

COVID-19 QUESTIONNAIRE - CANADA

1. THE MOST CRITICAL PHASE OF THE CRISIS

As long as measures to prevent the spread of Covid-19 restrict freedom of movement: What are the effects of the Covid-19 crisis on civil justice?

In response to the COVID-19 outbreak, the courts in Canada have taken extraordinary action to limit the spread of the virus. This has included restricting access to the courts and suspending certain operations, while also rapidly adapting their practices and procedures to ensure that essential functions remain operational to the greatest extent possible.

The specific measures adopted by the courts in Canada in response to COVID-19 vary across the country. Each Canadian province and territory has its own courts, as well as courts that have national jurisdiction. The Supreme Court of Canada presides over the entire system. In a number of jurisdictions across Canada, hearings have been adjourned, procedures and timelines for filings have been amended, and limitation periods have been suspended. While the courts in Canada have taken steps to limit or eliminate face-to-face interactions, the courts have adapted to ensure that they continue to provide essential services.

For example, in Ontario, Canada's largest province in terms of both population and economic activity, the Superior Court has adjourned most civil proceedings, but continues to hear urgent and time-sensitive matters remotely, by telephone or video conference. Such matters include those where immediate and significant financial repercussions may result if there is no hearing. Most parties seeking injunctions (such freezing orders) or other immediate court assistance in response to fraudulent activity should be able to avail themselves of this exception.

The Commercial List, a specialized branch of Ontario's Superior Court dealing exclusively with commercial litigation, has clarified that most proceedings relating to insolvencies and bankruptcies will be considered urgent or time sensitive, and will continue to be heard by telephone or video conference. Notably, however, bankruptcy and other searches through the courts will not be available while normal court operations remain suspended.

Courts across Canada have also encouraged, and in some cases, required, parties to file their materials through electronic means. For example, filings at the Ontario Superior Court now take place via email and through online portals, although hard copies will be expected once the emergency ends. Scheduling also takes place via email with court staff.

In addition, steps have been taken in a number of jurisdiction to modify requirements with respect to service and commissioning of affidavits. For example, parties can now effect service by email for most documents in many jurisdictions across Canada. In addition, lawyers are no longer required to be in an affiant's physical presence to commission an affidavit, provided that they verify the affiant's identity over video or some other reasonable means.

With most hearings adjourned, most rules relating to limitations periods, procedural timelines, and other deadlines have been relaxed. For example, the Ontario Superior Court has suspended all such time limits, and made repeated assurances that it will relieve compliance with rules, regulations and statutes as necessary to ensure justice between parties.

Since March 2020, each province has declared some form of emergency and placed varying restrictions on which businesses and services can operate during the outbreak. Invariably, the provinces have deemed legal and financial services essential, thus permitting law firms and banks to remain open. Many of these businesses have modified their service delivery methods to limit the spread of COVID-19. Most of Canada's major banks have restricted branch access and services in favour of telephone and internet banking. Most law firms have closed their offices to the public and implemented work-from-home measures to service clients remotely.

2. FORECAST: AFTER THE CRISIS AND LONG-TERM EFFECTS

What are the consequences of the Covid 19 pandemic once the pandemic has abated, in the gradual return to a new normality and what are the long-term effects?

(a) Which measures introduced during the crisis will be withdrawn immediately?

We anticipate that access to the justice system will improve once current restrictions are lifted. However, it is likely that a return to normal will be incremental, with limits on non-essential attendees at courthouses continuing for a longer period of time. There is a large and increasing pent-up demand for access to the courts by litigants to deal with the day to day issues and applications that arise in litigation, and that backlog will take an extended period of time to work through the courts. A full return to "normal" will be delayed. As noted above, we expect that emergency and urgent matters will continue to be addressed as a matter of priority in Canadian courts, including requests for freezing orders, investigative orders, injunctions and related relief.

(b) Which measures will remain in place?

There will be some benefits from the forced innovation that Canadian courts are currently experiencing. Processes are being modernized to take advantage of available technology and many legal professionals (both the Bench and the Bar) are embracing changes to the way cases are conducted, including increasing reliance on electronic filing, telephone hearings and video conferencing. Those are the most likely influences of Covid-19 to remain in the system, which should generally improve access to justice in the future.

(c) Will enforcement of economic crime, including corruption matters be weakened due to the lack of financial resources?

We do not anticipate a reduction in government funding for the criminal prosecution of economic offences in Canada arising from Covid-19. We also do not anticipate an increase in that funding. Times of financial hardship tend to increase the incidence of economic crimes, and therefore the criminal prosecutorial system will likely be asked to “do more” with the same resources. While we have great respect for the Canadian criminal prosecution service, the tools available to them do not allow proactive recovery of economic value for victims but rather focuses on punishment. Restitution can be ordered as part of sentencing, but those orders often amount to “too little, too late” to make a tangible difference for victims. Fraudnet and its strategic partners are experienced in using pro-active recovery remedies and methods for victims of economic crimes. Urgent or emergent remedies to combat fraud-related activity are available in the Canadian civil court system, and we do not anticipate that will change in the foreseeable future.

(d) Do you expect a rise of new fraud cases after the crisis?

Yes. In our experience, economic downturns tend to have at least two influences on economic crime. Desperate times tend to encourage desperate measures, which results in dishonesty, defalcation, misrepresentation and an increase in fraud-related losses. It also exposes existing frauds as investors liquidate their investments and learn that some of them were not what they appeared. We expect that the financial impacts of Covid-19 will expose both trends.

(e) Will the ratio of third party funded matter rise?

We expect it will. Third party litigation funding is increasingly commonplace in Canada and is generally recognized and accepted as facilitating access to justice in appropriate cases. It will not be a panacea for all investors or victims of fraudulent activity, but we expect that it will continue

to become more prevalent in litigation and in the insolvency context, both of which are important avenues for victims of fraud to consider in deploying recovery plans.

Contact details:

The four Canadian Fraudnet members are (from East to West):

William Brock (Davies Ward Phillips & Vineberg, Montreal)

<https://www.dwpv.com/en/People/William-Brock>

Derek Ricci (Davies Ward Phillips & Vineberg, Toronto)

<https://www.dwpv.com/en/People/Derek-D-Ricci>

Matthew Lindsay Q.C. (Rose LLP, Calgary)

<http://www.rosellp.com/matthew-r-lindsay-qc>

Christopher Ramsay (Clark Wilson, Vancouver)

<https://www.cwilson.com/people/christopher-ramsay/>