as the whole scope, and focusing on provincial courts without excluding case law from superior courts. I explain below why these boundaries were chosen and possible consequences of these boundaries.

2.2.1 Criminal Law Exclusive

This paper focuses exclusively on the management of criminal cases. I enjoy the Supreme Court’s definition in *RJR*: “any prohibited act that can result in penal consequences where some legitimate public purpose underlies the prohibition⁴⁰”. This encompasses both offences listed in the criminal code as well as offences that are defined in other federal statutes. By way of example: criminal charges under the Income Tax Act are in scope; cases proceeding in tax court are not.

This research focused on these criminal courts without exploring much other decision-making venues. There might be lessons in looking at other venues. Both in terms of how they manage their cases and how they breakdown when they are stressed. For instance, the Federal Court manages a staggering number of immigration cases every year⁴¹ and are likely, similarly stressed. The overlap and lessons found in those other venues would offer some enlightenment but these overlaps and lessons were not studied here.

⁴⁰ *RJR-Macdonald Inc. V Canada (Attorney General)*, 1995 Canlii 64, (1995) 3 SCR 199.

⁴¹ The federal court reports that there were 21,581 new immigration proceedings between January 1 and September 30, 2025. There were 20,774 proceedings pending during the same period. Canada, Federal Court, *Court Statistics and Activity Summary*, September 30, 2025, Online at: <https://www.fct-cf.ca/en/pages/about-the-court/reports-and-statistics/statistics-september-30-2025>.

2.2.2 Canadian Scope

The geographic scope is the Canadian practice of criminal law. Again, as with the focus on criminal law, there may well be lessons to be learned from other countries' domestic criminal systems or even international criminal law. Indeed, I have made occasional nods to American research of the US case management struggles, but a full comparison is out of scope for this dissertation. There has been continuous research into the American pre-trial system since at least the 1970s which has not been the case in Canada.

Within Canada, the entire country is in scope and cases are pulled from all provinces and territories. The provinces and territories might have different struggles and the approaches might have diverged slightly but the process is similar enough that it is possible to apply lessons from one to others. I have focused my data collection and case study research to courthouses in Ontario, mostly eastern Ontario for two central reasons: First, as mentioned, I am a lawyer who practised in Ontario and lives in Ottawa, mere blocks away from the only courthouse. This is the region I am familiar with and that familiarity short-circuits a bit of leg work. Second, being able to be physically in a courthouse is helpful. The case management courts happen daily and being present is an excellent way to learn from the participants. The criminal desk is a source of detailed information and a reliable way to get copies of documents like dockets or application records. Standing in front of the desk is a much more reliable method of getting information than an email to a central email box.

I chose to scope this dissertation around Canadian law rather than comparing to the US or UK systems because there was limited baseline conversation around the Canadian system. I think there are likely lessons to be learned from international jurisdictions. Other common law jurisdictions are wrestling with pre-trial delay similar to ours⁴² and limiting

⁴²Secret Barrister, *The Secret Barrister: stories of the law and how it's broken*. (London: Macmillan, 2018) tells several stories of a barrister in the UK and their struggles in the pre-COVID era. United Kingdom, Victims Commissioner, *Justice delayed: The impact of the Crown Court backlog on victims, victim services and the criminal justice system* (March 2025), online: <https://cdn.websitebuilder.service.justice.gov.uk/uploads/sites/6/2025/03/OVC-Crown-Court-backlog-report-10.03.25.pdf> at page 13 shows that the situation has gotten worse since then.

the scope to Canadian law does not come without risks. We could be treading common ground and leveraging other nations' experience could help us skip some steps in studying the problem. But doing a comparison to how other systems are meeting their challenges without the baseline understanding of our own by having a foundation of academic research in the area would be a mistake. For that reason, I focused exclusively on studying the Canadian experience and not comparing our approach to others'.

2.2.3 Provincial Court-Centric

I drew a fuzzy boundary around the provincial-level courts. These courts are the focus of the case management process because they handle most of the volume⁴³. While cases are managed in both provincial and superior courts, the focus of my work was in the provincial courts. Cases in superior courts have almost always spent an extensive amount of time in provincial court already. Provincial case management will handle the bulk of the disclosure and, if applicable, the preliminary inquiry. The Ontario Superior Court receives around 7000 new cases a year⁴⁴ while the provincial court received about 245,000 in 2024⁴⁵. I did not discard any data or cases from superior courts.

Provincial offences courts deserve special mention. These courts deal with traffic, other provincial offences, as well as certain federal offences when those are delegated to the provincial offences court. Regrettably, these courts are not in scope here. They are extremely high volume and have their own approaches to case management. They even have the same problems with volume causing delay and see similar signs of breaking down under the load. Unfortunately, I was not able to find a reasonable source of raw data for these courts and was not able to fit in-person observation into the project.

⁴³ *Ontario MAG Dashboard*, *supra* note 37.

⁴⁴ Ontario Superior Court of Justice, *Modernizing the Justice System, 2019-2023 Report* online at: <https://www.ontariocourts.ca/scj/files/annualreport/2019-2023-EN.pdf>.

⁴⁵ *Ontario MAG Dashboard*, *supra* note 37.

2.3 Out of Scope

My focus on case management is in contrast to how criminal procedure is commonly taught. Canadian law schools typically split their time between pre-charge investigative procedure, usually with a strong, justifiable bias toward teaching the Charter, and trial procedure⁴⁶. Neither of these two aspects of criminal procedure are in-scope here. The investigation of the offence, even if that investigation continues after charges are laid, is out of scope. The process after a finding of guilt including sentencing remains out of scope.

Finally, many hearings take place during the same period of time as what is considered in scope here. For instance, preliminary hearings, bail hearings, bail reviews, and Rowbotham applications⁴⁷ all happen after the charge is laid but before the case is resolved. The existence of these hearings and how they are scheduled is in scope. But how these hearings operate, is not. By way of example, how a bail review is run or how matters are dealt with in a routine guilty plea court is not in scope, But the scheduling of those hearings and the associated delays or unfairness are in scope. The reason for the distinction is that these hearings necessarily operate with different priorities than the underlying pre-trial process and bringing them into scope would have would have risked spreading the analysis too thin. Expanding the study to include these intra-procedural hearings would have meant splitting the data collection into many more parts. This applies recursively for expanding to other jurisdictions. It is too much context.

This exclusion includes trial procedure. Trial procedure is entirely its own ball of rubber bands. It has independent priorities and requires different observation. There is an argument that the criminal trial has gotten so lengthy that it is undermining the pre-trial process. Moldaver, quoted above, mentions this exact problem⁴⁸. Regardless, while the length of the criminal trial is important to the scheduling problem in the pre-trial stage, the reason for

⁴⁶See for instance: Coughlan, Stuart et al., *Learning Canadian Criminal Procedure*, fifteenth edition (Toronto: Thomson Reuters, 2025) and *Criminal procedure in Canada*, *supra* note 15 both of which break up their content that way.

⁴⁷*R v Rowbotham*, 1988 CanLII 207, 35 CRR 207.

⁴⁸*Supra*, note 33

the length and the process during that time is not in scope for this dissertation. Finally, after a finding, whether guilty or not-guilty there remains an administrative process that is out-of-scope here. There might be collateral consequences but the priorities and the venue for those processes are fundamentally different and so, are not studied in depth here.

2.4 Naming Things

There is a famous line in computer science that goes: “There are only two hard things in computer science: cache invalidation and naming things”⁴⁹. It is unlikely that I will be able to tie cache invalidation to the Canadian criminal justice system but it certainly has the same problem with naming things. To address this, I have included a glossary with this thesis. Any words that have specific meaning or come up routinely are defined in the glossary and the words are highlighted in the document. There are some key words, however, that deserve special mention: case management and case management court.

2.4.1 Case Management

The portion of the system that was in scope is referred to differently in different jurisdictions and sometimes inconsistently within the same one. Eastern Ontario often refers to the case management process as “remand” or “remand court” but if you travel to Toronto and ask for “remand court” you would find yourself in a court running bail hearings. If you travel to Calgary looking for “case management court” they will likely be puzzled but they will have no trouble finding you a “docket court” to observe for the day. I refer to these court sittings as case management court. The process is likewise somewhat inconsistently named. To be consistent, I will refer to this process as the pre-trial case management process.

There is a difference between the case management *process* and the case management *system*. The process is exclusively the series of stages while the system includes the series of

⁴⁹This quote is widely attributed to former Netscape engineer Phil Karlton. It has been through multiple remixes, jokes, and references. See eg. <https://martinfowler.com/bliki/TwoHardThings.html> .

stages as well as the non-procedural actors; the people, buildings, technology, and state of the case.

2.4.2 Case Management Court

The case management system, defined above, includes the actors, building, technology and stages. Many of these features come together in one place on a regular basis, case management court. I sat in case management courts in order to study case management systems.

Those involved with the criminal justice system are intimately familiar with the routine cadence of appearances where pre-trials are scheduled, disclosure is complained of, or plea dates are set. That process is made up of the hundreds of routine adjournments that happen weekly at larger court houses. These appearances might include scheduling other hearings like bail hearings or preliminary inquiries, scheduling discussions between counsel, status checks on disclosure or witness availability, or scheduling guilty pleas or trial dates. These appearances are the machinery that assemble a court file that is prepared for trial, plea, or withdrawal.

Chapter 3

History of the Pre-trial System

This part opened with a story bemoaning the lack of evolution of the case management process over the past 40 years. That period represents one or two generations of lawyers, judges, and clerks working through their case-load day-by-day. But the process and the underlying system that these generations of lawyers worked with is rooted in hundreds of years of history. Dozens of generations of them have worked towards the same goals. It would be easy to neglect those more distant historical eras in favour of examining the current generation in isolation. The problem with that approach, in my view, is that it makes it very difficult to evaluate practices that seem automatic to brains that have been warped by years of contemporary criminal practice, while also risking overlooking practices that were put in place to solve decades-old problems that no longer exist. And worse, it risks holding these processes sacred because they were passed down from the thoughtful leaders of yesterday. This chapter explains that the system that exists now is not some ancient brilliance forged in the fires of a long dead volcano but a long winding path towards the system that exists now.

This chapter looks back at the origins of the criminal pre-trial system from the early days of the English, French, and Indigenous legal traditions. It highlights some major milestones that have influenced our current system. This is not meant to be an examination of all aspects of the criminal process over all of history. That would be an enormous undertaking

and, while it might be a thoroughly exciting romp from the middle ages to the information age, it would also be a distraction from highlighting the key changes that resulted in our contemporary case management system. For the purposes of this Chapter I have broken the time into 4 eras. The first era is centred on some of the ancient roots of the process, including aspects of what might have been imported from pre-colonial legal systems, namely the Indigenous, French, and English legal traditions. The second era looks into the post-colonial practices. I have chosen to start this era off at European contact and cut it off at the implementation of the *British North America Act*. The third era examines the period between the *British North American Act* and the establishment of the *Charter*. The final era examines some of the major developments in process since the *Charter*.

3.1 Ancient Roots

The three key systems of criminal justice, English common law, French civil law, and Indigenous legal traditions intersected and collided in Canada to create the system that exists today. This section examines these historical practices and how they relate to the system today. This requires more than simply a walk through of black and white legislative history. The practices that got crystallized into statute or regulation in the 18th and 19th century tended to be those that were already in place. Practically speaking, this means that looking at the history of the process means more than finding its earliest instance in statute. These historical roots and the challenges they were responding to in their own circumstances helped inform the post-colonial period where Canada laid the foundation for the pre-trial process.

3.1.1 Ancient Indigenous Legal Traditions: Fairness and Community

The first systems of laws within the boundary of what we now call Canada were those practiced by Indigenous peoples. These legal systems evolved over thousands of years. They were used long before encountering any of the European legal traditions. They were diverse

and governed many aspects of life on the continent⁵⁰. The unfortunate reality is that, over the centuries, Canada has taken extreme measures to eradicate those practices and, more generally, the cultures that practice them. It is difficult to overstate the catastrophic damage that these efforts had on these communities. My starting point here is that these systems are sophisticated and are worthy of examination. As Profs. Friedland and Napoleon wrote in the Oxford Handbook to Criminal Law, these traditions are often treated “as isolated relics or artifacts of a fading past, [or] merely as cultural customs or practices.”⁵¹ This is because, as they go on to say, there is a myth that Indigenous people somehow lived in a lawless society and were aching for the order brought by having European legal traditions imposed on them⁵². This myth is explicitly rejected here. I will use past tense to refer to the practices as they were reported to have been at the time but, to be clear, they continue to develop and are alive.

That said, the cultural genocide has been effective at undermining the written research record and limiting research into these practices until fairly recently. There were hundreds of distinct and overlapping communities that each had distinct (and likely overlapping) legal traditions and practices. Likely, the best way to study these practices in depth would be to speak to Indigenous people and learn the history of their systems from them. That would be a worthwhile enterprise but it is too much of an undertaking for this project.

There were certainly criminal-like processes and the accused had collections of rights while involved with these processes before the community took collective action. A salient example comes from the Cree and Anishinabek traditions of *wetiko*. Stories of *wetiko* demonstrate a broad definition that encompasses a variety of anti-social or violent behaviours including murder. Hadley Louise Friedland writes about the *wetiko* as a legal-construct in The Wetiko Legal Principles⁵³. Citing interviews with elders and community members as well as of-the-

⁵⁰Dubber, Markus Dirk & Tatjana Hörnle, eds, *The Oxford Handbook of Criminal Law*, (Oxford: Oxford University Press, 2014) at Chapter 11.[Oxford Criminal Handbook]

⁵¹*Ibid* at pg 227.

⁵²*Ibid* at pg 228.

⁵³Friedland, Hadley Louise, *The Wetiko Legal Principles: Cree and Anishinabek Responses to Violence and Victimization* (Toronto, [Ontario, Canada] University of Toronto Press, 2018) [Wetiko].

time historical writing, she looks to those traditions for insights into how these communities can now respond to prolonged and endemic violence. A side effect of this work is that she extracts some of the processes and bundle of rights those communities leveraged when dealing with *wetiko*. She described their legal response to a *wetiko* both in terms of the process as well as the nature of the process.

The process she outlined included at least three stages:

1. recognizing and sharing warning signs
2. observation and evidence gathering to determine if someone fits the *wetiko* category
3. determining a response⁵⁴

This process of collecting information and observation was open to the community, while the decisions were left to the elders, the medicine people, and the immediate family. The focus of this process is toward healing the person and their relationship to the community. If that became impossible, then other measures, including exile and death, were considered. Procedural protections for the “accused” *wetiko* including the right to be helped and the right to be heard.⁵⁵

This is more than an interesting excerpt from a long history of Indigenous legal traditions. In fact, there is a real risk that I am projecting colonial stages of justice onto a system where they would not fit. That is not my intention. Instead, even this shallow scan suggests at least a unique root for some principles of fairness that we now aspire to in criminal justice. We should not treat colonial “first principles” as sacred when there were other, sophisticated, systems with different and equally valid basic principles. While my research from the written record in this area has not found “pre-trial”⁵⁶ processes in Indigenous legal traditions that look at all like the contemporary Canadian system. That does not mean that there were not

⁵⁴*Ibid.*, at page 79.

⁵⁵*Ibid.*, at page 101.

⁵⁶Trying to map “pre-trial” or other artifacts of colonial justice systems onto the Indigenous systems is almost certainly unhelpful. There needs to be a lot more work done here.

systems in place that were as sophisticated or thoughtfully crafted as the ancient English and French systems.

3.1.2 The Ancient French Struggle with Consistency

The French, in contrast, were dealing with very different pressures in pre-colonial times. The French empire had grown into a loosely-governed coalition of provinces under a single monarchy. This was in contrast to the North American Indigenous populations where there was less of an effort, as far as I am aware, to centralize legal decision making. The parliaments for those French provinces often drafted written law themselves, though the criminal law was largely left to be customary. This customary criminal law spawned from a combination of Roman and Canon law and included, up until the 13th century, trial by ordeal including trial by fire, water, and combat. I am hesitant to refer to heating plow shares to glowing red, boiling oil, or sword play as part of a formal pre-trial procedure. The move away from ordeals led to an inquisitorial process that started with private citizens prosecuting private citizens before a supervising judge.

In the inquisitorial, French pre-trial system, the appointed judge collected evidence in writing. Testimony for criminal offences was taken from the accused person and any witnesses in writing and then presented to the parties⁵⁷. During this period, torturing people to induce confessions or evidence was allowed⁵⁸. There was a presumption for bail before the investigation was complete, and of releasing the person to sureties except in the case of serious bodily harm and death⁵⁹. Each province had slightly different rules around collecting that evidence, who was appointed to be judges (normally the local noble), and what punishments were available for which offences; but broadly the process was the same. An accusation was made, the accused was taken before a judge where evidence was taken down in writing, routinely under torture, and a trial based on that written evidence was held after the rest

⁵⁷Esmein, A, *A history of continental criminal procedure, with special reference to France*, translated by John Simpson (Massachusetts: Little, Brown, and company, 1913) at page 94.

⁵⁸*Ibid* at page 107.

⁵⁹*Ibid* at page 68.

of the evidence was also taken down in writing.

The pre-trial process in this historic, kaleidoscopic period of French legal tradition included very few legally trained people in a disperse nation. Consistency was a constant struggle so preparing for the case also often meant gathering together lay people from the community to agree on what the law actually was in their province. By the 17th century, this aspiration toward consistency was addressed through the professionalization of the practice of law in every province in France except New France. By 1670 criminal practice and criminal law was crystallized in writing the *Ordonnance Criminelle*⁶⁰. This consistency and codification would predate codification in Canada by roughly 200 years.

3.1.3 British Criminal Law and Personal Rights

The British, on the other side of the English Channel, were comparably uniform. The Norman conquest in the 11th century brought a military feudal order and criminal trials were decided in formal layers of courts both within Westminster, the capital, as well as within the shires⁶¹. This period saw two developments within criminal procedure that survived history that I highlight here because they help frame this project in time: justices of the peace and the Magna Carta. These developments were initially designed, at least in part, to protect the local nobility from the authority of the Crown or to protect local nobility from the aspirations of the “lower classes”. They eventually found their way to protecting the rights of the general citizenry.

It was during this period that the king started appointing Justices of the Peace to oversee the trials of lesser criminal offences as well as cases involving disturbing the peace. These knights of the shire were given these judicial roles by the Crown with the aim of maintaining public order. They were also responsible for much of the process following an accusation of an offence. The History of Law in Canada describes these novel courts as having powers and

⁶⁰ *Ibid* at page 183.

⁶¹ Girard, Philip, R Blake Brown & Jim Phillips, *A History of Law in Canada, Volume One: Beginnings to 1866* (Toronto: University of Toronto Press, 2019) [HOLIC-1] at page 62.

structure that are reminiscent to the contemporary practice:

Another innovation in the prosecution of crime was the appointment of justices of the peace. Initially knights of the shire were appointed to keep the peace, but in the fourteenth century they were given judicial functions. ... They were in inquire into many types of crime and had power to arrest suspects, commit them to jail, and require anyone to give a surety for keeping the peace.⁶²

Modern Justices of the Peace continue play central roles in all aspects of criminal law in Canada but especially in the pre-trial stages in the provincial courts. The English version of the concepts of arrest, bail, and a number of other features of modern Canadian criminal process find their roots in this era.

This period also saw the drafting and revisions of the Magna Carta between 1215 and the 1350s. Fundamentally, it enshrined the right to “due process of law”:

no man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law.⁶³

The original draft of 1215 limited due process to “No *free person*” which, at the time, basically limited this fundamental right to the noble classes⁶⁴. Phillips and Brown in A History of Law in Canada summarize this imbalance as resulting in “unpredictable results” for marginalized groups:

The courts were reasonably effective at protecting the liberty of white, propertied, protestant males who already enjoyed many societal advantages, but the experience of less favoured groups was highly unpredictable.⁶⁵

⁶²*Ibid* at page 67.

⁶³Baker, John H, *The reinvention of Magna Carta 1216-1616* (Cambridge, United Kingdom: Cambridge University Press, 2017) at page 32.

⁶⁴*Ibid* at page 33.

⁶⁵HOLIC-1, *supra* note 61 at page 77.

The Magna Carta was not revelatory to the early English criminal justice system as it was largely overlooked at the time but, over the next several centuries, it became a foundational document within Britain and was central to the development of criminal justice in British colonies, including Canada.

3.1.4 Ancient Groundwork

For any of three of the ancient roots of Canadian criminal process it is fair to argue that there was no pre-trial process that would be recognizable in a modern courthouse. These nations were struggling with different pressures and their processes aimed to match those struggles. There was no need for extensive case management because the complexity of the problem was comparatively small. The British story comes closest by laying the foundations for some aspects of pre-trial procedure. The Indigenous process is said to have focused on healing the person and the community – somewhat alien concepts to criminal procedure in the contemporary era. The French pre-colonial system sought to keep consistency in legal decisions across a fractured, provincial nation and it was not until well into the 1600s that, for better or worse, professional lawyers held most of the key roles and levers.

I recognize that this synopsis does little justice to the complexity and evolution of these systems law through this period. But I note two things in reply. First, the focus here is on the pre-trial procedure; something that did not need to find its legs until the size of communities grew. Second, even at this level of abstraction, the history of these root sources shows three traditions that took different approaches to how they prioritized the time before a “trial”. As a gross oversimplification: the British crystallized the status quo, the French sought consistency and a written record, and the Indigenous nations looked to maintain and heal their communities and community members. Importantly, the system that emerged in Canada from this stew of competing histories was dictated by the outcome of wars rather than from a competition of ideas.

3.2 Post-Colonial Systems

The establishment of European colonies imported legal systems from Europe into North America. In the very early days of colonization, all of the systems ran in parallel. With each citizenry subject to the process of their own system of laws. I will occasionally, probably more often than I would like, group Indigenous traditions together when referring to how the colonial legal systems viewed them. As diverse as they might have been, their treatment by the resulting Canadian system was, tragically, pretty uniform.

This three lane justice system continued throughout the period until the middle of the 18th century when in 1763 the Seven Years' War ended. This saw two major changes to the criminal justice system in the colony. First, the Treaty of Paris in 1763 gave the British control of most of what would become Canada. Second, the Royal Proclamation of 1763 ostensibly defined the British position in Canada⁶⁶.

The Treaty of Paris gave the British formal control of the criminal justice system for all of British North America. By the 1790s British common law had been received and adopted in both Upper and Lower Canada as well the other provinces by the colonial governments⁶⁷. Treaties were often struck with Indigenous nations allowing them to practice their own legal system⁶⁸.

The on-the-ground reality of this system was that judges were taken from the land-owning classes and they travelled to the mostly rural communities across the newly-defined colony to hear trials in sessions courts. These courts were referred to as “quarter sessions” since these courts usually met four times a year in the communities that they visited. They travelled on these circuits extensively and nearly continuously. Circuit courts tried their entire docket during that sitting. More serious offences, such as murder and treason, would be tried in the major cities regardless of where the crime was alleged to have taken place.

⁶⁶The Royal Proclamation, dated 7 October 1763, reprinted in Clarence S. Bringham, *British Royal Proclamations Relating to America, 1603 – 1783* (New York: Burt Franklin, 1911). Justice Hennessy summarizes the history in *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701 at paras 74-80.

⁶⁷HOLIC-1 *supra* note 61 at pg 183.

⁶⁸*Ibid* at pages 303-305.

Pre-trial procedure from the perspective of an accused person in these communities meant sitting in gaol or, in the case of very minor offences, being at-large until the judge made their circuit appearance. Bail in this time was limited to non-felonies but “[t]he vast majority were tried in custody”⁶⁹ There was no pre-trial disclosure. The evidence that the prosecution relied on, usually the victim or the victim’s family’s oral testimony, would be a surprise on the day of trial’⁷⁰. It is notable that most prosecutions were triggered and prosecuted by private persons rather than the state. A state prosecution office was not founded until much later.

In the second half of the eighteenth century this pretrial process was dominated largely by private initiative, usually that of the victim of crime, rather than being orchestrated by a police force, although the state did provide some resources to assist victims of crime. These resources consisted principally of justices of the peace and the constables who operated under their authority.⁷¹

The role of the Justice of the Peace was also different than it is today. They were effectively responsible for the police force, they issued warrants and ordered constables to execute them. They collected evidence and ordered police officers, often volunteers, to arrest and detain people in custody. They were also responsible for questioning the accused people and taking evidence down from the accusers and other witnesses for the indictment stage of the process. They remanded people to gaol to await their trial at the next quarter session. They were, for most regions, the only justice official to have a continuous presence in the community.

Defence lawyers became more involved through the 18th and 19th centuries with around 25 to 30 percent of people represented by the mid 19th century’⁷². Their involvement though, in most cases, was limited to the trial proper. Preparation was effectively non-existent:

...when the bar found a volunteer or the court assigned a lawyer, those chosen

⁶⁹ *Ibid* at page 288.

⁷⁰ *Ibid* at page 295.

⁷¹ *Ibid* at page 287.

⁷² *Ibid* at page 295.

were frequently drafted in at the very last moment and had no real time to prepare the case.⁷³

Having counsel was not considered essential, nor was it recognized as a right until 1836 when the *Prisoners Counsel Act* also known as the Trials for Felony Act 1836 was passed in England⁷⁴. The colonial laws recognizing this right within Canada tumbled into place over the following several years⁷⁵

To summarize, the pre-trial process in early colonial Canada meant that an unrepresented, accused person almost always remained in custody without access to information about the accusation that brought them there. They would wait there until a travelling judge, probably from the largest nearby city, made their way to the community to have their day in court. Between the time that person was arrested and the trial date there was essentially nothing done to further the development of the charge. As far as a pre-trial process goes, this was unarguably unfair though perhaps more timely than the contemporary system. Chapter 5 describes my metrics for evaluating case management systems but it is safe to say that the system at this point in history was not a good one.

It was, however, the story throughout the 18th and 19th centuries in British North America. The next major shift was in 1867 which saw the creation of the Canadian constitution as the *British North America Act*⁷⁶. The next section focuses now on the effects of this newly-minted Canadian constitution on the criminal pre-trial.

3.3 Post-Confederation Developments

The pre-confederation era could be described as surveying the landscape of criminal justice in Canada; the post confederation era could easily be framed as laying the foundation. During the period before World War I the Criminal Code was developed and codified, the

⁷³*Ibid* at page 579.

⁷⁴Trials for Felony Act 1836 (6 & 7 Will. 4. c. 114).

⁷⁵HOLIC-1, *supra* note 61 at page 582.

⁷⁶The Constitution Act, 1867, 30 & 31 Vict, c 3.

criminal law was aligned across the provinces, and the profession of the judiciary was crystallized. After the war, more courts were established, urban centres and their courthouses expanded, and most critically, responsibilities were divided between the levels of government. There were three of these principal developments in the early 19th century that had a particular impact on the criminal justice system and the pre-trial system in Canada that I will highlight here. The first was confederation and the division of criminal law powers between the federal and provincial governments. The second was the codification of the criminal code in 1893 which laid the foundation for the next 80 years of development of criminal law in Canada. Finally, in response to the growth of the country, especially in the urban centres, most courts transitioned from a judge-centric scheduling system to a central one.

Indigenous legal traditions during this period were largely sidelined and often explicitly outlawed. Their use is greatly reduced throughout this period. They were not, however, extinguished. Though any case management lessons that might have been learned from these traditions are difficult to find in this era. This was the era of the residential school, and continued the cultural genocide of Indigenous people in Canada⁷⁷.

3.3.1 Division of Powers and Critical Delegations

The *British North America Act* split criminal law responsibilities between the provincial and federal governments. Broadly speaking, the Federal Government became responsible for the definition of the criminal law and procedure while the provincial governments were responsible for its administration. The Federal Government was broadly responsible for defining criminal law, including procedure:

91 (27) The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters⁷⁸

⁷⁷Canada. Truth and Reconciliation Commission. Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada. Winnipeg, 2015.

⁷⁸The Constitution Act, *supra* note 76.

To allay concerns of the cost of having these professional judges on the provincial bankroll, the federal government were additionally responsible for appointing and paying judges in the superior courts:

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.⁷⁹

There was some concern that giving the federal government the power to appoint and pay the salaries of the judges risked would result in them appointing a sympathetic judiciary, especially in Quebec, but financial concerns outweighed appearances⁸⁰. The provinces were left with the responsibility of the **administration** of Justice. This included organizing the courts and building and deciding how to fund their administration:

92 (14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.⁸¹

Pre-trial criminal procedure was, ostensibly, imposed by the federal government on the provincial courts. The interpretation and administration of that procedure remained a provincial responsibility. This push-and-pull aspect of the division of powers is discussed

⁷⁹ *Ibid.*

⁸⁰ HOLIC-2, *supra* note 92 at pages 34-36.

⁸¹ *Ibid.*

in more detail in chapter 4 below. At confederation, the procedure remained mostly scheduling assize courts and dealing with the daily docket. The complexity of today's system was unnecessary. An early flexing of the federal criminal law power came a couple of decades later with the drafting of a national criminal code.

3.3.2 Codification of Criminal Law

In July of 1893, the Criminal Code came into force. Passed by parliament in late 1892, it was a refinement, and codification of criminal law in the colony⁸². It essentially acted as the foundation for the development of criminal justice for the next 90 years. While it was not the earliest “codification” of criminal law in the new colony, there were several efforts in the provinces and smaller acts federally, it is the one that the contemporary Criminal Code of Canada holds as its direct ancestor. This ancestry makes it an interesting break point for seeing how case management was considered at the time. In short, it was not much considered at all.

It would be very tidy for me to claim that drafting the Criminal Code was a sharp response by a motivated parliament to simplify and standardize the English common law at the time. The fact is though that the story is as much about parliamentary manoeuvring and undercutting “the other honourable gentleman” as it was about good public policy. The Minister of Justice, John Thompson, was responsible for the introduction of the bill and appointed George Burbidge to draft it. Partly, at least, to prevent the other side from proposing such an important piece of legislation.

Immediately after receiving Taschereau's formal offer to draft a criminal code on 23 October 1889, Thompson wrote to Burbidge that he intended to codify the criminal law, and evidently gave him the impression that a bill would be introduced in the coming session.⁸³

⁸²*The Criminal Code*, SC 1892, c 29.

⁸³Brown, Desmond Haldane & Osgoode Society, *The genesis of the Canadian Criminal Code of 1892* (Toronto: Published for the Osgoode Society by University of Toronto Press, 1989) at page 122.

He was principally concerned about Taschereau being a opposition Liberal appointee and thus looking foolish for not having introduced it as the Minister of Justice:

Did he want one of the most important bills of the decade to be prepared by a Liberal appointee, Taschereau, when his friend a colleague Burbidge had already drafted such legislation? Obviously not.⁸⁴

Desmond Brown summarizes the dispute as a competition of consolidators looking to etch their name in the law.

The Canadian Criminal Code passed in 1892 was the product of a campaign by any single individual championing the idea of a period of time. There was a small coterie of men who proposed reform of some kind, including Gowan and future SCC judge Henry-Elzéar Taschereau, but they were consolidators, not even minimally codifiers, and Taschereau wanted his name attached to a groundbreaking statute.

...

In choosing [Sedgwick and Burbidge] Thomspson rejected an offer to draft a code from Taschereau, who took the rebuff personally, severely criticizing the Code after 1892.⁸⁵

There were other, consequential features of its passage through parliament including distributing copies to the public before parliament, understating the scope during debate, or passing through first and second reading without even distributing a copy of the bill to the members⁸⁶. Regardless, it was passed in 1892 and came into force in July of 1893.

A far as criminal procedure goes, Title VII of the newly minted Code was dedicated to it. The very first section of that part delegated the responsibility of defining the details of

⁸⁴ *Ibid* at page 120.

⁸⁵ *Ibid* at page 129.

⁸⁶ *Ibid* at pages 129-135.

the rules of court to the judges of that jurisdiction so long as they were published in the gazette:

553. Every superior court of criminal jurisdiction may at any time, with the concurrence of a majority of the judges thereof present at any meeting held for the purpose, make rules of court, not inconsistent with any statute of Canada, which shall apply to all proceedings relating to any prosecution, proceeding or action instituted in relation to any matter of a criminal nature, or resulting from or incidental to any such matter, and in particular for all or any of the purposes following : —

(a.) For regulating the sittings of the court or of any division thereof, or of any judge of the court sitting in chambers, except in so far as the same are already regulated by law.

(b.) For regulating in criminal matters the pleading, practice and procedure in the court, including the subjects of mandamus, certiorari, habeas corpus, prohibition, quo warranto, bail and costs, and the proceedings under section nine hundred of this Act.

(c.) Generally for regulating the duties of the officers of the court and every other matter deemed expedient for better attaining the ends of justice and carrying the provisions of the law into effect.

2. Copies of all rules made under the authority of this section shall be laid before both Houses of Parliament at the session next after the making thereof, and shall also be published in the Canada Gazette.⁸⁷

This language is not far removed from the language in the contemporary Criminal Code and the delegation of crafting these rules remains with the judges of the court. This practice

⁸⁷The Criminal Code 1892, *supra* note 82

of delegating much of the detail-work down the stack is explored more in chapter 4 but it started here – right at the beginning.

There were also attempts, even in these early days, to move trial along more speedily. The last half of the 19th century saw the introduction of both the *Summary Convictions Act*⁸⁸ and the *Speedy Trials Act*⁸⁹. Acts whose titles would not sound too alien to a 21st century lawyer or legislator.

This concentration of responsibility and authority with local judges continues in the contemporary system but other problems that this Code and these judge would have to face are going to multiply in the next couple of decades. The colony was growing and the administration of the criminal courts would need to keep up.

3.3.3 Canadian Growth and Case Management

During The 20th century Canada was growing quickly, both in terms of population and was a geographic dispersal. In 1880, the census counted roughly 4.3 million people⁹⁰. By the end of the pre-Charter era, in 1982, the census counted over 24 million⁹¹. When parliament passed the *Speedy Trial Act*, which tried to trim jury trials and speedy access to justice, in 1869⁹² there were few real cities west of Ontario. By the time the *Charter* was passed, several of those cities boasted more than a million people⁹³.

As is discussed further in chapter 6, this growth does not amplify the challenges faced by the criminal justice system linearly. Twice as many charges means more than twice as many interactions and more than twice as much complexity. I am not the first to note that this explosive growth triggered an explosion in complexity within the criminal justice system. In the late 1970s, Justice Perry Millar and Professor Carl Baar undertook a study of court

⁸⁸Summary Convictions Act, SC 1891, c. 45.

⁸⁹Speedy Trials in Ontario and Quebec Act, SC 1869, c. 35.

⁹⁰Canada, Census Branch, *Census of Canada 1880-81* [1881 Census] at page 405.

⁹¹Canada, Statistics Canada, *1981 Census*.

⁹²Girard, Philip, R Blake Brown & Jim Phillips, *A History of Law in Canada, Volume Two: Law for the New Dominion 1867-1914* (Toronto: University of Toronto Press, 2022) [HOLIC-2] at page 8.

⁹³*1981 Census supra* note 91.

administration in Canada in response to the explosion in complexity that they were seeing in British Columbian urban courts:

Massive case volume, by its sheer weight, first distorts and then subtly transforms the nature of justice. Under the weight of case overloads, summary criminal courts especially tend to degenerate into “symbolic” courts – harassed and busied tribunals which respond passively to the proposals of counsel; courts which drift without dynamic attempts at administrative reform in the face of mounting backlogs and adjournments.⁹⁴

They were already lamenting a trial collapse rate of 62 percent⁹⁵ and a delay of more than 90 days as being excessive⁹⁶. They also highlighted a quiet revolution that was taking place; many criminal courts were shifting from a judge-led, judge-centric scheduling system, where a large amount of scheduling power was held with the judges and the prosecution, to a centrally-managed one. This meant that cases were not assigned to a single judge for the pre-trial stages. Instead, cases were assigned after the pre-trial stage by the court administration to a judge for trial. Unlike the other changes I have highlighted in this chapter, which were noisy and often political, the move to central case management was a quiet shift that has had a profound and lasting impact on how the pre-trial, case-management process works in Canada.

In practice most assignment systems in Canada now constitute hybrids of one sort of another...High volume provincial criminal courts drift toward the master calendaring model.⁹⁷

The shift to central management was not without controversy:

⁹⁴Millar, Perry S & Carl Baar, *Judicial administration in Canada* (Kingston, Ont: McGill-Queen’s University Press, 2014) at page 4.

⁹⁵*Ibid* at pg 212.

⁹⁶*Ibid* at pg 196.

⁹⁷*Ibid* at page 201.

A group of Vancouver judges waged a three-year campaign to supplant a master calendar by an individual calendar system. At a superficial level, they saw it as a means of reducing prosecutorial control over trial scheduling, but in a deeper sense it represented a determined thrust to increase the pace of the trial process, in other words, as a legitimate and effective device for meeting heavy caseload pressures in the court.⁹⁸

This group of judges additionally posted a picture of a herd of musk ox, horns facing outwards above the door to the judges' chambers as part of their resistance to moving to a central scheduling model⁹⁹.

This post-confederation era began with a fundamental definition of Canada and saw the codification of the criminal law. It was foundational to how our criminal law is practised today. But it also quietly shifted how the courts and judges related to the cases that appeared before them and defined the nature of the scheduling problem that the courts would face in the contemporary age. The next major shift was the implementation and interpretation of the Charter, which took the complexity of the scheduling problem and turned the knob to eleven.

3.4 The Complexity of the Post-Charter Age

The changes that were necessitated by the Charter over the four decades since its implementation are arguably of the same magnitude as any of the historic adjustments to criminal practice. It was a titanic shift that we are still reckoning with. Penney et al. describe it as a revolution:

Since its enactment in 1982, the Charter has transformed the Canadian legal landscape. Arguably, no area of law has been affected more than criminal procedure. The Charter's legal rights provisions (sections 7 through 14) impose

⁹⁸ *Ibid* at page 214.

⁹⁹ *Ibid*.

constitutional restraints upon the investigative powers of police, which are supplemented by guarantees aimed at ensuring fair treatment for individuals once they are detained or charged with a crime. These guarantees, combined with the express remedial provisions, including the discretion vested in courts to exclude unconstitutionally obtained evidence...have occasioned what has been termed “a due process revolution”.¹⁰⁰

The “due process revolution” put strain on the underlying case management processes and that strain is ongoing. I will focus on three defining characteristics of the post-Charter age but that is by no means the limit of the impact that it had on criminal processes. The first defining characteristic is the remedial powers granted by section 24 that multiplied pre-trial hearings in a vast variety of contexts. The second is the disclosure regime that has created obligations on the Crown that expand with the evolution of any other section or element of criminal practice. The third fundamental characteristic of this era is the ticking clock and the upper bound for delay created by section 11(b) and *R. v. Jordan*¹⁰¹.

3.4.1 Explosion of Scheduled Pre-Trial Applications

The evolution of rights under the Charter is typically additive. The right to be informed for the reason of being detained would, without more, conclude after that information is given during the investigation. Many of the legal rights in sections 7 through 14 would operate this way in isolation. Section 24(1), however, brings all of them into the scope of the trial and creates pre-trial hearings to seek remedy. The wording is simple:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

¹⁰⁰ *Penney et al*, *supra* note 15 at page 30.

¹⁰¹ *Jordan*, *supra* note 2.

24. (2) Where, in proceedings under section (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.¹⁰²

Practically speaking, it pulls actions from the investigative stage and requires the criminal court that is hearing the charges to manage the appropriate remedy. This is a multiplication of the load that the case management system has historically had to carry. Now for every case of every sort there has been an explosion of pre-trial hearings that may or may not be required but are always a possibility. Prof. Roach writes in 2008 about the explosion in complexity.

As Justice Moldaver has suggested, a significant (but unknown) number of pre-trial motions have contributed to the length of criminal trials. Examples would include motions to exclude evidence under section 24(2), motions for third party records, motions about disclosure and lost evidence, Corbett applications, Dagenais applications by the media, challenges to the quality of interpretation under section 14, section 11(b) applications for a stay, challenges for cause of jurors, and defensive lawyering to avoid ineffective assistance claims. It would be foolish to deny that the Charter has not added complexity to the criminal trial process.¹⁰³

The list has not gotten shorter in the years since 2008. But Prof Roach goes on to argue, that there are other culprits in the Charter age that are equally to blame for the explosion in complexity:

But many other factors that are not related to the Charter have contributed to trial delay and complexity. These challenges include increased use of expert

¹⁰²The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

¹⁰³Roach, Kent. "A Charter Reality Check: How Relevant is the Charter to the Justness of Our Criminal Justice System?" The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 40. (2008) at page 748.

witnesses, ineffective and perfunctory pre-trial conferences, scheduling problems with busy defence counsel, poor boilerplate pleading in pre-trial motions, late pre-trial motions, inexperienced or overly aggressive defence lawyers or prosecutors, self-represented litigants, lack of effective pre-charge or pre-trial screening, the incentives created by hourly rates with no caps on hours spent in court, a last-minute culture within the legal profession, juror illness, lack of adequate court and correctional facilities, relitigation of pre-trial issues when a trial collapses, unduly complex and duplicative Criminal Code provisions and common law rules, last-minute guilty pleas, and longer sentencing hearings involving dangerous or long-term offender designation, remand credit or conditional sentences. If the Charter were to be abolished tomorrow, many of the problems that result in trial delay would remain.¹⁰⁴

This list was drafted in 2008 as a response to the 25th anniversary of the Charter. I used this list very early on to help define some of the data that was captured in chapter 9. The balance he identifies between discerning what complexity was introduced by the Charter and which is a function of a lack of discipline or maintenance of the case management system remains an exceptional insight. Certainly though, the hearings spawned by section 24 are a defining characteristic of this era of criminal law in Canada.

3.4.2 The Disclosure Bollard

The second multiplicative change that I want to highlight is the expansion of the Crown disclosure obligation. Crown disclosure is now so ingrained in criminal practice that it seems almost absurd that full, ongoing disclosure, is a fairly modern invention. In the age of the quarter session courts, people accused of crime could expect nearly no information about their charge until the trial date. In fact, they could expect to pay at least a nickel if they wanted a copy of their charges¹⁰⁵. The right to full answer and defence embedded in section

¹⁰⁴ *Ibid.*

¹⁰⁵ Criminal Code 1893, *supra* note 82, s. 597 & s. 654.

7 requires the Crown to provide all evidence in the possession of the Crown to the defence with some caveats around privileges that are out of scope here. Just to briefly summarize that basic history, *R. v. Stinchcombe* formally declared the relationship between full answer and defence and the disclosure obligation in 1991:

...the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. In contrast, the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to disclose can, therefore, be justified as being consistent with this role.¹⁰⁶

*R. v. O'Connor*¹⁰⁷ made the connection between disclosure and section 7 more explicit and clarified the scope of what documents needed to be disclosed. *R. v. McNeil* crystallized the on-going and positive requirement on the crown to be look into the extent of disclosure:

[49] The Crown is not an ordinary litigant. As a minister of justice, the Crown's undivided loyalty is to the proper administration of justice. As such, Crown counsel who is put on notice of the existence of relevant information cannot simply disregard the matter.¹⁰⁸

The consequences of this regime for the pre-trial case management system is that any new decision or expansion of any right will create additional disclosure. This is in addition to the explosion in the volume of disclosure that exists in the era of personal cell phones and police body cameras. In an article published around the same time as the one I quoted above by Prof. Roach, Justice Rosenberg of the Ontario Court of Appeal wrote of the consequences of this regime on pre-trial delay:

¹⁰⁶ *Stinchcombe*, *supra* note 28.

¹⁰⁷ *R v O'Connor*, 1995 Canlii 51, (1995) 4 SCR 411.

¹⁰⁸ *R v McNeil*, 2009 SCC 3.

I do not want to leave the disclosure issue without making one further point.

I am not sure that we have it right. Disclosure issues still plague the trial courts; the occasional inability of the prosecution to meet its obligations and occasional attempts by the defence to overreach can delay trials and bog down the proceedings in our courts with unnecessary motions. Our post-Stinchcombe full disclosure regime has not been without its costs to the system in terms of diversion of resources and delay. Disclosure obligations have led to increased costs to the state and lengthy, sometimes intolerable, delays in trials.¹⁰⁹

This was written more than 15 years ago and remains accurate in relation to the problems that the system struggles with today. In chapter 8 I review a case, *R. v. Hillier*, that captures every one of the problems Justice Rosenberg highlighted. Disclosure has and will continue to multiply the complexity in the pre-trial process.

3.4.3 The Ticking Clock

The right to be tried within a reasonable time, provided by section 11(b) of the Charter, is the last feature of the contemporary, post-Charter age that I will highlight in this chapter. It effectively creates a ticking clock that hovers above the case management process for every case in the courthouse at any given time. The implementation of this right falls squarely on the shoulders of the pre-trial process. For the last 40 years, this clock ticking down towards unreasonable delay has been a central theme in managing cases, disclosure, and scheduling in case management courts around the country. There are two features of this clock that are important to the state of affairs now. It has gotten slower over the years, while it has also become ostensibly more predictable.

What is “reasonable” in terms of delay has gotten a lot longer over the Charter era. *R. v. Askov* was central to defining the length of time considered reasonable in the early 90s.

¹⁰⁹J. Rosenberg, *Twenty-Five Years Later: The Impact of the Canadian Charter of Rights and Freedoms on the Criminal Law*, Supreme Court Law Review, 2nd Series, vol. 45 (2008).

At the time, the best district in Ontario was a median of 239 days total time between the laying of charges and the conclusion of the case, and between 315 and 349 days in the worst district:

By comparison, in Ontario the best district was London with a median total time of 239 days and the median upper court time of 105 days. Toronto, Ottawa and St. Catharines were all close together with median total times of between 315 and 349 days, and upper court times between 133 and 144 days.¹¹⁰

The months that followed the decision in *Askov* were tumultuous. It led to stays of tens of thousands of cases:

In the year that followed the release of the Supreme Court's decision in *R. v. Askov*, in Ontario alone approximately 47,000 cases were stayed arising from breaches of section 11(b) of the Charter.¹¹¹

Askov set guidelines of 8 and 10 months of institutional delay in provincial court and 6 to 8 in superior courts while leaving flexibility for factors such as the complexity of the case, seriousness of the offence, and the prejudice to the accused. This began the slowing of the delay clock. The explosion of pre-trial motions and disclosure complications described above led to the clock continuing to slow for the next 20 years¹¹². When *Jordan* was decided, about 20 years later, 30 months was set as the boundary for unacceptable delay. This is more than double the 349 days (12 months) that the Supreme Court lamented as problematic in *Askov*.

In the early days of 11(b) jurisprudence, the time before delay was unreasonable varied case by case and was ever-changing. While there remains some flexibility and a safety valve for extremely complex cases and defence-caused delay, the duration before delay is

¹¹⁰*R v Askov*, (1990) 2 SCR 1199.

¹¹¹Kozlowski, Tracy & Joanne Stuart, *A proactive practitioner's guide to section 11(b) of the Charter*, second edition (Toronto; Irwin Law, an imprint of University of Toronto Press, 2025).

¹¹²*Ibid* at pg 7..

unacceptable is somewhat more defined with *Jordan* aiming to provide a more predictable framework. While it might have created a more predictable framework, this predictability has led to some perverse incentives for accused people to delay their case as long as possible. Managing this tension and these incentives is a central theme in today's case management courts and is studied further in chapter 9.

This section focused on three characteristic of the Charter age that defined the nature of the pre-trial case management system. The explosion of pre-trial hearings in the pre-trial stage, disclosure acting as a multiplicative obstacle when any new decision or expansion of any right will create additional disclosure, and the ticking clock of 11(b). These characteristics are still central to the case management system in courthouses around the country and the response to them has been a continuous evolution. There is nothing about the current era that says that it was the inevitable destination for a just pre-trial case management system nor that it is the final destination.

3.5 Gradual but Not Inevitable

In this chapter I described four epochs in the history of Canadian criminal law history. These are not hard, bright-line, breakpoints in history. The changes to the case management process were mostly gradual but took place in the context of much larger, more monumental changes to the criminal justice system. The first, the ancient epoch, was the origin story for criminal procedure in the colony. The second, the British consolidation, defined the role that these ancient traditions would play and the relationship between the Canadian legal system and the Indigenous Peoples of Canada. The choice of the British root was not an exercise in legal balance, it was an exercise in war and peace-making. The third, post-confederation age, saw the codification of the Criminal Code, and defined the roles of the various levels of governments. This era saw the beginning of the tension between the federal and provincial governments that lasts until today. We stand, in my view, in the epoch of complexity introduced by the Charter. The immense complexity introduced to the pre-trial

stage of the criminal justice system during the last 40 years was absorbed by a system built on the foundation of different eras with different priorities and purposes.

This system was built gradually and incrementally over generations of lawyers, judges, courthouses, and even legal systems. The system we have today was not inevitable and it was not the result of divine intervention or some flawless canon of legal reasoning. The history is messy and the resulting system continues to develop. It remains an open question as to whether or not the case management system in use is suited for the needs it has been expected to meet. I argue that, in some ways, it is not. But before I can argue that effectively I need to define what that process is and what would make it fit for purpose. The next two chapters look at the statutory rules defining pre-trial procedure. I then, in the following chapter, examine what it means for a process to be a good one.

Chapter 4

The Complex Contemporary System

The last chapter looked backward at the history of how justice systems in Canada managed their cases. That was a good starting point for understanding the context of today's system but it is only a starting point. The contemporary system is one that has now been continually operating for over a century. The case loads are higher. The cases are more complex. The management required is more involved. Every month in Ontario between October 2022, and September 2024 there was an average of 18,099 *cases* that started their journey through the case management system. Alberta's criminal justice dashboard shows that there was an average of 19900 *charges* commenced. Statistics Canada puts the number of *cases* at about 3200 per month in Alberta. Frustrations with statistics using different keywords aside, these are busy systems. The vast majority of these cases at any particular slice of time are in a state of case management¹¹³.

The starting point for studying how these criminal pre-trial systems are set up is an examination of the statutes and regulations that define the bounds of them. The first half of this chapter does exactly that. It starts by looking at the constitutional foundation for creating a pre-trial process and continues through the layers of jurisdiction and delegation down to how courts define and refine local practices.

¹¹³Stats taken from: Ontario, Ontario Court of Justice, Criminal Court Statistics, online at <https://www.ontariocourts.ca/ocj/statistics/>; Alberta, Alberta Court Statistics Dashboard, online at: <https://www.alberta.ca/alberta-justice-dashboards>; Canada, Statistics Canada, Adult criminal courts, number of cases and charges by type of decision, online at: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510002701>.

4.1 The Pre-trial System Authority Stack

The specific process that a case will follow in a particular courthouse cascades down to that courthouse from a stack of sources. I imagine it like a stack of plates of differing sizes under a high faucet of running water. Each plate retains a bit of control of the process but mostly it asks the layer below it to do much of the work. This is a stack of constitutionally-based authority, federal jurisdiction, provincial regulations, court directives, common law tradition, and eventually local standard practices. The process any particular case follows in any individual courthouse will reflect their own interpretation and implementation of all of these sources. Granted, this mental model could describe just about any part of the common-law. But what is striking about the pre-trial system is the degree of residual discretion that is left after each level of abstraction. The *Criminal Code* leaves extensive discretion to the individual courts in each province about crafting their rules and the rules in those courts leave extensive discretion to the individual judges or courthouses. This helps explain some of the regional quirks of the resulting system but it is also responsive to the realities of a nation this large and diverse. For criminal procedure, the plates are very small at the top and a lot of the authority and decision making is left to the local level. This has been the case for at least as long as the *Criminal Code* has existed.

In brief, the *Constitution Act*, 1867 gives the jurisdiction over procedure in criminal matters to the federal government¹¹⁴. The federal government uses that power to maintain the *Criminal Code* where, scattered among and between offence descriptions, there are sections describing several elements of the pre-trial process. Mostly, however, the federal government uses the *Criminal Code* to delegate much of that authority to the provinces to create their own criminal justice policy and procedures so long as they remain fairly uniform between provinces¹¹⁵. The provinces further define that process by passing regulations under the *Criminal Code* and giving themselves the power to craft other directives. These directives

¹¹⁴The Constitution Act, *supra* note 76 s 91(27).

¹¹⁵*Criminal Code*, RSC 1985, c C-46 at 482(1).

and regulations are made to resolve local problems. These rules are then again interpreted and refined by the individual courts forming the local common law base. This common law foundation is further enhanced by any specific local practices that are responsive to local pressures and realities. These local practices could be as mundane as who is sitting at the table when these hearings happen or which administrator's desk receives documents during what time of day.

4.1.1 The Balance in Constitutional Sources

As mentioned, establishing the criminal case management process is kicked off by the Canadian Constitution where it grants the Federal Government the exclusive authority over all criminal law including "procedure in criminal matters":

91 (27) The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.¹¹⁶

The the first part of this section, "The Criminal Law" has been widely litigated and has been pretty much settled law since about the 1930s¹¹⁷ with some minor refinements since. "The Criminal Law" is any prohibited act that can result in penal consequences where some legitimate public purpose underlies the prohibition¹¹⁸. This first portion is normally the interesting part, but for dealing with case management it is the second, explicit, inclusion that is critical: "...including the Procedure in Criminal Matters". This last portion is less widely litigated. Justice Dickson wrote that it while it cannot be defined precisely, it has a broad meaning and covers a lot of area withing criminal law:

The phrase "criminal procedure" does not lend itself to precise definition. In one sense, it is concerned with proceedings in the criminal courts and such matters as

¹¹⁶The Constitution Act, *supra* note 76 at s 91.

¹¹⁷*Proprietary Articles Trade Association v Canada (Attorney General)*, (1931) 2 DLR 1.

¹¹⁸*RJR-MacDonald*, *supra* note 40.

conduct within the courtroom, the competency of witnesses, oaths and affirmations, and the presentation of evidence. Some cases have defined procedure even more narrowly in finding that it embraces the three technical terms—pleading, evidence and practice. In a broad sense, it encompasses such things as the rules by which, according to the Criminal Code, police powers are exercised, the right to counsel, search warrants, interim release, procuring attendance of witnesses.¹¹⁹

More recently the Supreme Court of Canada refined that definition, acknowledging the paramount jurisdiction of the federal government:

It has long been held that although a court may be provincially organized and maintained, its jurisdiction and the procedures to be followed by such a court in the application of laws enacted by the federal government are within the paramount jurisdiction of the federal government. This is particularly true of criminal law.¹²⁰

But for clever, succinct phrasing, the New Brunswick Court of Appeal’s phrasing of the principle in a reference about youth courts can hardly be beaten: “The criminal court, once having been validly established by the province, will follow the procedure set by Parliament”¹²¹. This state of the law has been stable since 1945:

The power given to the federal parliament to legislate in criminal law and criminal procedure, is the power to determine what shall or what shall not be “criminal”, and to determine the steps to be taken in prosecutions and other criminal proceedings before the courts.¹²²

While the grant is broad, it is not unlimited. In addition to the limitation within the clause, it is also subject to the limits brought on by the *Charter*. So begins the cycle of grants of authority, restrictions, and delegation of the rest.

¹¹⁹ *Di Iorio v Warden of the Montreal Jail*, (1978) 1 SCR 152.

¹²⁰ *Knox Contracting Ltd v Canada*, (1990) 2 SCR 338.

¹²¹ Reference Re Youth Court, 46 CCC (3d) 203 (NB CA).

¹²² *Attorney-General of Quebec v Attorney-General of Canada*, [1945] SCR 600.

4.1.2 Charter Limits and Complexity

This broad grant of authority to the federal government to legislate in criminal law and procedure is balanced with the restrictions imposed by the *Charter*¹²³. On its face, section 11 is the only section of the Charter related to case management. Section 8, search and seizure, tends to impact the investigation and the remedies to a violation of this section are all considered at the trial. Section 9, detention, and section 10, arrest, both squarely land in the period of time before the charges are laid. That surface-level interpretation of these sections, however, misses all of the ways that these sections complicate the preparation for trial and the consideration of the defence before deciding on how to plead. Detailing all the ways the Charter impacts criminal procedure is too much of an undertaking. Instead, the focus here is on how the Charter directly limits the downstream decisions on how to craft a pre-trial system. The complexity that it injects is hard to overstate but very easy to under appreciate.

Section 8, for example, can spawn an extensive collection of pre-trial hearings related to searches or to search warrants with names usually referring to appellate decisions. Dawson¹²⁴ or Garofoli¹²⁵ applications, relating to the cross-examination of affiants, both will require court time at different stages of the pre-trial process. Applications for state-funded counsel, under section 10(b) or any of the galaxy of Charter-applications that haunt impaired driver cases both extend the amount of trial time needed but additionally complicate the scheduling problem.

Section 11, as the main source of complexity and limits on how the pre-trial system operates, would be expected to be mostly settled. It is not. This section both enshrines the right to full disclosure as part of 11(d)¹²⁶, and limits the time that the pre-trial period can take under 11(b)¹²⁷. Individually, these are resolved issues in today's case management

¹²³ *Charter*, *supra* note 102.

¹²⁴ *Dawson v R*, (1998) 39 OR (3d) 436 375.

¹²⁵ *R v Garofoli*, (1990) 2 SCR 1421.

¹²⁶ *Stinchcombe*, *supra* note 28.

¹²⁷ *Jordan*, *supra* note 2.

courts. But the judicial conversation about the interaction between the right to full disclosure and the ticking clock that Jordan created continues to this day¹²⁸. Justices of the Peace are routinely asked to decide if disclosure is *sufficient* for the case to progress to another stage. As I will mention in my observations in the next part, these context-specific questions during the pre-trial period can derail cases for months.

While many of these Charter limitations on pre-trial criminal justice processes and their implications will have a fairly consistent impact across jurisdictions, other Charter rights have wildly different procedural impacts in different jurisdictions. For instance, section 14 entitles all parties of a criminal proceeding to the assistance of an interpreter where one is needed:

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.¹²⁹

Providing an interpreter will have a very different, on-the-ground implementation in Pangnirtung than it will in larger urban areas like Windsor. The rules in these jurisdictions will need to be flexible enough to account for the different on-the-ground realities that they encounter.

These are just three examples of the Charter limitations creating complexity in the pre-trial case management system. All of these complexities need to be handled by someone at the court hearing these cases. Hundreds of choices have been made to structure the system differently in different places in Canada, and those choices are tested daily. Rounding back to the division of powers, this give-and-take between granting authority to the next level of administration and restraining that power continues all the way down the stack. The next level down is the *Criminal Code* and other federal criminal legislation.

¹²⁸See eg. *R v Tsering*, 2024 ONCJ 641 at paras 54-55.

¹²⁹*Supra* note 102, s 14.

4.1.3 Criminal Code and Other Legislation

Empowered by the Constitution to craft the adjudicative process, the federal government scattered much of their contribution to the process throughout the *Criminal Code*, including aspects of the case management process in individual offences. This contribution mostly takes the form of limitations on the timing of notices and the consequences for failure to give notices. It includes extensive procedure around the timing of bail hearings and the procedure within them¹³⁰. It also includes a number of procedural descriptions for more exotic evidentiary issues such as foreign intelligence and offences such as terrorism.

The keystone contribution of the *Criminal Code* to the sources of case management process is s. 482, where the federal government delegates the bulk of the responsibility to the provinces and provincial courts to define their own rules:

482 (1) Every superior court of criminal jurisdiction and every court of appeal may make rules of court not inconsistent with this or any other Act of Parliament, and any rules so made apply to any prosecution, proceeding, action or appeal, as the case may be, within the jurisdiction of that court, instituted in relation to any matter of a criminal nature or arising from or incidental to any such prosecution, proceeding, action or appeal.¹³¹

This section is the direct descendent of the section that Burbidge drafted in the 1890s and has not changed much in the intervening 130 years. It is not a narrow grant. The courts have held that while the courts can create rules those rules may not grant substantive rights beyond those in the *Criminal Code*¹³². Their scope for rule-making is otherwise unbounded. The *Criminal Code* empowers provincial courts to regulate the sittings of courts, the “pleading practice and procedure in criminal matters” and the proceedings with regards

¹³⁰ *Criminal Code*, *supra* note 115, Part XVI is dedicated to compelling appearance. Section 516(1) for instance limits the length of adjournments.

¹³¹ *Criminal Code*, *supra* note 115 s 482(3).

¹³² *R v BC Tel*, 2002 BCCA 363 at para 55.

to bail and preliminary inquiries¹³³. Section 482 of the *Criminal Code* does, however, have a safety valve. It leaves the option open for the Governor in Council to craft additional rules through regulation to maintain uniformity.

482 (5) Notwithstanding anything in this section, the Governor in Council may make such provision as he considers proper to secure uniformity in the rules of court in criminal matters, and all uniform rules made under the authority of this subsection prevail and have effect as if enacted by this Act.¹³⁴

If this power has ever been used, I was unable to find any evidence of its use. In spite of its lack of use, it suggests an intention to keep the rules uniform across the provinces, while recognizing that there will be a need to deviate in the details between regions.

4.1.4 Provincial Rules

Without going into a comparative analysis of the 20 or so rules of practice that have been developed across the different courts, there are three things that are consistent throughout the country. First, as with both the Constitution and the Criminal Code, the rules define some aspects of the system but each also leave a large residual grant of discretion to individual judges, especially as it relates to the day-to-day operation of the court. Second, the rules tend to dedicate a fair portion of their efforts towards the operation of judicial pre-trials. Finally, these rules form the first layer that has any concern with efficiency.

The provincial courts each, as authorized, have leveraged the delegation from section 482 of the Criminal Code and created their own rules of practice and procedure. These rules include, for instance, the timing of pre-trial applications, the forms that pleadings must take, and when the requirements for these applications and pleadings are triggered. Navigating these rules, pleadings, timings, and forms is the bread and butter of criminal law practice in

¹³³ *Criminal Code*, *supra* note 115 s 482(3).

¹³⁴ *Ibid*, s 482(5).

Canada. The rules themselves – though developed by different courts in different provinces – are notable for their similarity.

Like the *Criminal Code*, the provincial rules each impose some limits on the case management and trial processes but then delegate wide discretion to the individual judges. This discretion extends, for instance to deciding whether or not to follow, or break the written rules. Alberta uses the phrasing “any order with respect to practice...”:

Court’s Discretionary Power

4 (1) To implement and advance the purpose and intention of these Rules, the Court may make any order with respect to practice or procedure, in any proceeding before the Court.¹³⁵

The section goes on to list 13 specific examples of orders that the judges can make. Ontario and New Brunswick both have similarly broad grants of discretion to judges but explicitly tie those grants back to the stated objectives of the rules. Ontario grants the power to make “any order or direction”:

4.1 When conducting a hearing or trial, the Court has the power to make any order or direction in relation to the conduct of the proceeding that would assist in ensuring that it is conducted in accordance with the fundamental objective set out in rule 1.1.¹³⁶

New Brunswick reverses the order a bit and says that judges can “dispense with compliance at any time”:

2.02(1) The Court may, only where and as necessary in the interests of justice:
(a) dispense with compliance with any Rule at any time or substitute a process that would produce an equally just result, ...¹³⁷

¹³⁵Alberta, Court of Queen’s Bench, *Court of Queen’s Bench of Alberta Criminal Procedure Rules*, SI/201-76, r 4(1).

¹³⁶Ontario, Ontario Court of Justice, *Criminal Rules of the Ontario Court of Justice*, r 4.1

¹³⁷New Brunswick, *The New Brunswick Rules of Provincial Court Practice*, r 2.

The rest of the provinces all have similar sections that follow in this vein. It could be easy to believe that with this much discretion afforded to individual judges, including the discretion to ignore the rest of the rules, that the rule must be ineffective or unrealistic. Instead, I think it is more accurate to say that these rules are crafted as a guide to be applied by thoughtful, careful judges in complex circumstances, with an understanding that in some circumstances achieving the aims of those rules is best accomplished in other ways. The flexibility to deviate is a feature, not a bug.

Secondly, each courts' version of the the rules create, define, and regulate pre-trial conferences. Judicial pre-trial conferences represent, in some respects, the bottom of the stack. This is where all the disclosure problems, trial issues, witness gotchas (such as illnesses, and absences), scheduling hiccups, conflicts of interests, and the unknowable complications that arise from the complexity of human interactions within the criminal justice system are meant to be caught and resolved before the trial date. The judicial pre-trial conference is the nexus where the actors and efforts of the pre-trial system all come together. While judicial pre-trial conferences are considered in the *Criminal Code* and are required for jury trials¹³⁸, they are otherwise pretty lightly regulated outside of these rules. It is a useful break point. The parties are expected to be prepared to discuss all aspects of the case. Most, if not all, of the other pre-trial steps must be complete by this point and the rules reflect that. Take, for example, the list from the Alberta Court of Justice Rules:

- (5) The following matters may be considered at the pre-trial conference and the parties shall come prepared with authority to make representations on,
 - (a) the adequacy of disclosure;
 - (b) proposed pre-trial or trial applications, including, pre-trial and trial applications referred to in Rules 2.5 to 2.7 above
 - (c) any admissions the parties are willing to make;

¹³⁸ *Criminal Code*, *supra* note 115 s 625.1.

- (d) the legal issues that are expected to be dealt with in the trial;
- (e) an estimate of the time needed to complete the trial and the reasons for the estimate;
- (f) any resolution of the matter, if appropriate.¹³⁹

This list is a comprehensive summary of everything that can be done before the day of trial for represented accused people. For non-represented people, these judicial pre-trial conferences are an opportunity for the judge to provide information to the self-represented accused and to check the status of the case from the Crown. Unrepresented pre-trial conferences almost exclusively happen in open court. In theory, those are meant to reduce the number of cases that collapse on the day of trial by forcing early preparation and refining the trial length estimates. Both the avoidance of case collapse and knowing estimated trial lengths are elements of an efficient justice system and are essential to determining the resources needed by all of the parties involved in the criminal justice system in relation to each case.

Alongside the *Criminal Code*'s delegated authority to create these rules of practice for the case management process, the provincial courts were also tasked by the Constitution with forming, funding, staffing, and operating the criminal justice system in their province. As a result, these provincial court rules are the first layer of the stack where efficiency, or cost is mentioned as a concern for the pre-trial process. In defining the core purpose of their rules, Alberta highlights the need for expeditious resolution:

3 (1) These Rules are intended to facilitate the just disposition of criminal proceedings in Alberta, and must be construed in a liberal and practical manner to secure the fair and expeditious resolution of the proceedings in which they are applied.¹⁴⁰

¹³⁹Alberta, Alberta Court of Justice, *Criminal Rules of the Alberta Court of Justice* (2024), r 5.

¹⁴⁰*Supra* note 135, r 3.

Ontario built efficiency directly into their rules with the use of the phrase, “justly and efficiently” and including further definition of how to interpret that phrase:

Fundamental objective

1.1(1) The fundamental objective of these rules is to ensure that proceedings in the Ontario Court of Justice are dealt with justly and efficiently

(a) Dealing with proceedings justly and efficiently includes

- (i) the gravity of the alleged offence,
- (ii) the complexity of what is in issue,
- (iii) the severity of the consequences for the accused and for others affected, and
- (iv) the requirements of other proceedings.¹⁴¹

So the while the court rules go a long way to defer to the discretion of the individual judges sitting daily in the courthouses to determine how to run their pre-trial and trial processes, they also provide guidance on what to prioritize. That is not, however, the end of the story with regard to efficiency and justice in the pre-trial system. There is regional nuance and targeted directives that can vary courthouse to courthouse in order to meet these overarching objectives.

4.1.5 Practice Directives and Regional Nuance

Prior to sitting in the back of case management courtrooms during this project, I would have argued that the black-letter law would be sufficient to understanding the pre-trial system well enough to model it. I would have said that: “The interactions, timelines, and players are all there in black and white - that’s enough - let’s go do some math.” I was wrong. The reality is that local practices, written and unwritten, are sufficiently diverse and

¹⁴¹Ontario Provincial Court Rules, *supra* note 136.

impactful that writing about case management without recognizing these practices would be near-negligent. These regional practices are not fancy but they contribute a great deal to the operation of the system in a particular region. This diversity amplifies the complexity of both studying this issue as well as maintaining these systems. I break these local practices down into two categories: written, regional practice directives; and unwritten regional ritual or nuance.

For some regions, the courts, usually through their chief justices, have issued special practice directives for case management in those regions. They can be called directives or practice notes. But whatever they are called, they function in the same way. They issue additional rules or requirements for managing cases through the pre-trial process. Most, but not all, of these directives come from larger centres where the case load is higher. For instance, in Alberta the provincial courts in both Calgary and Edmonton have issued different practice notes. In Calgary, the practice notes specify the length of pre-trial conferences and state which sorts of proceedings require pre-trial conferences. In Edmonton, the practice notes set different expectations, especially around the length of trial that requires a pre-trial conference. Ontario's provincial court has a number of practice notes divided by the type of proceeding but also, unhelpfully if you want to study this issue for a number of courthouses at the same time, includes this line for those looking for more information:

Contact the local courthouse directly to find out more about local courthouse protocols.¹⁴²

Manitoba, on the other end of the spectrum, has (as of December, 2024) over 100 notices for managing matters in every one of the province's jurisdictions. Many other centres across the province have specific practice notes. Notably though, outside Manitoba, many smaller centres do not have specific practice notes. That means that the issues that are clarified in the larger centres with written directives are more likely to be unwritten rituals or nuances

¹⁴²Ontario, *Ontario Courthouse Contacts* (2025), online at: <https://www.ontariocourts.ca/ocj/criminal-court/practice-directions-and-policies/>.

in the smaller court houses.

This use of unwritten rituals and nuances is probably necessary and widespread. Unwritten regional ritual and nuance can show up in a number of different ways. They can be as mundane as the number of cases on the docket in the region daily or the number of courtrooms in the courthouse. Most often though, they are regional practices that have become common but undocumented. One example is the cadence of adjournments during case management appearances. In Ottawa, the cadence is 2 weeks for out-of-custody matters. Barring specific requests from the Crown or the accused person, the matter will likely be put over for two weeks. In some regions this cadence is a month:

22 For as long as I can remember, one-month adjournments have been a quasi-customary feature of the preparatory stages of a case in the criminal courts. In this case, Mr. Brereton's first lawyer attended court on 10 occasions. On five of them, adjournments of one month or longer were granted. No questions were asked as to why that length of time was proportionate to the reason for the request. This approach is a vestige of the culture of complacency that the Supreme Court of Canada sought to jettison in *Jordan*. As this application demonstrates, a period of less than two weeks can make or break a case. One month should not be seen as the fundamental block of time in set-date or case-management court.¹⁴³

This might vary for in-custody people or people representing themselves. These cadences are never, as far as I have seen during my research, documented. But these unwritten regional rituals and nuances are critical to understanding the effect of unneeded adjournments. In chapter 9, I dig further into the catalogue of unwritten protocols that are followed in the East region of Ontario.

Beyond the written practice notes and the unwritten rituals and nuances, one final other differentiator for regional practice is the cast of individual actors who are involved daily in

¹⁴³*R v Brereton*, 2023 ONCJ 137.

case management of criminal cases. If a region has a single justice of the peace who is doing the entire docket every week, they often remember when cases come back without progress. A full-time, senior Crown has more influence on how the court operates and is better able to control the record and the adjournments than a new or part-time Crown who is just getting their footing. This is, in my opinion, a direct result of the structure described above. After all of the delegations of authority and limitation on that authority – at the bottom of the stack – the pre-trial system is fundamentally made up of people. It can only be as good as the authority these people can leverage and the understanding that they have of the process, the rules, and the human interactions within the criminal justice case management processes in order to make this complex system work.

Chapter 5

Defining Goodness

Case management processes differ, at least in the details, between provinces and even between courthouses within provinces. There are too many differently shaped grants of authority and regional pressures that differ from jurisdiction to jurisdiction to create a completely uniform process. This is to be expected in a country as large and diverse as Canada. This diversity is probably beneficial. What is not clear, however, is how to tell whether a particular process is “good” or whether any given change will make it “better”. Even what constitutes a “good” process and how that “goodness” is discussed, is a poorly understood problem in Canadian criminal law. This chapter focuses on that question. How should the quality of a particular criminal process be defined and what elements are indicative of a good pre-trial system.

Understanding these questions is especially important because they are questions that have to be routinely answered by administrators across the country. When the Supreme Court releases a decision like *Jordan*¹⁴⁴, there are suddenly hundreds of people who are going to have to ask how to make their version of the case management process “better”. The backroom file administrators, the justices of the peace, and administrative judges all need to balance complex considerations and make the case management process in their region work better. They cannot simply just make it faster, there is a balance to be struck. Take as a contrast when the federal government changes the elements of an offence, creates

¹⁴⁴*Jordan*, *supra* note 2.

new, more specific offences, or adjusts the available sentences for an offence, there are very few people with the discretion to make decisions on how those changes are designed. There may be hundreds of downstream judges that have to decide how to interpret those changes but crafting that change is a very limited crew of people. Parliament and, maybe in some esoteric as yet untested constitutional crisis, the Governor General are the rule-makers. On the other hand, when the Supreme Court ask justice administrators to find a new, better balance for their case management processes and craft changes to their local practices to adapt to that new challenge, it is a big, hairy, difficult question and this big, hairy, difficult question is being taken on by hundreds of people in a wide variety of regions and contexts. Unfortunately, thus far, there is very little discussion about what “good” means for answering those sorts of challenges outside of the rules of court.

This chapter looks to better define these goals and create a framework for thinking about what makes a case management process good. I have identified 4 characteristics that, should be considered when understanding the quality of a pre-trial system. They are: timeliness, fairness, efficiency, and resiliency. I will describe and defend them in each turn below.

5.1 The Need for Balance

Before diving into the individual characteristics, I would like to highlight that in this sort of system there will be a need for balance between competing goals. The Charter requires timeliness and fairness. But timely and fair justice systems are not free. Being fast and fair lies in tension with the need to be efficient with limited resources. The rules of court in a number of provinces identify this tension as the core purpose of their rules of procedure. Manitoba, Ontario, and Alberta use virtually identical language in their superior courts for identifying this tension:

Manitoba Queen’s Bench:

1.03 (1) These rules are intended to provide for the just determination of every proceeding and must be construed to secure simplicity in procedure, fairness in

administration and the elimination of unjustifiable expense and delay.¹⁴⁵

Ontario Superior Court:

1.04 (1) These rules are intended to provide for the just determination of every criminal proceeding, and shall be liberally construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.¹⁴⁶

Alberta Queen's Bench:

3 (1) These Rules are intended to facilitate the just disposition of criminal proceedings in Alberta, and must be construed in a liberal and practical manner to secure the fair and expeditious resolution of the proceedings in which they are applied.¹⁴⁷

The Ontario Court of Justice is more explicit about their objectives by further defining “just” and “efficient”:

- 1.1 (1) The fundamental objective of these rules is to ensure that proceedings in the Ontario Court of Justice are dealt with justly and efficiently.
- (2) Dealing with proceedings justly and efficiently includes
- (a) dealing with the prosecution and the defence fairly;
 - (b) recognizing the rights of the accused;
 - (c) recognizing the interests of witnesses; and
 - (d) scheduling court time and deciding other matters in ways that take into account
 - (i) the gravity of the alleged offence,
 - (ii) the complexity of what is in issue,
 - (iii) the severity of the consequences for the accused and for others affected, and
 - (iv) the requirements of other proceedings.¹⁴⁸

¹⁴⁵ *Criminal Proceedings Rules of the Manitoba Court of Queen's Bench*, SI/2016-34, r 1.03.

¹⁴⁶ *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*, SI/2012-7, r 1.04.

¹⁴⁷ *Court of Queen's Bench of Alberta Criminal Procedure Rules*, SI/2017-76, r 3.

¹⁴⁸ OCJ Rules, *supra* note 146 s 1.1.

All four of these examples recognize the balance between justice, efficiency, and timeliness. Justice Moldaver highlighted this problem of finding the balance between cost and timeliness in the context of the criminal trial and explained that the consequences of failing to do so are grave:

Some trials are so long that one wonders whether the process will not collapse under its own weight. I think our greatest challenge over the next several years will be to cope with complexity and prolixity in legal proceedings. We must find ways to retain a fair process but in the context of a process that can achieve practical results in a reasonable time and at reasonable expense. If ways to do this cannot be found, I fear that our legal system will become simply irrelevant for most purposes.¹⁴⁹

It seems that, given the number of cases that continue to collapse under the weight of their own process, that we have failed to meet His Honour's challenge. There is a risk, however, that in looking to adjust one factor, for instance timeliness, that we sacrifice, other equally important factors.

5.2 Timeliness

Timeliness has been a widely discussed dimension of criminal process for a long time and has certainly been elevated in the last decade to become the critical problem in Canadian criminal procedure. The Supreme Court has described its importance as a signal for the health of the system as a whole:

[2] Moreover, the Canadian public expects their criminal justice system to bring accused persons to trial expeditiously. As the months following a criminal charge become years, everyone suffers. Accused persons remain in a state of uncertainty, often in pre-trial detention. Victims and their families who, in many cases, have

¹⁴⁹ *Supra* note 33.

suffered tragic losses cannot move forward with their lives. And the public, whose interest is served by promptly bringing those charged with criminal offences to trial, is justifiably frustrated by watching years pass before a trial occurs.

[3] An efficient criminal justice system is therefore of utmost importance. The ability to provide fair trials within a reasonable time is an indicator of the health and proper functioning of the system itself. The stakes are indisputably high.¹⁵⁰

Timeliness in the criminal justice context has been defined as the time between the laying of the charge and the conclusion of the case including sentencing¹⁵¹.

Unlike some of the other characteristics I propose, the Supreme Court has fixed a target for timeliness. Any duration beyond that bright-line constitutes a failure of the system. Any process that exceeds 18 month in provincial court or 30 months in superior court without excuse is a bad process. It is a quantitative metric rather than a qualitative measure and it is a boundary condition without a gradient. The catch, however, is in parsing “without excuse” and there is extensive litigation on what constitutes an excuse whether it is defence-caused delay or exceptional circumstances¹⁵².

The consequences for a process failing to provide timely justice is widely discussed. The Supreme Court described those stakes as “indisputably high”¹⁵³. It includes extending the jeopardy that the accused person is under. It includes failing to provided timely closure for victims. And it includes the risk of witness memories and other evidence degrading.

Prof. Paciocco highlights the challenging task of balancing timeliness in her paper that came out less than a year after *Jordan* was released. Justice can be too slow and also too fast:

As criminal cases drag on, penological goals are undermined; presumptively innocent accused persons are left languishing in pre-trial detention or under re-

¹⁵⁰ *Ibid* at para 2.

¹⁵¹ *Ibid* at para 119.

¹⁵² *KGK*, *supra* note 3.

¹⁵³ *Jordan*, *supra* note 2 at para 3.

strictive bail conditions; victims and witnesses are further traumatized; evidence deteriorates; and the public loses faith in the criminal justice system. At the same time, excessive speed poses its own threat to the integrity of the criminal justice system: a rapid, “conveyor belt” approach to meting out justice hardly inspires public confidence, as illustrated by widespread antipathy towards rote plea-bargaining. Moreover, many of the rights of accused persons take considerable time to vindicate. In this light, finding the ideal balance between speed-up and delay is a challenging task.¹⁵⁴

There are secondary consequences for the system itself. As a case remains in the system longer, it consumes more resources like court time, prosecution time, and judge time. It is a feedback loop: as cases take longer, they take up time that would otherwise be used to deal with cases already in the system. As a result, those cases take longer as well.

There are countless examples of concrete consequences for cases progressing too slowly. On an almost daily basis, in jurisdictions around the country, serious cases are being stayed as a result of the process failing to deliver timely justice. The day I sat down to write this paragraph, yet another sexual assault was stayed for taking more than 30 months to reach conclusion¹⁵⁵. Justice Amarshi of the Ontario Court of Justice described the situation in Toronto as follows:

[24] I acknowledge the seriousness of these criminal charges. In the end it is the lack of institutional resources that weighs prominently as a cause for delay. The first trial dates in this matter were scheduled in January 2021, almost 11 months after the parties were prepared to proceed to trial in March 2020. When the matter did not proceed as scheduled, it would have been apparent to all of the criminal justice participants that this case was in jeopardy due to excessive delay. The Trial Coordinator was only able to identify one - two-day block of

¹⁵⁴ *The Hours are Long*, *supra* note 5.

¹⁵⁵ In this case: *R v J.H.*, 2024 ONSC 6017 - I have an email notification alert for cases citing *R. v. Jordan* on Westlaw. These alerts arrive several times a week.

trial dates before the May 30 and 31 dates. It demonstrates limited institutional flexibility to accommodate cases that are at risk. I further note the Crown could have prioritized this prosecution and agreed to accommodate this trial on top of other scheduled matters but never sought to do so.

[25] A stay of proceedings is warranted in this case.¹⁵⁶

Whatever the pre-trial adjudicative process is in Toronto it failed in this case. In another case in nearby Brampton, Justice Code stayed a case involving the sexual abuse of a child the failure of which they describes as embarrassment to the administration of justice:

[59] I cannot leave this Application without saying, in conclusion, that it is an embarrassment to the administration of justice that this serious “priority” case, involving alleged sexual abuse of a child, cannot be tried in accordance with the constitutional standard of trial “within a reasonable time”.¹⁵⁷

Every week similar cases fail, with serious consequences to the public’s confidence in the criminal justice system. Even if the cases are not stayed their lengthy continuations undermines evidence, witness memories fade, and the accused continues to live under the jeopardy of the charges and, often, bail conditions. This is an obvious dimension for evaluating a pre-trial case management process.

5.3 Fairness

Fairness is the second trait that I propose for evaluating the quality of a pre-trial system. While timeliness is a much easier measure, if the system fails to be fair, it is also a bad system. There are a number of ways the case management system can be unfair. It can put pressure on accused people to take unfounded pleas through coercion or harassment. It can systematically treat differently situated people differently. It can also fail to prepare the

¹⁵⁶ *R v M.K.*, 2022 ONCJ 392.

¹⁵⁷ *Liu*, *supra* note 34.

case for an accurate and thorough finding at its conclusion. Unfair criminal justice processes have been widely criticized in the US context and provide good, if tragic, examples of what happens when the pre-trial process breaks down in this way.

In *Ordinary Injustice: How America Holds Court* Amy Bach, a journalist and lawyer, writes about her eight-year study of the mechanics of the criminal courts in the US. She tells the sad stories of accused persons being bullied into pleading without counsel¹⁵⁸, true tales of judges convicting people without plea or trial¹⁵⁹, and of the administrative black hole in Mississippi where hundreds of cases simply stopped being processed and left floating in an administrative void¹⁶⁰. These are uniquely process failures. The pre-trial process itself failed to fairly protect people from the coercive power of the state or failed to come to an accurate conclusion as a result of the case never concluding.

There are other, more subtle, examples of process failures leading to unfair results or undesirable situations in US criminal justice processes. Prof. Kohler-Hausman studied the misdemeanour courts in a New York borough asking how the process in those courts for lesser offences were operating. Her conclusion was that the pre-trial process had been co-opted as a means of managing, controlling, and marking people rather than moving their case to completion:

The managerial model holds that “what the criminal law is good for” is to provide an opportunity to sort and test people hauled in from policing of so-called disorderly places, to see over time what sort of people they are and to keep records on them in the process.¹⁶¹

Another case management failure can come in the form of perverse incentives triggered by pressures brought of the other priorities. Take, for instance, how the ticking clock brought

¹⁵⁸ Amy Bach, *Ordinary injustice: How America Holds Court* (New York: Metropolitan Books, 2009) at pg 19.

¹⁵⁹ *Ibid* at pg 77.

¹⁶⁰ *Ibid* at pg 133.

¹⁶¹ *Misdemeanorland*, *supra* note 25 at page 76.

by Jordan with its indifference toward overall fairness can create incentives for the Crown that lean toward unfairness. Prof. Paciocco describes that tension as follows:

[Crowns] are incentivized to move forward with older cases first, knowing that the ceiling is the same in all cases regardless of prejudice to the accused. Concretely, this means that if Axel is awaiting his provincial court trial and has already spent 10 months in a notoriously overcrowded jail, while Buster is awaiting his provincial court trial and has been out under minimally restrictive conditions for 15 months, then the Crown and court officials will be incentivized to move forward with Buster's trial ahead of Axel's.¹⁶²

This type of incentive imbalance is another issue that needs to be considered when evaluating the quality of a pre-trial case management system. Case management systems that no longer prepare cases for a fair trial or have been co-opted for improper purposes are a critical failure. The Canadian system is not immune to these risks. Access to legal assistance is increasingly difficult and unrepresented people complicate and extend proceeding, sometimes to their own detriment. Justice Atwood from Nova Scotia notes the problems this causes in one of their routine 11(b) decisions:

[44] There is a significant increase in the numbers of persons coming before the court unrepresented by counsel. This inevitably prolongs and complicates proceedings: persons who are unrepresented will often wish to have counsel but will require multiple adjournments to navigate what appears to be an increasingly complex process of applying for legal aid. Persons who are housing or income insecure may not have the means or ability to apply for legal aid, even though they might qualify for it.¹⁶³

It would be trivial to make the system significantly more timely by sacrificing fairness. Requiring everyone charged with an offence to plead guilty the next day would be extremely

¹⁶² *The Hours are Long*, *supra* note 5.

¹⁶³ *R v Fulton*, 2022 NSPC 53.

expedient, but such a system would be deeply unfair. Maintaining a fair pre-trial system is difficult because it is hard to measure but it is equally important as maintaining a timely system.

5.4 Efficiency

The third measure that I propose is efficiency. The Supreme Court in *Jordan* appears to use the word “efficiency” as a synonym for timeliness early in the text:

[3] An efficient criminal justice system is therefore of utmost importance. The ability to provide fair trials within a reasonable time is an indicator of the health and proper functioning of the system itself. The stakes are indisputably high.¹⁶⁴

In my view, however, effectively applying limited resources to a case load and completing those cases quickly are distinct problems. The Court clarifies later in the decision that efficiency means something in addition to the timeliness of the system by using them together and separately:

[27] Canadians therefore rightly expect a system that can deliver quality justice in a reasonably efficient and timely manner. Fairness and timeliness are sometimes thought to be in mutual tension, but this is not so.¹⁶⁵

While they do not revisit efficiency to explicitly define it in this decision, it seems clear that they mean some function of cost and quality of justice where the cost of the system includes both the cost of the people involved and the time they invest in any particular case. Herbert Packer described efficiency strictly in terms of capacity in *Limits of the Criminal Sanction*:

Efficiency of operation is not, of course, a criterion that can be applied in a vacuum. By ‘efficiency’ we mean that system’s capacity to apprehend, try, convict,

¹⁶⁴ *Jordan*, *supra* note 2 at para 3.

¹⁶⁵ *Ibid* at para 27.

and dispose of a high proportion of criminal offenders whose offences become known. In a society in which only the grossest forms of antisocial behavior were made criminal and in which the crime rate was exceedingly low, the criminal process might require the devotion of many more man-hours of police, prosecutorial, and judicial time per case than ours does and still operate with tolerable efficiency.¹⁶⁶

I also think this misses the core ratio. Under this logic, efficiency is unrelated to the resources invested into the system. A universe with unlimited judicial resources, could create a justice system that is both completely fair and moved cases through to completion quickly. You could create a system of an infinite number of well-trained and thoughtful judges, build a countless number of well equipped courtrooms, and develop an endless supply of effective technological supports. Under Packer's definition, that universe would have an "efficient" justice system. That is not the universe that the Canadian justice system operates in.

Many of the provincial court rules include the efficiency of the system as a core purpose. As mentioned above, Ontario expands their definition to include even the nature of the case:

1.1 [(d)] scheduling court time and deciding other matters in ways that take into account

- (i) the gravity of the alleged offence,
- (ii) the complexity of what is in issue,
- (iii) the severity of the consequences for the accused and for others affected, and
- (iv) the requirements of other proceedings.¹⁶⁷

I define efficiency in this paper as the quality of the process when compared to the resources invested into it. This considers the output of the case management system, not the result of the case.

¹⁶⁶Packer, Herbert L, *The limits of the criminal sanction* (Stanford, Calif: Stanford University Press, 1968) at page 158.

¹⁶⁷OCJ Rules, *supra* note 136, r 1.1.

Efficiency lies in tension with timeliness and fairness and is what makes refining the case management process a difficult optimization problem. That does not mean that efficiency, timeliness, and fairness are mutually exclusive. It means that changes to one dimension can impact the others. A lack of efficiency means that the wrong resource is applied to the wrong problem at the wrong time, and as a result the system costs more, takes longer, and is less fair than it otherwise would be. It is a series of difficult trade offs.

But there is a ceiling on efficiency. There actually has to be the baseline level of resources to meet the demand. There are open questions as to whether the state is presently meeting this basic obligation. In 2023, the CBC reported Chief Justice Wagner wrote a letter to the Prime Minister claiming that the number of federally appointed justices was undermining the justice system. The letter was quoted in full in a Federal Court decision early in 2024:

Despite all our judges' professionalism and dedication, the staffing shortage inevitably results in additional delays in hearing cases and rendering judgments. Chief justices have indicated that, because judges are overburdened, delays in setting cases are unavoidable and hearings need to be postponed or adjourned. What's more, even when cases are heard, judgments are slow to be rendered because judges need to spend more time sitting, leaving them less time to deliberate.¹⁶⁸

Justice Pugsley talks candidly about resourcing in the Ontario provincial court saying that between the COVID-19 backlog and lack of appointed judges there is a crisis of available judges:

The Covid backlog has descended on the Ontario Court of Justice across the province like an avalanche, and the result of that huge backlog is only now starting to be seen. Yesterday, I was presiding as per diem judge in a Brampton court, on a five day trial from a 2020 allegation which was scheduled for February

¹⁶⁸ *Hameed v Canada (Prime Minister)*, 2024 FC 242 at Schedule A.

2024. Brampton OCJ currently is short six judges. I invite counsel to do the math.¹⁶⁹

Some resource limits can be resolved through making a system more efficient but that function does not continue to infinity. Even an extremely efficient pre-trial system requires a baseline of resources to manage its caseload.

5.5 Resiliency

The last dimension of quality that I propose for evaluating pre-trial systems is resiliency. It does not appear in any provincial rules, but is instead rooted in the idea that the criminal justice system is a dangerous system operated by fallible humans. Like the more familiar dangerous systems such as automobiles or bridges, when a justice system fails, there can be catastrophic consequences. While there can be catastrophic consequences for failure, the system is still a human one, with all the benefits and risks associated with that. There will be mistakes made on a daily basis. Faxes will fail to send. Files will be misplaced. Witnesses will forget their subpoena date. A system that runs on the very edge of failure and requires perfection in its execution will fail with a single adverse event. These adverse events are inevitable and should be accounted for.

Various courts around the country are being run at the edge of failing or beyond. Take for instance the Hamilton courthouse where cases are routinely scheduled to fail:

As I write these reasons, trial dates in the Hamilton Ontario Court of Justice are being scheduled beyond the Jordan presumptive ceiling every day, with some of the participants in the criminal justice system working feverishly to patch the cracks in the dam.¹⁷⁰

Or a case in Brampton that was stayed as a result of a breakdown in communication within the trial scheduling office resulting in the loss of a single emailed form:

¹⁶⁹ *R v Seibezzi*, 2022 ONCJ 457.

¹⁷⁰ *R v McCudden*, 2022 ONCJ 138 at para 70.

[75] In my view, it was the omission of the Trial Coordinator's Office to act on or to follow up on the trial scheduling forms that prolonged the case and not the lack of diligence by counsel.¹⁷¹

Beyond being operated and staffed with humans, the criminal justice system also has to manage adversarial actors. The accused is, in some circumstances, incentivized for the process to fail. The Supreme Court recognizes this reality in *Jordan*: "Accused persons may seek to avoid responsibility for their crimes by embracing delay, in the hope that the case against them will fall apart or they will obtain a stay of proceedings"¹⁷². Operating a dangerous system with adversarial actors demands that the system be resilient to interference or errors.

The criminal justice system is not unique in its dangerousness, nor in its complexity, nor in its dependence on human decision makers. There are other such systems and those systems recognize the need for resilience in the face of mistakes and complexity. Dr. Cook from the University of Chicago wrote his *Short Treatise on the Nature of Failure*¹⁷³ that highlighted these exact properties in the medical context but also in other complex contexts:

1. Complex systems are intrinsically hazardous systems

All of the interesting systems (e.g. transportation, healthcare, power generation) are inherently and unavoidably hazardous by the own nature. The frequency of hazard exposure can sometimes be changed but the processes involved in the system are themselves intrinsically and irreducibly hazardous. It is the presence of these hazards that drives the creation of defenses against hazard that characterize these systems.¹⁷⁴

¹⁷¹ *R v Lapin*, 2022 ONCJ 551 at para 70.

¹⁷² *Jordan*, *supra* note 2 at para 21.

¹⁷³ Richard I. Cook, "How Complex Systems Fail: Being a Short Treatise on the Nature of Failure; How Failure is Evaluated; How Failure is Attributed to Proximate Cause; and the Resulting New Understanding of Patient Safety" (2000) online at: <https://how.complex systems.fail>.

¹⁷⁴ *Ibid.*

The entire treatise is only 18 paragraphs and it is very much worth studying. It highlights the need for trained human operators and that the safety of the system is a feature of the entire system, not the individual components. His key point regarding resilience is that single points of failure are anathema to safely operating complex systems:

3. Catastrophe requires multiple failures – single point failures are not enough

The array of defenses works. System operations are generally successful. Overt catastrophic failure occurs when small, apparently innocuous failures join to create opportunity for a systemic accident. Each of these small failures is necessary to cause catastrophe but only the combination is sufficient to permit failure. Put another way, there are many more failure opportunities than overt system accidents. Most initial failure trajectories are blocked by designed system safety components. Trajectories that reach the operational level are mostly blocked, usually by practitioners.¹⁷⁵

The criminal justice system in Canada and specifically the case management system are complex human systems. There will inevitably be mistakes. Those mistakes should not be catastrophic. I propose then, that a significant trait associated with the “goodness” of a case management system is its resiliency – its ability to continue to function in spite of errors or failures occurring within it.

These four measures of quality are all essential features of a functioning pre-trial system. They lie in a balance with each other and any adjustments or decisions relating to changing the system should consider all of them. The complexity of this balancing act is very high. Scheduling problems by themselves are difficult to optimize even before they also include considerations of justice, fairness, and efficiency. The next chapter looks at how we manage that complexity with the ways we abstract away aspects of the problem and how those abstractions can be misleading. It will also take a short detour through computational complexity as a way to understand why this is such a hard system to maintain.

¹⁷⁵ *Ibid.*

Chapter 6

Complexity

So far, I have used some variation of the word complexity more than a dozen times. That is not an accident, a lack of imagination, or forgetting about the thesaurus on my shelf. Developing cases, scheduling the rooms in a courthouse, and maintaining a fair case management system is complex. Trivializing that problem by stretching badly fit metaphors or blaming an allegedly self-evident culture of complacency¹⁷⁶ obscures the necessity and difficulty of maintaining this complex system.

The goal of this chapter is to make it easier to understand how efficiency and processes interact and how changes can have non-intuitive consequences. It will provide a framework for understanding how complexity grows non-linearly in certain classes of problems, including those that are encountered in the case management system. This growth is not intuitive. Complexity, in the case of systems like this, is a proxy for efficiency and, under fixed resources, for performance.

The last several chapters argued that the contemporary criminal justice system exists under historically unique pressures. At no time were any of the earlier versions of the criminal justice system as complex as it needs to be today. Our legislative structure has left extensive discretion to hundreds of judges, justices of the peace, and court administrators in hundreds of different regions, but has also done little to recognize the issues they need to

¹⁷⁶First observed by the Supreme Court in *R v Jordan supra* note 2. Since then, it has been quoted hundreds of times across the country.

wrestle with or provide them with the resources to wrangle them.

This chapter centres on three things. First, I provide some formality towards a definition of “complexity”. I do lean into a bit of math from the domain of computer science. If that is alarming, take comfort that this is mostly going to take the form of tales about travelling salespeople, playing cards, and a heritage clock workshop. I explain how case management is a collection of problems that often scale non-linearly and are objectively hard. This provides a basis for comparing and understanding the observations that are made in Part [III](#). Second, I explore the metaphors, mental models, and abstractions that are often used to try to reduce this complexity into manageable, brain-sized pieces today. These metaphors can be as dangerous as they are useful, and when they are misapplied there can be consequences. Finally, I build my own metaphor that I will leverage to explore these concepts. This metaphor, one of a heritage cuckoo clock workshop, more accurately reflects the complexities of this part of the justice system while still being comprehensible.

The payoff for this exploration is that it better enables the explanation of some of the problems the justice system is struggling with. The system is complex and trying to gloss over that in the wrong way can be costly. This understanding should help identify solutions that aren’t simple more investment in structures or people. Armed with a more formal definition of complexity and a basic understanding about how complexity can explode in unexpected ways allows for more thoughtful criticism of the system. In my conclusion, I argue that simplification is going to be critical to improvement. This section forms the basis of why that might be the only route.

6.1 Defining Complexity

“Complexity” is an overloaded word. The criminal law already relies on it as a measure for a wide variety of things without a well-formed definition. “Case complexity” is used to

decide eligibility for state-funded counsel¹⁷⁷. It is used interchangeably with “lengthy”¹⁷⁸ to describe the duration of a trial. In the eras of *Mills*¹⁷⁹, *Askov*¹⁸⁰, and *Morin*¹⁸¹ “case complexity” was used to determine how long was appropriate before 11(b) was breached. *Jordan*, likewise, uses “case complexity” as a weight to determine the exceptional-ness of cases that have breached the delay ceiling¹⁸². The Criminal Code leverages complexity in determining aggravating factors for fraud and criminal organization sentencing¹⁸³ and instructs judges to “hav[e] regard to the complex nature of the investigation” when deciding applications for continued detention of things seized during investigations¹⁸⁴. In each of these uses, there is an implied gradient with less complex on one side and more complex on the other, but it is otherwise very much a “we know it when we see it” definition.

For most of these examples, a formal definition of complexity is not needed and a comparative definition is adequate. The comparative exercise is effectively a “gut-check”. Additional witnesses, evidence, counsel, or accused will all contribute to the complexity of a single case. Cases or investigations with more features are more complex than those with fewer. This sort of casual definition works fine for highlighting features that judges need to consider, but it can fall apart when looking at the system to manage those cases and trying to explain the nature of this system. Without relying on the gut-check approach taken for guiding case-specific decisions, we need a different approach. There are more structured approaches to comparing complexity between systems and problems in domains beyond law. One such approach comes from the world of computer science and how it evaluates algorithmic complexity. It is a useful approach because it allow for direct comparisons between problems.

To help understand algorithmic complexity, look at two problems involving a randomly

¹⁷⁷ *Rowbotham*, *supra* note 47.

¹⁷⁸ See eg. *R v Creglia*, 2018 ONCJ 262 at para 50: “No one seriously argued this impaired driving case was complex, and I conclude it was not. The case was straightforward enough that the applicant’s first trial was scheduled for one day”.

¹⁷⁹ *Mills v The Queen*, 1986 SCR 863.

¹⁸⁰ *Askov*, *supra* note 110.

¹⁸¹ *R v Morin*, (1992) 1 SCR 771.

¹⁸² *Jordan*, *supra* note 2 at para 71.

¹⁸³ *Criminal Code*, *supra* note 115 s. 380.1(1).

¹⁸⁴ *Criminal Code*, *supra* note 115 s. 490(3)(a).

shuffled deck of cards. How difficult are the problems of 1) finding a single particular card or 2) sorting the whole deck? Intuitively, it is obvious that sorting the deck will be more difficult, how much more difficult and why it is more difficult are more challenging questions to answer. One way to think about how hard the problem is would be to count the number of cards we have to look at for each problem. As the number of cards we have to examine increases the problem would be more difficult and is a good approximation of how complex the problem is.

Finding a particular card, at worse, will require flipping through the whole deck once to find the card. If we increase the the number of cards in the deck, the problem only gets more difficult by the number of cards we add, one-by-one. It increases linearly. The problem of sorting the deck, on the other hand, requires going through the deck some number of times to put each card in order. We could come up with some clever tricks such as splitting the deck into parts before sorting the smaller sections. But, for a well-shuffled deck, we will have to search through the deck a number of times that is more than one to find a home for each card. As we add cards to the deck, it gets more difficult more quickly for each subsequent card. We have to go through the deck, which is now larger, an additional number of times depending on how large the deck is. The rate of increase for that difficulty curve depends on how clever we were with our approach to sorting them. Probably, the best case is on the order of $N \log N$, or logarithmic so it grows slower than exponential but it is not quite a straight line either. It falls somewhere in between and is bounded by those two alternatives. Figure 6.1 shows four examples of how these numbers grow for different orders.

There are catalogues of problems and offices of mathematicians looking at the complexity of these sorts of problems. Computer science students are peppered with questions asking to find the order, or big-O notation, for a particular algorithm to solve a particular problem. The time complexity of an algorithm is a function that defines how difficult a particular problem is to find the correct solution. One of the critical breakpoints for these sort of algorithms is exponential time or where the time to solve the problem scales $O(2^n)$. For

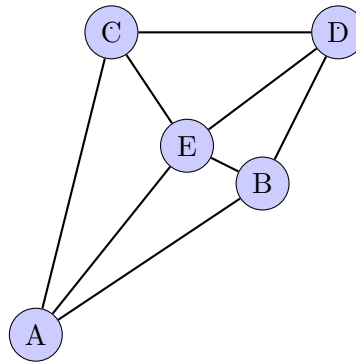
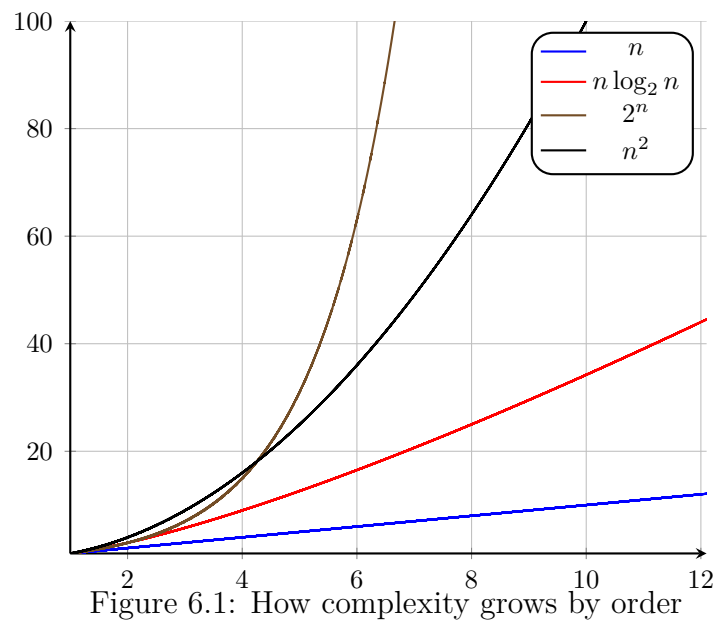


Figure 6.2: Simple Travelling Salesman Map

these problems, as the number of possible states increases, the time to find an ideal solution grows exponentially.

6.1.1 The Travelling Salesperson

Likely the most famous example of an exponential-time problem is the problem of a travelling salesperson. In this problem, we have a map of cities with roads of varying length between each. We need to find the shortest route for the salesperson that visits each city only once. Obviously, no-one wants to see the salesperson more than once. For the map in figure 6.2 with 5 cities, you could probably trace through each of the solutions and find the shortest by hand.

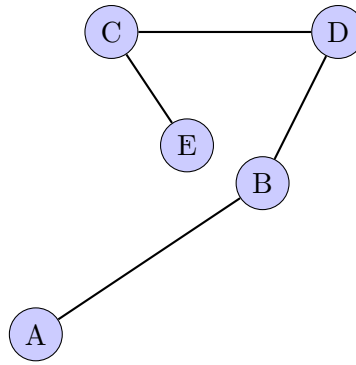


Figure 6.3: Simple Travelling Salesperson Solved Graph

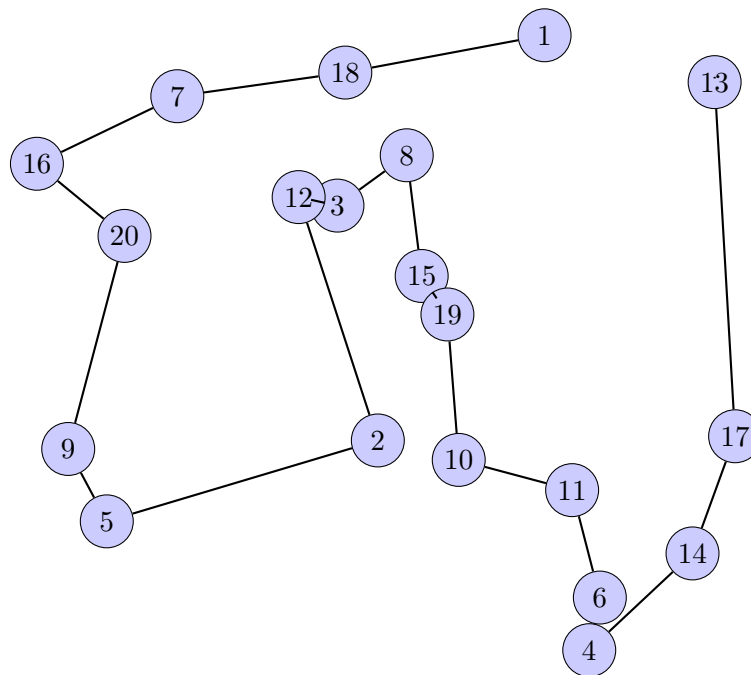


Figure 6.4: Larger Travelling Salesperson Solved Graph

Figure 6.3 shows what such a solution might look like if the scale of the diagram was approximately accurate.

With 5 cities there are only 12 possible routes to check. If there were 10 cities instead, the number of possible routes balloons to 181,000. With 20 cities, the number of possible paths is roughly 10,000,000,000,000,000. See figure 6.4 for an example of what one path looks like. It does not appear, at first glance, like the number of possible paths is that large but it is truly astronomical.

Explaining the problem of the travelling salesperson is fairly simple. It would not be out

of place as a puzzle on the back of a family restaurant place mat. For small numbers of cities finding the perfect solution is possible. But, as the number of cities grows, finding the correct solution becomes extremely difficult. When you get to larger numbers the problem explodes and even efficient solutions become out of reach. In the example above, doubling the number of connected cities only twice resulted in the number of possible solutions growing by a factor of a million-billion. Finding and confirming perfect solutions becomes very difficult. Even finding good-enough solutions to this family of problems has consumed decades of time for computer scientists. This family of problems is called a combinatorial optimization problem, and a number of familiar problems translate into them. If you have ever tried to create an annual large Secret Santa exchange without any cycles of people receiving gifts from the person they are assigned to give gifts to, you have tried to solve a simplified version of the travelling salesperson problem.

6.1.2 Scheduling Complexity

So what does a travelling salesperson have to do with understanding and maintaining the case management process in Canada? It is a concrete, well-studied, easily explained example of a problem where the order, or **complexity**, of the problem explodes as the inputs increase. The case management process, as it is now, takes several of this family of problem and stacks them on top of each other.

The scheduling of variable-length criminal trials into a limited number of courtrooms where a particular judge needs to sit every day is a routine action in case management court. This problem seems manageable for small numbers of cases, days, and judges. But like our poor salesperson, efficient solutions get extremely hard to find as the number of those things increase. If we knew some of the details, we might even be able to calculate the order of this problem. Thankfully, though, we do not need the details or the math. As I mentioned, there are catalogues of these problems. This type of scheduling problem

is a cousin of the classic partition problem¹⁸⁵ – a well explored problem where finding the perfect solution requires exponential-time. Scheduling the trial, however, is only one feature of case management. Recall that case management requires scheduling judicial pretrials, counsel pretrials, bail hearings, and next appearances. It has to consider the technology in the courtrooms, the judge’s schedule, the timelines in the rules, and the availability of counsel. Each time it adds a new event to schedule, it creates a new problem to solve where finding an optimal or near-optimal solution is objectively hard.

When we move from simply scheduling variable-length criminal trials (which, as examined above, is already a complex issue) to all of the essential pre-trial stages and processes there is even more complexity to consider. What about the overall problem of developing a case, stepping through all of the prerequisites (like disclosure, or legal aid) for all of the stages, the various participants that need to be involved at each step and their schedules, and the time it takes for them to complete their own individual tasks? This is, of course, the core function of the criminal law pre-trial case management process. And, there is another, well studied problem-family that it can be abstracted to. It could be described as a job-shop optimization problem where there are a number of jobs that require different, independent actors to work on the job before it can complete. Computer scientists would describe it as follows:

There are n jobs that have to be performed on m unrelated machines; in our case, every job consists of m nonpreemptible operations. Every operation of a job uses a different machine during a given time and may wait before being processed.¹⁸⁶

The time-complexity of finding optimal solutions to job-shop scheduling problems are almost always exponential time¹⁸⁷ for non-trivial examples. Just like the travelling salesperson

¹⁸⁵For an excellent introduction in accessible language see: Brian Hayes, “The Easiest Hard Problem”, *American Scientist*, Volume 9, No 2 (2002).

¹⁸⁶Taillard, E, “Benchmarks for basic scheduling problems” (1993) 64:2 *European journal of operational research* 278–285.

¹⁸⁷Gromicho, Joaquim et al, “Solving the job-shop scheduling problem optimally by dynamic programming” (2012) 39:12 *Computers & operations research* 2968–2977.

problem, looking for an optimal solution for this class of problem is, even computationally, very hard.

This means that, algorithmically speaking, even establishing the flow of pre-trial case management is a complex and difficult problem. All of this measurable complexity is stacked on top of underlying priorities that are themselves difficult to measure. Case management is a collection of exponential-time problems that are sprinkled with a generous serving of intangible objectives. If it is already hard to optimize a single scheduling problem, then optimizing that scheduling problem while ensuring the underlying priorities of equal access to justice, fair treatment, and efficient use of resources is an even more difficult problem. Recall that these problems seem tractable with small numbers of features and explode as features are added. Features like additional hearings, additional accused, more case load, prerequisites, courtrooms, or technological requirements all explode the difficulty of finding an efficient way to schedule the system.

Before returning from the domain of time complexity to the more concrete and limestone arena of the courthouse, there are two aspects of these scheduling problems to highlight that prevent this from being a completely intractable problem for criminal courts. The first is that while it might be **very hard** to find a perfect solution to problems of this type, finding good enough solutions can be much easier both practically as well as mathematically. A good enough solution will be some distance from the ideal solution, but we can aim to minimize that distance while maintaining the ability to reason about the system. The second thing to recognize is that this scheduling is done, in some fashion, with some degree of success, in every court around the country. While on sterile paper, it is an impossible problem to solve; it is solved every day in hundreds of regions across the country by a dedicated army of judges, clerks, lawyers, and administrators. These courts are not yet completely buried under the complexity of an objectively difficult problem. They manage this mean feat by simplifying the problem through heuristics and abstractions. They use strategies to simplify the problem, they make reasonable guesses, and they try to bring down the size of the

problem to a manageable level. The next part will discuss some of these strategies.

6.2 Abstractions and Heuristics

The justice system is not alone in trying to wrangle enormous, complex, human systems. Health care, engineering, and technological systems all have had to adapt to increasingly complex requirements and workloads. My last gig was as a software developer with a company that had an enormous, monolithic application that handled billions of dollars a year of transactions for hundreds of thousands of clients. That system was complex, important, and ever-changing. Maintaining and improving it was the work of hundreds of developers and dozens of teams. It would have been impossible for any of us to understand the entire thing and this lack of omnipotence was the source of predictable problems. While we each had detailed understandings of our own domains, we had to communicate these understandings to people who did not need those details. They needed an abstraction. These communications often took the form of metaphors and mental models. One team might explain their system as a pipeline. Another might abstract their system as a service counter. These metaphors were fundamental for teams to work together. Preserving, refining, and communicating these metaphors occupied a fair bit of the senior engineering team's time. We did not need a perfect understanding, nor did we need a perfect solution. Near-enough and good-enough solutions were sufficient to keep the system online and the interactions on time.

Case management, likewise, does not need a perfect solution. It does not need to find the most efficient possible schedule or the most timely arrangement of every hearing. It is sufficient for it to schedule hearings, communicate with witnesses, and disclose evidence in a good-enough fashion. This means that there is room for finding non-optimal solutions. The courts can leverage abstractions or heuristics to simplify the problem, and leverage metaphors to obfuscate some of the complexity. This section describes some of those heuristics and metaphors.

6.2.1 Breaking Down Case Management

The specific heuristics used in a courthouse differ from courthouse to courthouse. They are no more consistent than the culture of the staff or the construction of the building they operate within. They are used to break down the impossible complexity of finding a perfect scheduling solution to one that is good-enough and repeatable in the day-to-day workings of the courthouse. While they vary between courthouses, they tend to fall into three broad categories: grouping, guessing, and reducing.

The most common way for courts to break case management into more manageable sized pieces is to group the “thing” into subsets. Usually the “thing” is cases. The strategy could be to group cases by counsel, the existence of counsel, the name of the accused, the type of offence, or the prosecuting agency involved. Each of these groupings means that there are a fewer number of effective “things” for the court to deal with. Scheduling on the basis of having particular days for letters of the alphabet or certain times of day for represented, unrepresented, or detained people are common.

I have, somewhat uncharitably, called the second class of heuristic: guessing. This strategy involves simplifying an aspect of the process by making an informed guess about the specific feature of that aspect. While this guessing is usually based on past experience or evidence, sometimes it really is just a guess. For instance, the number of additional trials that are scheduled in an otherwise full courtroom could be based on the historical collapse rate for that region, or those types of cases. This educated guess simplifies the scheduling problem by removing the need to evaluate the likelihood of collapse on a case by case basis. Using a standard rate might not be perfect but the case-by-case approach would be impossible and risk wasting court time. Courts might also have specific durations for certain things or a regular cadence that is unrelated to the actual unresolved task. “Come back in two weeks after you have had a conversation with the Crown” is a guess about how long it will take and that guess might apply to everything from counsel pre-trials to bail reviews and client meetings.

The third large class of practice simplifies the problem through reduction or by making the problem smaller. Usually by removing cases or by removing processes. After courthouses reopened after the initial stages of the COVID-19 pandemic, the Ontario Attorney General took measures to try to reduce the caseload. Certain impaired driving offences were plead down to provincial offences.¹⁸⁸ Crown counsel were instructed to consider the COVID-19 load on the court in their evaluation of public interest: “In reviewing alcohol impaired driving cases, Prosecutors must consider the impact of the COVID-19covid 19 pandemic as an exceptional circumstance justifying the withdrawal of the Criminal Code driving offence in exchange for a guilty plea to the Highway Traffic Act (HTA) offence of careless driving.”¹⁸⁹ A number of cases were dropped or de-prioritized. It is easier to find an efficient solution with a reduced case load and the consequences of an inefficient one are lessened. Parliament has tried to combat the size of the case inventory by cutting processes. It removed the availability of a preliminary inquiry for all but the most serious offences¹⁹⁰. Reductions can also happen as a consequence of landmark decisions. Both Jordan, and Morin saw massive inventories of cases stayed¹⁹¹. A system that is shedding its load by reducing its capacity is a sign of a problem and there is a risk that those reductions can lead to unfairness and inefficiency.

In chapter 9, I examine specific examples of these strategies in three courthouses in the Eastern Ontario region and at the Calgary courthouse.

6.2.2 Bad Metaphors

Simplifying the case management system itself into manageable bits is the first half of the problem. The second is communicating the resulting process with criminal law participants. Some of these participants might be having their first encounter with criminal justice, and

¹⁸⁸Ontario, Ontario Crown Prosecution Manual, D. 39 COVID-19 Recovery, eff date: October 7, 2021, online at <https://www.ontario.ca/document/crown-prosecution-manual/d-39-covid-19-recovery>.

¹⁸⁹*Ibid.*

¹⁹⁰C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts*, 1st Sess, 42nd Parl, 2018, (assented to 21 June 2019).

¹⁹¹*Practical Guide to 11(b)* *supra* note 111 notes that both cases saw stays in Ontario in the thousands.

communicating how the system works and what to expect is important. No matter which abstraction is chosen there will be some resolution (and thus some detail) lost. Whether it is done through graphics like flow charts or, as is more common, through metaphors. Projecting the whole process into a simplified model to highlight particular aspects of it is a long-standing practice in criminal law. The most famous example of this is probably Herbert Packer's two models of criminal justice. He explains his approach to simplifying the complexities of criminal law into metaphors as abstractions from reality that are helpful in exploring changes and evolutions:

One way to do this kind of job is to abstract from reality, to build a model. In a sense, a model is just what an examination of the constitutional and statutory provisions would produce.¹⁹²

Prof. Packer leverages these metaphors, the Due Process Model and the Crime Control Model, as a means to talk about a complex, ever-adjusting process:

Neither is presented as either corresponding to reality or representing the ideal to the exclusion of the other. The two models merely afford a convenient way to talk about the operation of a process whose day-to-day functioning involves a constant series of minute adjustments between the competing demands of two value systems and whose normative future likewise involves a series of resolutions of the tensions between competing claims.¹⁹³

They are often described as the conveyor belt and obstacle course models for criminal justice. While simply describing these models does not actually simplify the system, they simplify the communication about the system and have been extremely effective at highlighting certain aspects and making it easier to reason about those aspects. Leveraging these models and the tension between them has been used as the basis of law school classes

¹⁹² *The Limits of the Criminal Sanction*, *supra* note 166 at page 152.

¹⁹³ *Ibid* at page 153.

on criminal procedure¹⁹⁴ and riffing on these metaphors is a past-time of criminal justice research and writing¹⁹⁵.

The risk of communicating in metaphors is that the properties of the metaphor need to match the aspect of the system under study. Communicating in terms of a conveyor belt for a system that requires multiple agents, priorities, and paths will ignore those agents, priorities, and paths. Take, for example, the common refrain in the Ottawa courthouse that the pretrial process is one of a train or a trolley. “We need to get this trolley back on the tracks” is a pervasive phrase from both the Crown and the bench. “This case is on the resolution track” is another. It is an easy abstraction to understand. The train (case) starts at the beginning and needs to make it to the end. There might be diversions or derailments but the train must continue tirelessly in the direction of completion, whatever completion means. Another abstraction of the progress of a single cases used in case management court is that of a dog on a leash. “I would like to keep this matter on a short leash” is not infrequently said by the Crown in Ottawa. Both of these abstractions are from the perspective of the progress of a single case progressing from start to finish.

On their face, it makes sense to leverage this type of metaphor when addressing a particular case in a busy case management court. They are projections of a complex system reduced to the view required for a single case in a busy court. That is the right unit of measure when addressing one case. But they fall short when trying to reason about the system more broadly. Trains operate within a railway and do not often compete for resources besides the track they roll upon. Cases, on the other hand compete for lawyer time, court time, and court staff. Cases rarely move linearly from start to finish, and these deviations are not unexpected derailments; they happen in just about every case of any description. As for the dog-on-a-leash metaphor. It is terrible. Even as the owner of a scruffy, black,

¹⁹⁴My first exposure to Packer’s metaphors was auditing Prof. Ewing’s excellent criminal procedure class at Queen’s University in 2022.

¹⁹⁵See eg. Roach, Kent, “Four Models of the Criminal Process” (1999) 89:2 The journal of criminal law & criminology 671–716; In *Misdemeanorland* *supra* note 25, Kohler-Hausmann convincingly crafts her own model as one of management as justice.

well-mannered terrier, it provokes uncomfortable imagery and gives the impression that the Crown is exerting extreme control, dragging a case through the system to a particular place. It is not a good look for a dispassionate and moderate Crown. A side effect is that these cases may be given shorter adjournments as a result. Whether or not this short leash helps progress cases more quickly is hardly clear and is explored more in chapter 9.

Another, more colourful, systematic metaphor that was coined by Justice Dunphy in response to the backlogs brought on by the suspension of the courts due to the COVID-19 pandemic was the “pig in a python”:

[17] ... The backlog is the mathematical result of the cascading systemic impact of cancelled scheduled hearing dates and deferred scheduling of future hearing dates occurring during the periods of total physical closures of court operations plus other periods of only partial re-opening where fewer hearings than normal were able to be processed. The resulting backlog is in the process of being worked through but, like the proverbial *pig in the python*, it will take some time before it can be considered to be fully digested.¹⁹⁶

It is useful to conveying the problem of the backlog of cases impacting every case upstream of the case while also being extremely memorable. It has been repeatedly cited and referred to in reasoning about the “ripple effect”, yet another metaphor that COVID-19 has introduced to the court system. The next part develops a metaphor that should be able to help visualize the complexity and how the people, processes, and priorities interact to create a highly complex system and assist with communication and analysis while looking at data from the real system.

6.2.3 The Heritage Clock Workshop

I propose that a better abstraction for the pre-trial case management system is a heritage cuckoo clock workshop. A workshop that builds artisan, ornate and accurate clocks with a

¹⁹⁶*R v Titus*, 2022 ONSC 3484 at para 17.

team of skilled workers. These workers might be specialists on particular parts of the clock but they all work together in the same workshop to the same ends. They want to build the best clocks that they can, as quickly as they can, without sacrificing the quality of the movement.

This model is better than the conveyor belt, obstacle course, railway, or dog-on-a-leash models for reasoning about the case management system because it captures features of this system that those models do not. It captures the intangible objectives like fairness while recognizing that efficiency is still important. The diligent carpenters building the clock are as interested in ensuring the quality of the product as they are about optimizing the speed at which they can produce clocks. The quality of a hand crafted clock is a qualitative measure, like many of the features of the justice system. It also highlights how bottlenecks can form and the downstream impact they can have. Maybe there is a particular artisan gear carver that works in the corner and everyone depends on her work. Identifying this person as a critical piece of the system is easier to understand with this picture than trying to wedge the idea of a critical path into a model based on trains, snake-digestion, or dog-walks.

Scheduling a workshop like this also shares the time complexity of the problem of scheduling cases. Both are job-shop family problems and both have exponential time complexity. Trying to find the optimal arrangement of three artisans is trivial in one room. Determining the same thing for hundreds or thousands is mind-boggling.

Finally, a shop making clocks in this fashion helps represent the human element of the justice system in the metaphor. Today, our system is not powered by unflinching robots, or large language models trained on centuries of jurisprudence. The workers building clocks in our mythical workshop match the nature of the people working daily on the court system: they are human gears in a bigger machine.

I considered several alternatives before deciding to refine the heritage clock workshop model. A factory would have been a possible stand-in. Factories are also complex systems

and are easy to tell stories about. Factories that build toasters are famous in management¹⁹⁷ and information technology circles¹⁹⁸. But justice is not a toaster. Many aspects of our system encourage a bespoke approach. Sentencing and youth justice are prime examples where balance is critical. Modern factories look for consistency, cost efficiency, and throughput above quality. Our system aims to find the delicate balance, even in the pre-trial stage.

The value of defining this explicitly is that it will simplify writing about consequences of the complexity – such as cascading failures – in the later parts of this paper without abstracting away the non-linear nature of the scheduling problem. This sort of metaphor helps make consequences clear. Wasting the judge’s time has consequences beyond a late lunch break for the clerk. It holds up a whole courtroom. Just as wasting the talented gear carver’s time is going to disrupt the whole floor. Having a window built into the wall of the workshop so that hard-working craftspeople can dump a third of the clocks out of the building because the collective workshop lacks the capacity to fully finish them is a much more dramatic visualization for the current state of affairs in Ontario than a couple of trains stopping in Slough instead of Reading.

6.3 Summarizing the Foundations of Case Management and Complexity

The criminal law case management system is complex. This chapter highlighted that complexity and defined it in concrete, comparable terms. It is a stack of exponential-time problems that explode as the number of features increase. Because it is a stack of problems that scale exponentially, simply growing the judiciary or adding a constant number of resources to the system will never be able to keep up with that exponential growth. Studying this complexity and the Canadian courts’ approach to managing it is fundamental to stemming the growth of the problem and the goal of the rest of this paper. Justice Fairburn of

¹⁹⁷Grove, Andrew S, High output management, 2nd ed. edn (New York: Vintage Books, 1995).

¹⁹⁸Kim, Gene, Kevin Behr & George Spafford, The Phoenix project: a novel about IT, DevOps, and helping your business win, 5th anniversary. (Portland, Oregon: IT Revolution Press, 2018).

the Ontario Court of Appeal called out for the same simplicity that I suggest is needed:

We must remain ever mindful of imposing more demands on an already overly burdened and complex criminal justice system. The criminal law is not calling for more complexity. If anything, it is calling out for simplicity and, most importantly, quality justice delivered with efficiency.¹⁹⁹

Before moving on to how I studied these problems in the contemporary system, I will briefly summarize this part. The first chapter drew the boundaries around the scope of the project. I am specifically looking to cover the period between the charges being laid and the trial: the machinery of the criminal justice process. I then reviewed some of the origins of this system and looked at how some of the ancestor criminal justice systems managed their case load. Largely, as expected given the lack of complexity, they did not need to manage it explicitly. The case load was small, the number of people involved was minor, and so the system was simple. That said, there are features of those simple systems that carry on today. Justices of the Peace remain central to the management of the criminal law regionally, and due process is still a central quality of the process that we aim for. I then described the stack of authorities that parliament created and how those cascade down to the system that exists today. This chapter highlighted that, while there are some explicit controls on discretion, much of the day-to-day practice of law in the pre-trial case management system is left to the discretion of the individual courts and judges themselves. Finally, I defined 4 dimensions of fitness for a pre-trial system: fairness, efficiency, timeliness, and resiliency. These 4 dimensions were taken from case law, the rules of the local courts, and from the fundamental fact that people make mistakes. In chapter 8, I describe what happens when the process fails in one or more of these dimensions. With this foundation established for how the pre-trial case management is structured in Canada, the next part moves on to studying several present-day implementations.

¹⁹⁹ *R v King*, 2022 ONCA 665 at para 183.

Part III

Studying The System

Chapter 7

Studying the System

Part II built a foundation for understanding the contemporary case management system: where it came from, how the legislation acts as an exercise in passing the buck, how to think about its quality, and finally one way to reason about its complexity. That introduction was as broad as it was because it needed to dispel some key illusions about the nature of that contemporary criminal law case management system – that it is a simple system that was carefully designed over a long period of time. These illusions probably exist because there is not yet a good discussion of the criminal case management system in Canada. It was largely left to grow organically based on a variety of historical influences and pressures, and the contemporary system shows signs of that. This part takes a detailed look at this contemporary system and how it operates on a day-to-day basis. It answers the question of: “how ‘good’ is the system that we have set up?”.

7.1 My Approach

There was no particularly well-trodden path in Canada for studying criminal case management but there is a decades-long tradition of study by US scholars in the area. Malcolm Feeley conducted his study in the 1970s²⁰⁰ by attending court in the nearest courthouse to his home in New Haven, Connecticut. Issa Kohler-Hausmann conducted her study in the 2010s

²⁰⁰ *The Process is the Punishment* *supra* note 22.

in one of the nearby New York boroughs²⁰¹. Numerous authors and journalists followed a similar path in-between these significant studies²⁰². They all found success in being in the courthouse in the region near where they lived. I considered a case law only approach but case law biases heavily towards cases failing for timeliness. For decades, adding time has been a safety valve that allowed the criminal justice system to be inefficient or to remedy unfairness. I wanted to look at a broader swath of criminal law cases, not just those that have been reported on as failing for delay, but also those that have proceeded along the “usual” path for criminal cases.

Chapter 8 examines two failed cases that find the roots of their failure in how they were case-managed. That chapter carefully examines two very different cases that failed in similar ways. It also highlights some judgments where the judges are obviously frustrated, angry, and candidly despondent about the state of case management in these courts. These judgments and these two selected cases in-depth motivated the classes of data that I collected in-person and requested from government databases.

With Chapter 8 taking a vertical view of a small number of cases from end-to-end, the next step is to collect the data I identified in that chapter for as large a sample of cases as possible. In Chapter 9, I describe what criminal case management court looks like on-the-ground and how it differs between the four courthouses that I observed. This is mostly done through an empirical qualitative study of the appearances in those courts. Case management courts are the best window to how cases are managed available to the public because they are the only public view of the progress of the cases in these courts.

The final chapter in this part tackles the implied question: what is the capacity for change? The COVID-19 pandemic shutdown some courthouses for months at a time and interfered in scheduling hearings, appearances, and trials. The pandemic forced massive adjustments in the case management process while courts were grappling with these shut-

²⁰¹ *Misdemeanorland*, *supra* note 25.

²⁰² See eg. Bach, Amy, *Ordinary injustice: how America holds court*, 1st ed. (New York: Metropolitan Books, 2009) or Bogira, Steve, *Courtroom 302: a year behind the scenes in an American criminal courthouse*, 1st ed. (New York, NY: Alfred A. Knopf, 2005).

downs, the ensuing backlog, and associated uncertainty. It was, in a sense, an experiment without the ethical dilemma. The system changed dramatically as a result of the pandemic and some of the changes that the administrators thought made the system better have been kept. Chapter 10 examines those changes in various regions around the country and how those changes survived the return to “normal” operations. These changes, directives, and the accompanying fallout provide a unique insight into what happens when a black swan event²⁰³ catastrophically breaks the system and how it repairs itself.

7.2 Known Blind Spots

There are some blind spots in this study that find their root in planning the study with some humility in being an outsider to the system and some risk aversion to overloading my ability to collect data.. There is a temptation, and maybe even a cognitive bias, to overestimate one’s own understanding of a new and complex system because of expertise in a different complex system. There are experts in operations research that quietly work in these courthouses. There is a small army of statisticians scattered across the country that consistently and without any fanfare provide data analysis on the mechanations of the criminal case management system. There are clerks and administrative staff who have spent their careers maintaining these systems and working within these courtrooms. To that end, I tried to avoid falling into any sort of Dunning-Kruger-like trap by overestimating my own expertise.

One direct consequence of this approach was the choice to exclude certain specialized courts or case-streams. I avoided specialized intimate partner violence (IPV) (called domestic partner violence in some jurisdictions) courts as a result. This is a gap in the research. These courts are high volume and breakdowns are disastrous to the victims, accused, and families. There is no indication in the case law that the situation in these courts is more consistently

²⁰³Black swan events are improbable but inevitable catastrophic events. Taleb, Nassim Nicholas, *The black swan: the impact of the highly improbable*, 2nd ed., (New York: Random House Trade Paperbacks, 2010) is a pop-science coverage of the term.

good. However, the transcripts are more difficult to obtain, and keep. There are dimensions to measuring the fairness of the process in these courts that extend beyond those of other offences. My opinion is that the process in intimate partner violence courts deserves its own investigation focusing on them exclusively. My baseline study here would not be able to give that added complexity the analysis that it deserves.

Similarly, I also avoided specialized Indigenous courts. These courts are inconsistently spread around the country and are still finding their feet. Like IPV courts, they also tend to have a more nuanced set of priorities. Examining and comparing case management in Indigenous courts would also certainly be worthwhile but I was not able to do that in this study.

I also focused on numbers as observation as opposed to anecdotes. Studying how to make the criminal justice system measurably better means measuring it. Whether that means comparing the measures that exist over time or collecting new statistics. Anecdotes are plentiful in large volume systems and relying on them can be emotionally impactful²⁰⁴ but does not highlight systemic failures especially in large-volume systems. There is an anecdote for every theory because there are so many cases travelling through the system at a time. If the system is starting – as I allege – to break down systematically, then the individual stories would be useful for highlighting the consequences of those failures but not for actually fixing the problems. This does mean, however, that some of the human impact of these failures are buried in bar graphs.

Finally, pre-charge screening has been pitched as one possible solution to the volume in criminal courts²⁰⁵. I am skeptical of the claim, but testing it would require studying pre-charge screening jurisdictions and comparing them to other jurisdictions. The first challenge is that this would inject a fair bit of complexity and risk into the study. It would double

²⁰⁴Perrin, Benjamin, *Indictment: The Criminal Justice System on Trial*, first edition. (Toronto, Ontario: University of Toronto Press, 2023) is an example of a recent justice system study that centrally relied on anecdotes and interviews.

²⁰⁵See eg: Department of Justice, *Charge Screening Practices and Crown Evidentiary Thresholds in Canada: A report prepared for the Steering Committee on Justice Efficiencies and Access to the Criminal Justice System*, 28 November 2023 at page 112.

the number of jurisdiction I need to visit and it would mean having two distinct streams of data. The second issue is that raw data from the charge screening process is hard to come by. The charge screening system, with the exception of published statistics, is comparatively opaque. Unlike first appearance court, there is no office that you can sit in and watch a Crown prosecutor decide whether or not to approve a charge.

Having confessed these blind spots, the next chapter dives deeply into two cases that failed catastrophically. Chapter 8 examines two cases and their court records in detail, from first appearance to the eventual stays and some of the aftermath. This helps frame the data in Chapter 9 and provides a broad, concrete description of how pre-trial case management often works.

Chapter 8

Pathological Cases

There are a lot of criminal cases that are obvious failures. Over the past 4 years, I have reviewed well over five hundred judicial decisions on the issue of timely justice. Not all of these cases were stayed, but all had stretched past or near-to the Jordan limit. This section reviews, end-to-end, two such obviously failed cases where those failures can be attributed to the case management process that was followed. The goal here is not to provide two anecdotes to support “this is how bad it can be”, but instead to look at the details of two bad-fact cases and use those to identify dimensions of case management that should be examined in order to better understand the problem. This chapter explains how cases are case managed over their entire life cycle using the information from the court’s case file, as well as the transcripts from all of the appearances in case management.

These two cases from Ontario represent different classes of case management problems with wildly different underlying facts. *R. v. Aden*²⁰⁶ is a case of attempted murder in Toronto during a period of problematic gun violence. *R. v. Hillier*²⁰⁷ is a case involving a protest in Ottawa where a Member of Provincial Parliament was charged with mischief and obstruction. The case reviews are, candidly, a bit of a grind to read. There are a lot of dates. There are lengthy periods of time during these cases where little actually happened that are only separated on the page by the space between two paragraphs. There are more

²⁰⁶ *R v Aden*, 2023 ONSC 766.

²⁰⁷ *R v Hillier*, 2024 ONSC 6300.

details than might typically be included in a case summary of cases stayed for unremarkable reasons. But these details are important. This grind is the real experience of any accused person whose case is winding through the case management process. Those mundane details and 90 second court appearances²⁰⁸ make up the majority of the interaction that most people accused of crimes will have with the justice system until the date of their trial, their plea, or their charges are withdrawn. To really capture the experience of the accused person, one would need to read a paragraph, take a two-week break, and then read the next one. I do not suggest that approach.

R. v. Aden highlights the unfairness of custody and the consequences of fragility in a case that failed after over three years. *R. v. Hillier* examines how serial aspects of the system, those aspects that prevent other progress from being made on the case, can derail the case for months at a time. It also, through the examination of the individual appearance transcripts, shows how easy it is for the case to be handed off to the next person with the hope that it will progress the next time.

8.1 *R. v. Aden* - Attempted Murder in Toronto Stayed for Delay

The case of *R. v. Aden* is remarkable for the severity of the charges, the fragility of the process that caused the case to fail, the unfairness that failure spawned, and the farcical way that it concluded.

[1] Ismail Aden is charged with attempted murder, aggravated assault, discharging a firearm and several firearm possession offences, it being alleged that he and his co-accused ambushed a man and shot him several times, causing serious injuries. Mr. Aden's trial is scheduled to begin on June 19, 2023 and end on July 7, 2023, 39 months and 23 days after he was first charged.²⁰⁹

²⁰⁸As discussed below in chapter 9, 90 seconds was roughly the average appearance duration in Ottawa. I do not have data for Toronto, but based on the transcripts in *Aden*, that seems like a reasonable estimate.

²⁰⁹*Aden*, *supra* note 206 at para 1.

Mr. Aden was never convicted. The charges were stayed as a result of a violation of his right to a trial in a reasonable time. This lack of conviction needs to be highlighted before reviewing how this case proceeded through the case management process. These allegations remain **only** allegations. I will make no comment on the strength of the evidence which was never tested.

8.1.1 The Allegations and the Context

The allegation, among others, was that Mr. Aden on or about the 13th day of March in the year 2020 at the City of Toronto in the Toronto Region did attempt to murder Kevin Kusi by discharging a firearm, contrary to Section 239, subsection (1) of the Criminal Code of Canada²¹⁰.

The story told by the prosecution is that on March 13, 2020, Mr. Kusi was returning home to his apartment on Falstaff Avenue in Toronto. As he entered the lobby, two masked men armed with firearms shot at him twenty-two times. He was struck 5 times and spent 6 months in hospital recovering²¹¹. Evidence was collected from the lobby. There was security camera footage of the shooting. There was allegedly evidence seized from a mobile phone. The gun and the getaway car were both found during the investigation. As far as prosecutions go, this was fairly limited in scope. There was a single scene, there were no eye witnesses that needed to testify, the evidence was all forensic, circumstantial, or video.

This shooting happened at a time when gun violence was a constant and chronic issue in Toronto. 2019 saw a record number of incidents of gun violence²¹² and there was media attention on the growing problem²¹³. At the provincial level, the government was focused on combating the problem and much was written in media and by stakeholders about how

²¹⁰ *Ibid* (Indictment charge 1).

²¹¹ *Ibid* (Para 8 of Crown factum on 11(b) application).

²¹² Tom Cardoso, “Toronto sees record number of shootings in 2019, but fewer deaths”, *The Globe and Mail*, (1 January, 2020) online at: <https://www.theglobeandmail.com/canada/toronto/article-toronto-sees-record-number-of-shootings-in-2019-but-fewer-deaths/>.

²¹³ US news was even taking notice. See eg. David McGuffin, “In Canada, Gun Violence Is A Growing Problem For Toronto”, *National Public Radio*, (3 January 2020) online at: <https://www.npr.org/2020/01/03/793257323/in-canada-gun-violence-is-a-growing-problem-for-toronto>.

to address it²¹⁴.

The judiciary was equally emphatic in their efforts to rein it in. They used strong terms in sentencing gun violence crimes and spoke frequently in decisions on the need to condemn it. Justice Akhtar condemned it as a cancer that blighted the city in 2018:

[21] Gun crime has become a cancer in Toronto. Despite several years of case law condemning the offence, the possession of firearms remains a blight on the city and its residents. Guns are made and used to maim, threaten and kill. Their impact goes well beyond the victims of such crime: spouses, romantic partners, parents and children suffer the trauma of a loved one lost to the mindless violence wrought by the use of firearms.²¹⁵

It was called a scourge²¹⁶ and a plague²¹⁷ within other courts in the region. For the judges of the courts, gun violence was intolerable:

Severe or exemplary sentences must continue to be imposed in order to clearly signal and reinforce to the public at large and to the criminal community that resort to the use of prohibited handguns for unlawful purposes will not be tolerated in our society and in our City.²¹⁸

In summary, this case was at the very top of the seriousness spectrum during a time with laser-like focus on gun violence. The evidence was fairly straightforward. There were no wiretaps. There were no competing witnesses or novel science. This was not a large-scale project with a legion of accused people – just two. For most purposes, it was as straightforward a case as a case could be in terms of its prosecution. And yet, the case management process failed in every measure.

²¹⁴Ontario, Office of the Premier, *Ontario Combating Gun and Gang Violence*, (16 November 2021) online at: <https://news.ontario.ca/en/release/1001174/ontario-combating-gun-and-gang-violence>.

²¹⁵*R v Thavakularatnam*, 2018 ONSC 2380.

²¹⁶*R v Gibb*, 2020 ONSC 3548 at para 30.

²¹⁷*R v Camara*, 2019 ONSC 115 at para 47; *R v Biya*, 2018 ONSC 6887 at para 43.

²¹⁸*Ibid* at para 34.

8.1.2 The Process

As I mentioned, retelling these appearances is not an exciting endeavour. Judges, when writing Jordan decisions, often leverage tables to distill the years of intermittent progress down into a couple of pages of a three-column table, one column for the date, one for the event, and the last for the amount of time to be counted as delay. That is useful for counting the passage of time, as needed to decide section 11(b) applications. This section in this chapter, however, is analyzing the root causes of the failure to help frame the data that I have collected in the next chapter. The devil is in the details and the details are exposed in the mundane. These are the mundane details of why this serious, high-priority attempted murder case failed.

Several days after the shooting, on March 14, 2020, Mr. Aden was arrested. He made his first appearance while in-custody over the weekend in Weekend and Statutory Holiday (WASH) court, on March 15, 2020. There were 5 appearances before his bail hearing on April 3, 2020. It took two additional appearances before the bail decision was delivered on April 8, 2020. On April 9th, his ninth appearance in court, there was a 10 week adjournment to allow for all disclosure to be provided to defence by the Crown. Six weeks pass before defence counsel is retained. Initial disclosure is provided on June 5, 2020, 9 weeks into the 10 week adjournment²¹⁹.

I will briefly interrupt the retelling to highlight this pattern of activity clustering around the end of an adjournment period. This is a common pattern in the case law and one that I will highlight in the court observation below. There seem to be two possibilities. The first, more optimistic option, is that adjournment periods are estimated accurately for the amount of work and the turn around time for that work. Alternatively, the work happens as the deadline looms. This less optimistic tickler system has been noted with some derision by the provincial court in Ontario:

²¹⁹Dates and events are taken from the application record, including transcripts of the individual appearances, for the application for a stay. *Aden*, *supra* note 206 (Defence Application Record).

[30] In this case, the Crown's office appeared to struggle with providing disclosure from the beginning. The initial package provided at the first appearance did not contain any video evidence, civilian evidence or even a complete police witness list. Further disclosure was often not sent out until after scheduled set dates or pre-trials. It appears from the record before me, that the court dates and pre-trials were a tickler system for the Crown.²²⁰

Moving back to the process in Aden, there were 3 emails requesting disclosure, 6 partial disclosure packages, and 2 court appearances between June 5, 2020 and October 22, 2020, a period of 14 weeks. On October 23rd, 2020 the Crown makes an application to unseal the information to obtain (ITO) so that it can be disclosed²²¹. This request is critical because up until the second trial date it was not completed and the first trial date went by without it even being disclosed. The story of getting this ITO disclosed is one of the problems that flowed throughout the lifespan of this case. The first judicial pre-trial is scheduled at that appearance for November 12, 2020. A little less than 8 months have passed, disclosure is not complete, there has been no effective judicial intervention. Mr. Aden is in-custody and is appearing approximately on a monthly basis in court.

These court appearances are usually very brief and are mostly entirely devoid of meaningful progress or direction. Here is the entire transcript of the October 22, 2020 appearance as it would have appeared to Mr. Aden²²²:

CLERK REGISTRAR: Sir at the Toronto South, can you please give us your name?

ISMAIL ADEN: Ismail Aden.

CLERK REGISTRAR: Thank you.

²²⁰ *R v Turcios*, 2024 ONCJ 628.

²²¹ ITOs are 'sealed' preventing them from being disclosed or revealed, for instance, by asking for them at the criminal counter. It is common practice to unseal them for disclosure after the search has been conducted.

²²² I have omitted a conversation about which line number his case was listed on the docket as before he was called upon.

THE COURT: Sir, this is the Justice of the Peace – hold on, Justice of the Peace speaking, just for identification purposes in addition, can you state your birthdate, sir?

ISMAIL ADEN: September 1st, 2001.

THE COURT: Okay, thank you, that’s what I have on my docket. And we’ll let duty counsel speak on the matter. Is there a message from counsel for this gentleman?

MR. DAVIDSON: There is, Your Worship. Counsel is Ashley Dresser. Ms. Dresser advises that there important disclosure that they had been waiting for which has recently been received. Counsel is addressing it. Will have a Crown pre-trial and will be meeting with Mr. Aden and hopefully have a judicial pre-trial set up prior to the next court date. She is proposing an adjournment by video to November 26th, 202 court and she wants Mr. Aden – she wanted Mr. Aden to appear since he doesn’t have an opportunity to call her very often, so she wanted him to know the status of the case. So November 26th, 202 by video.

MS. NEVIN: That’s agreeable, Your Worship.

THE COURT: Can I just – okay, thank you, I just wanted to hear from Ms. Nevin our assistant Crown attorney and she’s agreeable. So at your lawyer’s request, Mr. Aden, I am remanding you to November 26th next, in this courtroom, 202 court by video remand to be spoken to. Thank you.

ISMAIL ADEN: All right.²²³

Duty counsel says that counsel for the accused wanted them to appear personally to communicate the status of the case.

“...she wanted Mr. Aden to appear since he doesn’t have an opportunity to call

²²³ *Aden*, *supra* note 206 (Official Transcript, 22 October 2020).

her very often, so she wanted him to know the status of the case.”²²⁴

That is, at best, problematic. The reason behind his inability to contact counsel is never expanded on in this case. It is impossible to know why communication for Mr. Aden was difficult. Whether it was something particular to his situation or a general problem is not explored in the transcript or anywhere else in the record for this case. That said, there is a lack of surprise by the sitting justice and there are frequent complaints by defence lawyers that there are problems with talking to clients. In Ottawa, not the jurisdiction of this case, the refrain from defence of: “<client-name> call me after the appearance so we can talk” probably happens about five or ten times a day. The reality is that difficulty in communicating with persons in-custody is widely known, and routinely ignored²²⁵. The Canadian Civil Liberties Association published a report that highlighted the problem with some dire warnings from counsel on the ground about this issue:

So, the easiest thing to do is just to make this someone else’s problem tomorrow... But so many times I see that person come back again tomorrow and be adjourned again. There is no pixie dust. There’s no lawyer waiting for them at the courthouse... We’re adjourning people, but we’re not helping people. We’re just kicking them into the system and saying, ‘Good luck.’ ²²⁶

Also note that the involvement of the Crown in moving **their** case forward consists entirely of four words: “That’s agreeable, Your Worship”. This phrase is said so often in the case management courts that I sat in and the case transcripts that I reviewed that it would not be out of place on the crest for the Ontario Crown’s office in Ottawa or Toronto.

The next period is an example of **churn**. Nothing happens at appearances 15, 16, 17, or 18 between December 3, 2020, and January 21, 2021. Each appearance was before a

²²⁴ *Ibid.*

²²⁵ Myers, Nicole M, “The bail process is both the trial and the punishment: Surveillance and control without the burden of conviction” (2025) 58:3 Journal of criminology (2021) pages 466–484 at pages 3 and 29.

²²⁶ Canadian Civil Liberties Association, “Still Failing: The Deepening Crisis of Bail and Pre-Trial Detention in Canada”, (2024), online: https://ccla.org/wp-content/uploads/2024/04/CCLA_Bail-Report-V2.pdf at page 29.

different Justice of the Peace and instructions were either not left for duty counsel or they were lost.²²⁷ The proceedings for each appearance can be summarized as follows: Mr. Aden appears. **He is asked** if he knows anything about the progress of his case. He answers in the negative. The Crown searches in *SCOPE*²²⁸ for information and the case is adjourned for a week to get instructions. This was the pattern on each of these 4 appearances. On February 25, 2021 defence counsel confirms the dates of the preliminary inquiry for April 21, 2021²²⁹. Roughly 13 months have passed since Mr. Aden was arrested. Disclosure is not complete, including the aforementioned information to obtain that was requested in June of 2020²³⁰. On May 7th, 2021 the case leaves provincial court when Justice Di Zio commits Mr. Aden to stand trial²³¹.

Initially, the case moves through the Superior court with some urgency. The first appearance in Superior Court case management court²³² is on June 4, 2021. There is a judicial pre-trial four days later on June 8, 2021. The judge noted the lack of complete disclosure. Potential trial dates are discussed in advance of the return date of June 11, 2021 but that conversation does not finish in time for the appearance. So on June 11, 2021 it is adjourned again to June 18, 2021. On June 18, 2021 a 7-day trial is set for December 6, 2021 with a trial confirmation date of November 5, 2021²³³. This is a lead time for trial in Superior court of about 5 and a half months. Neither the Crown nor the defence note in the application record any progress or communication between June 18, and November 5 2021, the trial confirmation date²³⁴.

Trial confirmation appearances are typically check-in appearances with little substance. In theory, they are meant to force the parties to check that they are ready for trial and to

²²⁷ *Ibid* (Official Transcripts, 3 December 2020, 10 December 2020, 14 January 2021, 21 January 2021).

²²⁸ *SCOPE* is the Ontario Crown's computer system for tracking cases and appearances.

²²⁹ *Ibid* (Official Transcript, 25 February 2021).

²³⁰ *Ibid* (Defence Application Record, Tab E29).

²³¹ *Ibid* (Official Information, Defence Application Record, Tab B).

²³² The Toronto region Superior Court case management court is often called "practice court"

²³³ Dates are taken from the defence application record, including transcripts of the individual appearances *Ibid* (Defence Application Record).

²³⁴ *Ibid* (Defence Application Record, Tab E).

confirm the nature of the hearing. Here is the relevant portion of the appearance for Mr. Aden:

MS. DRESSER: Good morning, Your Honour. It's counsel Ashley Dresser for Mr. Aden. I apologize that my video is no[t] on, I'm just in transit to the courthouse at the moment. Mr. Aden is in custody at the Toronto South Detention Centre. I am not sure if the jail is aware he should be appearing by video today or not.

MS. CULP: Ms. Dresser, I don't believe that he's appearing by video today. I'm wondering if it's – if you're content that we deal with it with a discretionary bench warrant.

MS. DRESSER: Absolutely. I saw him this week and advised what would be happening today. So, Your Honour, on behalf of Mr. Aden we are prepared to confirm the trial date on December 6. There is a potential s. 9 Charter motion that the defence would be filing which we are not filing, and I have advised Ms. Bradstreet, the assigned Crown, as such, and so from our position we're ready to go.

THE COURT: You're ready to go and you're not filing a previously anticipated or contemplated s. 9 motion, is that, is that right?

MS. DRESSER: Correct.

THE COURT: Okay. Good. And Mr. Abshir's counsel, Mr. Goldman, you're ready to go?

MR. GOLDMAN: Yes, Your Honour, ready to go.

THE COURT: And the Crown.

MS. CULP: Same here, Your Honour, ready to go.

THE COURT: Okay. Well, that sounds like a trial confirmation to me. This matter will go....²³⁵

²³⁵ *Ibid* (Official Transcript, 5 November 2021).

Ms. Dresser, Mr. Aden's counsel, confirmed there would be no section 9 application and that they were "ready to go". Mr. Goldman from the prosecution also, somewhat alarmingly, confirms that they are "ready to go". They are not.

Between the readiness hearing and the trial date there is a flurry of activity behind the scenes. The Crown disclose on November 17th, for the first time, that they will bring a disreputable conduct application. Disclosure packages are created and disclosed on November 21, 2021 and November 25, 2021. On November 26, less than a week before the first trial date, the Crown discloses download data from Mr. Aden's phone. Phone download data that had been available since May 2021, before the first appearance in Superior Court.²³⁶

The first trial date of December 6, 2021 is cancelled on December 2, 2021. This disclosure had been available since May of 2021 to the police. The Crown begrudgingly acknowledges some fault:

[15] Ten days before the trial was scheduled to commence, the Crown was made aware that Mr. Aden's phone download was ready. Upon review of that download, it was clear that the data had been available in May 2021 and that the OIC had failed to pick it up. It would be an understatement to say that the Crown was shocked given its numerous requests for this disclosure. Recognizing the magnitude of what had transpired, the Crown immediately alerted counsel for Mr. Aden (and Mr. Abshir) upon learning of this development. Efforts were made to ensure the disclosure was provided as soon as possible.²³⁷

This is a good break point to reiterate the case status. It has been over 19 months since Mr. Aden was arrested. There have been 25 in-court appearances. Disclosure remains outstanding, including the aforementioned ITO that has been requested since June, 2020. The prosecution has, somewhat understandably, had to change their approach to the case as the police continue to drip disclosure to them. Mr. Aden is still in custody.

²³⁶ *Ibid* (Crown Factum on the 11(b) application, para 15).

²³⁷ *Ibid* (Crown Factum on the 11(b) application, B293).

After that missed trial date the case churns again. The police officer in charge of the case is replaced with, what the Crown calls in their own factum, “a more diligent officer”²³⁸. Further requests are made by the defence for the ITO for the phone. The back and forth concerning ongoing disclosure continues until June 3, 2022 with the final package of disclosure being delivered by the Crown to the defense. This ends the disclosure part of the story. In summary, fundamental disclosure continued until 6 months **after** the first trial was meant to have concluded.

Returning to the case management process, the next flurry of appearances start on December 10th, 2021 to schedule the second trial date. The availability of the judges and courtrooms for the summer months of 2022 are not available until the new year so the case is adjourned until January 2022 to wait for that schedule. The case churns on January 14, 2022 without any progress but on February 4, 2022 the next trial date of August 2, 2022 is set for a nine-day trial. The case is adjourned until April 19, 2022 so that the court can check-in again on disclosure and find out the nature of any applications that might be brought by either side. On April 19, 2022 the co-accused’s lawyer advises the court that there is going to be a change of counsel²³⁹.

On May 13, 2022, the 10th appearance for case management in the Superior Court, counsel for the co-accused is officially changed and new counsel is not available for the recently set trial date. This highlights another factor when considering case management. The wrinkles and complexity brought by multiple accused on the same information. Recalling how complexity scales from chapter 6, the increase in inefficiency for scheduling the additional counsel is exponential compared to a single one. That is, scheduling that fourth person is probably four times more difficult than scheduling the third. This plays out in open court here when the second counsel’s schedule is less flexible than the first.

Dates were kept open for months hoping for the assigned Crown’s trial to collapse but it never did. The judge in the 11(b) application noted that succinctly in the decision.

²³⁸ *Ibid* (Crown Factum on the 11(b) application, para 16).

²³⁹ *Ibid* (Defence Application Record, tab D).

[58] Efforts were made over the following months to obtain earlier trial dates.

They were unsuccessful.²⁴⁰

On July 6, 2022 there are eight exchanges of possible dates and eventually a three week trial is scheduled for June 19, 2023 with a trial confirmation date of January 11, 2023. This is an 11-month [lead time](#) for the next trial date. The trial would have ended “39 months and 23 days after he was first charged.”²⁴¹

On July 28, 2022 the case appears in Jordan court. This is a special court intended to specifically address cases that were risking going over the Jordan deadline.

There were additional court appearances on September 29, 2022, October 25, 2022, and November 7, 2022.²⁴² These represent the 16th, 17th, and 18th court appearances in Superior Court. There were some judicial pre-trials and emails in the background looking for earlier dates but the best hope is that a matter assigned to the Crown in January would resolve. It did not.

At the 18th and final case management appearance, the matter is adjourned from November 7th, 2022 to January 6, 2023 for the section 11(b) motion. The application was heard on January 6, 2023 and was granted on January 31, 2023. There were 19 appearance in the Ontario Court of Justice and 18 appearances in the Ontario Superior Court of Justice. That is, 37 case management appearances between the arrest and the eventual conclusion. This does not include all of the trial dates, preliminary dates, judicial pre-trials, or other meetings. There was never a trial. Mr. Aden was released from custody on January 31, 2023.

8.1.3 The Dimensions of Failure

The process that took this case took through Toronto’s case management courts is not especially unusual but it was still a spectacular failure. Every dimension: fairness, timeliness,

²⁴⁰ *Ibid* at para 58.

²⁴¹ *Ibid* at para 1.

²⁴² *Ibid* (Defence Application Record, tab D).

efficiency, and resiliency; it failed every one.

First, looking to the fairness of the process and the possible result. There were three unfair features that the pre-trial process spawned here: the process itself was unfair, the result was unfair, and it skirted catastrophic unfairness at trial should the first trial have gone ahead.

The process itself being unfair meant that Mr. Aden spent over 3 years in custody at a provincial detention centre. The fact of his detention is, arguably, not itself unfair. Mr. Aden had a bail hearing and he was detained. There were review hearings into his detention as the case progressed. But, as was made clear in the case management hearings, he had difficulty communicating with his lawyer while he was detained. The case management process itself was used in place of communication with counsel. This harkens back to the early days of criminal justice in Canada where the accused sat in the gaol waiting for the travelling justice to arrive, without disclosure of the evidence and while having to pay a nickel for even a copy of the charges²⁴³. A process that allows this to happen is inherently unfair.

There are also some perverse side effects of such a long pre-trial detention. There are few, if any, programs available to people in provincial remand centres²⁴⁴. Provincial jails are notoriously overcrowded²⁴⁵ and Mr. Aden's detention overlapped with the COVID-19 pandemic. The unfairness is amplified when the charges are stayed after such a long period. When someone is sentenced after a conviction to over three years in custody a portion of that will likely include time on parole. Parole is not available when someone is released after a charge is stayed and there are no programs available in Ontario for people released after charges are stayed for delay. Mr. Aden walked free after the charges being stayed with no more than what he was arrested with, three years older than when he was arrested.

The result was unfair to the victim and to the community at large. There was no trial on

²⁴³Criminal Code 1892, *supra* note 82, s. 597 & s. 654.

²⁴⁴"...conditions in remand centres tend to be particularly harsh; they are often overcrowded and dangerous, and do not provide rehabilitative programs." *R v Summers*, 2014 SCC 26 at para 2.

²⁴⁵See eg. Ontario, *Ombudsman Annual Report 2024-2025*, (2025) at page 5; Or any sentencing decision where the person was held in custody in Ontario in the past 10 years.

the merits and there never will be one. There was no opportunity for the court to, once again, condemn gun violence or to evaluate the evidence if it was lacking. Failure of the machinery of criminal justice like this undermines the confidence in the system and continued failure rots it.²⁴⁶

Finally, had the first trial gone ahead, it would have gone ahead while critical evidence – the cell phone messages – sat in a locker somewhere deep within the bowels of the Toronto Police Service. This evidence was available and ready to be picked up for months. It was fortune rather than prudence that uncovered the missing disclosure and brought it to the defence. The process had not managed to provide complete disclosure before the first trial date. The ITOs has still not been unsealed. Case management failed a core function: to prepare the case for trial. It was an unfair pre-trial process that would have resulted in an unfair trial.

Looking briefly to the second dimension – timeliness – it is obvious that the case failed to bring about a timely resolution. It exceeded, without excuse, the upper bound that the Supreme Court defined in *Jordan* of 30 months. It is a more interesting question to ask: “where did that time go”? Some of the time was lost in scheduling. Some was lost to churn. Initially, it may seem like the blame lies exclusively with the officer in charge that failed to deliver the disclosure but that single mistake exposed the underlying fragility of the system. The lead time to get the second trial was nearly a year. It had already taken a year to get the case from provincial court, through to the preliminary hearing. Another handful of months were lost when the assigned Crown was unable to reschedule another important trial and no other Crown could take on the case. The failure to conclude this case in a timely fashion was the result of a fragile system running at capacity, such that there were oversized impacts from not-unexpected events.

Disclosure delay and complications is a common problem in the courts, at least in Ontario. It is routinely a breakdown in communication between police and the Crown about necessary

²⁴⁶ *Jordan*, *supra* note 2.

and available disclosure. In staying a sexual assault for delay Justice Waby of Toronto noted that this disclosure breakdown is a routine problem:

[54] The lack of reasonable and necessary steps being taken by the police resulted in an initial 12-month delay in the receipt of key, pre-existing and readily available video disclosure. This delay was then compounded by the revelatory disclosure of a further video witness statement on the first scheduled date of the original trial that was taken 5 months previously and which resulted in additional delay.

[55] I echo the comments of judicial colleagues in this jurisdiction who have previously expressed their concern and frustration at the current state of affairs with respect to the lack of timely disclosure and its impact on our justice system. Policing is a challenging and increasingly complex task but it is about more than simply the effective prevention and detection of crime. It necessarily involves the appropriate and timely provision of disclosure. The work does not stop once the handcuffs are applied to an accused person. The disclosure process may not be glamorous, but it is critical work without which our justice system cannot function.²⁴⁷

You would expect such an overloaded system to try to make itself more efficient. The classic management phrase is to “do more with less.” But the management of the Aden case was unarguably inefficient. There were 18 appearances in provincial court and 19 in superior court. There were no fewer than 6 judicial pre-trials. There was a scheduled trial that collapsed mere days before it started. That is a seven sitting-day block of time that was booked for a trial that did not take place, where this block of time will be difficult to reclaim. The second trial of nine-days was cancelled months in advance because the co-accused changed counsel. The metaphor of a case being on a track falls apart in situations like this. There are ripple effects to cases failing that cross into the operation of other cases

²⁴⁷ *Tsering*, *supra* note 128 at paras 54-55.

in the system and those effects are difficult to measure. This case is no different. It consumed resources far beyond what the result would suggest would be needed. How many, or which cases were impacted by the cancelled trial dates and extensive process might be unknowable.

8.1.4 The Farcical Fallout

Following the judicial stay, in July of 2023, there was a complaint made by the victim of the shooting, Mr. Kusi, to the Office of the Independent Police Review Director (OIPRD) alleging misconduct on the part of the officer who failed to pick up the phone extraction data.²⁴⁸ A bureaucratic oversight of giving notice in an appropriate time window resulted in the complaint being stayed for delay. The initial complaint was investigated and the Chief of Police for the Toronto Police Service said that the complaint was founded but not serious. Mr. Kusi asked the OIPRD to review the decision that it was not serious and they directed the Chief to conduct a hearing having found that the misconduct was, in fact, serious. The Chief failed to comply with the timelines of the Police Services Act for providing notice to the officer involved. In December 24, 2024, four and a half years after the shooting, the complaint was dismissed for that period of delay.

I find in the review of the case law submitted that section 83(17) does apply in this case. Section 83(17) does not provide a limitation, but a triggering of a pre-charge process to determine if the delay is reasonable or not. This process allows both the officer and the Public Complainant to make submissions to the Board on the reasonableness of going past six months. In this matter the OIPRD chose not to seek such an application after the six-month time frame had passed.²⁴⁹

The failure of a civilian complaint due to the timing of an administrative notification is a fitting complement to the Kafkaesque case management process that failed to try a gun-related, attempted murder case in Toronto during a time when gun violence was a prime

²⁴⁸ *Toronto Police Service v. Police Constable Andrea Chalmers #8146*, (24 December, 2024), Case number: 18.2024, Toronto Police Service Discipline Hearing (Unpublished).

²⁴⁹ *Ibid* at page 23.

focus. The next section examines a case where it was alleged that a minister of provincial parliament committed mischief and obstructed police officers during protests in Ottawa in 2022. It too was stayed for taking too long, but the root causes for this delay are less certain.

8.2 *R. v. Hillier* - High profile Mischief Stayed for Delay

The second case that I review in detail is remarkable for the profile of the circumstances surrounding the alleged offence in the community as well as the profile of the accused person as a Member of Provincial Parliament. The summary by the Ontario Superior Court describes the case as stemming from the “Freedom Convoy” protests in Ottawa in early 2022:

Randall Hillier stands charged with two counts of mischief, three counts of counselling to commit an indictable offence, three counts of obstructing a peace officer, and one count of assaulting a peace officer. Police swore the Information on March 28, 2022. The charges emanate from Mr. Hillier’s alleged participation in the “Freedom Convoy” that took place in Ottawa’s downtown core during January and February of 2022. A four-week judge and jury trial is scheduled to commence on January 27, 2025. The total delay is just shy of thirty-five months.²⁵⁰

This case, like *R. v. Aden*, took too long to complete, at nearly 35 months, and was stayed for that delay. That stay was then appealed and, as of writing, the case continues, more than four years later. But the sequence of events is very different from that of *R. v. Aden* and the contrast between the two is telling of the different ways the case management system can break down. The Hillier case did not fail for the lack of diligence of the police or the Crown. Instead, the progress of the case stalled behind bottlenecks, synchronous processes, and apparent judicial indifference.

²⁵⁰ *Hillier* (11b), *supra* note 207.

8.2.1 The Allegations and Context

In early 2022, a convoy of protesters arrived in Ottawa to protest, among other things, the government's response to COVID-19. After several weeks, the protest was dramatically dispersed by aggressive police intervention. An investigation into the protests that lasted about a month resulted in charges being laid against Mr. Hillier for his alleged involvement in the portion of the protest that was illegal²⁵¹. There are two disclaimers before getting further into the allegations. At the time, I lived in Ottawa about 10 city blocks from the centre of the protest. I could hear the protest from my porch. My review of this case is not about the validity of the protest, their message, or methods; it is only about how this case was managed through the courts leading up to the eventual stay. I will also reiterate, as I did for *R. v. Aden*, that none of the allegations have been or ever will be tested in court. Mr. Hillier was never convicted and the evidence was never tested.

The prosecution alleged that during the protest Mr. Hillier committed two counts of mischief over \$5000, three counts of counselling to commit mischief, three counts of obstructing a peace officer, as well as assaulting a peace officer. The indictment provides no other information particularizing the charges. The best version of the Crown's theory of the case comes from the decision on a prior discreditable conduct application brought by the Crown towards the end of the process. In that decision, Justice Parfett, describes the Crown's accusation as follows:

[25] The theory of the Crown is that the Freedom Convoy may have started as a legitimate protest, but it was ultimately declared illegal. Consequently, those persons who continued to occupy downtown Ottawa were engaging in criminal mischief by interfering with the lawful enjoyment of individuals' property. According to the Crown, Mr. Hillier was an active participant in the now illegal protest. Alternatively, it is their theory that he aided and abetted the participants.

²⁵¹ *Ibid* (Crown Factum page 1).

[26] The Crown states that the proposed evidence relates to three specific issues at trial, including the following: intent (*mens rea*), party liability, and narrative. The Crown argues that the evidence of the rallies demonstrates a pattern of behaviour in which Mr. Hillier defied authority and encouraged others to defy the regulations. The evidence also indicates that Mr. Hillier had a significant following in Ontario such that his statements on social media in relation to calling the police and encouraging people to keep coming to Ottawa and join the Freedom Convoy would have had a much greater impact than comments from a less public figure.²⁵²

Mr. Hillier was among a group of people that were charged in relation to the protest but he was charged separately from any of the other participants. On March 28, 2022 the charges were laid after Mr. Hillier turned himself in and he was released on bail that same day.

8.2.2 The Process

The case management process that kicked off on March 28, 2022 finished nearly 3 years later with a judicial stay as a result of Mr. Hillier's right to be tried in a reasonable time being denied. There were struggles from the outset of this case with disclosure, complex scheduling, and judicial indifference to delay. I will not step through each appearance in the the process, as I did with *R. v. Aden*, for brevity, so instead I will highlight those key appearances in the provincial court and will summarize the problems that this case encountered in the superior court.

As mentioned, Mr. Hillier was charged on March 28, 2022²⁵³. He was released with the consent of the Crown on the same day. The bulk of disclosure was provided on April 6, 2022 with a number of exceptions. The key exception was the video evidence taken from security

²⁵² *R v Hillier*, 2024 ONSC 5028.

²⁵³ *Hillier (11b)*, *supra* note 207 (Indictment).

cameras on Parliament Hill. This disclosure became a sticking point for Mr. Hillier that lasted 7 months.

This case churned in case management court without progress, signs of progress, or intervention to aid with progress until November 2022. Mr. Hillier's counsel argued that he was unable to have a productive conversation with the Crown until the missing disclosure was provided. This decision was confirmed as legitimate at the eventual Charter application hearing and this 7 months was counted against the Crown. For the first handful of appearances the justices took an optimistic, hopeful tone month after month that there would be some development that would cause the case to become unblocked. On May 4, 2022, at the first case management appearance, the court notes this "expectation" with a direction to schedule the pretrial as follows:

THE COURT: The expectation is that you receive that disclosure in a timely fashion, sir, you are to schedule a counsel pretrial with instructions as well too, okay?²⁵⁴

The case is then adjourned over for a month. At that next appearance, on June 8, 2022, the court takes a "hopeful" tone towards moving the case forward while again adjourning the case for over a month:

THE COURT: Thank you. So the matter for Randall Hillier will adjourn to July 20th, Number 14 Court at 8:30 a.m. and that's to allow for the disclosure to be provided and then hopefully that's provided and a counsel pretrial can be held in the interim as well.²⁵⁵

Mr. Hillier's lawyer and the Crown met shortly after that appearances to discuss outstanding disclosure but, as the transcript make clear, nothing else. The Crown has yet to raise any objection to the adjournments. A month and a half passes to July 20, 2022 where

²⁵⁴ *Ibid* (Transcript, 4 May 2022, line 28).

²⁵⁵ *Ibid* (Transcript, 8 June 2022, line 19).

the court adjourns the case another month suggesting if they can do a counsel pre-trial (CPT) they should:

MR. ANBER: This is a matter, Your Worship, where there's an extensive amount of additional disclosure that's outstanding. To this end, Mr. Whiteman, who is the assigned Crown and I conducted a CPT related to disclosure on June the 9th and we went item by item, and I think we reached agreement over most of those items, and so we continue to await those items.

THE COURT: So when would you like to come back, 17 or 24?

MR. ANBER: August 24, please.

THE COURT: For missing disclosure. Thank you, sir. And of course CPT, if you can do it.²⁵⁶

On August 24, 2022 the prosecution breaks from their persistent indifference and asks for the case to be scheduled for a judicial pre-trial.

THE CROWN: The Crown would like to set a JPT to move this matter forward. It's the Crown's position that the absence of these two items does not hinder the defence ability to participate in a JPT.²⁵⁷

Defence counsel is not ready for the JPT as they lack the disclosure to have meaningful counsel-to-counsel conversation about how the case should continue.

MR. ANBER: And so certainly I endeavour to try and work with Mr. Whiteman to resolve that quickly, but that needs to be reviewed before I can have a substantive CPT with him.²⁵⁸

The court responds to the impasse with hopeful anticipation and a little bit of rock and roll:

²⁵⁶ *Ibid* (Transcript, 20 July 2022, line 14).

²⁵⁷ *Ibid* (Transcript, 24 August 2022).

²⁵⁸ *Ibid*.

THE COURT: ...Though, Mr. Anber, I do anticipate that when it comes back at that time we're ready to rock and roll, that all these issues have been, have been dealt with.²⁵⁹

Another month and a half pass until the next appearance on October 12, 2022. Over six months now have passed since Mr. Hillier was arrested. He remains on strict conditions and there remains video evidence outstanding from Parliament Hill. The court remains "hopeful" that the disclosure will be provided and that counsel will have their long awaited meetings. The justice adjourns the case for another 6 weeks. The Crown does not raise any objection:

THE COURT: Thank you. So, Mr. Anber, why don't you follow up with Mr. Whiteman, have a CPT and hopefully you'll get the video and have a JPT, we'll return on November 30th.²⁶⁰

Before the 6 weeks are up, the Crown brings the matter back into court to try to force action. In the background, the last tranches of disclosure were provided on October 12th 2022, immediately after the case management appearance, and on October 22nd 2022. This appearance, on October 28, 2022, is two weeks later. This time, it is the Crown assigned to the case that speaks to the matter and takes the position that disclosure is complete enough to have an effective judicial pre-trial. When the court looks to schedule a judicial pre-trial, counsel is not available for at least a month.

THE COURT: You're aware, obviously, the, the court runs JPT almost every day of the week.

MR. ANBER: Yes.

THE COURT: And so we'd have availability almost any day starting next week onward. But you're saying between — you, you need to deal with the recent

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid* (Transcript, 12 October 2022).

disclosure and restrictions on your schedule that the first available dates are November 28th and 29th?

MR. ANBER: Yes, in light of the steps that need to take place in order to respond to the charges, I was suggesting the 28th and 29th are available to me.²⁶¹

The two reasons that counsel gave for the month delay was their own scheduling conflicts and the need to review the recent disclosure with their client. As far as the public information goes, that judicial pre-trial happened on November 28, 2022 and then 4 days later, on Friday, December 2, 2022, the case left the provincial court as Mr. Hillier elected to be tried by a judge and jury in the Ontario Superior Court.

This case is a near-perfect example of what it looks like for a case to churn in case management court. The pleading, hopeful language from the bench, the disagreement as to whether or not disclosure is complete *enough*, and an uninvolved Crown reviewing case notes and context on-the-fly; they all point to a process that fails to rein in runaway cases. It took about 8 months to conduct the first judicial pre-trial and to pin down an election. It only took 4 days to move the case to superior court after that election was made.

The case continued to flounder in the Superior Court phase. While there is still some churn, there were not nearly as many case management appearances. The key issue, instead, is how a serialized process, especially if it is unusual or complex, stalled the system for an extended period of time. In this case, it was a change of venue application that blocked any other progress.

Mr. Hillier brought an application for a change of venue arguing that there was pervasive and institutional bias in Ottawa that would prevent a fair trial from happening there. Justice London-Weinstein summarized that position as follows in her decision that eventually denied the application:

The Applicant argues that pervasive bias exists not only against him individually, but also that there is pervasive and institutional bias in the Ottawa community

²⁶¹ *Ibid* (Transcript, 28 October 2022).

that the Freedom Convoy protest met the elements of the offence of mischief. He points to the fact that significant portions of the Ottawa citizenry are named as plaintiffs in a civil lawsuit against participants of the Freedom Convoy protest.

He argues that the bias cannot be remedied by any other means.²⁶²

Note that the application was initially brought on April 12 2023, and the aforementioned decision was made on September 25, 2023. The intervening period of about 6 months can safely be described, based on the application record for the delay application²⁶³, as completely devoid of any progress. The reason for the lengthy void in the development of this case is that all other processes were made dependent on the outcome of this change of venue application. No pre-trials were held. No trial dates were secured. No disclosure was clarified.

The first change of venue application was brought and summarily dismissed in a single-paragraph decision²⁶⁴. Two days later, the Supreme Court released *R. v. Haevischer*²⁶⁵ that held that applications in criminal cases should only be summarily dismissed if they are manifestly frivolous. The next 5 months were spent rescheduling, redoing, and redeciding the change of venue application.

Sometimes situations like this are described as bottlenecks, but that does not accurately capture the problem. A bottleneck, like a closed lane in the highway, slows the progress of cars but there is still movement. This change of venue application was completely blocking all progress in the case. It acted more like a power outage at the clock shop that I discussed in chapter 6. No-one could do any work on any aspect of the case until the change of venue application was dealt with. These serialized, blocking processes seem to be fairly rare, I saw very few of them while observing provincial court. But when they emerge, they can rain chaos. Especially, as in this case, when they do not go entirely to plan. For Mr. Hillier, it meant that his case spent 9 months in Ottawa's Superior Court only to decide that it should stay there.

²⁶² *R v Hillier*, 2023 ONSC 5374 at para 3.

²⁶³ *Hillier (11b)*, *supra* note 207 Defence Application Factum.

²⁶⁴ *R v Hillier*, 2023 ONSC 2557.

²⁶⁵ *R v Haevischer*, 2023 SCC 11.

The final lesson from this case is the relevance of lead time for lengthy cases. On December 7, 2023 at a self-represented judicial pre-trial, a 4-week jury trial was set to end on February 21, 2025²⁶⁶. This is a lead time of over a year to start a trial. That appearance was itself over a year and a half from the initial arrest. The trial would have been a full three years removed from the end of the protest that this charge related to.

On November 14, 2024, roughly 8 weeks before the trial was set to start Justice McVey found there was over 30 months of unexcused delay and granted the stay application:

[105] The total day is 1061 days. Sixty-five days is defence-caused delay and must be deducted from the total. A further forty days shall be deducted on the basis of exceptional circumstances. This brings the total net delay to thirty-one months and thirteen days.

[106] The net delay is over the 30-month Jordan ceiling. As a result, the application is granted. The charges against Mr. Hillier are stayed.²⁶⁷

8.2.3 The Dimensions of Failure

I will not dig in again on the fact that this case took far too long. That is obvious. What is more interesting is how the different actors framed that delay. This difference in framing plays out daily in case management courts, as the next chapter details. The Crown framed the problem of timeliness as if they were helpless in the face of defences counsel's resistance. In their factum they referred to the conduct of the defence in regard to that video disclosure as "at worst, a delay tactic, and at best, a contribution to the culture of complacency denounced in Jordan"²⁶⁸. The judge found differently. Crucially she found that the disclosure requested was essential and so refusing to meet with the Crown was a fair position for the defence to take:

²⁶⁶ *Hillier (11b)*, *supra* note 207 (Transcript 7 December 2023).

²⁶⁷ *Ibid* at paras 105-106.

²⁶⁸ *Ibid* (Crown Factum para 36).

[27] Counsel responded on August 28, 2022, and advised the Crown that the Parliament Hill video was “crucial” disclosure to Mr. Hillier’s election and needed to be received before next steps were taken. With respect to the other items of outstanding disclosure, counsel fairly conceded that they were not critical, and that the matter could proceed without them. Counsel consistently maintained his position that Mr. Hillier could not make an election without viewing the Parliament Hill video.

[28] Counsel received disclosure of the video on October 26, 2022. At that time, despite other disclosure remaining outstanding, counsel obtained instructions and Mr. Hillier formally made his election on December 2, 2022. Given that counsel had many months to discuss the state of the case with Mr. Hillier before receiving the video, in my view, Mr. Hillier’s election could have been made even earlier. However, I am not prepared to find that five weeks in the circumstances was necessarily unreasonable.²⁶⁹

The debate about whether there has been *sufficient* disclosure is, as I discuss in the next chapter, a common occurrence in case management courts that I observed.

This case demonstrates how difficult measuring efficiency would be if exclusively examining cases that fail. If we imagine that there is some “unit of justice” done when the justice system completes a case, then the efficiency of that system would be the amount of time and resources invested per “unit of justice” delivered. The efficiency of *R. v. Hillier*, and all such cases, is undefinable since the time spent in court is divided by the zero “units of justice” that were delivered. But justice is not a toaster. We need to consider how much time is spent on the cases that fail since, in this limited, human system, cases are always going to fail sometimes. This case, in particular, required 5 reported decisions and 16 court appearances. There was 4-weeks of jury trial time cancelled roughly 90-days beforehand. There were 3 judicial pre-trials with counsel and 2 self-represented judicial pre-trials in the

²⁶⁹ *Ibid.*

Ontario Superior Court²⁷⁰. There were no fewer than 4 full days of pre-trial hearings, one for the 11(b) application and no fewer than 3 for the venue change application.

Finally, there were two critical, stand-alone events that effectively undermined the resiliency of the case management process. As with *R. v. Aden*, disclosure was an issue that remained unresolved for months and blocked all other progress such as pre-trials or an election. In this case, the missing disclosure was known about by both the prosecution and the accused, and it was disclosed when the prosecutors obtained it. The process however was entirely stalled and the ensuing fight about whether it was essential to hold a pre-trial pushed paused on progress in the case for months. There was never an application over the disclosure from either party and none of the sitting justices took an active role in managing the issue except to hope that it would be solved and to ask for movement before the next appearance²⁷¹.

Likewise, the entire process again ground to a halt in the face of a change of venue application. No judicial pre-trials were held while that application was pending. No trial dates could be set. It acted like a power outage for the case and for nearly 8 months the case waited for the lights to come back on.

Unlike *R. v. Aden*, there is no Kafkaesque follow-up story. The judicial stay received some media attention, with CTV, CBC, and the Ottawa Citizen running stories.²⁷² That was about the extent of it for the next 15 months. Then, in March of 2026, the Ontario Court of Appeal granted the Crown's appeal and ordered a new trial.

²⁷⁰ *Ibid* (Crown Fractum, Appendix A).

²⁷¹ *Ibid* (Crown Factum, page 18).

²⁷² Ken Warren, "Convoy protest charges against ex-MPP Randy Hillier stayed due to delays", *Ottawa Citizen*, (15 November 2024), online at: <https://ottawacitizen.com/news/local-news/convoy-protest-charges-ex-mpp-randy-hillier-stayed-delays>; Dan Taekema, "Randy Hillier's convoy protest charges stayed due to court delays", *CBC*, (15 November 2024), online at: <https://www.cbc.ca/news/canada/ottawa/andy-hillier-convoy-protest-charges-stayed-1.7384487>; The Canadian Press, "Ex-Ontario MPP Randy Hillier sees 'Freedom Convoy'-related charges stayed over delays", *CTV News*, (15 November 2024), online at: <https://www.ctvnews.ca/toronto/article/ex-ontario-mpp-randy-hillier-sees-freedom-convoy-related-charges-stayed-over-delays/>.

8.2.4 The Appeal and Decision

Four years after the alleged events that formed the basis of the charges, the Ontario Court of Appeal, on March 20, 2026, sent the case back to the Superior Court. They found that the delay did **not** breach Mr. Hillier's section 11(b) rights. The wheels of justice grind slowly, they grind fine, and they occasionally start rolling again more than a year after they ostensibly stopped.

On its surface, the decision reads like a fairly standard 11(b) appeal. The appeal court did an accounting of the case management process's timeliness and there was a disagreement from the panel on how the trial judge apportioned the delay. They found that the day-counting should have been otherwise and they changed the result. In this case, the appeal judges found that when the trial judge apportioned time between the Crown and the exceptional circumstance of the SCC decision, that she ought to have apportioned that time period entirely to the exceptional circumstance:

[86] The application judge made no finding about the extent to which the justice system could have mitigated this period of delay, whether or not the Crown had taken the additional "reasonable steps" she prescribed. Nor did she make a finding as to whether any portion of this period represented chronic institutional delay. As noted, her conclusion that the release of Haevischer and the resulting need to reschedule the change of venue motion amounted to a discrete exceptional circumstance was an implicit rejection of defence counsel's submission that the delay during this period constituted "institutional" delay.²⁷³

Basically, the court said that the Superior Court decision mistakenly counted 3 months incorrectly. They decided that when the summary dismissal of the change of venue application had to be revisited, the time to schedule that re-hearing constituted an exceptional circumstance and should be excluded. With that delay exempted from the *Jordan* calcula-

²⁷³*R v Hillier*, 2026 ONCA 202 at para 86.

tion, the case had taken less than the boundary 30-months and should have gone to trial on the merits. So far, this is a very typical 11(b) appeal. The wrinkle worth exploring is that they found that the judge ought not to have apportioned the delay as she did because she had not found that “chronic institutional delay” played a role in that period of 3 months.

They decided that because the Crown had acted with some urgency, the judge implicitly found that there was no “chronic institutional delay” responsible for this delay. 3 months to schedule a new hearing was not long enough on its own to apportion the exceptional period in this case. It is a bit of a strange chain of reasoning, and I believe that it is going to take some interpretation from the courts below. But, while *Jordan* says that along with the absence of prejudice, chronic institutional delay cannot be relied upon to justify a period over the *Jordan* limit²⁷⁴, the Ontario Court of Appeal here has said that absent “chronic institutional delay” or Crown heel-dragging apportionment is never correct.

[86] ...As noted, her conclusion that the release of Haevischer and the resulting need to reschedule the change of venue motion amounted to a discrete exceptional circumstance was an implicit rejection of defence counsel’s submission that the delay during this period constituted “institutional” delay.²⁷⁵

This is, as the court notes, consistent with their other decision on exceptional circumstances:

[87] This court has consistently upheld decisions fully deducting discrete exceptional event delay in cases where there is no suggestion the justice system could have mitigated the delay or did not try to do so ...or where there is no evidence that some part of it is attributable to chronic institutional delay.

...

²⁷⁴*Jordan*, *supra* note 2 at para 81.

²⁷⁵*Hillier (appeal)*, *supra* note 273 at para 86.

This court has never imposed an apportionment of discrete event delay, i.e., to ascribe some portion of it to institutional delay, in the absence of a finding to this end in the court below.²⁷⁶

The suggestion is that defence applicants, where exceptional circumstances are argued, are expected to prove that “chronic institutional delay” played a role in the length of the delay caused by that exceptional circumstance. The process for doing so, the evidence required, and the boundary for “chronic” is left as an exercise to the reader. This all betrays some of the hidden complexity of the supposedly simple deadlines that *Jordan* looked to define.

This is probably not the end of the story of *R. v. Hillier* but it is the end of this section. The case has continued for years and, as of writing, it will be heading back into Superior Court case management in Ottawa. The case management system has had to manage a surprise decision from the Supreme Court and months of delay relating to a video tape from Parliament Hill among the standard fare for a criminal case. While it makes for a good story, it also illustrates areas deserving of broader study, such as the nature of “chronic institutional delay” and the process for catching disclosure problems.

8.3 Going Wide - What Data is Needed?

This chapter picked two cases from a pile of hundreds of cases that have been stayed for delay over the past several years and examined the details of that failure. Each failed for the same top-line reason, lack of timely justice, but underneath they had different pressures and circumstances. For both, it was the underlying case management that broke down, very slowly and over a series of varying and not-unexpected events. Understanding how those processes work on a day-to-day basis requires more than reviewing only the failures and will require broader study.

R. v. Aden and *R. v. Hillier* both helped define some of the data that the next chapter analyzes. The first is to look at is churn: How many appearances simply do nothing but

²⁷⁶ *Ibid* at para 87.

set a new date in these courts? The second is scheduling: How long in advance are these court booking hearings, or pre-trials? The third is efficiency: How are the courts spending that time if not catching these problems? The fourth, and perhaps most obvious, given the two cases reviewed above, is disclosure: How often is disclosure the sticking point before the next step in the case?

To answer these questions, the next chapter presents data that was collected from thousands of appearances in case management courts in the eastern region of Ontario. It also compares that data to a smaller data set from Calgary.

Chapter 9

Case Management Court Day-to-Day

The last chapter took a vertical look at two cases through their entire life cycle. That view provides a narrow, slit-like view into the criminal case management system but this view is distorted. Both of those cases were examined in isolation from any of the other hundreds of cases that were in progress at the same time in those courthouses. They also both failed in the same way, timeliness. Studying the system exclusively in this narrow way is like following the perspective of a single clock on the shop floor that you know ahead of time is getting dumped out the window. From that perspective, the shop floor might as well be a tunnel from the front door to defenestration. But from the perspective of someone trying to help the shop floor craft better clocks, the floor is still a hive of activity. Likewise, the criminal case management system handles thousands of cases in parallel. These cases interact, they intersect, and they interfere with each other. A broader, horizontal perspective can draw a less distorted picture. Getting that broader perspective means looking at cases at every stage and looking for cases that conclude in a variety of ways. There are two publicly-available windows into criminal case management for this sort of view: access to information requests and the case management courtroom. This chapter looks at data collected from the courtroom.

The case management courts that I observed are essential. There were moments of judicial brilliance, fundamental Crown exercises of discretion, and human empathy snowed-

under by a mountain of tedium, needless meetings, schedules, and appearances.

I observed court in the east region of Ontario for 4 months and took detailed observations for 27 sitting days in Ottawa, 7 sitting days in Perth spread over 4 months, and 7 sitting days in Kingston spread over 4 months. This resulted in collecting data on roughly 3400 appearances in Ontario. I then went to Alberta and spent 10 days in Calgary's case management courts taking down the same data. In Calgary I observed over 1100 appearances.

This chapter is broken into 3 sections. The first section explains the data collection process and describes the data that was collected. The second section analyzes data about individual appearances to look for insights about the nature and quality of those appearances. This includes looking at the duration of these appearances, the numbers of them, and how those appearances complete. The third section looks more broadly at the data for insights into the processes and systems themselves and their quality. It covers the number of actors involved on a daily basis, the cadence of the system, as well as looking at this data for insights into lead time to schedule various events. The last section of this part analyzes that data against the four measures for the quality of the system. What does the data that I collected say about the timeliness, fairness, efficiency, or resiliency of the system as it was operating at the time.

9.1 Data Collection

Provincial case management court in Ottawa starts at 8:30 am in a small courtroom on the bottom floor of the Ottawa courthouse, far from the entrance, number 14. Since the COVID-19 pandemic interfered with in-person court operations in 2020, the case management court also starts at 8:30 on a video conference meeting streamed live from that same courtroom. It runs five days a week in Ottawa for provincial offences and one morning a week for federal offences. I attended these case management courts for three months in 2023 and have revisited them occasionally since then.

I also attended two other courthouses in Ontario in the same region as Ottawa: Perth

and Kingston. Perth operates its case management court one day a week and Kingston usually two days a week. Both were streamed on video conference with a mix of people online and in-person. Finally, I spent two weeks in Calgary observing the process there in-person in early 2024. They have at least two case management courts per day, one for in-custody and one for out of custody matters, as well as a special intimate partner violence case management court that runs one day a week. By the time I was in Calgary, they were almost entirely back to being in-person with rare remote appearances.

I chose Ottawa because I lived near the courthouse and practiced there earlier in my career. Perth and Kingston are differently sized regions that sit in the same Eastern Ontario judicial region. Finally, I chose Calgary because it shares a similar population to Ottawa so it should see a similar case volume.

My practice was to attend virtually if I was collecting data. If I attended in-person, I did not take down granular data but instead watched for matters to get transcripts of and to pay more attention to the process and the people involved. Calgary was the exception where I attended in-person and also took down data.

I collected data at the [grain](#) of the individual appearances. I collected a line of tagged data for each appearance, as it happened. This data included the start and end time of the appearance, what the eventual adjournment was for, when it was adjourned to, and tags for some of the important metadata about the matter as it was discussed. For example, these tags could include whether the person was represented, whether section 11(b) rights were waived for the period of that adjournment, or whether disclosure was discussed. The data for a single appearance might look as in [table 9.1](#) for an Ottawa provincial matter, where the person was represented and the matter was adjourned in order for the person to do counselling in preparation for a plea.

I used the “tags” columns to collect information about the nature of the appearance and what happened. I kept it as a comma separated list of hyphenated values. The tags that I used are laid out in [appendix A.2](#) along with their descriptions. I did not gather any

Start time	4/5/2023 8:48:49
End time	4/5/2023 8:49:51
Court Number	14
Event	Remand appearance
Adjourned to	April 26, 2023
Adjourned for	Plea prep
Tags	represented, 11b-waived
Pre-trial Date	
Key/Value	
Notes	counselling

Table 9.1: Example data entry

identifying information about the appearances.

I also collected a second set of information about the court session itself. This included information about the session that I was observing. I collected information on how large the docket was supposed to be by counting the docket or from the Ontario Dockets site²⁷⁷. I also included the name of the judicial officer, which support staff were present in court, and the number of matters that I was able to enter data about.

I entered the data into Google Sheets. This allowed for online and offline collection and meant that backups of the data would be taken care of. This data was then extracted from Google Sheets into a Git repository daily using the Google Sheets API²⁷⁸. The data extracted this way was stored as a comma-separated values (CSV) file. The data itself was stored in a private sheet that was protected by multi-factor authentication. It was shared through view-only links to protect it from inadvertent edits. I used Python in a Jupyter notebook²⁷⁹ and sometimes a calculator to do the analysis. I also used Python scripts to check for consistency and typos.²⁸⁰

²⁷⁷Ontario, Superior Court of Justice and Ontario Court of Justice, *Daily Court Lists*, online at: <https://www.ontariocourtdates.ca/>

²⁷⁸The Google Sheets application programming interface (API) is a software interface for interacting with Google Sheets programmatically as opposed to via the website.

²⁷⁹Thomas Kluyver et al, *Jupyter Notebooks – a publishing format for reproducible computational workflows*, (IOS Press, 2016).

²⁸⁰The data and analysis code is available on [Github](https://github.com/serlin/porcupine-data) at <https://github.com/serlin/porcupine-data>.

9.1.1 Safeties and Disclaimers

The data is a single-coded dataset collected by a single person. There are going to be mistakes and inconsistencies. I tried to minimize mistakes by checking tags and dates for typos automatically and conditional formatting for dates and other sorts of fields. I described the tags and their definitions in appendix A.2 and had that appendix open with me while doing the data collection. Even so, I am certain there are mistakes because this was a manual data-collection and recording process. In order to mitigate the impact of any such mistakes, I collected large quantities of data such that there should be enough extra appearances collected to make those mistakes less statistically significant. I would have liked to go back and spot-check my collection to see how accurate it was but that is made impossible through policy and law. The Courts of Justice Act²⁸¹ prohibits any recording of proceedings. This means that there is no going back on a broad scale without the extreme expense of daily transcripts. Transcripts in Ontario cost \$6.30 per page and a reasonable estimate is about one page per minute of sitting time. A single day's transcript could easily exceed \$1000. The terms of use for the Ontario docket webpage prohibits any collection of that data²⁸², so counting the lines on the docket could only be done that day and never revisited.

9.2 About the Appearances

The atomic unit of the criminal case management system is the individual, routine court appearances that bring all of the parties together to discuss what is going on. They are the best window that the public has into the day-to-day operation of the costs that are carrying most of the cases in a jurisdiction at any time. Most appearances provide a snapshot of the status of the case at the time of the appearances and some indication of where the case is going next.

These individual appearances seem to have two intended objectives. They are meant to

²⁸¹ *Courts of Justice Act*, R.S.O. 1990, c. C.43, s 136.

²⁸² *Supra*, note 277. The terms of use state: "The information contained in the daily court lists may not be collected, copied or distributed in any fashion, including for resale or other commercial use."

usher cases from charges being laid through to completion by way of some judicial nudging, and they are meant to maintain jurisdiction over the accused person by keeping a chain of adjournments that the person is aware of. It has been argued that they also have other, less noble, objectives such as meting out justice before conviction either through incarceration or harassment²⁸³. This section analyzes data from thousands of these court appearances asking how successfully the systems in these courthouses are at meeting those, more noble, objectives.

All of the criminal case management courtrooms that I have appeared in as a lawyer or watched as an observer, which is about a dozen across 4 provinces and 1 territory, have a similar workflow for the majority of cases that can be described as follows:

1. The **defence counsel** advises the court which matter they wish to call,
2. The **judicial officer** tells them they are ready,
3. The **defence counsel** gives a summary of what has happened and the next steps, and asks for a return date a bit later in the same court
4. The **prosecuting counsel** provides any input they have on what has happened or their view on the steps – which is usually little, and
5. The **judicial officer** declares that the matter is returning on the day suggested by the defence counsel.

These appearances are short and these courts are busy. In Ottawa, Perth, and Kingston, these appearances are presided over by a justice of the peace. This section examines just how short, how busy, and what the end product is for these appearances.

²⁸³Feeley, *supra* note 22 notes the process acting as the punishment in the 1970s while Kohler-Hausmann *supra* note 25 notes consequences before conviction in the 2010s both in the US system.

	Mean	Median
Ottawa	112.19	86
Kingston	65.82	50
Perth	100.79	80
Calgary	79.18	86

Table 9.2: Average appearance durations by city in seconds

9.2.1 Duration

I measured the duration of the hearing from the time the matter was ready to proceed, until the time that the judicial officer last spoke about the case. These times are usually book-ended by the clerk of the court noting the matter’s location on the docket for the record and then calling for the next matter. Understanding the length of these appearances helps contextualize the rest of the information about the system as a whole.

The duration of these hearings are, on average, very short. They are often so short that it challenges credibility that meaningful judicial nudging could happen for every one. In Ottawa, during my observations, the mean duration was 112 seconds with a median duration of 86 seconds. The majority of the over 2300 appearances I observed in Ottawa were over in less than 90 seconds. This sub 90-second median was true for all four jurisdictions that I took data from. Table 9.2 shows these averages.

The eastern region of Ontario were all similar. Perth’s mean duration was roughly 101 seconds, with a median duration of 80 seconds. Kingston, meanwhile, dealt with more than half of its docket is less than a minute each with a mean time of 66 seconds and a median time of 50 seconds. Calgary’s median time was less than 90 seconds with a slightly shorter mean. These 90 seconds include the time for all of the explanation of the case and the time for the judicial officer to recite for the record the adjournment date and time. Figure fig. 9.1 shows how tightly grouped the appearance duration is around those averages.

This diagram shows Ottawa with a slightly longer and more left-skewed duration curve than the other three jurisdictions but three are of a similar shape²⁸⁴. This is showing that

²⁸⁴The solid line represents a kernel density estimation fit to the graph.

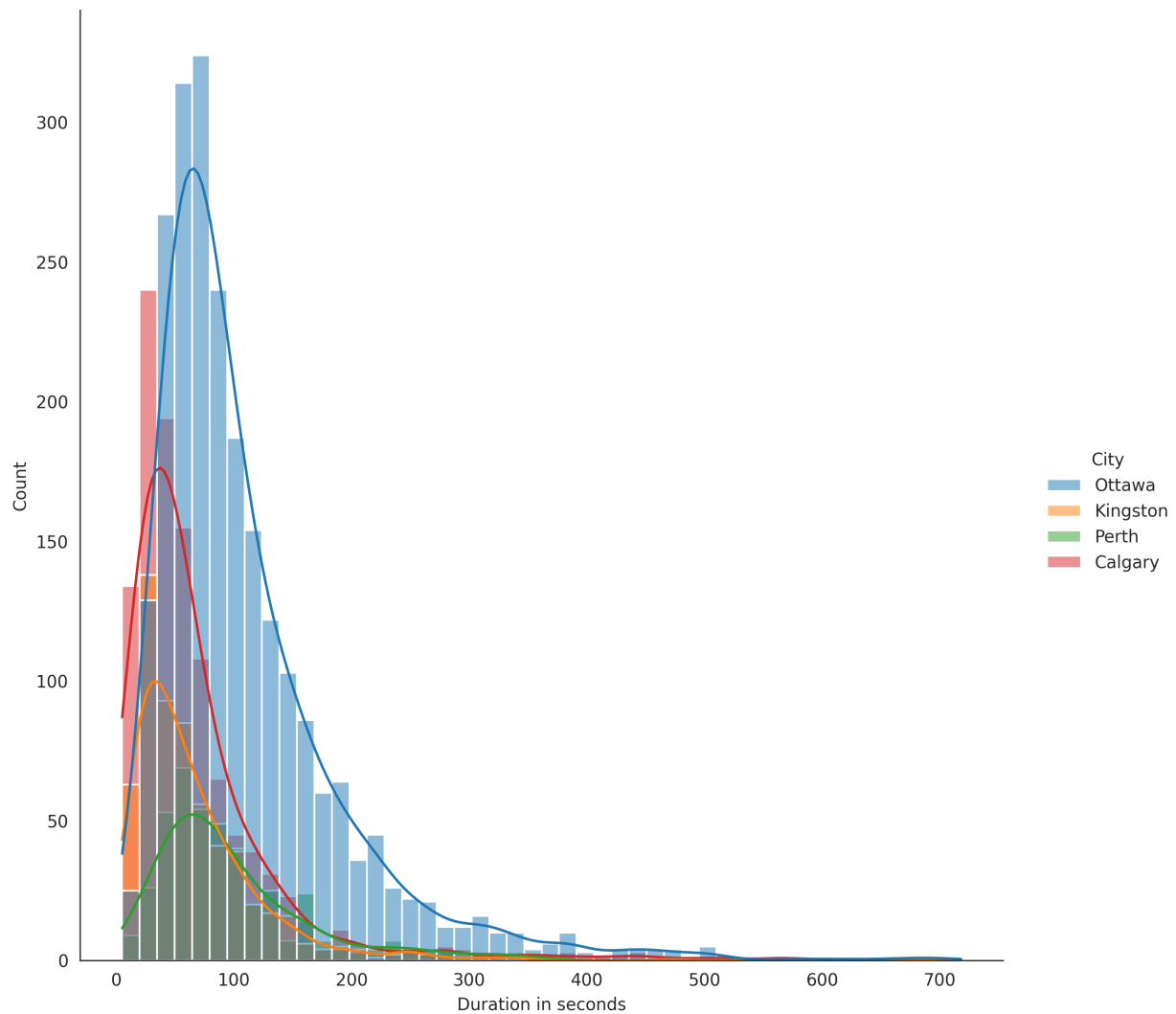


Figure 9.1: Durations of appearances broken down by city

most matters are dealt with quickly, and there is a long tail of matters that required addition time and intervention. Note that I collected data for the most appearances from Ottawa so the size of the bars is less important than the shape of the curve underneath.

The comparatively long appearances that I noted are interesting because they often embody what I expected would be the core function of these courts. In Ottawa, the longest appearances I recorded were roughly 10 minutes and the 15 longest were all over 7 minutes. Table 9.3 shows the event logging that I did for these appearances.

These appearances are all varied with their outcome. Some were set for trial, or dealt

Duration	Adjourned for	Tags	Notes
00:08:19	Trial scheduling	represented, in-custody, duty-counsel-with-instructions	The AG preferred the indictment Mental health court considered and she refused to attend court. Was at central east
00:08:22	Trial	represented, publication-ban	
00:08:24	SCJ Preference	represented, jpt-held	
00:08:26	Client discussions	in-custody, no-show, represented, bench-warrant-wd	
00:08:42	Discussions	represented, youth	
00:09:21	Self-rep JPT	unrepresented, accused-present	Prints information was invalid and the crown lost jurisdiction on the original Original offences were withdrawn. Sent over to constellation for the remainder Bail on consent after the initial detention. 523 5 cases together. Extensive submissions on whether the person should be released having triggered a release Montreal matter with complicated history and a youth murder charge
00:09:52	Pre-trial motions	represented	
00:10:16	Stayed	no-show	
00:10:47	Summons	no-show, bench-summons	
00:11:09	Intake	represented, in-custody, accused-present	
00:11:27	Trial	represented	Complicated issue with a person not being produced in spite of a court order Info taken from the day before
00:11:33	Intake	represented, in-custody, bail-hearing-held, french, interpreter-present	
00:11:58	JICMC	represented, youth, in-custody, duty-counsel-with-instructions, accused-present	
00:16:27		represented, in-custody, accused-present, info-missing	
00:31:47	Plea	no-show, wrong-court, 11b-waived	

Table 9.3: Longest 15 Ottawa appearances

with an accused person who refused to attend court while in-custody. These appearances often involved core issues being discussed or scheduled. The longest appearance of 31 minutes was an extreme outlier and was unusual. It involved trying to find the correct place for a plea to happen on an otherwise simple matter. It held up court and the clerk spent half an hour paging people in the courthouse to find someone to take it on.

It could be argued the longer appearances are the ones that are wasting the most time in these courts. Surely, if other appearances could be finished in 90 seconds, so should these tortoises. I think that the long tail referenced in table 9.3 suggests that the contrary is true. It is the longer appearances, even the extreme longest, where the fairest, most efficient use of limited resources is happening.

Finally, the duration of the appearances differed slightly between represented and unrepresented people. Figure 9.2 shows the distribution of appearance times split by representation.

Matters for unrepresented people are 40 percent longer on average than those with representation. It was surprising to me that they were only that much longer. There is an expectation that unrepresented people will require additional assistance from the bench and will have questions. Part of the less-than-expected increase in time is down to unrepresented people being often found in the early stages of the process and looking for disclosure and information about legal aid. The second factor is that meaningful discussion in Ottawa (at least) between self represented people and the Crown tends to happen at judicial pre-trials which were not observed.

In isolation, the raw numbers about the number of seconds spent on individual appearances in busy courtrooms could seem inconsequential. Consider though, the consequences of these appearances both for the system and the people appearing there. The last chapter showed two cases where the routine nature of these courtrooms failed to address fundamental problems. People representing themselves either by choice or by financial necessity are asked to appear in these courtrooms as well, for a little over two minutes every couple of weeks.

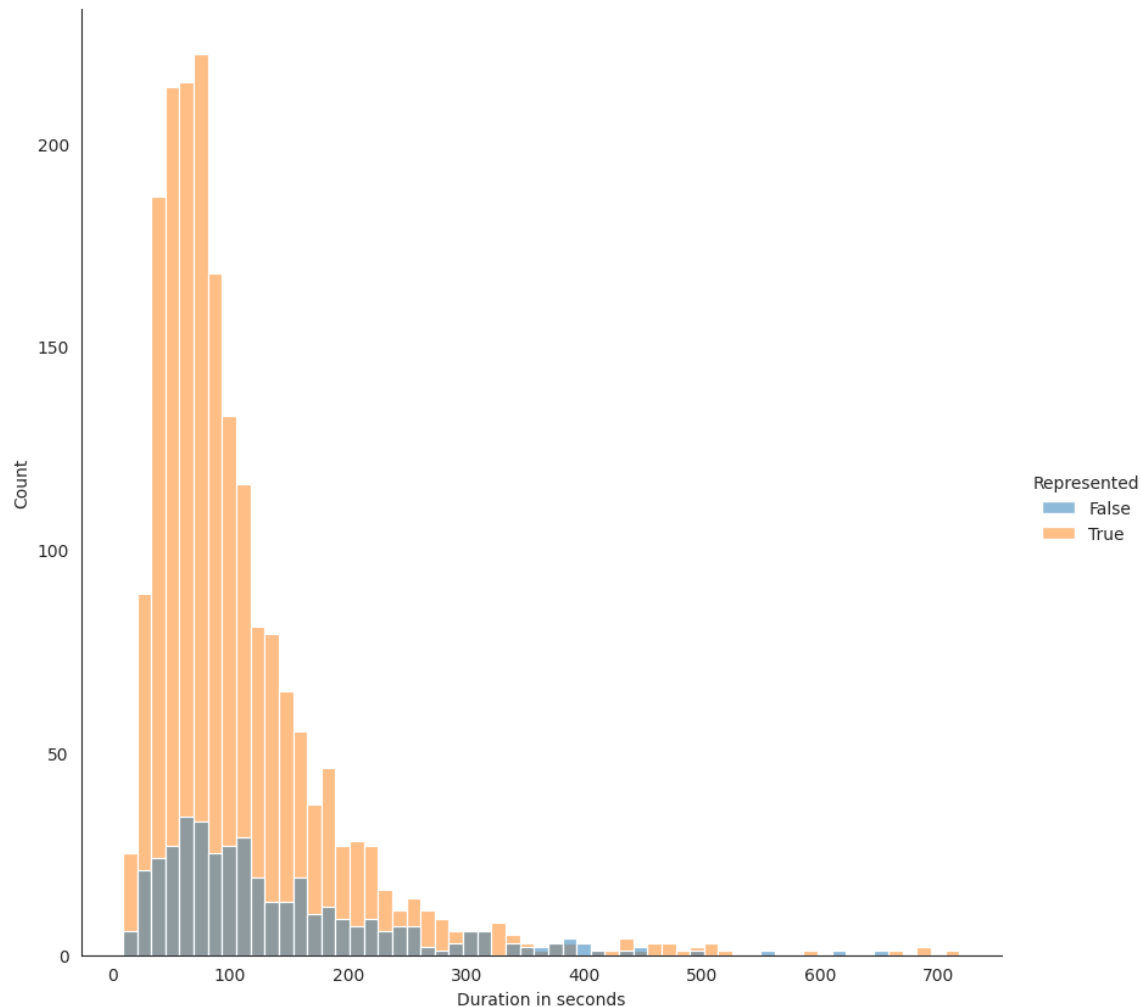


Figure 9.2: Durations of appearances by representation

It is possible that this limited courtroom time is all the time needed to nudge cases along towards resolution or act as a tickler system for progress. The next section looks at one other possible explanation for the brevity of these courtroom appearances: congestion.

9.2.2 Congestion and capacity

The natural question following the last chapter that highlighted how short these appearances are on average is “why are these pre-trial appearances so brief?” One option is most of these matters need very little actual attention from the court so the matter moves on quickly. The accused person and the Crown go back to diligently working on the case after

the court appearance. This is the most optimistic option. A second possibility is that the case management system is running at capacity and there is no time to give each matter the time it needs in order to be constructively advanced towards some resolution. This option is a lot less optimistic. My observations suggest that the answer is likely somewhere in between and that how close the case management system is running to capacity varies depending on the courthouse.

In Ottawa, the data that I collected combined with some simple arithmetic suggests that for many days the system is running at capacity. All of the court time available is spent managing cases without much headroom. The naïve approach is simply to look at the available time and how that can be divided among the volume of cases.

The schedule in Ottawa calls for court starting at 8:30 am, there is a 15 minute minute break in the morning and another in the afternoon²⁸⁵ with roughly an hour scheduled for lunch. The court-day is typically scheduled to run until 4:00 pm. That works out to 7.5 hours for the court being open and about 6 hours (or 360 minutes) worth of sitting time per day. There were, on average, 125 matters on the docket per day in the provincial case management court during my time there. This works out to a little less than three minutes per matter.

The last section showed the average duration of an appearance in Ottawa was about 112 seconds, or nearly 2 minutes. On first blush, that seems like there should be some flexibility. In practice though, there is not. There is slack time between each matter called. The court needs to shift paperwork, digital or otherwise, and the people involved need to get into position. For out of custody matters that might mean the lawyer or the accused person needs to approach the bar. But for in-custody matters that involves a guard removing the first person from the video-call and bringing in the next. That time adds up. If it only took 20 seconds to move from one file to the next, then that is another half hour of time

²⁸⁵These breaks mean different things to different participants. The clerks quite often use a significant portion of that break hauling files to and from administration and catching up on the morning's paperwork. I cannot emphasize enough how hard these people often have to work to keep up.

to account for over the whole docket. Twenty seconds might be possible for out-of-custody, in-court matters but in-custody matters can easily take a couple of minutes to transition to the next person. The reality for Ottawa is that it **must** turn over a file on average faster than every two and a half minutes including slack time or it will go over time. Ottawa is at full capacity on most of their dockets.

The Calgary story is similar. The out-of-custody provincial case management courts have extremely long dockets and dealt with over 150 cases on average while I was there in January 2024. Calgary's court had both a shorter time to turn over cases and a shorter time between cases. Notably, the courts often finished before the end of the day and ended the day by picking up matters from the case management counter to issue bench warrants. This is a good point to bring up one of the innovations in Calgary: the case management counter. In Calgary, the first several appearances before a case gets kicked over to the regular case management court are held at the case management counter before a justice of the peace. The intention is for accused persons to gather the context and the help they need early in the process²⁸⁶. For those that are represented, they have also made the service available online²⁸⁷ to counsel. These two services, counter-service and online adjournments, could fundamentally change the nature of early appearances. Anecdotally, they did. There seemed to be fewer cases in case management court that were in the early intake stages. That could very easily be due to any number of factors that were invisible to me. Differences in legal aid, Crown practices, or judicial nuance could have all played a role.

Case law suggests that Toronto, Canada's largest judicial region, is experiencing a similar problem with capacity and congestion in case management courts. In staying an alleged shooting and after the typical 2-column appearance summary Justice Mulligan observed how the Toronto lists require triage and remand is almost always a "fait accompli":

[18] To be fair to the jurists presiding in Case Management courts at the Ontario

²⁸⁶Alberta, Alberta Court of Justice. *Case Management Offices (CMO) Out-of-Custody Docket Protocol*, online at: <https://albertacourts.ca/pc/resources/covid/covid-19-criminal-and-youth-criminal-matters/CMO>

²⁸⁷Alberta, Government of Alberta, *Adjournment Digital Service*, online at: <https://adjournment-request.alberta.ca/>

Court of Justice-Toronto, their lists are often so long that it is next to impossible, as I understand it, to deal with matters substantively without stretching the court day well into the evening...A review of the transcript filed shows that there was no Crown input to the Court during this hearing. The remand was presented to the Court as a sort of “fait accompli” as opposed to a substantive weighing and judicial consideration of the reasons for the request to adjourn Mr. Tinglin’s case yet again²⁸⁸

She goes on to note that even the Judge-led Intensive Case Management Court are suffering the same congestion and lack of attention²⁸⁹.

This congestion explanation for the brevity of the case management appearances that I observed is one plausible explanation for the shortness of the appearances. I explore a second explanation in the next section; these cases did not need any judicial intervention in the first place.

9.2.3 Adjournments and exits

In the last section, I noted that the Ottawa courthouse is operating at or over capacity and they have to grind through matters quickly in order to finish the day on time. I also noted that on average, Calgary’s appearances are even shorter though the sessions do not tend to run as long. That statistic focused on the theoretical level of attention that these matters are getting. The consequence of that attention is how the appearance ends and where the case goes next. A central issue for both *R. v. Aden* and *R. v. Hillier* that I examined in the last chapter was [churn](#) – appearances that consumed court time and extended the case while little was contributed to the progress of the case. The case progress very little both at the appearance as well as in the intervening time. In *R. v. Turcios*²⁹⁰ the judge in Toronto noted that the Crown appeared to be using the case management system as a tickler system

²⁸⁸ *R v Tinglin*, 2025 ONCJ 45 at para 18 (emphasis added).

²⁸⁹ *Ibid* at para 19.

²⁹⁰ *Turcios*, *supra* note [220](#).

to remind the Crown to continue working on the charges. This section looks for symptoms of those anti-patterns by studying what the next step is after a case is adjourned in case management court.

Broadly speaking, there are two ways that a court finishes dealing with a matter in case management court. The matter either exits case management or it carries on and is adjourned for some other reason. Those that exit are usually exiting for a trial or a preliminary hearing in provincial court, a guilty plea, or because the charge is withdrawn. If a case carries on in case management, it is usually adjourned back into the same court for another, similar appearance. The reasons provided for these adjournments is informative regarding the productivity of the appearance and the efficiency of the process.

There are an astonishing number of reasons that counsel cite for requesting an adjournment. For each adjournment that I recorded data for, I included the core reason for the adjournment if it was mentioned. In Ottawa, I noted about 60 different adjournment reasons. Calgary had a slightly smaller variety with 51. Kingston and Perth had 35, and 32 respectively. Some are obvious and frequent, like requiring time to review disclosure or to adjourn to the trial date. Some are rather rare, like adjourning to an Indigenous People's Court or adjourning the matter while waiting to transfer to another jurisdiction. I categorized the adjournment reasons into 8 broad categories, while the full list can be found in appendix [A.2](#):

- Offline discussions: Conversations outside the scope of the courthouse. Counsel pre-trial being a prime example
- Judicial discussions: Conversations that included a judge, for instance, judicial pre-trials or judicial case management
- Accused preparation: Adjournments for the accused to prepare their response. Includes legal aid, preparation for a plea, or applying to a specialized court
- Exits - Case ended: The case is over, the matter was withdrawn or stayed.

- Exits - Case continues: The case continues but no longer in case management. Usually adjourned to trial, plea, or preliminary hearing
- Presence problem: Adjourned because the accused or counsel failed to appear, often a bench warrant or summons
- Intake: Adjourned to deal with early matters in the case. For instance, initial disclosure or Crown screening
- Other: Catch-all for anything not mentioned above. Also catches adjournments with no reason at all.

Offline discussions encompassed counsel pre-trials (CPTs), discussions between client and the counsel and discussions between counsel. The distinction between a CPT and “discussions” was the formality of the meeting. Typically CPTs were scheduled and had a more formal structure and specific goals. “Discussions” could have meant anything from exchanging emails to meeting in person about a specific issue. The “other” category gathers up the rest of the adjournment reasons that did not fit neatly into the rest of the categories including no reason given.

In figure 9.3 I show the breakdown in Ottawa for how these matters are adjourned. The most common reason for adjourning a case was to have offline conversations between counsel. This means that the most frequent request from counsel when they come to case management court is for additional time to talk about the case among themselves. Only 11% are set down to move on from case management. Notably, more than 5% of the matters will result in a warrant or a summons of some sort and a little less than 2% are stayed or withdrawn in these courts.

Table 9.4 shows how case in Calgary were adjourned during my observation. The story is similar at the top-line; the most frequent request of counsel is for more time to talk to each other. The second most common adjournment, however, was for a bench warrant. This was probably the result of the case management office appearance counter sending all of

Visualizing adjournments and exits in Ottawa

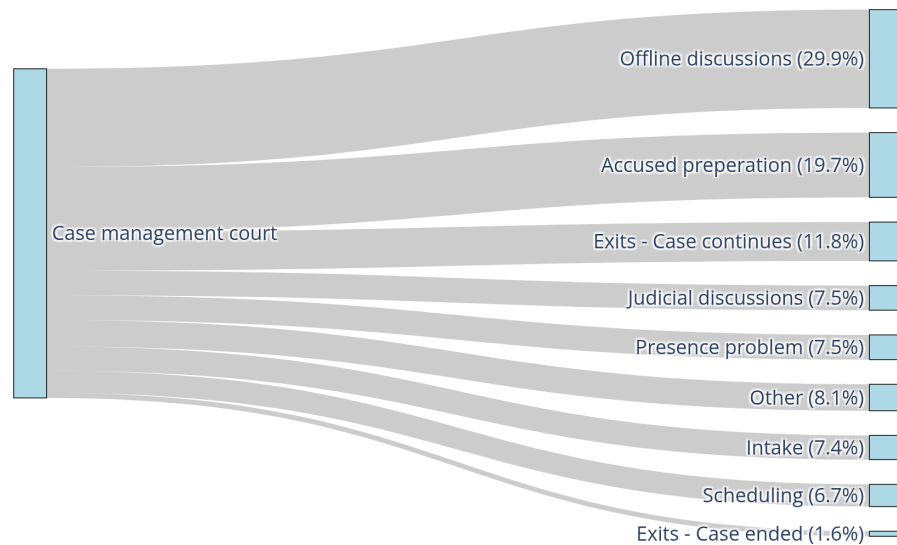


Figure 9.3: Ottawa, Ontario adjournments by category

their no-shows to the judge at about 2:00 pm. Any failures to appear from the counter were handled in that central court. The number of matters that move on from case management is very similar to Ottawa with only about 13% exiting case management.

Briefly, Perth again had a similar top-line ratio with more than a quarter of matters needing additional time for counsel discussions as seen in 9.5. It also had a bit of a higher proportion of cases exit case management after their appearances at 17%, compared to fewer in Calgary and Ottawa.

With those statistics in mind, we return to the issue of churn adjournments. Accused preparation, offline discussion, and intake appearances are more than 50% of the appearances in every jurisdiction I observed. These are, usually, parts of the process with little need for judicial intervention. That is 50% of the entire workload not needing a justice involved but appearing before one anyway. Another less frequent, but important type of churn is waiting

Visualizing adjournments and exits in Calgary

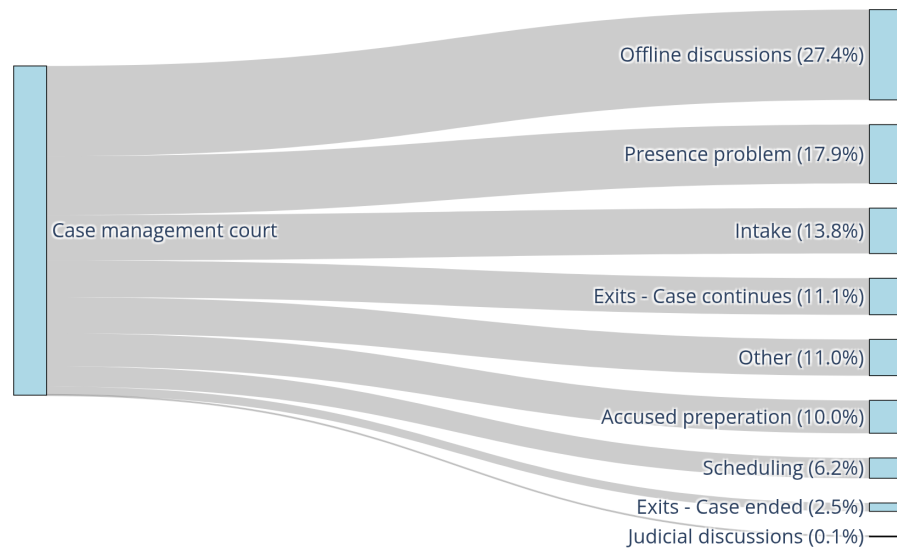


Figure 9.4: Calgary, Alberta adjournments by category

for legal aid paperwork. In Ottawa it made up about 4% of adjournment requests but the sitting judge can do little until that issue is resolved one way or another. Duty counsel is often enlisted to try to help that process along. An argument might be: “waiting for legal aid is time that will not count towards delay against the state, so it is fine”. Framing delay that is defence-caused this early in the process neglects the fact that these cases remain in the queue and consume court resources. More importantly, the case will continue to eat into the life of the person who has been accused of an offence. Preparing for a guilty plea was the largest portion of the accused preparation category. About 8% of the adjournments were in the case management court to be adjourned so that the accused person could put together a suitable plea plan. This might include counselling or simply getting the information about the person from friends or family. Unless this happens a couple of times it is difficult to see how a justice could have a great deal of input there.

Visualizing adjournments and exits in Perth

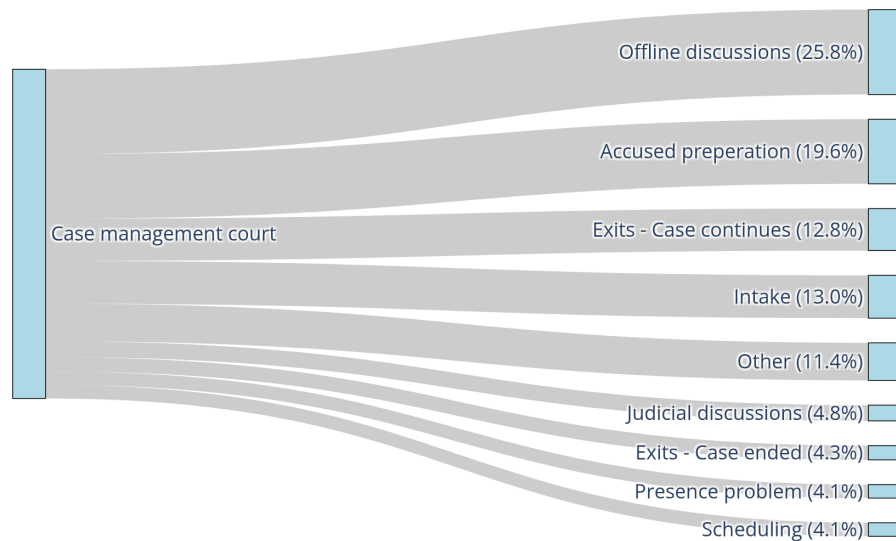


Figure 9.5: Perth, Ontario adjournments by category

This section presented a second answer to the earlier question of why many these appearances are so short. In addition to congestion and the resulting necessity, there is really not much for the justice to interrogate. One constant from each jurisdiction was that the most frequent reason for coming back to case management court every couple of weeks was to say: “we are still working on it”. But not everyone comes back to case management court, as I alluded to, sometime people fail to appear.

9.2.4 Compelling attendance

For matters where the involved person or their representative does not come back to say “we are still working on it”, a fairly large number of them do not come back at all that day. In these cases, a bench warrant is issued. The scope of these bench warrants,

their nature, and the mechanics of their execution is scattered around the *Criminal Code*²⁹¹ and they are not in scope for the purpose of this dissertation but their frequency and their fairness is. The decision of whether or not to endorse the bench warrant for release²⁹² is a consequential decision and it is the most common decision that the judicial official sitting in case management court has to make. Endorsed warrants mean that the accused can be released on an undertaking while unendorsed warrants require that person be brought before a justice before being released again.

In Ottawa, about 7% of the matters in case management court resulted in a bench warrant. That number is about 18% in Calgary²⁹³ Figure 9.6 shows that about a third of the warrants that are issued in Ottawa are unendorsed and will require the person being taken into custody and brought back before a justice.

Calgary has a smaller percentage of warrants being issued without discretion for the police to release the person as shown in figure 9.7.

The decision whether or not to endorse the warrant is a consequential decision that is made, usually, with only the input of the Crown. Typically, it is done in a nearly empty courtroom unless there is a bespectacled PhD student sitting in the back of the courtroom taking notes. The catch, which I will revisit at the end of this chapter, is that bench warrants are very rarely issued for individuals with representation.

9.2.5 Disclosure

One of the key hypotheses for the lengthy delays in criminal justice is that of disclosure. Both *R. v. Aden* and *R. v. Hillier*, discussed above, had disclosure as a central theme in their failure. Unfortunately, extracting information about disclosure from the conversations at case management appearances was not consistent. Disclosure is often requested, provided, and discussed in the background and may or may not be brought up in case management

²⁹¹ *Criminal Code*, *supra* note 115 for example: s 499, 508, 597.

²⁹² *Criminal Code*, *supra* note 115 see forms 28 and 29.

²⁹³ With the caveat that all the bench warrants from one court are sent to another court to be issued.

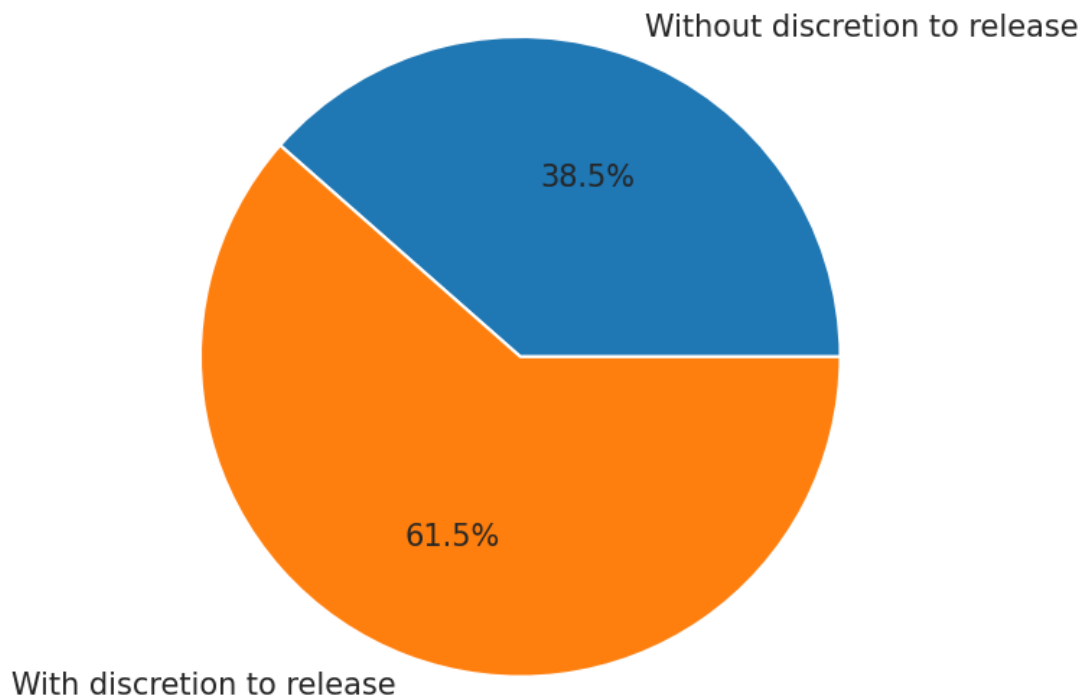


Figure 9.6: Ottawa bench warrant endorsement split

court as the reason for the adjournment. Even so, the debate about “sufficient disclosure” to take the next step in the case management process was still routine in court. I tagged about 2% of appearances where disclosure was specifically requested, about 2% where disclosure was noted as having been recently provided, and about 2% where disclosure was the central reason for the adjournment. Taking account of overlap, this meant that for about 5% of all appearances, disclosure was an aspect of the conversation. The problem for this study was the lack of continuity between complaints of lacking disclosure. I was unable to identify ongoing or continuing requests.

The second problem for identifying disclosure issues from this vantage point is that, as was the case in *R. v. Aden*, the catastrophic disclosure problems are often discovered after case management has completed. The failure happens silently during the case management

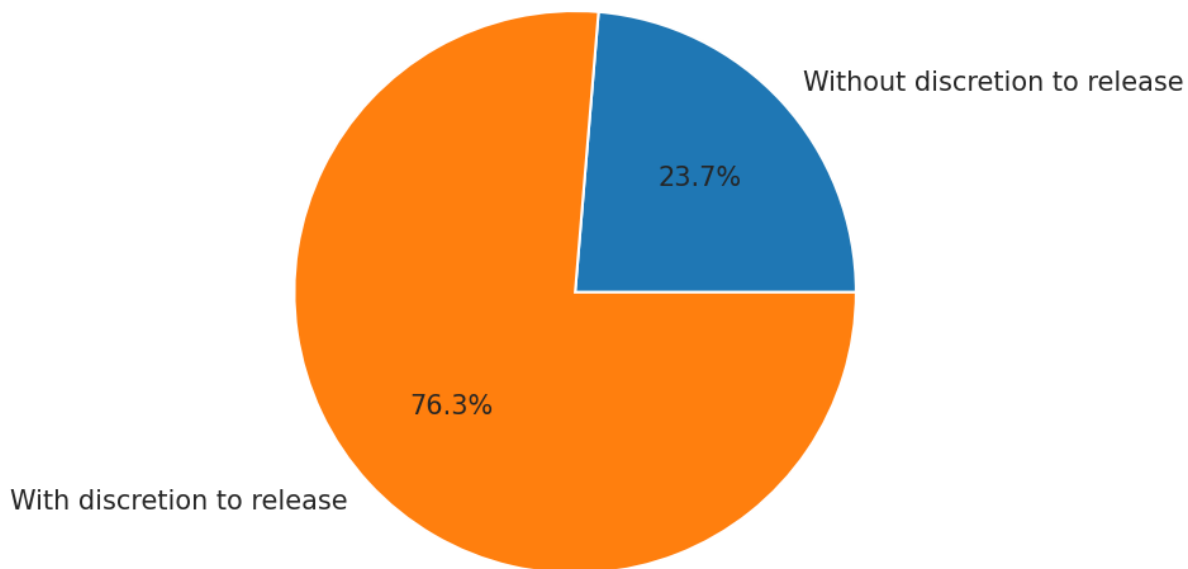


Figure 9.7: Calgary bench warrant endorsement split

stage and materializes during or immediately before the trial. When this happens, at least in Ottawa, the cases are adjourned to a new trial date without passing back through the case management stream. These disclosure breakdowns would be invisible to the case management process.

This inconsistency in collecting data on disclosure is, paradoxically, revealing for the problem with disclosure in the case management stage. The lack of continuity, the debatable nature of what “sufficient” means before elections are made, and the silent nature of the breakdown from the perspective of the people in case management court, are all elements that can make disclosure such a landmine at the trial stage.

9.2.6 Representation

Starting with the glaringly obvious, being represented by counsel in the criminal justice system is important. Counsel protect their client’s rights and advocates on their behalf. This

Start time	6/15/2023 13:42:49
End time	6/15/2023 13:59:16
Court Number	14
Event	Case management appearance
Adjourned to	June 16, 2023
Adjourned for	Plea
Tags	represented, in-custody, accused-present
Notes	Get a transcript

Figure 9.8: Data collection for R v Lameroux

is often thought of happening in the trial context, but opportunities are present throughout the case management process as well. Counsel are indispensable. Instead of a graph to demonstrate this point, I will instead recount the story of an accused person who was represented in case management court by effective counsel.

Mr. Lamoureux’s case management story is a tale of two lessons, the power of representation and the need for flexibility in an otherwise mechanical process. Mr. Lamoureux was likely in custody for a breach of probation relating to possessing a weapon. He was saved from an extra 4 weeks in jail because he was represented by diligent counsel. The normal case management process had already broken down because of a mistake of duty counsel and no-one, except Mr. MacLellan, his lawyer, had noticed. The line of the data I took down that day, shown in figure 9.8 looks fairly standard except for the duration of 15 minutes and a note to myself to get a transcript.

Mr. Lamoureux was not on the docket for case management court that day. Duty counsel had mistakenly asked on behalf of Mr. Lamoureux earlier in the week that his matter be adjourned for several weeks instead of noting that there was a judge’s order to produce him at the courthouse that should be respected. He was not on a any docket in the courthouse at all but he did appear in court thanks to some legwork by counsel and some flexibility from the jail.

MR. MacLELLAN: ... the matter is a little bit out of the ordinary. Judge Dorval signed an order to produce earlier in the week to have Mr. Lamoureux produced

in Number 3 Court this morning at 9:00 o'clock. For whatever reason, that order was not acted upon. I contacted the RDC later in the morning when [he] didn't appear in 3 as he should have [...] and they were kind enough to offer him up today at 1:30. I would expect the Information is probably - presumably in Number 3 Court.²⁹⁴

The court was hesitant to deviate from the typical practice of processing the docket as it appears:

THE COURT: Right. It's just I - I don't have it here in Court Number 14. It wasn't set for 14. I understand it was set for 3 is what you're saying with an order to produce. However, I've got staff here saying that it wasn't on the 3 virtual docket either. So I - I just don't know how to actually speak to the matter.²⁹⁵

The matter had been inadvertently adjourned for over a month²⁹⁶ His lawyer makes it clear he should be in court and the lengthy adjournment was a mistake:

MR. MacLELLAN: The order to produce was issued on Tuesday by Judge Dorval. We have a situation where this young man is at a time served position. His Information is in the Ottawa courthouse. I'm simply asking - whatever's happened here - or practical perspective, if we could just get the Information brought into court and adjourned 'til tomorrow in a plea court so (ph) we can get to a fair result for Mr. Lamoureux.²⁹⁷

The clerk of the day was also hesitant to break from standard practice. They noted that there is a three-day "grace period" before bringing a matter forward and were concerned about the administrations ability to find the documents:

²⁹⁴ *R v Lameroux*, (15 June 2023), Ottawa information number: 23-11401822 at page 2 (Removed first name).

²⁹⁵ *Ibid* at page 3.

²⁹⁶ I tried to find a copy of the transcript for this adjournment appearance but failed. It is not clear on the information what happened and I was unable to track it down.

²⁹⁷ *Ibid* at page 4.

CLERK/REGISTRAR: That's not the proper way to have Informations brought to court. Your request needs to be put in with Crim. Admin. and usually it's a three-day grace period to have matters brought forward and put on a docket. I could call Crim. Admin. right now and have them pulled. How long it will take, I don't know because this is a last-minute request that's being sprung on them. (INDISCERNIBLE) like, there's just - it's not as - I know it sounds like a simple process but it's not as simple as it may seem to have these Informations pulled and brought down. And then the other thing is Mr. Lamoureux is here today on an order to produce. His remand is at OCDC holding him there until July when his plea date was originally scheduled. So we have no way to have him appear tomorrow unless an OTP can be made and have him brought forward tomorrow either by video or in person, whichever way it can be done.²⁹⁸

The matter was stood down briefly to find the documents and for the justice of the peace to reflect.

THE COURT: What I'm going to do is I understand that this person is in custody. I understand that Mr. Lamoureux can't just continue to appear and be brought back on a whim. I'm standing the matter down because I'm not prepared to make a decision on it right now. I'm going to stand it down. I'm going to determine what I can do in this situation. If we are able to find the Information, if I see fit to do that, then we'll bring it - we will adjust it as need be and hopefully we can communicate with OCDC in order to facilitate him being brought tomorrow if that's what ends up happening.²⁹⁹

Finally, after a break, the matter was adjourned to the next day for the plea to happen:

THE COURT: Assuming that it's going to be resolved anyway, so.... Mr. Lamoureux, your matter is going to go over 'til tomorrow which is June 16th, 2023,

²⁹⁸ *Ibid* at page 7.

²⁹⁹ *Ibid* at page 8.

15 Courtroom Number 5 at 9:00 a.m. and that's for the purposes of your counsel to sort out a plea for you. That's my understanding. ³⁰⁰

This was an example of a case management appearance where flexibility trumped rigidity and indisputably resulted in a more fair outcome. It took nearly 15 minutes. There was able representation by diligent counsel, consideration by the judicial officer, and some legwork on the part of the behind-the-scene administration to make it happen. All time well spent.

Like this matter, there **are** cases that require case management. This section looked at how the system spends a fair bit of time and effort on cases that do not. The next section looks at the nuances of the systems that have been built in the jurisdictions I observed, and how these differences are important and consequential.

9.3 About the System

The previous section looked at granular data about the individual appearances. This section, instead, looks at those appearances in aggregate to consider the nature of the broader system. First, it highlights some of the nuance in the regions that I observed. These are examples of the small differences that make each system slightly different. Second, I explain the cadence of each system and what that means for efficiency. Finally, I look toward the end of the case management system and describe what my data showed about lead time for trials or preliminary hearings.

9.3.1 The Nuance

All of the jurisdictions I visited have been slightly different. The fundamentals are the same. There is a decision maker mostly hearing from counsel about cases that were adjourned a couple of weeks earlier, but the details are always a bit different. It is like eating macaroni and cheese at your neighbour's house. The components might be largely the same but it is always a bit different. The details make the dish. This section highlights some of those

³⁰⁰ *Ibid* at page 11.

details that do not change the basic ingredients of the system but make up the character of the local system. This local character was found even in places that were, ostensibly, in the same judicial region. Kingston, Perth, and Ottawa all are considered the East Division of Ontario. Even so, they had meaningful differences in how they operate.

Ironically, the first thing I will mention is something that was universal. The heroes of managing the case load in every courthouse that I visited were the clerks. They were a critical part of the process. In addition to updating the paperwork, and ensuring that all of the matters are heard, they were often the custodians of procedure and frequently double-checked with the judge or justice when they thought the justice had misspoken or an error of omission was made. There are however differences in how they are used and how many there are. In Ottawa, Perth and Kingston, there was usually two clerks doing the paper work and delivering everything upstairs to the central administration. While in Calgary there was usually only one court staff with a runner that would appear every hour or so. There was no additional court reporter in Calgary where the court relies instead on the clerk to start and stop the recording. Eastern Ontario had another person managing the record.

There were more significant differences between the other actors involved in the day-to-day operation of these courts³⁰¹. Ottawa often had 2 provincial crown lawyers on the call to case management court as well as a police liaison from the Ottawa Police Service. Often there was an administrative staff as well, though user names made it hit or miss to identify them. There was a separate case management court for the federal matters so it was unusual to see federal lawyers in these courtrooms. A federal agent was present in both Kingston and Perth along with a liaison for the Ontario Provincial Police. There was no such federal liaison in Calgary, they operated, like Ottawa, in a different courtroom. The biggest difference in the cast between Ontario and Calgary was that in Calgary case management court was overseen by a judge. In Ontario, the court was overseen by a justice of the peace almost exclusively unless the matter was sent to a judge for a special court session called

³⁰¹Counting the actors relied on being able to recognize them on the call. There might have been other routine attendees that I was not able to pick out the names of.

the Judge-led Intensive Case Management Court (JICMC)³⁰². I saw no evidence of case management being different specifically because of there being a judge instead of a justice of the peace. Both the justices of the peace and the judges exercised the same authority at a similar rate, with similar context provided to them in the courtroom.

Getting sent to a different schedule, such as JICMC, was an Ottawa specialty during my observation and the data bears that out. Over the two weeks in Calgary the case management appearance was used to schedule a judicial pre-trial (JPT) exactly once. In Ottawa, setting up JPTs or adjourning to JICMC made up a full 7% of the adjournments as seen in 9.3. There was also, at one point in my observations, a requirement for a meeting with a Crown lawyer in order to schedule a trial: the scheduling conference. The schedule for the scheduling conference was being scheduled no less than 3 weeks from the date it was requested. Combined with the cadence of the case management court, this meant that scheduling a trial or a preliminary hearing in Ottawa often took 4 or 5 weeks. Scheduling judicial pretrials in Ottawa during my observations required at least a 4 week lead time. At the time, there was a requirement for a formal counsel pre-trial (CPT) before there could be a JPT and there needed to be a JPT before a trial could be set for many of the matters. All of this scheduling had to be done at case management court appearances. The combined lead time of CPTs, JPTs, and scheduling conferences was about 3 months exclusive of any other work that needed to be done.

Another nuance between courthouses was how information was made available to the sitting judicial official. In Perth, the case management court was frequently handled by the same justice of the peace. He routinely recognized the case that was being discussed from the previous appearance and was able to handle them with continuity. None of the other jurisdictions I observed had that consistency. The second source of this context is the paper docket. At the time I was in Calgary, the paper dockets included a wealth of handy information for the sitting judge. The file age, the number of previous appearances, and

³⁰²Ontario, Ontario Court of Justice, *Practice Direction: Judge-led Intensive Case Management Courts*, (8 May 2023), online at: <https://www.ontariocourts.ca/ocj/notices/jicmc/>.

the previous counsel were all in black and white on the pages of the docket immediately available to the whole room. The dockets in Ontario are, as far as I could gather, a lot less detailed. It is possible that dockets are printed differently for different audiences but I have never found a docket to contain the same quantity or quality of information in Ontario as it does in Calgary.

9.3.2 The Cadence

Turning back to the raw data, each region had a cadence to their case management process. The cadence of the process is the time that is most often given between appearances. For instance, a common request in case management court is that counsel need to speak to their client (or the Crown) so could the matter return in that region's cadence number of weeks. Table 9.4 shows the mean and median adjournment length for the four regions I observed.

	All Adjournments		Non-Hearing Adjournments	
	Mean	Median	Mean	Median
Ottawa	39.65	27	26.43	21
Kingston	30.74	21	28.72	28
Perth	32.22	21	24.34	21
Calgary	30.70	14	20.14	14

Table 9.4: Average adjournment durations in days by city of courthouse

Non-hearing adjournments exclude adjournments to trials or preliminary hearing dates. It is not a coincidence that the median for the non-hearing adjournment all line up with a multiple of 7. Calgary had a cadence of 2 weeks. Ottawa and Perth were both 3 weeks and Kingston was 4. The mean also does not deviate that far in either direction, especially after excluding trial and preliminary inquiry adjournments. Figure 9.9 show how the concentration of adjournment length centres around those cadences.

This cadence was fairly consistent in Ottawa for represented and unrepresented people as seen in figure 9.10. There is one spike at 8 weeks. This is attributed to the number of first

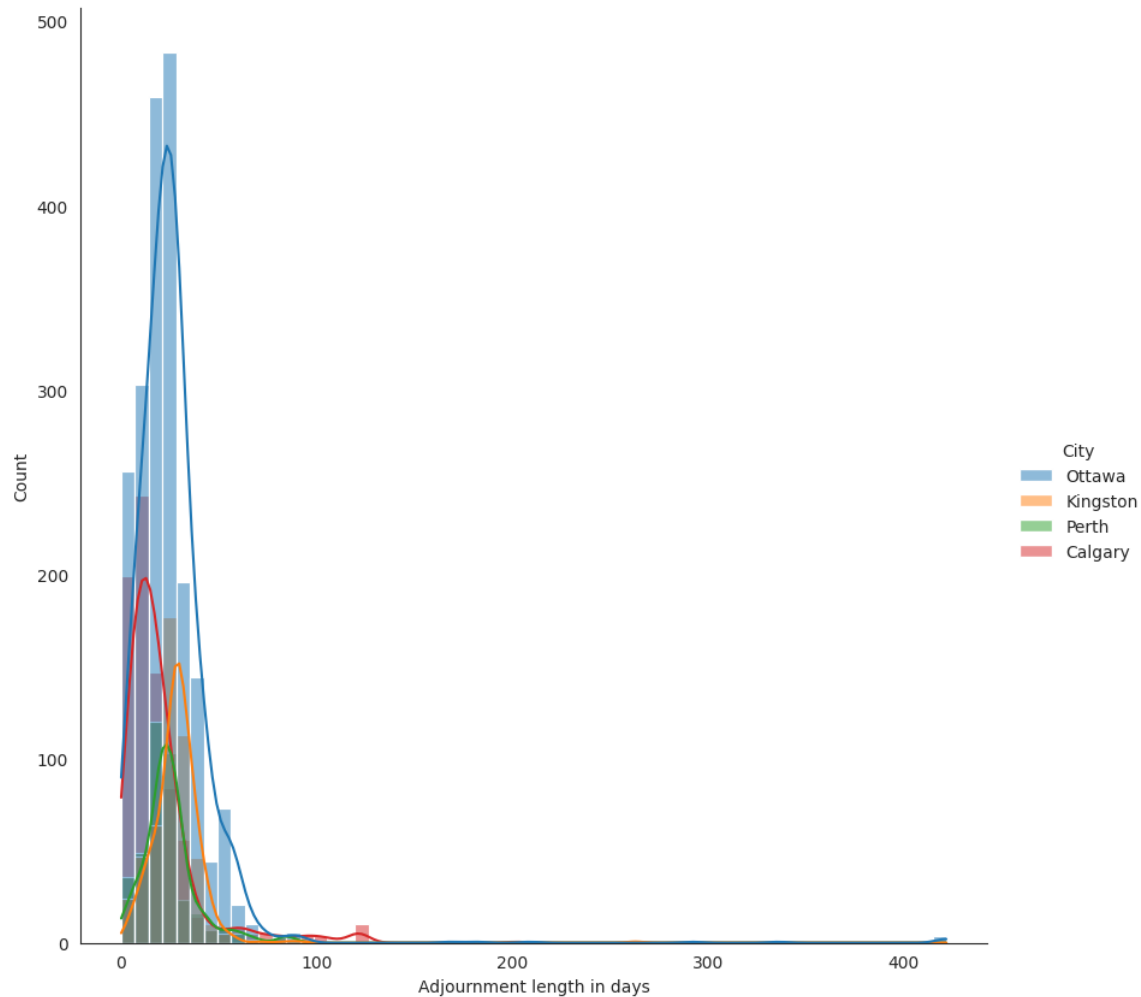


Figure 9.9: Adjourment length distribution by town

appearances that are attended by unrepresented people and the need for intake including retaining a lawyer or applying for legal aid.

The exception to the typical cadence is in-custody matters. Both Ottawa and Calgary scheduled routine appearances in regular case management court after bail. Both had a median adjournment of 7 days with mean adjournments of 8.8 and 10.1 days respectively. Perth had an in-custody cadence of 10 days. Kingston handled its in-custody docket differently and I did not observe any of those appearances.

The existence of a cadence is suggestive of there not being a great deal of introspection on the actual time needed for the adjournment. Justice Band out of Toronto noted as much

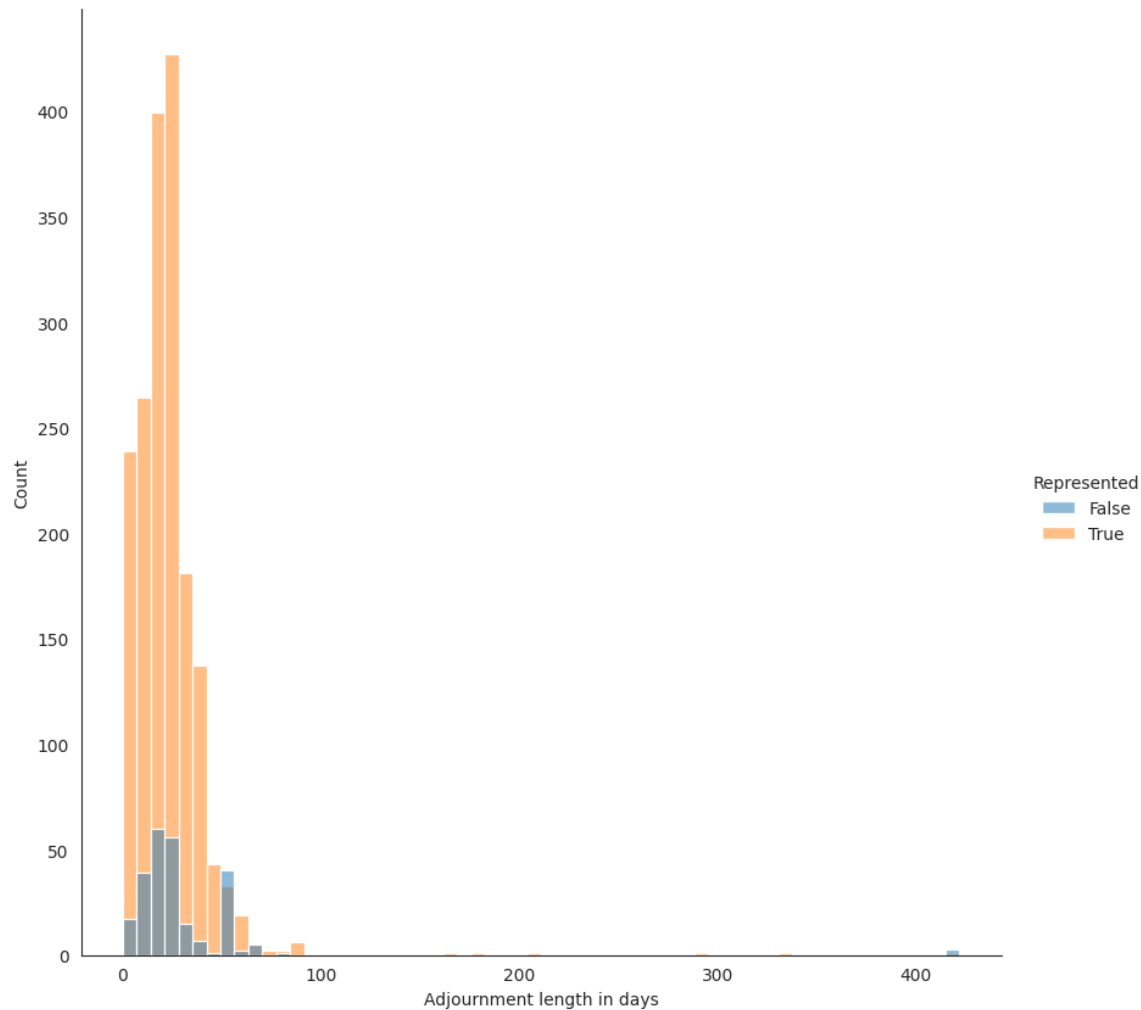


Figure 9.10: Ottawa - Adjournment length distribution by representation

in deciding a delay application:

[22] For as long as I can remember, one-month adjournments have been a quasi-customary feature of the preparatory stages of a case in the criminal courts. In this case, Mr. Brereton's first lawyer attended court on 10 occasions. On five of them, adjournments of one month or longer were granted. No questions were asked as to why that length of time was proportionate to the reason for the request. This approach is a vestige of the culture of complacency that the Supreme Court of Canada sought to jettison in *Jordan*. As this application demonstrates, a period of less than two weeks can make or break a case. One

month should not be seen as the fundamental block of time in set-date or case-management court.³⁰³

As justice Band noted, the default is so ingrained that whether there needs to be a 1 day exchange of emails or a weeks-long review of disclosure the adjournment length is often the same. Combine this with the most frequent request, out-of-court conversations, and there is a real question as to the necessity of many of these appearances.

9.3.3 Lead Time

Lead time is the time between an event being ready to happen and that event actually happening. For instance, the lead time for a trial. There are two classes of lead time I was able to gather some data about: pre-trial lead time and hearing lead time.

Figure 9.11 shows the distribution of lead times for the four regions. Not enough trials were set in Kingston or Perth to make an observations. In Kingston, of the 615 appearances that were observed, only 6 trials were scheduled. In Perth, of the 433 appearances that were observed only 11 trials or preliminary hearings were scheduled. For Ottawa and Calgary, however, there is a clear bi-modal distribution for scheduling trials. This is the difference between scheduling in-custody and out of custody trials. Coincidentally, the out-of-custody average in Calgary is similar to the in-custody average in Ottawa.

Alberta has also developed a data product that includes several metrics surrounding case management process and one of those is the criminal trial lead time. The Alberta Justice Dashboard shows a criminal trial lead time of 24 weeks for 2024³⁰⁴ which lines up with the mean time in my data set of 159 days.

Cadence can be an indicator of the capacity of the case management system to handle matters in that phase in a timely fashion. Longer cadences lead to shorter daily case load. Lead time on the other hand is an indicator of the post-case-management system's capacity

³⁰³ *Brereton*, *supra* note 143 at para 22.

³⁰⁴ Alberta Justice Dashboard, *supra* note 113.

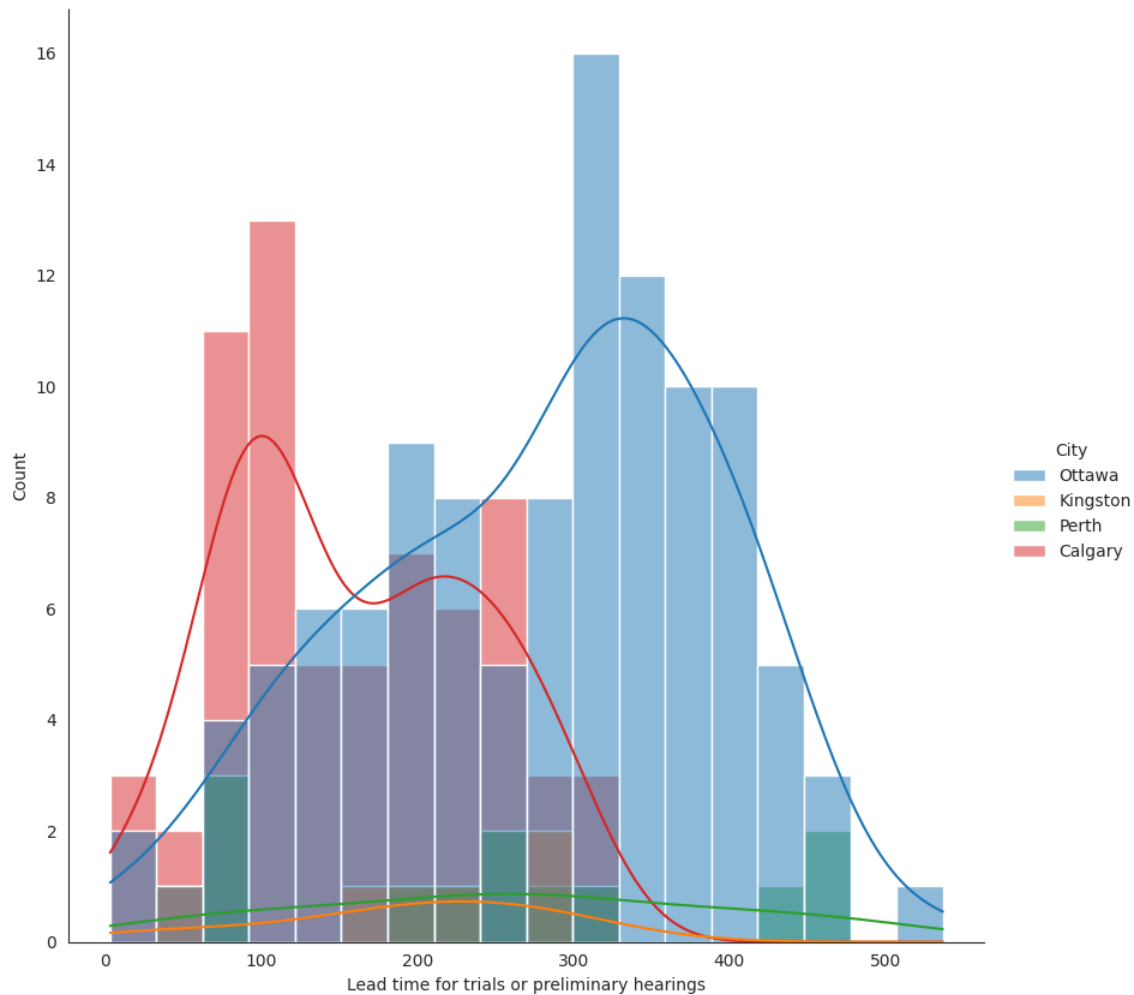


Figure 9.11: Trial lead time distribution by town

to handle the phase after case management has completed. Longer lead times suggest more congested trial and preliminary hearing courts. The direct impact on case management is that longer lead times necessarily compress the amount of time that can be spent managing cases. The median lead time in Ottawa of 42 weeks only leave 7 months in case management to ensure everything is prepared before the Jordan deadline. This leaves little room for error and turns every mundane problem into a crisis. Hopefully, no witnesses get a cold. Calgary, during my observation, had a much bigger buffer for errors as a result of much shorter lead times.

9.4 Assessing Goodness

This chapter thus far has highlighted some of the data that I collected from the back of case management courts in Calgary and three courts in eastern Ontario. This section looks what that data could suggest about the quality of the systems that I saw. I argued in chapter 5 that four useful dimensions for assessing the quality of a case management system are timeliness, fairness, efficiency, and resiliency. It is against these four dimensions that I have leveraged the data that I gathered to measure these systems.

In summary, the raw data paints a picture of a case management system that is often either fully saturated or overflowing. Case management courts are, understandably, struggling to meet their objectives. While the consequences of that struggle are visible daily, including in the churn and the manner in which cases end, they are mostly borne by the people who are waiting in-custody or are unrepresented. There are recent efforts, which I also highlight, to mitigate these problems.

9.4.1 Timeliness

There seems to be two issues with timeliness suggested by the data I collected. The first is the risk that congestion will prevent the system from reacting in a timely way to the needs of individual cases. The second is that it will unnecessarily and unhelpfully extend a case and with the time pressure of *Jordan*³⁰⁵, those cases will eventually fail.

Timely intervention is a keystone of an effective case management process. I have argued that it is the reason for the routine appearances. This reactivity is undermined in a system that is at capacity. For instance, the courts in *R. v. Hillier* relied on these hopeful appearances and that case failed because the interventions came too late. With dockets of over 100 matters, recognizing the cases that need intervention in the time allotted is a herculean task imposed on a very busy courtroom. The fact that the most frequent reasons for the adjournments do not involve the judicial official at all suggests that this congestion is

³⁰⁵ *Jordan*, *supra* note 2.

partly unnecessary. Many of the adjournments are for further, out-of-court discussion, and much of the rest are for intake. Neither are situations that justices are able to meaningfully contribute to.

There has been an effort in Ontario to enhance the reactivity of the Crown. The focus has been responding to cases at risk of being stayed for delay. Their internal information system is called **SCOPE** (**S**cheduling **C**rown **O**perations **P**repared **E**lectronically (**S**ystem)). It is the warehouse for Crown information about criminal cases and has been in used in some regions since 2013 and more broadly since 2017³⁰⁶. It has been enhanced to flag cases that have been going on too long with “too long” being defined as 8 months. The Standing Committee on Public Accounts addressed SCOPE’s increased usage and case flagging in a 2023 report:

The Committee heard that the Ministry has been working to leverage available resources to track cases that are vulnerable to being stayed. In particular, the Ministry has added an eight-month flag to SCOPE (the Crown’s electronic case management tool), which alerts Crown attorneys to the need to prioritize a file. SCOPE now has several colour-coded flags that make it very clear to Crown attorneys which cases are vulnerable to being stayed so that they can take steps to address the matter.³⁰⁷

As noted above, I posit that the second aspect of timeliness is whether the process itself is too long and risks undermining its own goal. While fixed cadences are probably essential at this volume, since it would be difficult to correctly divine the needed adjournment length every time, fixed cadences mean that every adjournment of two, three, or four weeks that

³⁰⁶Ontario, Ontario Ministry of the Attorney General, *Putting Justice Within Reach: A Plan for User-Focused Justice in Ontario*, (29 November 2017, update: 28, February 2024) online at: <https://www.ontario.ca/page/putting-justice-within-reach-plan-user-focused-justice-ontario> [https://web.archive.org/web/20240314052856/https://www.ontario.ca/page/putting-justice-within-reach-plan-user-focused-justice-ontario]

³⁰⁷Ontario, *Standing Committee on Public Accounts, Criminal Court System*, 43-1, ch 3 vol 3 (November 2023).

was made for a single, quickly completed, task is longer than necessary. There seems to be an awful lot of those types of adjournments in the data I collected.

There is also temptation for clever defence counsel to leverage the nature of the system to stretch matters out. As much as courts have tried to prevent this mischief with decisions saying that counsel cannot lie in wait³⁰⁸ it remains tempting. It is difficult to say definitively, based on the data available, whether or not delaying cases is happening intentionally but it is a risk that the bench is alive to as well. It has perhaps never been so eloquently put as by Justice Macia in the provincial court in Montreal who’s parenthetical, “drop by drop the river rises”, expresses his frustration with counting and the efforts of defence counsel to tally up adjournments:

[23] The presumptive ceilings of 18 or 30 months in Jordan have – in a sense – introduced prescription into Canada’s criminal law. Once the ceiling has been breached, it’s the Crown’s burden to establish exceptional circumstances justifying the delay. Inevitably, defence counsels who claim to be diligent in their efforts to move the case along will want to tally up every adjournment in the trial history to establish a breach in the Jordan ceiling. A delay – no matter how minute – will not be ignored if it could support a section 11 b) Charter application (drop by drop the river rises). Despite hopes to the contrary, micro-counting will continue to be the bane of a trial judge’s existence.³⁰⁹

This risk does warrant some concern and is actively guarded against by attentive prosecutors. For instance, while I was observing Ottawa, the Crown’s office assigned a single, senior Crown lawyer to handle the case management docket for a couple of months. Being senior, they were very comfortable challenging defence counsel on the record on issues like timeliness. They were candid, if a bit cheeky about it. They would ask when specifically defence counsel sent the email that the defence counsel had, moments ago, put on the record

³⁰⁸ *JF*, *supra* note 3 at paras 32-35.

³⁰⁹ *Martell v R.*, 2022 QCCQ 9333 at para 23.

as the reason for the adjournment request. The answer, frequently, was mere hours before that appearance. The biting quip: “I will get in touch with the midnight Crown on that” was routine and served to correct the record that the Crown was at fault for the delay, and prevent that mischief, intentional or not.

There have been other efforts to find a balance between frequent appearances for judicial nudges and useful appearances that I had no data available for. As mentioned, Calgary does the first three appearances over-the-counter and these can be adjourned online by counsel. Neither of those efforts are open to the public. Ontario had also recognized this problem and created enhanced designations. These are 12-week initial adjournments for the purposes of covering the entire intake phase. In Ottawa, I noted their use exactly three times. They have since been replaced with presumptive 12-week adjournments at the first appearance.

9.4.2 Fairness

Fairness in the case management process means at least two things:

- does the process contribute to, and not undermine, a fair conclusion?
- is the process itself fair?

The former is a question that, in my view, requires a different sort of study to answer. Without the gift of clairvoyance, it requires looking backwards from eventual failures towards the process that spawned that failure. This has been done. Kent Roach noted several such failures in *Wrongfully Convicted*. For instance, in summarizing the case of a false confession of a man who was actually incarcerated at the time of the offence in 2017, Roach notes the process failures that must have occurred at every step:

At multiple stages of this case – Catcheway’s arrest, the decision to detain him in pre-trial custody, the review of the charges by the Crown prosecutor, the review of the case by the defence lawyer, the presentencing review by the probation officer,

and the final review by the judge – information that would have shown he could not have committed the crime had somehow been missed.³¹⁰

The situation I noted above with Mr. Lamoureux was a near miss of a similar sort of failure. Identifying those sorts of failures of fairness is the job of those in the courtroom. In order to detect these failures they need the full picture and the time to reflect. My observations suggest that often, they get neither.

The second question regards the inherent unfairness of the process, however, is more easily wrestled with. The fairness of the process itself means that it treats people equally with regard to what they need. I will highlight two examples of the process failing to operate fairly: unrepresented people, and those in-custody.

I spent months in these court rooms for this study, several years appearing in them during my early career, and several additional years thinking about them. The permutations and complexity of trying to usher a case through the contemporary case management system still surprises me. Navigating it without legal training or experience would be exceptionally challenging. Even so, every day we have dozens of people trying to do that in Ottawa alone. The current safety valve for this unfairness is the availability of duty counsel. In all four jurisdictions, duty counsel was asked to help prepare people for, assist them with, and debrief them after their unrepresented appearances.

But the existence of duty counsel does not render the whole process fair. Appearing every two weeks for a court appearance that is usually a status update has consequences for the self-represented. I vividly recall seeing a man who had made efforts to appear on time, on-line, who over the course of the day appeared to melt into his chair. He was sitting on a tubular steel wooden stacking chair against a white wall in a kitchen doorway. The sort of uncomfortable chair that would be found at a high-school reunion or a basement church service. He wore a dress shirt and for the first 15 minutes he sat bolt upright waiting for his matter to be called. This was 8:30 in the morning on the Ottawa case management video

³¹⁰Roach, Kent, *Wrongfully convicted: guilty pleas, imagined crimes, and what Canada must do to safeguard justice*, (Toronto, Ontario: Simon & Schuster Canada, 2023) at page 10.

conference call. His matter would not be called until after all of the represented matters had been dealt with which took until the lunch break. After lunch, his matter would not be called until after the in-custody matters were dealt with at 1:30 pm. His matter was called at roughly 2:30 pm. This man was present and waited the entire day. Some justices make efforts to advise unrepresented people of when their matters would be heard but it is far from a perfect system.

So, in addition to having to navigate the complex system, unrepresented people often have to wait for hours for their matter to be brought up. They were, in all four jurisdiction, brought up after defence counsel's matters were called. Counsel sat higher in the hierarchy than self-represented people. Each time, these unrepresented people might be missing work, trying to balance child care, or just melting into 1970s-style laminated furniture. Those who qualify for legal aid or who those can afford counsel experience none of those downsides. Finally, unrepresented people are more likely to be subject to bench warrants. Counsel can make a number of attempts to get in touch with their clients and still appear on their behalf. Unrepresented people, generally, miss one or two appearances before there is a warrant issued.

The second class of people who experience the process differently and with more difficulty are those detained in custody. I am speaking here specifically about how persons in custody have to interact with the case management system. There are credible criticisms about the whole bail system but I do not have room for them all here. The vast majority, roughly 90%, of appearances that I saw were out-of-custody appearances. Those who were detained experienced the system decidedly differently and it appeared to be deeply unfair. These appearances are almost universally remote. The rooms they are in are loud. The accused persons are often inaudible or confused about what is going on in the courtroom. There is no one available on-site at the jail, aside from the jail guards, to explain the situation. As noted, for *R. v. Aden* in chapter 8, communication with people in-custody can be difficult. The most common refrain from counsel to the people they were representing who were appearing from jail by video was: "call me".

9.4.3 Efficiency

The system seems to spend a lot of time and paperwork moving cases that needed no intervention. 50 appearances a day in Ottawa are less than 90 seconds long. These appearances might act as nudges to counsel to do their homework but those nudges come at a cost. In Ottawa and Calgary, those nudges lead to long dockets and lengthy days. There is another, more subtle, source of inefficiency in Ottawa that was special to it: schedules.

Ottawa is obsessed with schedules. There is a schedule for scheduling a scheduling meeting to schedule a trial. That is not hyperbole or exaggeration and I am not alone at my wonder. Michael Spratt, a defence counsel in Ottawa, noted how different this is in other regions as well in an opinion piece from the summer of 2025 titled *Hurry up and wait: The Ontario court's relentless commitment to inefficiency*:

The problem isn't just the rules. It's also that those rules are entirely different in every courthouse. In one courthouse, a remand appearance can be done administratively; in another, you'll need a full judicial audience. You can set a trial date in one region with a quick call to trial coordination; in another, you'll need to pass through a gauntlet of pre-trial hearings, case conferences, and magical forms. A few years ago, I ran a serious sexual assault trial in Regina. When the Crown sent me indexed, organized, and immediately usable disclosure, I was shocked. When I asked to schedule a meeting to set up a meeting to eventually schedule another meeting to get approval to schedule the trial, the Crown was confused. "In Saskatchewan," they said, "we just set the trial."

It was the first and only time I have ever said this unironically: Ontario could learn something from Saskatchewan.³¹¹

I did not have the benefit of visiting Saskatchewan for this project but Mr. Spratt's expe-

³¹¹Michael Spratt, "Hurry up and wait: The Ontario court's relentless commitment to inefficiency" *Canadian Lawyer*, (27 June 2025), online: <https://www.canadianlawyermag.com/news/opinion/hurry-up-and-wait-the-ontario-courts-relentless-commitment-to-inefficiency/392679>.

rience mirrors my observations in Ontario – Ottawa especially. Ottawa spends an incredible amount of court time and administrative energy in scheduling. Recall from chapter 6 that scheduling is a **really** hard problem to solve with an efficient solution. Ottawa has taken an already complex problem and stacked copies of it on top of each other. The data bore that out as well. Scheduled meetings were responsible for nearly 20% of all the adjournments including CPTs, JPTs, and hearing scheduling in Ottawa. This was one of the few glaringly obvious cultural difference I noted between the 4 courtrooms.

There were some other notable, less obvious, differences between the Calgary and Ottawa systems that were directed towards efficiency. Calgary has a digital system for providing availability information directly to counsel and the court while booking remote courts³¹² They have another digital system for early adjournments³¹³ during the intake period, removing some of the intake appearances from the docket. Out-of-band communication is ad-hoc and not scheduled through case management court and finally they have a much shorter lead time, so even cases that start to stretch are not immediately a crisis.

9.4.4 Resiliency

Finally, the resiliency of the system is its ability to absorb mistakes, failures, or unexpected shocks. The biggest safeguards in the systems that I looked at were the humans operating them. Whether there were the quietly heroic clerks correcting errors, the slightly cheeky senior Crowns protecting the record, or the diligent counsel defending the rights of their clients. The safety in this dangerous system is grounded in the ability for these people to recognize defects and react appropriately. The volume in the system has grown along with the burden on these people. Guarding against defects for 8 hours over 130 cases in Ottawa is materially different than doing it for less time for fewer matters in Perth.

The second source of resiliency in the case management system that I will briefly highlight

³¹²Alberta, Government of Alberta, “Remote Courtroom Scheduling, online: <https://alberta-courts.ca/cj/about-the-court/innovation/rcs>.

³¹³Alberta, Government of Alberta, “Adjournment Digital Service”, online: <https://adjournment-request.alberta.ca/>.

is its ability to be changed. Because the fine details have been left to local judges and court administration, these people can adjust the process to meet local needs. Mr. Spratt mentioned this in his article as a frustration, but in some circumstances it can be productive. The power to make these adjustments was put to the extreme test with the responses to the COVID-19 pandemic. I explore this in much more detail in chapter [10](#).

9.5 Conclusion

Ore-trial case management is meant to ready cases for completion. In some dimensions, these processes are missing the mark. Going back briefly to the model of the clock workshop, the criminal case management courts that I observed often acted like workshops that spent much of their time passing clocks that needed no work from work-desk to work-desk. These finished clocks buried the clocks that needed attention under a mountain of ticking steel and spruce. In this case, it takes special effort and recognition to propel the defective clocks out the window or find the ones in need of specialized work. Case management courts invest an extensive amount of their time and effort for under-90 second appearances for the sole purpose of being told that the parties need to talk to each other. They have buried themselves in the busy work.

Calgary, while being of similar size and make-up to Ottawa, has taken a somewhat different approach in some aspects. While they still have extensive dockets of cases that appear to require little intervention, the first three appearances happen over-the-counter. Out-of-band communication about availability and scheduling can happen whenever everyone is ready. On the basis of the evidence here, I cannot conclusively say their approach is better, but it certainly appears to be steps taken in the right direction.

In my opinion, the riskiest misconception to hold about criminal case management is that “it works fine for most cases”. The reality is that any case management process would work fine for most cases because the data suggests that most need very little judicial attention. But the ones that do, need it to be delivered efficiently, quickly and fairly.

I conducted this study in the long, dark shadow of the COVID-19 pandemic. Courts were shutdown across the country for weeks or months in 2020 and the ripples are, arguably, still being felt. The next chapter takes a look at this watershed event and how it shaped the process at the time. The responses from the humans that work on these systems are telling for how resilient this system was when it was adjusted to meet these unprecedented challenges.

Chapter 10

COVID-19 and Resiliency

In January 2020, the first case of the novel coronavirus SARS-CoV-2 (COVID-19) was identified in Canada³¹⁴. By March 2020, COVID-19 was a national emergency³¹⁵. This national emergency impacted every area of Canadian life from the obvious like healthcare to the mundane like grocery shopping. The criminal justice system was not spared the impact. The next three years saw fundamental changes to the case management processes in criminal courts in Canada at velocity never seen except perhaps immediately after the establishment of The Charter³¹⁶.

This chapter is not a story about how the changes to the case management process in criminal courts were successes or failures, nor do I try to dissect the decision-making of the administration of justice in the various provinces. Rather, this chapter looks at the response to the pandemic as an optimistic demonstration of the system's capacity for evolution. There is no doubt that the system struggled with lengthening delay, terrible detention conditions, and frequent changes that were difficult to track even for the seasoned practitioner. But it showed a great deal of capacity for resiliency during this period of time. The courts' responses to the COVID-19 pandemic are an example of how powerfully practice directives can augment, further define, and fine-tune the case management process. These powers

³¹⁴Duffin, Jacalyn, *Covid-19: a History*, (Montreal, Quebec: McGill-Queen's University Press, 2022) at page 17.

³¹⁵*Ibid* at page 25.

³¹⁶The Charter, *Supra* note 102.

were quickly leveraged in previously unheard of ways. The combination of these practice directives and the experienced and diligent human beings that managed the criminal court system on the day-to-day basis baked a substantial amount of resiliency into the criminal case management system.

It would be unethical to do an experiment on the case management system. It is too important and the consequences are impossible to control for. The response to a crisis of this magnitude was a dozen experiments all happening at once on the real system without the same ethical dilemmas. This chapter first looks at what triggered those pandemic-imposed experiments and what was at stake for the system at the time. Next, this chapter looks at how the courts responded to the pandemic in three stages. They shutdown. They opened back up. And then they adjusted to the ever-changing reality. Each court took a slightly different route, had slightly different pressures, and wound up in a slightly different place. Finally, I highlight the lessons and legacies of the pandemic on the criminal case management process.

10.1 COVID-19 in the Court System

The COVID-19 pandemic was declared an emergency in Canada in March of 2020. Over the next 3 years, Health Canada reported that 60,871 people died in Canada from the disease itself³¹⁷. Schools were closed³¹⁸ which led to chaos for the school systems and for the guardians of those children³¹⁹. Hospitals were overwhelmed³²⁰ and so there was chaos and tragedy in the health care system.

The court system was not immune to the chaos. Most court operations in most of the country were halted in March of 2020³²¹. Thousands of trials were cancelled³²². Appearances

³¹⁷Canada, Health Canada, “COVID-19 epidemiology update: Summary” (1 October 2024) online: <https://health-infobase.canada.ca/src/data/covidLive/Epidemiological-summary-of-COVID-19-cases-in-Canada-Canada.ca.pdf>.

³¹⁸Covid-19 History, *supra* note 314 at page 32.

³¹⁹*Ibid.*

³²⁰*Ibid* at page 33-34.

³²¹*Trial Delay and COVID-19*, *supra* note 8 at page 843.

³²²*Ibid.*

were adjourned and progress for a lot of cases stalled.

In response to this challenge, judges issued hundreds of directives, notices, and adjustments around the country, in order to try and ensure the continued functioning of the court. The administration of justice was challenged to balance the uncertainty of the time with the reality that the court system cannot simply shut down. People were still in custody. People were still being charged with offences. This section describes how the administration managed this balancing act for the three years of the pandemic. It first provides a timeline of the pandemic for some additional context, describing the timeline of events, closures, vaccines, and waves. This is required given that even as I write this chapter in 2025, it can be difficult to remember the chaos and events that happened during that period. The timeline puts the adjustments the courts made in context and helps explain the decisions of courts that would otherwise seem puzzling. In the second half of this chapter, I lay out the stakes and answer the question: “why did these changes need to happen quickly and why did they need to be effective?”

10.1.1 Basic History

To understand the courts’ responses, this section recalls some of the progression of the COVID-19 pandemic in Canada. This is context that helps explain some of the decisions the courts made and what information was available to them at the time to inform those decisions. It also explains some of the terms of art that became familiar during those early years of the COVID-19 pandemic but that may fade from memory over time. If “green zone”, “Atlantic Bubble”, and “Omicron Variant” are still fresh in your memory, this section might be unnecessary and even a bit stressful.

Table [10.1](#) outlines some of major events of the COVID-19 pandemic in Canada. From the Canadian perspective, the pandemic started in 2020 and continued well into 2023. Relatives of the virus remain in circulation as of writing this chapter and have been rolled up with influenza and colds as a serious seasonal illness.

Table 10.1: Timeline of the COVID-19 Pandemic in Canada

December, 2019	First case of SARS-CoV-2 identified in China
January 25, 2020	First case SARS-CoV-2 identified in Canada
March 11, 2020	Pandemic declared world wide by WHO
March 12, 2020	Non-essential travel restricted
March 13, 2020	States of emergencies declared
July 18, 2020	Second wave of infections in Canada
April, 2021	Vaccines made widely available
March 5, 2022	Third wave of infections in Canada
May, 2023	Emergency in Canada declared over

While the first case was found in Canada in January 2020, the scope of what was coming was still unknown. The WHO declared the worldwide pandemic a couple of weeks later. By mid-March 2020 the situation in Canada was serious and both the provincial and federal governments mandated unprecedented restrictions on businesses, schools, and other institutions. Non-essential, international travel was restricted and there were mandatory quarantines for international travellers arriving in Canada. The Prime Minister made the statement that Canadians who were overseas needed to make their way back urgently, lest they get stuck³²³. Legislation was passed that required businesses to close or implement measures for limiting capacity³²⁴. It was a fast-moving, and drastic response in the early days.

³²³Kathleen Harris, “Trudeau says government will do all it can to help stranded Canadians, but concedes some will remain trapped”, *CBC*, (21 March 2020) online: <https://www.cbc.ca/news/politics/trudeau-canadians-stranded-covid19-coronavirus-1.5505582>.

³²⁴See for example Alberta’s order: Alberta, Alberta Health, “CMOH order 02-2020”, (17 March 2020) online: <https://open.alberta.ca/publications/cmoh-order-02-2020-2020-covid-19-response>; or Ontario’s similar order: Ontario, Office of the Premier, “Ontario Orders the Mandatory Closure of All Non-Essential Workplaces to Fight Spread of COVID-19”, (23, March 2020), online: <https://news.ontario.ca/en/release/56435/ontario-orders-the-mandatory-closure-of-all-non-essential-workplaces-to-fight-spread-of-covid-19>.

The intention of the shutdowns was to reduce the number of contacts that people had, in order to reduce the transmission of COVID between people. The message from health authorities was to “flatten the curve” This was the message from Canada’s chief public health officer on June 19, 2020 as the first wave was waning in time for the summer months:

After months of Canadians working together to flatten the curve, many places across the country have re-opened in time for the summer. Although sunny days are ahead, we must not let our guard down because there are still areas where COVID-19 is actively spreading.

It has been just over 100 days since Canada reported its first one hundred people with COVID-19 and this past week we exceeded 100,000 reported cases. Although all indicators of COVID-19 activity have steadily declined in recent weeks, our epidemic curve and cumulative cases are a reminder of how quickly this disease can spread. As we continue to live with COVID-19, we must remain vigilant. Unless we keep public health measures up, we will not be able to keep COVID-19 disease activity down.³²⁵

About 3 months after this statement, Canada was well into its second wave of the pandemic and restrictions were elevated again. The pandemic continued in these waves. There would be a rise in restrictions as cases escalated; and eventually the number of new cases of COVID-19 would peak and then begin to fall, and in response the restrictions would ease, people would gather again, and the cycle would repeat. Health Canada identified 4 distinct waves. As of writing, that information has been rolled into the general seasonal illnesses like influenza³²⁶

³²⁵Canada, Public Health Agency of Canada, “Statement from the Chief Public Health Officer of Canada on Saturday, June 20, 2020”, (20 June 2020), online: <https://www.canada.ca/en/public-health/news/2020/06/statement-from-the-chief-public-health-officer-of-canada-on-saturday-june-20-2020.html>.

³²⁶Canada, Health Canada, “Canadian respiratory virus surveillance report”, online: <https://health-infobase.canada.ca/respiratory-virus-surveillance/about.html>.

The decisions about the extent and nature of the restrictions and their timings were mostly made at the provincial level with a couple of notable oddities. One such oddity was the establishment of the Atlantic Bubble. Starting in June of 2020, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador standardized their travel restrictions and required quarantine for anyone from outside the Atlantic provinces:

Earlier today, [June 24, 2020,] the Council of Atlantic Premiers announced travel restrictions in Atlantic Canada will be eased as COVID-19 case numbers remain low in each province. Interprovincial travel within Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador, without the requirement to self-isolate for Atlantic Canadian residents, will be permitted beginning Friday, July 3.³²⁷

This “Atlantic Bubble” made for some puzzling jurisdictional question but also led to court implementation details that had probably never been considered. What happens when a witness resides outside the bubble but was subpoenaed inside? The rises and falls in infection rates and the corresponding changes in restrictions caused a lot of uncertainty and unforeseeable policy changes, which made the situation extremely unpredictable for everyone including the courts.

In 2021, vaccines were made available and distributed widely to the Canadian population. This began the phase of returning to “normal” though there were still waves of infection and continual fallout from the health, economic, political, and general societal consequences from the early-pandemic to be reckoned with. In early 2022 a new variant, known as the Omicron variant entered circulation and became the dominant strain in Canada. There was a spike in infections and the cycle repeated itself once more. These cycles oscillated and those oscillations were eventually dampened into a much more manageable level. The pandemic fallout for the criminal justice system was extensive and lasted well into 2023. This is a

³²⁷Nova Scotia, Nova Scotia Government, “No New Cases of COVID-19, Atlantic Travel Bubble Announced”, (24 June 2020), online: <https://news.novascotia.ca/en/2020/06/24/no-new-cases-covid-19-atlantic-travel-bubble-announced>.

system that schedules appearances weeks in advance and trials months or over a year in advance. The pandemic measured its instability in waves and in weeks.

10.1.2 High Stakes for Criminal Courts

The criminal justice system is a high-stakes system. This was no less true during the pandemic. Though the stakes were not uniformly distributed across the participants. Prof. Paciocco describes the stakes for justice system participants and how the consequences are unevenly distributed in her paper of 2021, notably written while the pandemic was still happening:

Some of the accused persons squeezing through the resulting bottleneck have been languishing in pretrial detention at a time when jail conditions are more dangerous and desperate than usual. Others have been released pending trial. For some of them, material conditions—such as curfews or home confinement—may actually have been relatively similar to those experienced by members of the general public under social distancing orders; but the emotional, social, and financial stresses associated with pending criminal charges, and the psychological and economic strain caused by COVID-19, are likely to be mutually exacerbating. Meanwhile, victims, witnesses, and the many family and community networks impacted by criminal prosecutions have been enduring an extended period of anticipation at a time when stress is already running high, and when access to support and fellowship is restricted. Furthermore, many of those who are disproportionately likely to be prosecuted for crimes, or to be victims of crime, are also likely to be among those hit hardest by COVID-19.³²⁸

She notes that those most likely to be prosecuted or be victims are frequently the same group as those hit hardest by the effects of COVID-19. People in-custody, who already

³²⁸ *Trial Delay and COVID-19*, *supra* note 8 at page 837.

struggle to be treated fairly at the case management stage, are disproportionately hit by lock downs as jail conditions were more dangerous and desperate than they otherwise would be. The stakes were high even for those that were out of custody on release. They would have had to deal with their conditions being amplified by any shutdown. There are credible arguments that people who are out on bail on restrictive conditions are being punished before being convicted. Many of whom are out on bail for minor offences. Nicole Myers notes this problematic feature of the bail system in a 2024 Canadian article:

With no clear line between the guilty and the presumed innocent, being accused of wrongdoing instigates and justifies intervention. The language of prevention, risk management and public safety obfuscates the collateral consequences of the pre-trial process, consequences that are most intensively experienced by marginalised groups. Sanctioning commences upon arrest with pre-trial detention, supervision requirements and conditions of release instigating a trial period that tests and assesses the accused person's amenability and compliance as they navigate multiple court appearances over an indeterminate period.³²⁹

This was notably written only shortly after the pandemic and would have been no less true during the pandemic.

Besides the participants, the stakes for the court administrators themselves were also high. The court system is a complex system operated and maintained mostly by humans. Due to the years of practice requirements to be named to the bench, the judges tend to be older humans. The clerks, court staff, and the other routine participants at the courthouse were all individually dealing with the same uncertainty and risks that the rest of the country was.

Many Judges and Justices of the Peace are part of a vulnerable population because of their age or pre-existing health conditions. Proactive steps to reduce

³²⁹ *The bail process is both the trial and the punishment supra* note 9 at page 479.

risk may be appropriate.³³⁰

Finally, the consequences for the administration of justice was potentially catastrophic if the criminal court system was unable to rise to the challenges during the early COVID years. Serious cases that were already being tried are no less serious because of the viral situation in the region. Trust that “the justice system was fair to all” declined over the pandemic according to surveys taken by the Department of Justice³³¹. Rebuilding that trust in the justice system was a central objective in returning to normal operations following the pandemic.

While stakes for the criminal justice system were towering and the effect of the pandemic was far-reaching, the scope of this paper is not. This paper is focused on two aspects of the pandemic: what the response to COVID-19 reveals about the resiliency of the criminal case management process, and what lessons can be learned from this response. I will leave boiling the ocean of untangling the impact of the pandemic on the rest of criminal justice system to others. To that end, the next section examines the individual responses that individual regional courts made to their case management process that tried to manage the crisis and bring order to the chaos.

10.2 Court Responses

Courthouses in every region had to navigate differing provincial guidance, near-daily changes in infection rates, and unpredictable developments in restrictions and policy. It is easy to read back through the list of changes during the 2020-2023 time period and see flip-flops and inconsistency in the way that these courthouses reacted to the pandemic, and this was fitting with the developments at the time which, as detailed above, were in a state of continual flux. While the responses happened at different times and to different extents, due

³³⁰Alberta, Alberta Provincial Court, “Provincial Court Pandemic Plan”, (15 April, 2020), online: <https://www.albertacourts.ca/docs/default-source/pc/prov-court-pandemic-plan-covid19.pdf>.

³³¹Canada, Justice Department, “State of the Criminal Justice System: Impact of COVID-19 on the Criminal Justice System”, (2022), online https://www.justice.gc.ca/eng/cj-jp/state-etat/2022rpt-rap2022/pdf/RSD-2022-SOCJS_Covid-19_Report-en.pdf.

to the varied conditions across the country during this time, these responses to COVID-19 in the provincial courts can be broken down into three phases:

- Shutting down
- Re-opening
- Countinual adjustment

The shutdown happened in March of 2020 in every jurisdiction. The nature and execution of that shutdown differed slightly between them. But courts cannot stay closed forever in a law-respecting society, so it was necessary to reopen in some way, shape, or form, and to be functional. Staying functional was revisited and iterated on over three years and eventually the courts adjusted to a state that resembled the status quo. This section looks across several jurisdictions to explore the process of shutting down, re-opening, and adjusting, and to examine how these processes impacted the resiliency of the criminal court systems that needed to be maintained.

10.2.1 Shutdown

The first stage for the courts was, like much of the rest of country in March 2020, to shut the doors and stay inside. This happened almost synchronously across the country with Ontario acting first. In his order of March 15, Justice Morawetz, adjourned all matters in the Ontario Superior Court of Justice until June:

By order of Chief Justice Morawetz, for any accused person who has a criminal matter scheduled for any type of appearance in the Superior Court of Justice between March 17, 2020 and June 2, 2020, that matter is adjourned, unless directed otherwise by the Court. To preserve jurisdiction, for all accused persons who have been scheduled to appear between March 17, 2020 and June 1, 2020

a bench warrant with discretion will issue as of the date the person is scheduled to appear, pursuant to s. 597 (4) of the Criminal Code.³³²

A similar order was issued in the Ontario Provincial Court³³³ on the same day. The rest of the provinces and territories followed suit within a week. These orders were all made under the rules of procedure discussed in chapter 4 made under the Criminal Code. There were no new powers created at this point in the pandemic. This was the language used in British Columbia's order:

With the exception of matters determined by a judge to be urgent, all out of custody criminal matters (initial appearances, remands, applications, trials, and sentencings) scheduled to proceed between March 18 and May 16, 2020 are adjourned without the parties having to attend Court. See Appendix "A" - Adjournment Details for the next date. The Court file will record that these adjournments are due to COVID-19.³³⁴

In addition to taking the same strategy of a 2-month adjournment for all matters, the BC order is notable because the document it was issued with, NR-19³³⁵, was used as the repository for guidance and directives for the rest of the pandemic. It became the source of truth for the situation in BC courts for the next 3 years.

These suspensions are complex procedurally as well. Judges across the country, usually the chief justice of the relevant courts, effectively issued arrest warrants for tens of thousands

³³²Justice Morawetz, "Notice to Accused Persons, Profession, Crown, Public Prosecution Service of Canada, Correctional Institutions, Witnesses, Jurors, The Public and The Media Regarding Criminal Operations" (15 March 2020) online: <https://www.ontariocourts.ca/scj/covid-19-suspension-crim/> [https://web.archive.org/web/20200318200844/https://www.ontariocourts.ca/scj/covid-19-suspension-crim/#expand].

³³³Ontario Court of Justice, "COVID-19 Pandemic – Criminal Case Adjournment Dates – Out-of-Custody Accused", (28 March 2020), online: <https://www.ontariocourts.ca/ocj/covid-19/criminal-list-adjournment/> [https://web.archive.org/web/20200330205225/https://www.ontariocourts.ca/ocj/covid-19/criminal-list-adjournment/].

³³⁴BC Provincial Court, "NP 19 - Notice to the Profession and Public COVID-19: Suspension of Regular Court Operations" (23 March 2020), online: <https://web.archive.org/web/20200406073111/https://www.provincialcourt.bc.ca/downloads/Practice%20Directions/NP%2019%20COVID-19%20Suspension%20of%20Regular%20Court%20Operations.pdf>.

³³⁵*Ibid.*

of people who otherwise probably would not have failed to appear. Manitoba's criminal courts took a particularly expansive view of their authority and issued, as part of their directive, an order that converted all jury trials to a judge-alone trial or, if the accused still wanted a jury' no trial at all until the pandemic was over:

Effective immediately, all trials scheduled to proceed by judge and jury prior to June 30, 2020 will not proceed with a jury. Rather, they will proceed by judge alone or will be rescheduled to proceed at a later date. Jury Selections are therefore also cancelled during this time. The one jury trial currently in progress will continue until its final disposition.³³⁶

This order was not immediately tested as all Manitoba criminal trials were cancelled a few days later³³⁷ The Manitoba order has drawn some criticism for undermining the open court principle and for being dubious procedurally³³⁸

But while they adjourned some matters, the criminal courts across the country did not shut down entirely. The stakes were too high. Each court included a safety valve in their order for urgent or essential matters – the justice system still needed to deal with the bare minimum. The Provincial Court of Manitoba worded it, for instance, as follows:

The Provincial Court of Manitoba remains open to deal with in custody matters in all court centres (Winnipeg, Portage la Prairie, Brandon, Dauphin, The Pas and Thompson), and is available to hear applications with respect to other urgent matters.³³⁹

³³⁶Manitoba Courts, "COVID-19 Manitoba Courts", (25 May 2020) online: <https://www.manitoba-courts.mb.ca/news/covid-19-manitoba-court-schedule-changes/>.

³³⁷Manitoba, Provincial Court of Manitoba, Re: Appearance in Winnipeg Before the Court during the COVID-19 Suspension and Restriction of Hearings, (18 March 2020), online: https://web.archive.org/web/20200410075647/http://www.manitobacourts.mb.ca/site/assets/files/1964/notice_-_provincial_court_-_covid-19_march_18_2020.pdf

³³⁸Shawn Singh and Brandon Trask, "Part B – Drawing the Curtains in the House of Justice: Analyzing the Impact of Pandemic Measures within Manitoba Courts on the Open Court Principle, Access to Justice, and Charter Rights", 2022 45-5 Manitoba Law Journal 215, 2022 CanLIIDocs 4178, online: <https://canlii.ca/t/7n0p7>.

³³⁹Manitoba, Provincial Court of Manitoba, "Re: COVID-19 Suspension and Restriction of Hearings", (16, March 2020), online: https://web.archive.org/web/20200410075708/http://www.manitobacourts.mb.ca/site/assets/files/1964/notice_-_provincial_court_-_covid-19_march_16_2020.pdf.

This state of criminal courts across the country doing the bare minimum to deal with essential matters continued for about eight weeks from mid-March 2020, roughly the duration of the first wave of COVID-19 in Canada. Taking a snapshot here, the courts were running in what **they** considered the absolute minimum to accomplish their obligations under Canadian criminal law. This baseline is important because it is an implicit comment from the bench that declares the most important and urgent matters that they deal with on a day-to-day basis. It included, crucially, still dealing with people who were in-custody and the various orders and warrants that they issue. Notably, routine remand appearances did not make the cut. These appearances were suspended during this period. The courts got to this point of minimum operation by leveraging powers granted in the late 1800s and contemporary rules made with those powers. The radical changes in the early stages of the pandemic did not require parliamentary intervention nor did the decisions concerning when and how to reopen.

10.2.2 Re-opening

It hard to draw a bright line around when courts “re-opened” as it was a gradual and iterative process based on the local COVID-19 situation, but there was some structure to the courts’ approaches. Having only dealt with the bare minimum for weeks, there was a need to address more fulsomely the array of criminal court matters that had been on pause. In particular, the courts needed to find a way to meet with the persons involved in criminal court processes, in a way that would be safe and effective. There was provincial health authority guidance, for instance, on the number of people that could occupy the same indoor space. Usually, that number was less than 10.

The reality is also that our present court facilities will not permit some types of proceedings to be heard during the pandemic. One such example is jury trials.

As per the May 11, 2020, directive, the Court has extended the suspension of all

jury trials in Nova Scotia until Sept. 8, 2020.³⁴⁰

In addition to the practical realities of some of the functions, the courts also needed to decide what aspects of their operations were most important. Alberta provincial court listed their essential priorities in the pandemic response plan that they released about two weeks into the pandemic:

Essential Functions

1. Bail hearings for adults that can't be handled by the Hearing Office, and Youth Release hearings
2. In-custody docket appearances, including summary dispositions — particularly where an individual is likely time served.
3. In-custody trials or preliminary inquiries.
4. Warrants on urgent basis by JP and PCJ³⁴¹

The first four of these essential functions were focused on people who are in custody and urgent warrants. Each province had a similar list of priorities but the roll-out of the approaches diverged here between the provinces quite a bit. Ontario took months to reopen courthouses for routine matters and kicked the can down the road a number of times about resuming them. This was the order on May 11, 2020 after the end of the initial suspension:

All criminal trials and preliminary inquiries that were scheduled to be held between Friday March 20, 2020 and Friday July 3, 2020, including trials and preliminary inquiries involving people who are in custody, are suspended, unless a

³⁴⁰Nova Scotia, Nova Scotia Judiciary, “COVID-19: Frequently Asked Questions Re: Matters in the Supreme Court (General Division)”, (27 May 2020), online: https://web.archive.org/web/20200922232735/https://www.courts.ns.ca/News_of_Courts/documents/NSSC_Frequently_Asked_Questions_v4_05_27_20.pdf

³⁴¹Alberta, “Provincial Court of Alberta Pandemic Plan”, (15 April 2020), online: https://albertacourts.ca/docs/default-source/pc/prov-court-pandemic-plan-covid19.pdf?sfvrsn=3d378180_4 I excluded the second third of the list as it focuses on emergency protection orders and family law matters.

judge seized with a continuing matter orders otherwise and the Regional Senior Judge is satisfied that the necessary courthouse resources are in place.

The Court is not currently setting criminal trial or preliminary inquiry dates because of continued uncertainty as to when full operations will resume and the need to prioritize within the Court's caseload.³⁴²

Automatic adjournments were again extended in July 2020 until August 2020:

If you have a case management criminal court appearance in the Ontario Court of Justice on or before July 31, 2020, do not attend court. The court will adjourn your matter without you being present, using a court order called a “bench warrant with discretion”, which will require you to attend court on the new date.³⁴³

Between August and December 2020 the Ontario Provincial Court rolled out virtual case management with Espanola being the last to resume operation³⁴⁴. It took nearly 9 months for there to be a routine appearance court in the entire province.

In contrast, though with very different challenges, Manitoba rolled their changes out and reopened many of their courts, even the most remote circuits, earlier than that. The difference was that they took an approach of monitoring, adjusting, and more monitoring. Their September 2020 notice, which laid out the timing for the last courts to reopen, mentioned both the challenges and the approach:

The Provincial Court of Manitoba is committed to re-opening a court sitting only when safety protocols and the resources to implement the safety protocols

³⁴²Ontario, Ontario Court of Justice, “COVID-19: Notice to Counsel and the Public re: Criminal Matters in the Ontario Court of Justice”, (22 May 2020), online: <https://web.archive.org/web/20200526105305/https://www.ontariocourts.ca/ocj/covid-19/covid-19-criminal-matters/>.

³⁴³Ontario, Ontario Court of Justice, “Notice to the Profession and the Public re: Criminal Case Management Appearances and Setting Trial and Preliminary Inquiry Dates”, (2 July 2020), online: <https://web.archive.org/web/20200707053751/https://www.ontariocourts.ca/ocj/covid-19/notice-criminal-july2-2020/>.

³⁴⁴Ontario, Ontario Court of Justice, “Update – Additional Court Location Commencing Virtual Criminal Case Management Appearance in October and November 2020”, (22 October 2020), online: <https://web.archive.org/web/20201103175403/https://www.ontariocourts.ca/ocj/covid-19/update-criminal-october222020/>.

are in place to protect all participants and the community. The ability to implement such protocols is a challenging endeavour at this time affecting the opening of several circuit locations. We continue to work with our partners towards resuming court sittings.³⁴⁵

As infection numbers increased with the second wave of the pandemic, Manitoba's courts reacted and closed their doors again in fall 2020, which started a process that continued in waves throughout the province for the next two years:

As of November 2, 2020, Winnipeg has moved to a Code Red designation, a restricted level based on the COVID-19 Pandemic Response System of Manitoba. Other regions have moved to a Code Orange. We as Courts advised we would continue to assess the COVID situation and react and adjust accordingly. Given the rising COVID numbers across Manitoba and particularly in Winnipeg, Courts have determined enhanced COVID measures should be implemented immediately.³⁴⁶

The reopening period varied from province to province but the goals were the same: increase service to the public while abiding by the health restrictions and standards in order to protect the participants in the criminal court system. Abiding by these restrictions and standards did require investment. Screens and cameras were installed in courthouses around the country; physical distancing meant installing Plexiglass barriers; and enhanced cleaning protocols were expansive.

In their 40-page guide describing the efforts to prepare a courthouse for reopening, the Ontario Ministry of the Attorney General identified remote work and online services as a priority:

³⁴⁵Manitoba, Provincial Court of Manitoba, "Re: SOVID-19 Suspension and Re-Opening of Additional Courts", (28 September 2020), online: https://www.manitobacourts.mb.ca/site/assets/files/1966/notice_-_provincial_court_-_covid-19_-_reopening_courts_september_28_2020_-_e.pdf.

³⁴⁶Manitoba, Provincial Court of Manitoba, Re: COVID-19 – Update", (2 November 2020), online: https://www.manitobacourts.mb.ca/site/assets/files/1966/notice_-_provincial_court_-_covid-19_-_update.pdf.

Reducing the need for in-person attendance to the courthouse continues to be the most effective method of mitigating the risk of transmission of COVID-19. Remote work, the prioritizing of online services, and the modernization of courts will continue to be a key focus during recover.³⁴⁷

These efforts to reopen the courts in a manner that was as safe as possible and to otherwise address the needs of the criminal court system would continue for the next 3 years and be revisited many time as the waves swelled and retreated.

10.2.3 Adjustment

The next two years from 2021-2023 were spent slowly and falteringly returning to a steady state within the criminal courts across the country. This ongoing process of modifying the system, evaluating the success of those changes, and refining them was continuous and visible. British Columbia published no fewer than 50 modifications to NR-19 and Manitoba published at least 81 different notices regarding changes in the criminal court processes before the pandemic stopped impacting the court sittings in that province.

This ability to frequently and repeatedly iterate demonstrates the fourth trait that I propose is important to case management in criminal justice – resilience. The closures were often cyclic and continued throughout the three years. Even in January of 2022, courts were still adjusting to the waves of the pandemic. Alberta cancelled trials and case management offices for several weeks:

Between January 4, 2022 and January 21, 2022 inclusive, all non-urgent out of custody trials, preliminary inquiries and other hearings requiring viva voce evidence will be adjourned.

All case management offices remain closed for in-person attendance until further notice. See the Case Management Offices (CMO) Out-of-Custody Docket Proto-

³⁴⁷Ontario, Ministry of the Attorney General Recover Secretariat, “COVID-19: Recommended Precautionary Measures”, (2 July 2020), online <https://files.ontario.ca/mag-covid-19-recommended-precautionary-measures-en-2020-07-03.pdf>.

col for information about how to appear remotely at the CMO and the advanced duty counsel service.³⁴⁸

Nova scotia also took a two-week suspension:

Due to the ongoing situation with COVID-19 and the Omicron variant, the Provincial Court of Nova Scotia is extending the suspension of most in-person proceedings until Friday, Feb. 11, 2022³⁴⁹

The courts had the authority and the structure to adjust to a highly unusual, rapidly evolving, and complex nationwide pandemic within the walls of the courthouse. The delegation in the Criminal Code dating back to the 19th century was sufficient to make changes that were able to respond to an unprecedented reorganization of the case management process that differed in each region. The court system was able to recover through the challenges of the time and while there were certain struggle with the resulting backlog³⁵⁰ the blow was not fatal and the resiliency and flexibility of the people in the system was responsible for much of that success.

Like the reopening after the initial shutdown, there was no bright line for when operations returned to normal. Mask mandates outlasted other pandemic measures, jury trials sputtered back to a start in 2021, 2022 saw at least one wave that cancelled trials and other in-person appearances. Broad, provincial-level directives stopped appearing midway through 2023 and were entirely cancelled by the end of 2023. The pandemic ended officially in May of 2023³⁵¹

Before closing this section, I will briefly mention the activity of a federal judicial committee called the [Action Committee on Modernizing Court Operations \(ACMCO\)](#). Struck in

³⁴⁸Alberta, Provincial Court of Alberta, “COVID-19 Court Measures Update”, (4 January 2022), online: <https://www.albertacourts.ca/docs/default-source/pc/covid-website-announcement-january-1-2022.pdf>.

³⁴⁹Nova Scotia, Nova Scotia Supreme Court, “Supreme Court Extends Modified Essential Services Model”, (26 January 2022), online: https://web.archive.org/web/20220129080807/https://www.courts.ns.ca/News_of_Courts/documents/NSSC_Modified_Essential_Services_Model_Extended_01_26_22.pdf.

³⁵⁰“The Covid backlog has descended on the Ontario Court of Justice across the province like an avalanche, and the result of that huge backlog is only now starting to be seen.” *Seibezzi, supra* note 169.

³⁵¹United Nations, “WHO Chief declares end to COVID-19 as a global health emergency”, (5 May 2023), online: <https://news.un.org/en/story/2023/05/1136367>.

response to the pandemic in 2020, it includes the chief justice of the Supreme Court and the Minister of Justice as co-chairs. It acted as a clearinghouse and hub for information sharing and coordination between the provincial courts:

The Action Committee on Modernizing Court Operations (the Action Committee) develops non-prescriptive, practical guidance for addressing challenges, and highlights opportunities and innovative practices to modernize court operations and improve access to justice for court users. Its work targets all levels of Canadian courts, in all types of court matters, including criminal, civil and family. The Action Committee also acts as a hub for information sharing, coordination and collaboration among judicial and justice partners who work in court operations across the country. Additionally, it identifies areas of further study that may interest policymakers, academics, and training providers in the field of court operations.³⁵²

There are shadows of the impact of their efforts in the similarity I have noted above but it is hard to pin those efforts down specifically. This committee drafted reports and provided informal advice to courthouses across the country and enlisted experts to develop that advice. That committee continues to operate in 2025 to develop reports on ways to modernize court operations. I refer to their work again in the final part.

10.3 The Pandemic's Lessons and Legacies

If you spend much time with criminal lawyers practising in Canada you get used to hearing complaints about the criminal court system. These complaints vary in their breadth from the systemic: “the whole system is broken” to the individual: “I don’t think that person is fair”. This is equally true, in my experience, from the prosecutors as it is from the defence counsel, as it is from the judges that sit on the bench. One of the frequent

³⁵²Canada, Department of Justice, “Action Committee on Modernizing Court Operations: Progress Report 2023-2024”, (2024), online: https://publications.gc.ca/collections/collection_2024/jus/J4-158-2024-eng.pdf.

complaints about the system is the extremely slow pace that things change. I am somewhat guilty of that about 180 pages ago³⁵³. But the criminal justice system's response to the COVID-19 was not slow and plodding, instead it was focused, responsive, and iterative. The demonstrates, at least, the capability for dramatic change. The lessons learned during the COVID-19 pandemic about how to make changes in the criminal court process should not be lost. Writing in the summer of 2020 the former chief justice of the Supreme Court and the writer of rather good criminal fiction³⁵⁴, Beverley McLachlin, noted the risks of these lessons being lost in a short plea for the system not to go back to its old ways:

There is a danger that once things return to normal, the legal system will go back to its old ways. This would be to squander the opportunity the current crisis has given us to rethink the way we do justice in Canada. Instead of returning to the “old normal” we need to build on what we have learned to bring the justice system into the 21st century.³⁵⁵

This message was reiterated by Chief Justice Wagner as part of a report of the work of the Action Committee on Modernizing Court Operations in 2023 as the courts started turning away from the pandemic response and back to business as usual:

This has been a year of evolution for the Committee. As we cautiously turn our attention away from COVID-19 as a public health emergency and towards court modernization, we retain the opportunity to use what we have learned during the pandemic - about our justice system's resiliency, innovation, and collaboration - and apply these lessons to both longstanding and emerging challenges.³⁵⁶

³⁵³I mention on page 16 that the practices in case management had been at least recognizable to lawyers rifling through archives since the 1980s in Ottawa.

³⁵⁴McLachlin, Beverley, *Full Disclosure: a Novel*, (Toronto: Simon & Schuster, 2018).

³⁵⁵Beverley McLachlin, “Access to Justice: A plea for technology in the justice system”, *Law360 Canada*, (17 July 2020), online: <https://www.law360.ca/ca/articles/1752056> [Technology Plea].

³⁵⁶Canada, Department of Justice, “Action Committee on Modernizing Court Operations: Progress Report: 2022-2023”, (2023), online: <https://www.fja.gc.ca/COVID-19/Progress-Report-Bilan-202223-eng.html#Achievements>.

This Committee was struck in response to the pandemic to provide guidance and expertise in responding to COVID-19. It now acts as a central repository for the lessons learned and advocates for modernization in the court system.

The pandemic, no doubt, perpetuated some unfairness in the criminal justice system. There were cases stayed that should not have been and there were people languishing in the system far longer than they ought to have been. But there are still lessons to be learned that are broader than how to manage case load during a global pandemic. I will highlight four here. The first is that the courts needed no additional legislative tools to make foundational changes to their processes. They had the authority they needed and with the motivation of a complete collapse, each provincial court responded. The second is that the deployment of technology, which had been an ongoing struggle for years³⁵⁷ aided that response and will continue to be involved in the maintenance of this system. That movement toward adoption of technology in court processes continues. The third is that the implicit declaration of the system's priorities should be taken seriously. The courts explicitly declared that they were focused on the the experience of those in custody even during the mundane appearances in routine cases. Over the course of pandemic this was declared almost universally to be **the** top priority. That should not change. Finally, the justice system was able to desynchronize some of the routine appearances by cutting out the judge and the courtroom for extended periods. I mentioned the Ontario experience with enhanced designations because I am most familiar with them but there were other examples from many other jurisdictions given above about how they adapted their routine appearances.

10.3.1 Administrative Authority and Flexibility

The court rules were not designed for the purpose of handling a global pandemic and the standard for their success should not be measured against perfection. Indeed, courts grappled with how to apply the court rules to deal with the unprecedented pressures exerted by

³⁵⁷Technology Plea, *supra*, note 355.

COVID-19, and with hindsight we can see that there were times that the court rules may have limited the ability of the courts to react in a fulsome way to these pressures. What these court rules do demonstrate, however, is that the courts possess broad authority because parliament recognized very early that flexibility in the daily operation of the courts was necessary. In the aftermath of the pandemic [ACMCO](#) issued guidance for court administration to consider when planning for emergencies. Included in that guidance was planning to prepare emergency procedures:

Continuing to function in an emergency will likely require a court to change the way it operates. Preparing procedures or processes to support business continuity may include:

- Developing emergency response procedures for each plausible emergency scenario identified in a risk assessment
- Preparing a list of statutory limitations and other urgent matters to prioritize in a situation of limited capacity, as well as guidance on extending or suspending timelines
- Making copies of all relevant operational procedures and policies easily accessible both in electronic and hard copy³⁵⁸

These were all lessons hard-learned in the pandemic, and they demonstrate that the courts have the capacity for change.

Courts leveraged their authority, for instance, over the pre-trial process to create new notices that changed how often counsel appeared and how involved judges were with the case management process. While Ontario struggled to quickly roll virtual court out throughout the province in the early part of the pandemic, it completed the policy portion of that

³⁵⁸Canada, Department of Justice, “Planning for and Responding to Emergencies in the Courts”, *Action Committee on Modernizing Court Operations*, (14 March 2024), online: <https://www.fja.gc.ca/COVID-19/Emergency-Planning-and-Response-in-the-Courts-Planification-et-interventions-durgence-dans-les-tribunaux-eng.html>.

problem within weeks of the pandemic shutdown. Manitoba, instead, tried to keep things as stable as possible and adjusted their process as frequently as necessary to respond to the changing health circumstances. Both leveraged – in novel but very different ways – their authority to define the case management process. They had that authority. They still do.

10.3.2 Rapid Deployment of Technology

In her plea that I mentioned above, former Chief Justice McLachlin notes how the pandemic acted as a “muscular nudge” in the right direction towards modernization of Canada’s courts:

The COVID-19 crisis has given the justice system a muscular nudge in the right direction. Unable to sit physically in courtrooms, courts are conducting urgent business by telephone or platforms like Zoom. With courthouse counters closed, documents are being filed electronically. Some courts of appeal have been conducting most if not all of their hearings virtually.³⁵⁹

The move toward virtual hearings and electronic document filing was swift. In the 9 months after the pandemic started, Ontario had rolled out remote routine appearances to over 50 courthouses and they were the slowest of the provinces to do it. Even so, they still accomplished this feat at a time where they were required to make a legion of other changes to allow the courts to meet safely. The technology used was not new. Video conferencing over the Internet has existed for at least 15 years. Nor was it a novel legal problem to overcome. There has been a method for remote appearances in criminal law since 1999³⁶⁰. Alberta has maintained and expanded some of those technological systems including scheduling systems³⁶¹.

³⁵⁹Technology Plea, *supra* note 355.

³⁶⁰*Criminal Code*, *supra* note 115 section 714.1 dates back to 1999.

³⁶¹Alberta, Government of Alberta, *Adjournment Digital Service*, online at: <https://adjournment-request.alberta.ca/>.

These technological systems were fundamental during the pandemic to the criminal court's ability to continue operating under circumstances that otherwise limited gatherings of groups of people that are essential to the criminal process. The technological systems' value has not diminished in the years since. Even as the pandemic waned, while I was observing court, it was not unusual for the technological systems that had been installed to be used for non-pandemic related purposes. There was power in being able to virtually call-in lawyers to a criminal courtroom who might have a client who was unexpectedly on a docket. Having police on a call to explain an illegible note on a summons or check on the status of an arrest saved a number of trips to the basement.

I will echo the concerns of the [ACMCO](#) that replicating inefficient processes with technology does not necessarily make them more efficient:

Replicating inefficient processes using technology will not resolve underlying problems – a process should only be transferred to a virtual setting if it has been confirmed to effectively serve a valid purpose. As the transition to virtual hearings in response to the pandemic was necessarily hasty, it is wise to revisit processes that were adopted in the early days of the pandemic before deciding what will be kept in the long term.³⁶²

10.3.3 People In-Custody are a Priority

It is trite to say that people who are in custody should be a top priority for the case management system. These are people who are presumed innocent that are being held in jail in spite of their legal innocence. The courts made this priority explicit in the policies that they drafted as they kept to minimal operations during the peaks of the pandemic.

Again, I am not alone in saying that we should take the opportunity presented by the pandemic to recognize the consequences on those in custody. Prof. Kerr wrote, with some

³⁶²Canada, Department of Justice, “Virtual Hearing: Orienting Principles”, *Action Committee on Modernizing Court Operations*, (19 November 2024) online: <https://www.fja.gc.ca/COVID-19/Virtual-Hearings-Principles-Audiences-Virtuelles-Principes-eng.html>.

hopefulness during the early stages of the pandemic, that the courts should leverage the momentum and the focus on confinement during the pandemic towards life after that extraordinary event:

The implication is that — outside of this extraordinary pandemic moment which will hopefully soon pass — the lived realities inside of our institutions of detention and punishment are acceptable and fair. But rather than using COVID-19 to condone the problematic system we already had, we might use it to press in the direction of greater sensitivity to the many non-pandemic issues that bear upon all life in our institutions of detention and punishment. ³⁶³.

The implicit recognition through policy-making during the pandemic was that the highest priority function of the case management courts was to manage people who are being detained. This lesson should not be lost.

While commenting on the nature and appropriateness of bail and the system that support early incarceration is outside of the scope of this paper, the systems that carry the cases of those detained people is squarely in scope and was clearly a priority during the pandemic. But that is not always the case. Indeed, at the time of writing, the government has introduced a bail reform act to “strengthen” bail laws by making them “stricter”³⁶⁴ That act includes a single procedural consideration to allow a review board to order remote appearances³⁶⁵. There are no other procedural considerations. It will be up to the courts again, if the result of the bail reform is additional people appearing from custody, to manage those cases fairly with the same priority they were given during the pandemic.

³⁶³Lisa Kerr & Kristy-Anne Dubé, “Adjudicating the Risks of Confinement: Bail and Sentencing During COVID-19” (2020) 64-7 Criminal Reports 311.

³⁶⁴Canada, Department of Justice, “Canada introduces sweeping reforms to make bail laws stricter and toughen sentencing law, DOJ explainer” (23, October 2025), online at: <https://www.canada.ca/en/departement-justice/news/2025/10/canada-introduces-sweeping-reforms-to-make-bail-laws-stricter-and-toughen-sentencing-laws.html>].

³⁶⁵*Ibid* section 13.01 as amended.

10.3.4 Enhanced Designations and Desynchronization

The pandemic has left other legacies in the criminal courthouses of the country. There were obviously the backlogs that had to work their way through the system after thousands of trials and hearings were cancelled. This “pig in a python” took years to be digested and the ripple effect has been cited up until well into 2024 by the Ontario Crown to justify delay exceeding Jordan³⁶⁶. These backlogs are transient effects of the pandemic but there have been some other lasting changes as well, specifically desynchronization for some appearances. This happened during the lengthy forced adjournments during the pandemic and, in response to the backlog, has been kept in some regions. In Ontario they originally referred to them as enhanced designations.

The Ontario Court of Justice describes them as a 12-week adjournment where the represented parties are expected to take the necessary steps in the background rather than have a handful of status update appearances:

The Enhanced Designation requires counsel – both Crown and defence – to take meaningful steps to move cases forward during the intake phase of the case. Rather than granting a series of short-term adjournments to confirm completion of individual steps, the Enhanced Designation establishes a standard, 12-week adjournment during which Crown and defence counsel are expected to take all the necessary steps toward completion of the intake phase of the case. If the intake phase is completed before the end of the adjournment period, the parties can move the case forward by securing a trial date through the trial coordinator or by bringing the case forward for resolution. If the parties encounter a problem with moving the case forward during the intake phase, either party may bring the matter before the Court so that it can be addressed.³⁶⁷

³⁶⁶ *R v Simpson*, 2024 ONCJ 52 at para 52.

³⁶⁷ Ontario, Ontario Court of Justice, “Practice direction – Enhanced Designations of Counsel” (3 June 2024), online: <https://www.ontariocourts.ca/ocj/notices/alternate-form-appearance/>.

Enhanced designations were replaced in June 2025 with a 12-week presumptive adjournment at the first appearance when represented by counsel essentially making it universal with the same expectations:

Subject to paragraph 10, the Court’s expectation is that, on the return date from the 12-week adjournment, counsel will, at minimum, have addressed disclosure and conducted a meaningful Crown pre-trial and, unless a judicial pre-trial is required, be ready to do one of the following:

resolve the matter, or identify the courtroom and date to which the matter should be traversed or adjourned to implement the resolution; or set a trial or preliminary inquiry date.³⁶⁸

In theory, these adjournments should shrink the dockets in the case management courts by shifting some of the burden back onto the counsel for the early appearances. This was a direct result of returning from the pandemic and another legacy that it left with the court system.

10.4 Conclusion

I do not have the data to argue that all of the courts’ adjustments were successful or even moved the needle in the right direction. There has been little retrospective about the pandemic’s effect on the criminal courts since the pandemic ended but very little about the the case management in particular³⁶⁹.

There was certainly unfairness and, with a glut of trials cancelled, all of the courts struggled with timeliness for months or years afterwards. The Ontario Attorney General routinely

³⁶⁸Ontario, Ontario Court of Justice, “Practice Direction: 12 Week Adjournment from First Appearance in Criminal Case Management Court for Counsel Matters”, (2 June 2025), online: <https://www.ontariocourts.ca/ocj/notices/12-week-adjournment-first-appearance/>.

³⁶⁹See eg. MacDiarmid, Laura et al, “A Post-Pandemic Bail System: Lessons Learned From Supervising Accused During Covid-19” (2025) 64:3 *Howard journal of crime and justice* pages 372–381 which looks at how bail supervision changed during the pandemic. I am not aware of any other work in the vicinity of case management.

argued in their 11(b) submissions anywhere from 4 months³⁷⁰ to 6 months³⁷¹ to 10 months³⁷² should be attributed to the pandemic.

So, it would be premature to make an empirical case for measuring the quality of the adjustments that the courts made. It is fair to argue that the case management system demonstrated some resiliency and there were some standout changes made to an underappreciated system. These changes met the needs of the time when the stakes were stratospheric. It is notable that the plans crafted during the emergency were not to add more process or double down on appearances. Instead, all of these courts loosened restrictions on the types and number of interactions, they increased the number of asynchronous or remote meetings, and trusted the people in the courthouse building to persevere through a series of difficult challenges.

These people deployed technology briskly to bring the case management system into the modern era and implicitly recognized the most important tasks in the system were those that impacted people in custody or dealing with bail issues. The fallout and the legacies of the pandemic have lasted with video screens now common and automatic early adjournments in Alberta and Ontario both outlasting the pandemic.

But here is the crux of the issue; in Ontario, at least, the courts continue to operate at a crisis level. They continue to struggle, as of writing, to bring cases in before the Jordan deadline³⁷³, and the day-to-day operation is trending towards a series of bureaucratic hurdles and obstacles³⁷⁴. There is no excuse now for not addressing these issues as they did during the pandemic. The court administration and the government have the authority. They have the best available data, and they have been here before. In the final part of this dissertation I suggest some evolutions that arise from the data collected and analyzed in the previous two chapters and the lessons that the COVID-19 pandemic ought to have taught.

³⁷⁰*R v Korovchenko*, 2022 ONCJ 388 at para 7.

³⁷¹*R v Simmons*, 202 ONSC 7209 at para 67.

³⁷²*R v Andrew*, 2024 ONSC 607 at para 17.

³⁷³*R v Duke*, 2026 ONCJ 62 charges stayed on February 2, 2026 – 9 years and 6 months since the *Jordan* decision.

³⁷⁴Hurry Up and Wait, *supra* note 311.

Part IV

Conclusion

Chapter 11

Conclusion: Maintaining the Case Management System

The central question for this study is how does the pre-trial case management system need to evolve to meet the needs of contemporary criminal justice. At its heart, the pre-trial case management process is simple. It simply needs to make sure that a case gets fairly and efficiently through to completion in a timely fashion. There are, as an over simplification, three goals: provide disclosure, schedule events, and protect the integrity of the final result. The simplified system looks something like figure [11.1](#).

But figure [11.1](#) neglects all of the complexity that has been described in the earlier parts of this thesis. It ignores all of the *what-ifs* that the real system has to address. What if disclosure was insufficient the first time? What if counsel disagree on whether it is sufficient? What if the person is in custody? What if they do not have a lawyer?

As I have mentioned, trying to navigate all of the possible iterations of the real-world, complex system is an on-going, humbling educational experience. Figure [11.2](#) shows a possible abstraction of the case management process in Ottawa.

It looks slightly different in every courthouse in every region but the core lesson is the same: it is more complicated than ever to manage the caseload of the criminal justice system in Canada. The complexity of figure [11.2](#), and the real process that it is an abstraction of, is not the worst of the issues. Each case individually runs through a similar flow and

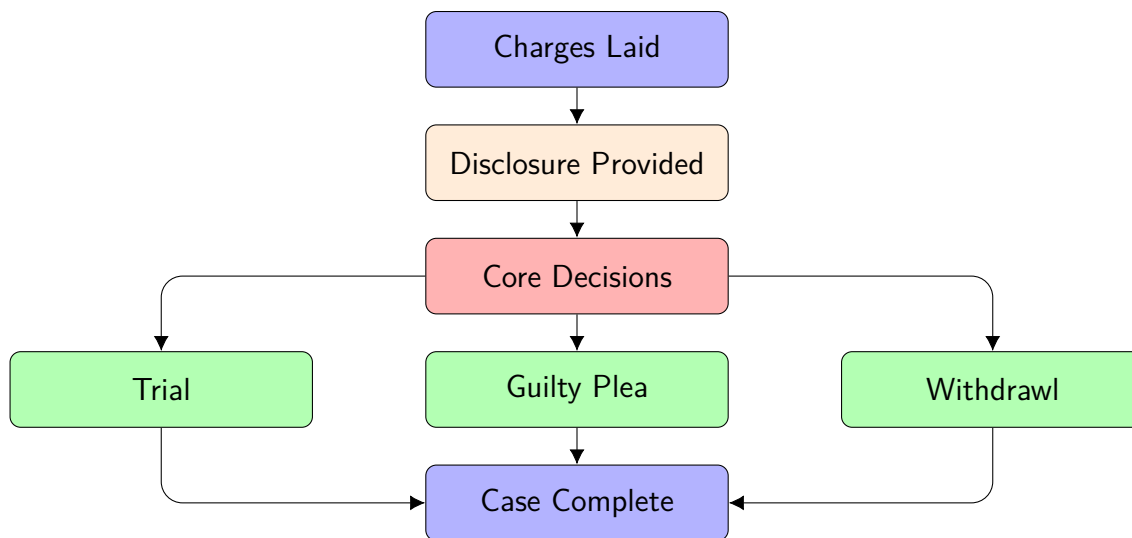


Figure 11.1: Essential Case Management System Flow

there are thousands of cases in the courthouse competing for resources. Time, people, courtrooms, and attention are all limited, and at each stage of the process, cases require differing amounts of each. These scheduling challenges are immense and the resulting inefficiency in the contemporary criminal justice system has been a crisis for decades, but *Jordan* capping the available delay has sparked the tinder.

Part II laid down a foundation for understanding the case management system by first retelling some of its history. That part then examined the legislative structure and how delegating most authority is central to the scheme. Finally, it then proposed appropriate measures for assessing its quality. Part 3 studied the system through three lenses. It looked at two pathological criminal cases, *R. v. Aden*³⁷⁵ and *R. v. Hillier*³⁷⁶, from end-to-end. These two cases failed because they took more time than the *Jordan*-mandated deadline and they highlighted other flaws in the underlying process. This part then went on to undertake an in-depth study of the system by analyzing data collected from inside case management courtrooms in Ontario and Calgary. Finally, it explored how the COVID-19 pandemic reshaped these courtrooms and how the pandemic suggested that it could be resilient.

³⁷⁵ *Aden*, *supra* note 206.

³⁷⁶ *Hillier* (11b), *supra* note 207.

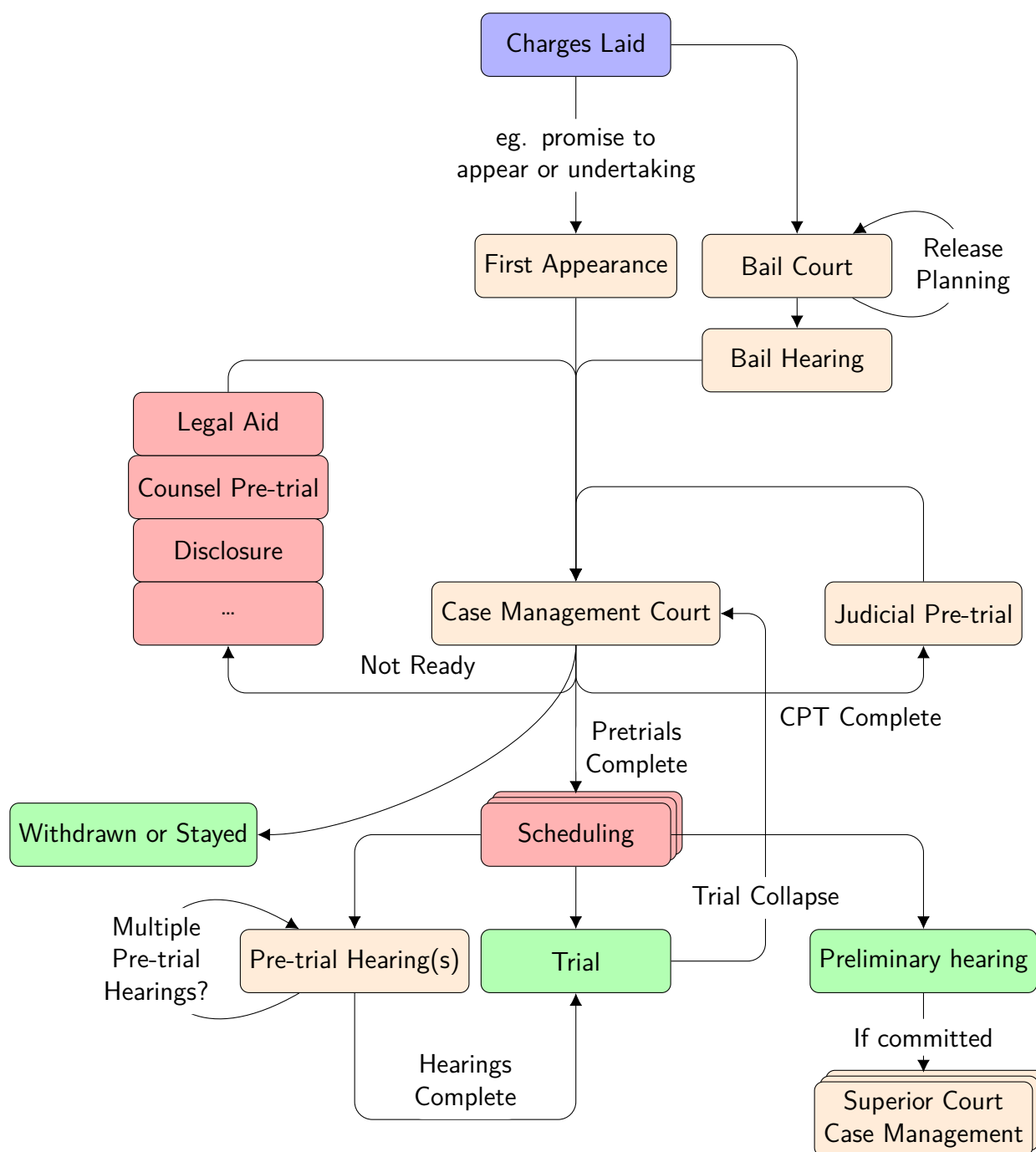


Figure 11.2: Simplified Ottawa Case Management System Flow

Throughout this dissertation, I maintain that the criminal case management system is a dangerous system that is too-often treated as either a bureaucratic obstacle course or a slow-running conveyor belt. Preparing these cases and providing information to the accused person is fundamental to the safe operation of a justice system. I have broken this final, more argumentative, part of the dissertation into four sections. The first section restates the objectives and metrics discussed above in chapter 5. The second section looks at four presumptions that I argue are fatal to maintaining a case management system. I say that each should be rejected. The next section highlights notable observations from the study above. Then, finally, I argue for 5 specific evolutions for the case management system that I believe were suggested by this project.

11.1 Restating System Objectives

At its heart, pre-trial case management has a pretty simple goal. It is meant to manage criminal cases between the time the charges are laid until there is a conclusion to the case. The “manage criminal cases” phrase, however, is doing some heavy lifting. From the perspective of the accused person it means being given the information they need to make decisions about the case against them. This information includes both disclosure as well as an understanding of the prosecutions positions on pleas. It means retaining counsel, if possible. Fundamentally, it is meant to give the accused person agency over their response to the case. From the perspective of the prosecution it means having the opportunity to provide this information and being able to review the case and ensure a fair prosecution. From the perspective of the justice system it also means ensuring that hearings are scheduled with the appropriate people and resources in place. The collision and tension between these objectives lead to a sequence of events that includes pre-trials, meetings, out-of-court communications, and scheduling hearings.

Managing cases **well** requires ensuring that the result is not made unfair by the process breaking down. It also requires that the process itself is fair. It must conclude in a timely

fashion, respecting the accused rights to a trial in a reasonable time. The process does not consume an inordinate and unnecessary amount of resources, and it should be resilient to the inevitable complications, mistakes, and unforeseeable novelties. In short, as I discussed in chapter 5, the process must be fair, timely, efficient, and resilient.

The next section looks to undermine some fundamental and pervasive presumptions about the criminal case management system that I studied.

11.2 The Four Fatal Presumptions

One of first things this paper set out to do was dispel some presumptions about the case management system. These are presumptions that are fatal to trying to make the system better. The four that I am most concerned with are:

- It works just fine
- It is now how it has always been
- It just needs more people
- It is hopeless and cannot be fixed

Each of these presumptions would, if true, justify not addressing the problems in the criminal case management system. This study, however, undermines each of them and this section will step through them one at a time and explain how.

11.2.1 It works just fine

The first presumption is that it works just fine. If the system is able to meet its objectives consistently then there is no need to consider changing or maintaining it. This presumption builds in a bit of wiggle room for the system working “good enough” and surrenders any ambition of making it better. This presumption would argue that the system is failing at an appropriate rate or not at all.

There are two rebuttals that this study supports. First, there is evidence on a near-daily basis of stayed cases and congested courtrooms which undermines the presumption that the system's ability to manage cases is "fine". Second, "fine" is not a high enough bar for a system with consequences as serious as the ones present here.

For a long time, the safety valve for the failures of the case management system was to slow matters down. If disclosure was not ready in time, *extend*. If there were too many trials on a trial date, *extend*. If there were not enough judges available for a plea or trial, *extend*. *Jordan* put a cap on that safety valve. This study reviewed two cases in detail whose failures can be attributed to the system that managed those cases. I also cited other cases throughout the rest of the paper where the case management system broke down. It does not work fine if there are routine catastrophes.

11.2.2 It is how it has always been

The second presumption that I found arose routinely while I was doing this research is that this is how cases have always been managed. One possible, unspoken second half of the sentiment of "this is how it has always been" is that: "and it worked before". Or, equally likely, it has always been done this way and there must be a good reason for that. Of course it might be true that there was a good reason that the case management process was set up this way for a particular point in time or that it did work at some point before, I have not looked into how well the case management process worked in, for instance, the 1960s, but it should be obvious that the underlying needs and the available tools have changed since then.

The reality is that managing a case management system this complex is a comparatively recent development. Centralized scheduling is an invention of the 1970s. Quarter sessions were standard throughout early Canadian history and small dockets for circuit courts in rural regions are still common. It is not as timeless a problem as it first seems. Our current solutions need not be sanctified as sacred.

The corollary to the assumption that this is how it has always been is that the underlying needs of the criminal case management system have not changed. That is not true. The complexity of the cases has grown. The number of cases in a courthouse has also grown. This study showed that there are dozens of different reasons for cases to be adjourned. Many of the pre-trial hearings are tied to applications for relief under the Charter and some applications are novel to be from the last decade. There is no doubt that the load that this system needs to manage is different.

11.2.3 It just needs more people

The third presumption is that the problem is **only** the lack of people working in the courthouses or at the Crown's offices. I will not argue that the courthouses are sufficiently staffed. Nor that clerks and judges carry inadequate workloads. Nor that Crowns offices should carry more files. There has undoubtedly been an increase in the workload for these people in the criminal justice system that has been unmatched by equivalent investment. I do argue though that overcoming the problems in the case management system that I have described requires more than throwing money or people at the problem. The lack of judicial resources has been cited since at least the 70s³⁷⁷ for many of the struggles of the criminal justice system. Even the most recent Chief Justice has written a now-famed letter to the Prime Minister about the lack of resources³⁷⁸.

So, while there is certainly a shortage of staff and other resources, the problem comes from how complex systems like this grow. As discussed in Chapter 6 the complexity curve of scheduling problems is often non-linear. In the case of a problem like scheduling case in a case management system, that complexity curve is almost certainly super-linear or exponential. The staff-count of a courthouse cannot grow at the same rate.

By way of a simple example, if you need to double the trial-capacity of a 2-judge courthouse through only staffing, you need hire two additional judges and all the associated staff.

³⁷⁷Judicial Administration in Canada, *supra* note 94 at pages 3-4.

³⁷⁸*Hameed*, *supra* note 168 at Schedule A.

If that courthouse is already 20 judges, you would need to hire 20 more judges. Justice Moldaver noted in a speech to defence counsel that the prolixity of impaired matters has increased the length of these trials by between 4 and 8 times³⁷⁹. Simplifying trials has the same impact on both courthouses at the same ratio. While, this is an oversimplification since it looks only at trial times, looking for efficiency and simplicity in the case management system rather than adding more people is an alternate, equally valid, lever. Eventually, as the curve continues to grow, it becomes the only reasonable lever to pull.

11.2.4 It is hopeless and cannot be changed

The last presumption is the most pessimistic, but is seemingly the principle destination for people who interact with, or operate this system: hopelessness. This presumption is that better case management is a hopeless ideal and that nothing can change or will change. You can see symptoms of this presumption in the transcripts of both *R. v. Aden* and *R. v. Hillier* above. The adjournments to the next appearance laced with hope that the underlying issues would be solved.

This presumption fails first by way of example. The rapid evolution that was required in the face of COVID-19 and the tools that were leveraged that were already in place to make those evolutions is evidence that things **can** change. It fails second by way of some, perhaps, unreasonable optimism. There are hundreds of intelligent people that have worked on this system under constraints and demands that continue to change. Given the tools and urgency they can do it again.

These four presumptions would be fatal to any efforts to improve things. My preference, however, is the inverse. Which could be written as:

The contemporary system does not always work, and there are changes that should be made beyond simply hiring more people. The powers and potential to do so are already in place.

³⁷⁹Moldaver Speech, *supra* note 33.

I describe the observations that I made in this study to support that inversion in the next section.

11.3 Notable Observations

This section summarizes five notable observations that were made during the study that support the argument that the case management system can be better.

11.3.1 The Baby-Elephant of Disclosure

One of the central missions of the case management system is to ensure that the accused knows the case against them. Put further into practical criminal law terms: that they have the *disclosure* they need. It is the elephant in the room for any discussion of case management and criminal justice in Canada.

When I set up this study, I assumed that disclosure would be discussed in-depth routinely in case management court. It was, in fact, frequently discussed, though perhaps less often than I would have expected. However, it was discussed at far less depth than I expected at the outset. I had assumed that I would be able to draw concrete conclusions about the effectiveness or issues with disclosure from those discussions. I was wrong. First, the in-court discussions about disclosure are, usually, entirely hollow. The processes to manage disclosure are almost entirely hidden behind the scenes. There is little publicly-available information about the systems used by the police or the Crown to manage and provide disclosure. The interactions between these two players for preparing disclosure are also non-public. The police provide it to the Crown somehow and the Crown – after occasionally editing it for privileges – provide that to the accused. Courtroom discussions about how the disclosure-sausage is made is minimal.

The second aspect that made disclosure difficult to study in this way was that the problems arise far later. If there has been an oversight by one of the two main actors, the police or the prosecution, the issue remains dormant and it may not erupt until immediately before

a hearing. For cases delayed for disclosure reasons, the disclosure issue may churn largely unnoticed, as in *Aden*, or it might be immediately problematic, as in *Hillier*, but it often erupts only after the case has left case management for a hearing. This means understanding the consequences of the hollow conversation in case management cannot be done broadly in the same manner that I was able to collect data on pre-trial processes writ large. In order for me to study disclosure, I would have had to catch those consequences by observing the starts of trial lists but those are fast-moving targets without much volume.

The lack of in-depth study of disclosure is not as important a blind-spot as at first it seems for the purposes of this study. Disclosure is uncontroversially a problem that is growing and will continue to grow. Whole classes of disclosure like cell phone data, or body-worn cameras, would not have existed twenty years ago now take immense resources to manage. My study did not miss the resulting adjournments for this novel disclosure, but it did miss the consequences of failure. The scaling problems are within the black box that is the Crown and police offices and that scaling problem leaks back into the case management process by blocking progress there.

11.3.2 Churn Contributes to Delay

Unlike disclosure, churn **is** a core case management problem. As I note earlier in this paper, churn is when cases appear in court without any progress to report. These are the cases that appear for no reason other than to update a disinterested judicial official and maintain a record of mostly meaningless appearances. They consume a surprising amount of court time. At least half of the dockets that I observed were made up of cases that were in court simply to churn.

There is the obvious front-end cost of court time and attention for churn. But there are also other back-end costs as well. There are admin staff in offices updating files that were unnecessary. There are court staff carrying folders from one place to another. Managing these cases is low-leverage work that gets in the way of doing the real work of these courts.

Additionally, churn contributes to slack time since these cases risk congesting these courts and increasing the cadence. As dockets fill, whether those cases needed to be there or not, the duration of the average adjournment will need to be extended. This is true even for cases that are being actively worked on. As these adjournments extend, it takes longer to be in the room where scheduling happens. This churn was noted in each of the four courthouses that I studied and contributed to the failure of both of the two pathological cases studied in this dissertation.

11.3.3 Congestion Brings Fragility

When case management is operating on a knife's edge, congesting the case management system brings fragility and risks causing cases to fail. This manifested during my observation in two ways. High lead times forced cases to be managed quickly, and the courts themselves being very busy.

Lead time in Ottawa during this study for a provincial court hearing was roughly 12 months on average. There is currently a 12 weeks presumptive adjournment for the first appearance. That is roughly 15 months of time baked into the floor of the time that it takes for a case to be concluded. This means, in Ottawa, cases concluding in provincial court need to finish their preparation within three months before scheduling a trial in order to fit within Jordan limits.

While I was in Alberta their lead time was far better at 6 months and their dashboard shows that this shorter lead time is true in all their major centres³⁸⁰. This means they have nearly twice as much time to manage the case before risking running into the Jordan ceiling. That is twice as much time to find mistakes in disclosure, or twice as much time to narrow the issues for an eventual trial.

³⁸⁰Alberta Justice Dashboard, *supra* note 113.

11.3.4 Flexibility Bolsters Fairness

One of the observations that was surprising to me, though it is difficult to draw an empirical data-based line around, is that some flexibility in the application of the criminal pre-trial process led to increased fairness more often than it led to problems.

I referred to the case of Mr. Lamereux in chapter 9 where his matter had been mistakenly adjourned several weeks more than it was supposed to have been. Fairness was achieved by the flexible work of the people in the courtroom and the earnest submissions by his counsel. There were near-daily examples of the power of some flexibility for the courts, whether that being recognizing counsel or accused out of order, or issuing bench warrants with discretion to the next date for mistakes of counsel. I would have expected deviations to result in more complexity and eventual problems. But, based on the observations here, the opposite appears to be true. Giving court staff the time and ability to be flexible to the application of the rules appears to advance the interests of justice more often than not.

11.3.5 Complexity Scales Faster than Humans

The last observation from this study that I will highlight is that the complexity of this criminal case management system will likely – as it is currently operating – out-scale the ability to add humans to manage it. The foundation for this argument is laid out in chapter 6 where I argued that this sort of scheduling problem is akin to a job-shop problem, which scales non-linearly. That classification is supported by the processes in the four courthouses that I observed.

Over time, the number of cases and the complexity of scheduling those cases has trended up, and the pressure on the underlying system responsible for scheduling and managing those cases has increased non-linearly. The data I collected bears that out as Ontario court rooms were fully saturated. Adding a judge to a roster of twenty will have the same impact as finding a way to make those twenty judges 5% more productive and efficient.

The second aspect of this observation is that the complexity of the cases has exploded,

even recently. Sexual assault cases, for instances, will routinely have **multiple** applications for third-party records, hearings involving representation for parties and, if the accused is self-represented, then more hearings regarding representing them during cross-examination. Recall, scheduling four things is not twice as hard as scheduling two, it is exponentially more difficult.

Wrangling this explosion of complexity in the criminal case management system requires dedicated, thoughtful, maintenance work, and current efforts are not keeping up with that explosion. In the next section I explore some proposals for that maintenance work that the observations in this study suggest could be helpful.

11.4 Specific Evolutions

If I am correct in arguing that there are problems in the criminal case management system **and** that these problems should be fixed, then the natural follow-up is to answer “how?” Solutions are not universal. A change that works well to improve fairness in Ottawa might undermine a necessary feature of the courts in Iqaluit. I do not believe that there is a universal system or a universal culture in the hundreds of courthouses in the country. I do, however, believe that there are lessons that can be learned from the courthouses in Ottawa, Perth, Kingston, and Calgary that can be applied more broadly outside the walls of those courthouses.

The very first question I get asked after talking to lawyers or judges about criminal case management is always: “well, how do we fix it?” My answer now is, perhaps unhelpfully, that we need to ask and answer that question another 400 times. We need to throw out 300 of the worst answers and then we need to carefully consider the remaining 100 in order to find 25 answers that improve the system by 5 percent each. There is unlikely to be a moonshot policy change or a groundbreaking technology on the horizon that will save us from the hard graft of making iterative improvements over the long term. My view, while I ask to pardon the tautology, is: *maintaining a justice system requires maintenance work*.

That work is continuous. The fundamental gears of our system need to adjust to contemporary realities. Just as they will need to adjust to contemporary realities again in 20 years. As I discussed in Chapter 3, the fundamental character of the pre-trial process is ancient and the contemporary pressures are very much not. So adjustments need to be iterative and continuous.

There are three key levers that can be used to perform maintenance work on the criminal case management process. The first lever is the local rules and directives. The courts' responses to COVID-19 showed how powerful these rules and directives can be in addressing critical issues. There is wide discretion to manage the case management process and rules of the courts are often updated with that in mind. The second lever is the criminal law in federal statute. As I write this, in 2026, there are increasingly desperate pleas being made by the provinces for the federal government to do something in legislation. The third is technology. This is a sticky issue. I am somewhat partisan in this regard as a life-long technology enthusiast and professional software developer. But leaning on technology risks crystallizing bad processes in inflexible and slow-changing systems. There is a long and storied history of large, important systems being "modernized" very badly through technology. That being said, as discussed in Chapter 10 certain uses of technology have made the appearances more effective and efficient. Balancing the use of these levers to address the problems identified above is a hard problem.

After saying that maintenance is continuous iteration and improvement, and also that most of the ideas will not be in the subset of ideas that improve things, I still propose five evolutions in criminal case management system that are supported by the data and research in the rest of this dissertation.

The first is to make resiliency a consideration when working on this system. The second is simplification. The number of steps, sub-processes, forms, and cascading meetings needs to be considered carefully. The third is to recognize the dangerous nature of the system and to treat failures and near misses as they are treated in other dangerous systems. The fourth

is to provide the relevant information for making the decisions about the operation of the system to the relevant operators as they need it. The final evolution I propose is to make this aspect of the criminal justice system easier to study. Put another way, we should make the work that I have done in this dissertation easier for the next person.

11.4.1 Include Resiliency as a Measure of Quality

The first improvement suggested by my research, especially the two pathological cases, is to weave resiliency into the case management process. Fragility has no place in a safety-critical system like the criminal justice system. There are too many single points of failure in the case management system, especially as it was operating in Ottawa. The combination of 12 months of lead time for trials and the array of pre-trial processes, each with various dependencies leaves very little room for error. Behind the scenes, disclosure is also far too brittle. There are reported cases, just about weekly at time-of-writing, that cite a missing piece of disclosure for the reason for excessive delay. Individual errors are going to happen in any human system, they should not be fatal to cases.

Provincial rules universally list timeliness, efficiency, and fairness as part of their purposes. I suggest that there should also be consideration for whether a process, or changes to the system will make the case management system more fragile. Those that do, should be considered much more carefully.

11.4.2 Simplification: Decoupling, Desynchronization, Duty Counsel

The second bit of maintenance that my research suggests is to keep the process simple. Simpler processes, so long as they do not make the process unfair should make the system more timely and more efficient. Simplification can take a endless number of forms but I suggest three in particular: decoupling, desynchronization, and duty counsel.

Decoupling process means reducing the dependencies between processes and thus untangling some of the lines on the flow chart. It can mean making steps not depend on eachother.

For example, does that jurisdiction hearing need to happen before a trial is even scheduled? It can mean eliminating steps that have become universal because they wound up in a critical path. There was a single judicial pre-trial scheduled in Calgary while I was observing court there compared to dozens in the same number of appearances in Ottawa. It can mean relying on unscheduled conversations for simple problems. During my observations, Ottawa was scheduling counsel pre-trials to discuss sentences and trial estimates between 4 and 6 weeks in advance. Calgary had a single pink sheet of paper.

The second way I suggest to simplify the process is to desynchronize as many aspects of it as possible. Colloquially, people who work in offices often talk about desynchronization in terms like: “this meeting could have been an email”. Desynchronization attacks the complexity of the scheduling problem by reducing the number of synchronous events that have to happen. For criminal case management, a tendency towards synchronous events means the process is frequently stalled waiting for a meeting. My observations suggested that [slack time](#) due to synchronization can be a problem, especially as the appearance cadence gets longer. One way to combat that is to conduct more parts of the process on an as-needed basis with as-needed participants. This is already done in a number of ways. Trials are often scheduled ahead of time by getting the parties together with a scheduler. Calgary desynchronizes this process even further by having an online scheduling tool. Ontario moved more of its process this way during the COVID-19 pandemic by way of enhanced designations that are currently leveraged through using the automatic 12 week adjournment, where the expectation is for all of the intake steps - steps that notably require little judicial assistance - to be finished. My data suggests that further efficiencies could be found by desynchronizing more of the criminal case management process.

The final and most obvious way to simplify the system for a large subset of participants is to abstract that complexity away from the accused entirely. Represented people took less in-court time even at the case management stage. During my observation, represented people were able to take advantage of longer adjournments. Additionally, a sizeable percentage of

the adjournments in the early stages of cases in Ottawa were for legal aid reasons.

Simplifying the process makes the scheduling problem easier and can improve its efficiency. Systematically reducing the coupling between processes, and the number of mandatory sub-processes for each case, can have an impact that spreads well beyond that case.

11.4.3 Data to the Right People in Time

The case management processes in Calgary and Ottawa were similar enough that visiting Calgary's case management courtroom was not a completely alien process to me. That said, one simple but fundamental difference between the two courtrooms was the information available immediately to the sitting judge. The docket provided to the judge, as well as to everyone else in the court room, included details about the files before the court. This included the number of appearances, the counsel representing the accused, and all of the charges involved. Ottawa's equivalent docket included the charges, and the nature of the appearance. This immediate availability of more relevant data in Calgary meant that judges there could make the most of their 90 second appearances by more quickly recognizing the cases that looked to be floundering and why.

The same needs to be true at the prosecution's office. I mentioned in chapter 9 the Ontario Crown's developed their SCOPE system to highlight cases where there is a Jordan risk or disclosure delays timing out. This is absolutely a move in the right direction and the impact is visible in the courts where these counsel are making appearances with stacks of files to manage. To further benefit the case management process, that information could, where it is not privileged or prejudicial, be made available to the sitting justices.

11.4.4 Learning from Failure vs. The Finality Conveyor

The criminal justice system is a safety-critical system. There are real consequences for failure that I have returned to throughout this dissertation. On the other hand, finality is

a core feature of our criminal justice system. We protect it through 11(h) of the Charter³⁸¹ and various provisions about the availability of appeals after acquittals. These two features, failure and finality, collide when there are breakdowns or near misses. When a charge is stayed for delay, that is often treated as routine rather than the failure of a safety-critical system. Worse, there is almost never a retrospective after the stay of what happened after the stay. Similarly, near misses, like missing disclosure on the eve of trial, or the emergence of unfairness for in-custody people, are almost never treated as critical incidents.

There are tens of thousands of cases that traverse the Canadian criminal justice system in a year. At least one serious case a week is presently failing for delay³⁸² over the *Jordan* limit. An unknowable number have non-delay issues that are caught by an attentive justice or clerk. A smaller, unknowable number have issues that are never addressed. This should be unacceptable in a safety-critical system. If one bridge a week collapsed on the Trans-Canada Highway or if an airport had planes routinely crossing in each other's path at the airport, those would be critical incidents and would be followed up on with new safety measures and a lot of understanding of what brought on the incident in the first place.

This paper did one potential example of such an exercise when it looked at the *Aden* and *Hillier* cases. As far as I am aware, those were the only retrospectives ever done for those cases. Continuous improvement and maintenance means learning from failure and learning from near misses and too often the criminal justice system simply moves on. There will certainly be cries of: "the system and its people are too busy to learn from the failures" which should, in my opinion be met with: "these lessons are too important to miss."

11.4.5 Make Research Easy

The last evolution I propose is admittedly a bit self-serving as someone who has spent time researching how the criminal case management system operates. In order for the system

³⁸¹Charter, *supra* note 102.

³⁸²The CanLII RSS feed for 11(b) cases in the last 3 months has had at least 10 cases in it where the charges were stayed for the last several years.

to be managed effectively, this part of the criminal justice system needs to be easier to study. The data available is not granular enough and is often rolled up into broad statistics. This is helpful for a headline on the CBC but it is not useful to someone looking to do a computer model on cases and processes or even analyse simple statistics on the differences in court-times as between cases in the same courthouse. The data that is available can be locked behind onerous terms of use and the data that is subject to access to information legislation is not easily sprung loose.

As an example, I filed an *Access to Information Act* request in order to gather data from the federal government's Public Prosecution Service about the practices across the country. That request was initially denied without any information as to why. I was required to then appeal that to the Office of the Information Commissioner. It took well over a year to finally resolve that request. The equivalent provincial request for information was a dead-end and I have never been able to see that data from Ontario. The data that is posted daily about the dockets in Ontario explicitly forbids any form of collection: "The information contained in the daily court lists may not be collected, copied or distributed in any fashion, including for resale or other commercial use."³⁸³ In order to get data about the size of dockets on any given day, I counted them in place, on the website, but could make no backups. This reduces the usefulness of my dataset in the long term.

Making iterative improvement over time requires the ability to measure the impact of any changes that have been made. This is presently impossible outside the walls of the Crown's offices or the courthouses. As far as I can tell, there is a single-digit number of people looking at this problem quantitatively in Canada. Given the difficulty in collecting relevant data or finding raw data, that number is unlikely to grow as quickly as the problems do. If they are interested in improving the case management process, it behooves the stakeholders in the criminal justice system to broaden the number of people who are able to study it. This necessarily requires making the data that these stakeholders collect more readily available

³⁸³Ontario Court List, *supra* note 277.

to researchers.

11.5 Final Thoughts: Dangerous Systems Take Work

The criminal case management system in Canada is a weary system that is struggling to meet its objectives. It was neglected for decades as the criminal justice world changed around it. The deadlines defined by the Supreme Court in *Jordan* has amplified the pressure that it is under and we are now starting to see the cracks. I conclude with two final observations. The first is that there are worse ways for the criminal justice system to fail beyond being slow. The second is that this is a human system and the humans that operate it are critical to its long-term viability.

A justice system that is slow is definitely problematic. There are, however, more serious failures than being slow. These failures impact the fairness of the system in fundamental and catastrophic ways. Two of the books that I frequently reference in this paper, *Misdeemeanourland* and *Punishment without Crime*, are exceptional in many ways but they also highlight justice systems in the United States that are failing in dimensions beyond timeliness. The risk of decisions like *Jordan* that challenge the system to be better in one dimension is that the challenge is not met with the requisite response in terms of resources or other improvements. This failure to make the proper resources available or make other systemic improvements puts pressure on other dimensions in the system. This can create a pressure vessel. I argued earlier in this chapter that for nearly 40 years, the safety valve for the case management system has been delay. It is a dangerous and unanswered question as to what happens when you close that safety valve and simply wait for the natural consequence.

Finally, the humans that operate this system are critical to its long-term viability and they should be central to improving it. One of the worst legacies to come out of the *Jordan* decision, in my opinion, is the oft-quoted, rarely examined “culture of complacency”. How such a culture emerged universally across a country as broad and diverse as Canada is treated as a great mystery of the contemporary criminal justice system and, as a concept, ignores

the decades of courts and parliaments pretending that adding processes, hearings, and case load did not need to come with a matched investment into the system that supports them. The humans on-the-ground from the clerks to the lawyers to the judges did not suddenly fall victim to a plague of universal complacency in the early 2000s. They continued to do the hard graft in an increasingly complex system without the necessary scaffolding and support.

This needs to change. The criminal justice system is a dangerous system. Failures can be catastrophic for the individual and for faith in the rule of law. Letting the case management system gradually decay should be unacceptable to all levels of government and courts. Appeal-level decisions need to consider the underlying procedural requirements of their decisions. Federal parliament needs to take seriously the constitutional responsibility to maintain the criminal justice system both in terms of policy as well as resourcing. Maintenance is hard, often thankless, work but this part of the criminal justice system is too important to develop through entropy or by waiting for the next 20-year Supreme Court check-in.

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Appendix A

Supporting Data

A.1 Online Data sets

The raw data is available [online here](https://wearygears.ca/porcupine-data-Draft-zero.zip)³⁸⁴. The zip archive also includes the Jupyter Notebook that was used for data analysis and for generating the charts for the thesis.

A.2 Coding Catalogue

³⁸⁴Full URL: <https://wearygears.ca/porcupine-data-Draft-zero.zip>

Project Porcupine Coding Catalogue

Chris Donaldson

Glossary

Matter - A matter is a collection of informations associated with a particular person.

Column Definitions

Court Number - This is the court number assigned by the court system. For virtual courts it is the number assigned in the docket rather than the number given by the zoom link.

Event - What was happening at the time noted.

Adjourned to - The date the matter was adjourned to appear again

Adjourned for - Why was the matter adjourned. What was to happen between this event and the adjourned to date.

Tags - Comma separated list of features of the event to answer questions about what happened, who was there, what had happened before, etc.

End time - The time the event stopped

Pre-trial Date - If there was a pre-trial scheduled on-the-record, this is the date

Key/Value - Spare column to allow for expansion on-the-fly. For example if there are 2 trial dates set. Trial Date 2: January 1, 1970 would be in the key/value column.

Linked matter - Originally for matters that were stood down. Wound up not being useful but kept in the data for consistency.

Notes - Any notes on the appearance.

Entry Definitions

Time

While the time stamps won't be perfectly accurate, the result should be within five or ten seconds of the duration of the appearance. Time stamps were generated from my local system clock which was synchronized with Microsoft's time server every morning.

Start time: Logged when the name of the accused or the line number on the docket is mentioned in order to call the matter. Eg. "The next matter your worship is line number 245 - John Smith **<timestamp>**".

End time: When the Justice states the action on the record or when it became clear that the comments on the matter were over. Eg. "Mr Smith, you will return to this court in 3 weeks on June 24, 2023. This is so that the defence can set up a CPT with the Crown. **<timestamp>**".

Events

Tag	Description	Validity Date
Remand appearance	An appearance for a particular matter for scheduling and status checks	
Recess	The court was off-record and not handling files	
Private prosecution	Non-remand appearance of a private nature. Private 810 orders are the most common.	
Break	There was a break in observation.	

Adjourned for

Each matter is almost always adjourned for a particular reason. This column was designed to capture that reason. The question that this column is meant to answer is: "what was proposed to happen in the time between this appearance and the next appearance?" It is possible that there were multiple things that were supposed to happen. Some common collections of reasons have been grouped into a single reason. For instance, the initial conversations, disclosure, screening sheets, and retainer, have been grouped into "Intake".

One of the core dimensions of an adjournment reason is that the matter either leaves the remand pool as a result of this adjournment, for instance it's set for trial or remains in remand, for instance if it went for a counsel pre-trial. Essentially each tag should answer the question: "Is this matter still churning in remand or has it moved on?"

	<u>Description</u>	<u>Exit?</u>	<u>Validity Date</u>
Bail	Adjourned to a bail court for a bail hearing		
Bail prep	Adjourned for the accused person to prepare a plan for release from custody		
Bail review	Adjourned to a superior court bail review		
Bail review prep	Adjourned for the accused to prepare a new release plan for a bail review		
Bail review scheduling	Adjourned to schedule a bail review hearing		
Bail scheduling	Adjourned to schedule a bail hearing		
Client discussions	Adjourned in order for the defence counsel and their client to have discussions	No	
Co-accused	Adjourned for reasons relating to a co accused on the matter	No	

	Description	Exit?	Validity Date
CPT	Adjourned for a counsel pre-trial. These are distinct from “discussions” as they are structured and usually pre-scheduled	No	
Crown discussions	Adjourned for discussions within the crown office	No	
Decision	Adjourned for a final decision	Yes	
Disclosure	Adjourned while defence waits for disclosure	No	
Discussions	Adjourned for discussions between defence and the Crown	No	
Diversion	Adjourned for diversion steps to be taken. Usually some action taken by the accused person.	No	
DTC	Adjourned into drug treatment court	Yes	
Federal transfer	Transferred to the Federal Crown's remand court	No	
Intake	After the first appearance there are a number of steps before the matter could proceed in any direction. These include the initial disclosure being provided, initial CPTs, retaining a lawyer, etc. I have grouped the frequently repeating steps under the “Intake” tag in early appearances.	No	
IPC	Indigenous people's court:	Yes	
JICMC	Judge-led intensive case management court: A court meant to put the matters in front of a judge that can, hopefully, determine how to get them to proceed properly.	No	
JPT	Adjourned in order to conduct a judicial pre-trial. JPTs are structured, prescheduled conversations with defence counsel, Crown, a judge, and occasionally the investigating officer.		
Legal aid	Adjourned for the accused person to apply for, or obtain legal aid funding		

	Description	Exit?	Validity Date
Mental health court	Adjourned to mental health court. This only happens after an application has been accepted.	Yes	
MHC application	Adjourned for an application to mental health court	No	
Motion scheduling	Adjourned for getting a date for pre-trial motions	No	
Plea	Adjourned to a plea court in order for the accused person to plead guilty to at least some of the charges	Yes	
Plea prep	This is time for the accused person to prepare for entering a plea. Often this takes the form of counselling, treatment, or other actions designed to improve their position after a plea	No	
Plea scheduling	Adjourned to find a date before a judge for the accused person to plead guilty	No	
Police discussions	Adjourned to give the Crown an opportunity to discuss the matter with police.		
Pre-trial motions	Adjourned to a date for pre-trial motions		
Prelim	Adjourned to a preliminary inquiry date	Yes	
Presentence report	Adjourned to obtain or while awaiting the writing of a presentence report		
Relisted	Sometimes a matter is "relisted" if there are discrepancies in an information or on the computer system.		
Retainer	Adjourned for the accused person to arrange retaining (and paying) for their defence counsel		
Self rep JPT	Adjourned to be before a judge so that the self-represented person can have a judicial pretrial.		
Sentencing	Adjourned for sentencing before the judge that took a plea		

	Description	Exit?	Validity Date
Sentencing scheduling	Adjourned to find a date for sentencing before the judge that took the plea		
Stayed	Charges were stayed. (Probably always at the request of the Crown)	Yes	
Stalled	Adjourned for no readily apparent reason	No	
Submissions	Adjourned for final submissions in a ... trial?	Yes	
Summons	Adjourned when the accused did not appear for them to receive and respond to a summons	No	
Transfer	Transferring to another jurisdiction	Yes?	
Trial	Adjourned to the trial date	Yes	
Trial scheduling	Adjourned to schedule a trial date		
Warrant	A warrant was issued for the arrest of the accused person	Yes	
Withdrawn	Charges were withdrawn. (Probably always at the request of the Crown)	Yes	

Distinguishing between “discussions” and “CPT”: Discussions, whether they are between counsel, or client and defence counsel, or Crowns internally are informal especially in terms of scheduling. CPTs and JPTs are scheduled meeting with a more rigid structure.

Tags

There are a couple of different classes of tags. Not every appearance will have a tag from each class.

Representation

Tag	Description	Validity Date
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represented	The accused was represented by counsel who appeared on their behalf	
represented-foc	Occasionally counsel will “appear as a friend of the court” which means they are not retained but will appear to assist the accused in hope of becoming retained.	
unrepresented	The accused appeared unrepresented.	
lost-contact	Defence counsel has lost contact with the accused person.	
counsel-removed	Defence counsel was removed as being counsel of record leaving the accused unrepresented.	
counsel-changed	Defence counsel was removed from the record and a new defence counsel was put on record	
enhanced-designation	An enhanced designation was filed with the court allowing for longer adjournments but attached to an undertaken to follow-up diligently	

Duty Counsel

Tag	Description	Validity Date
duty-counsel-assisted	Duty counsel assisted the accused person at the appearance but was not representing them	
duty-counsel-with-instructions	Duty counsel appeared on behalf of another lawyer with instructions from that lawyer	
duty-counsel-represented	Duty counsel appeared on behalf of the accused person as their counsel.	
duty-counsel	Duty counsel appeared but it was unclear whether duty counsel assisting the person, appearing on behalf of another counsel, or representing them.	

Presence

Unless otherwise noted, the accused is **not** present at appearances.

Tag	Description	Validity Date
accused-present	The accused is present at the appearance	June 13, 2023
accused-ill	The accused was not present but indicated, through duty counsel or some other officer of the court, that they were ill.	
in-custody	Accused is in-custody either in court or by video from jail. Also implies that the accused was present. It is possible that in-custody and accused-present will both appear in the tags but that was for consistency and not a change of actual presence.	
no-show	No-one, accused or counsel, appear for the matter	
bench-warrant-wd	The accused did not appear and a bench warrant was attached with discretion to perfect at the next appearance. (See note)	
bench-warrant-endorsed	A bench-warrant was issued for the arrest of the accused person and it was endorsed by the judicial officer for that person released after arrest.	
bench-warrant-unendorsed	A bench-warrant was issued for the arrest of the accused person and it was not endorsed for their release. This means they would have to be brought before a justice rather than released from the station.	
bench-warrant	A bench-warrant was issued for the arrest of the accused person but it was not clear on the record whether that warrant was endorsed or unendorsed	
bench-summons	A summons was issued to be served on the accused person requiring that they attend court at a particular date. This normally happens when someone fails to appear for court the first time.	
counsel-no-show	Counsel failed to appear for the matter in spite of being on record.	

ordered-to-appear-personally	The accused was ordered to appear personally at the next appearance.	
no-service		June 15, 2023

Case status

Tag	Description	Validity Date
first-appearance	This is the first appearance in court for this matter.	
first-appearance-after-release	It is the first substantive appearance but the person first appeared elsewhere. As far as I can tell, this means they went through bail court where most of the preliminary matter were not dealt with (elections or arraignment)	
first-appearance-after-summons	This is the first appearance after a summons was issued.	
elected-summarily	The crown elected to proceed summarily during this appearance	
elected-by-indictment	The crown elected to proceed by indictment during this appearance	
youth	The accused is a young person under the YCJA	
publication-ban	There is a publication ban for this matter	
info-relaid	The information had been relaid with amendments.	
multiple-accused	There were multiple accused on the information	

Historic actions taken

These tags refer to actions that are mentioned during the appearance that happened between the previous appearance and this one. While they might be insightful there is no real obligation to mention progress. They will be an incomplete record of the progress though

They might signal triggers for other transitions pretty reliably. (Eg. cpt-held -> jpt-held)

Tag	Description	Validity Date
cpt-held	A formal counsel pre-trial was held	
jpt-held	A formal judicial pre-trial was held	
disclosure-requested	A comment was made during the appearance that disclosure had been requested by the defence	
disclosure-received	A comment was made during the appearance that disclosure had been received	
disclosure-ready	A comment was made during the appearance that disclosure was ready	
cpt-requested	An explicit request for a CPT with the crown was made during the appearance	
bail-hearing-held	The last appearance was a bail hearing.	

Nature of the adjournment

Tag	Description	Validity Date
defence-request	Defence counsel stated on the record that the adjournment was at the request of the defence. (See note)	

11b-waived	The accused explicitly waived their section 11b rights for the period of this adjournment.	
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Exits

Tag	Description	Validity Date
charges-withdrawn-by-crown	All charges were withdrawn by the Crown	
charges-stayed-by-crown	All charges were stayed by the Crown	

Language

The language tags are self explanatory

Tag	Description	Validity Date
<language of proceeding>	The appearance was conducted in a language other than English.	
interpreter-present	The appearance was translated by a court interpreter.	
interpreter-absent	The appearance was conducted in a language other than English and was translated to English or French by a member of the public, the bench, or counsel. This also captures when there was an interpreter ordered but did not appear	

Key/Value Pairs

Some events require additional notes that don't deserve a whole column or additional columns that otherwise don't fit.

Trial length: __ days

Prelim length: __ days

Pre-trial date: <Date> (Note: Pretrial date for trial is often the trial readiness/management court in Ottawa)

Trial date #: <Date>

Explanatory Notes

Bench warrants with discretion

When matters are adjourned without defence counsel being on record a bench warrant with discretion is attached to the information in order to maintain jurisdiction.

Endorsed vs unendorsed warrants

Defence requests

There is a habit of defence counsel to refuse to waive 11b and instead signal "this is a clear defence request". The provincial Crown in Ottawa fights against that characterization.

Slack time

There are periods of time between real appearances that I refer to as slack time. This could be the period between
It could also be a period of time where the court is rerouting a case to a more appropriate court, or helping someone who is in the wrong courtroom.

Dangling tags

There will be some tags that were used early in the study that are no longer valid. If a tag is not described in this document it should be considered a dangling tag and not relied on.

Enhanced designations

See: <https://www.ontariocourts.ca/ocj/covid-19/archives/alternative-form-of-appearance-july-5-2021/>