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## Ontario Civil Justice Reform in the Wake of COVID-19: Inspired or Institutionalized?

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### Abstract

On 17 March 2020, Ontario's courthouses shut their doors as the civil justice system locked down with the rest of the province. Regular court operations were suspended due to the state of emergency caused by the COVID-19 pandemic. This was followed by a flurry of activity as courts drew up plans to resume operations as soon as possible. The "new normal" became virtual hearings, either by video conference, in writing, or by telephone.

As Attorney General Douglas Downey said, "We've modernized the legal system by about 25 years in 25 days." Has the revolution arrived? Will the changes made in response to the pandemic become permanent? Will they be sufficient to address the problems of cost and delay that plague the civil justice system?

This article will posit that many of these changes are likely to become permanent. However, the extent and effectiveness of change will depend on the ability of "policy entrepreneurs" to use this moment of crisis to overcome institutional inertia in the Ministry of the Attorney General (MAG) and professional resistance in the Bar. This is not the first time that "dramatic innovation[s]" have been made in response to crisis in the civil justice system, as evidenced by the history of reform in that area. Lasting change will not come easily.

Furthermore, while these changes are welcome, they are insufficient to address the crippling backlog facing the courts. A functioning civil justice system is essential to a functioning democracy, and Ontario's civil justice system is fundamentally broken. The "paradigm shift" needs to go further. We need to entirely change our conception of how courts work, the nature of procedural justice, and our understanding of access to justice and how to facilitate it.

The answer I propose, as Richard Susskind and others have, is a system of online courts, where human judges hear evidence and arguments and render decisions by way of an online platform, all within a public dispute resolution (court or tribunal) system. British Columbia's Civil Resolution Tribunal (BC CRT) is an excellent example. I argue that, as in BC, online courts could be initiated incrementally, alongside the current system, and thereby bypass and address many of the issues facing the current court system. I conclude with some thoughts for the future.

Much has been written on the subject of online courts, and the COVID-19 crisis in Ontario has precipitated numerous blogs and online articles. However, no-one has yet conducted a deep analysis of the changes in Ontario and what they mean for our court system. More importantly, my article fills a gap in the literature on online courts in general, none of which has considered the history of civil justice reform and the nature of institutional change.

### Keywords

civil procedure, civil justice reform, online courts, remote courts, virtual hearings, access to justice, institutional change, legal history, legal culture

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**Cover Page Footnote**

Assistant Professor, Western Law, London, Ontario. I thank Michael Lesage and Charles Feldman for their comments on drafts of this paper, as well as Mr Justice David M Brown for his time and insights. All errors are the author's own.

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Suzanne E Chiodo\*

### Abstract

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This article will posit that many of these changes are likely to become permanent. However, the extent and effectiveness of change will depend on the ability of "policy entrepreneurs" to use this moment of crisis to overcome institutional inertia in the Ministry of the Attorney General (MAG) and professional resistance in the Bar. This is not the first time that "dramatic innovation[s]" have been made in response to crisis in the civil justice system, as evidenced by the history of reform in that area. Lasting change will not come easily.

Furthermore, while these changes are welcome, they are insufficient to address the crippling backlog facing the courts. A functioning civil justice system is essential to a functioning democracy, and Ontario's civil justice system is fundamentally broken. The "paradigm shift" needs to go further. We need to entirely change our conception of how courts work, the nature of procedural justice, and our understanding of access to justice and how to facilitate it. The answer I propose, as Richard Susskind and others have, is a system of online courts, where human judges hear evidence and arguments and render decisions by way of an online platform, all within a public dispute resolution (court or tribunal) system. British Columbia's Civil Resolution Tribunal (BC CRT) is an excellent example. I argue that, as in BC, online courts could be initiated incrementally, alongside the current system, and thereby bypass and address many of the issues facing the current court system. I conclude with some thoughts for the future.

Much has been written on the subject of online courts, and the COVID-19 crisis in Ontario has precipitated numerous blogs and online articles. However, no-one has yet conducted a deep analysis of the changes in Ontario and what they mean for our court system. More importantly, my article fills a gap in the literature on online courts in general, none of which has considered the history of civil justice reform and the nature of institutional change.

What if some extra-ordinary event occurred, and one day we woke up to find that all our courthouses had crumbled to the ground and we had to replace every courthouse in this province? What would we re-build in their place?<sup>1</sup>

## Introduction

These prescient remarks by The Honourable Justice David Brown of the Court of Appeal for Ontario came to fruition on 17 March 2020. The courthouses of the province continued to stand, but their doors were shut by the state of emergency caused by the COVID-19 pandemic. Following the suspension of all regular operations in mid-March, a flurry of activity ensued as courts drew up plans to resume operations as soon as possible. The “new normal” became virtual hearings, either by video conference, in writing, or by telephone.

As Attorney General Douglas Downey said, “We’ve modernized the legal system by about 25 years in 25 days.”<sup>2</sup> Has the revolution arrived? Will the changes made as a response to the pandemic become permanent? Will they be sufficient to address the problems of cost and delay that plague the civil justice system?

This article will address those questions and posit that many of the changes made are likely to become permanent, but that the extent and effectiveness of change will depend on a number of factors. I will also argue that the changes are insufficient to address the crippling backlog facing the courts, and that a more transformational response is required in order to ensure a functioning civil justice system, which is essential to a functioning democracy.

I will begin with an overview of Ontario’s civil justice system prior to the pandemic. This reveals a system that is fundamentally broken due to cost, delay, and inaccessibility. I will then review the changes that have been wrought by the pandemic, such as virtual hearings. The next section of the article will consider whether those changes will become permanent, as well as some of the arguments for and against procedural change. I go on to look at the roadblocks and facilitators of modernization. Roadblocks include institutional inertia in the Ministry of the Attorney General (MAG) and professional resistance in the Bar, both of which have hampered so-called “dramatic innovation[s]”<sup>3</sup> that have been attempted in decades past. Facilitators include “policy entrepreneurs” that may be able to use this moment of crisis to effect lasting change.

The next section of the article posits that digitizing existing processes will not be enough to address the cost, delay, and inaccessibility endemic to our civil justice system. The “paradigm shift” needs to go further. We need to entirely change our conception of how courts work, the nature of procedural justice, and our understanding of access to justice and how to facilitate it. The answer I propose, as Richard Susskind and others have, is a system of online courts, where

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\* Assistant Professor, Western Law, London, Ontario. I thank Michael Lesage and Charles Feldman for their comments on drafts of this paper, as well as Justice David M Brown for his time and insights. All errors are the author’s own.

<sup>1</sup> Justice David M Brown, “Some Thoughts on Creating a Sustainable Public Civil Justice System” (Paper delivered at the Ontario Bar Association (OBA) Civil Litigation and Insurance Sections End of Term Dinner, Toronto, 11 June 2014) [unpublished] at para 7.

<sup>2</sup> The Canadian Press, “COVID-19 pandemic forces an Ontario justice system ‘stuck in the 1970s’ to modernize” (29 April 2020), online: *CBC* <[www.cbc.ca/news/canada/toronto/ontario-courts-modernize-1.5549850](http://www.cbc.ca/news/canada/toronto/ontario-courts-modernize-1.5549850)>.

<sup>3</sup> Ontario, Ministry of the Attorney General, Civil Procedure Revision Committee, *Report of the Civil Procedure Revision Committee* (MAG, 1980) (Chair: Walter B Williston) at 27, online: *Internet Archive* <[archive.org/details/mag\\_00003004/page/n1/mode/2up](http://archive.org/details/mag_00003004/page/n1/mode/2up)> [*Civil Procedure Revision*].

human judges hear evidence and arguments and render decisions by way of an online platform, all within a public dispute resolution (court or tribunal) system.<sup>4</sup> British Columbia's Civil Resolution Tribunal (BC CRT) is an excellent example. I argue that, as in BC, online courts could be initiated incrementally, alongside the current system, and thereby bypass and address many of the issues facing the current court system. I conclude with some thoughts for the future.

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### **The Before Times – The State of Civil Justice Pre-COVID**

Civil justice was in crisis in Ontario long before COVID-19 arrived. The *Rules of Civil Procedure*<sup>5</sup> have not changed significantly since at least the 1980s,<sup>6</sup> and the system is poorly structured and chronically underfunded. Because funding decisions and structural reorganization are the purview of the MAG, it is this Ministry that holds the key to any significant change.

In 1976, the *White Paper on Courts Administration* spoke of “the caseload crisis facing the courts of this province [which] has the potential to seriously undermine the quality of justice in Ontario.”<sup>7</sup> Despite subsequent changes which will be discussed further below, delays and issues of access to justice have only increased. Canada ranks 100 out of 189 countries that are part of the World Bank's Enforcing Contracts indicator,<sup>8</sup> and its civil justice system scored just 0.47 out of 1.0 for speed (and 0.57 for accessibility and affordability) in the 2019 World Justice Project Rule of Law Index.<sup>9</sup>

In the past four years, the average time it takes to dispose of a civil case in Ontario has gone up by 37 per cent, to an average of 904 days in 2018/2019. For small claims, the average time for disposition has more than doubled in the past four years, to an average of 435 days in 2018/2019.<sup>10</sup> The backlog in Ontario's courts increases by an average of 23 per cent every year.<sup>11</sup> This phenomenon is partly a result of focusing court resources on the criminal justice system, in order to comply with constitutional time limits post-*Jordan*.<sup>12</sup>

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<sup>4</sup> Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press, 2019) at 6, 60-61. Much of the literature considers technical issues of architecture and design of online courts, as well as the implementation of artificial intelligence. These issues, while crucial, are beyond the scope of this article.

<sup>5</sup> *Rules of Civil Procedure*, RRO 1990, Reg 194 [Rules].

<sup>6</sup> Changes to the Rules are made by the Civil Rules Committee, which is made up of judges, lawyers, and court services representatives. The Committee is independent of the MAG and is authorized by statute to make new rules of procedure, but these rules cannot change the substantive law.

<sup>7</sup> Ontario, Ministry of the Attorney General, *White Paper on Courts Administration* (MAG, 1976).

<sup>8</sup> “Doing Business: Enforcing Contracts Indicator,” online: *The World Bank*

<[www.doingbusiness.org/en/data/exploretopics/enforcing-contracts](http://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts)> [perma.cc/D83W-7NXT].

<sup>9</sup> World Justice Project, *Rule of Law Index 2019* (World Justice Project, 2019) at 56, online (pdf):

<[worldjusticeproject.org/sites/default/files/documents/ROLI-2019-Reduced.pdf](http://worldjusticeproject.org/sites/default/files/documents/ROLI-2019-Reduced.pdf)> [perma.cc/66DE-4K7S].

<sup>10</sup> Office of the Auditor General of Ontario, *Annual Report 2019: Reports on Correctional Services and Court Operations*, vol 3 (Office of the Auditor General of Ontario, 2019) at 98-99 [Auditor General's Report].

<sup>11</sup> *Ibid*, Appendix 13 at 138-140.

<sup>12</sup> *R v Jordan*, 2016 SCC 27. In *Jordan*, the Supreme Court of Canada laid down a new framework for compliance with s 11(b) of the *Charter* (right to be tried within a reasonable time) in criminal cases. There is

The civil case backlog will only get worse as a result of COVID-19. In the six weeks following the suspension of the courts in mid-March, the Court of Appeal for Ontario (ONCA) was down to about 36 per cent of its usual output,<sup>13</sup> although matters have improved since then.<sup>14</sup> The output of the Superior Court of Justice (ONSC) was down much less, although trial activity seemed to have been put entirely on hold. The courts face a crippling backlog as they resume in-person proceedings.<sup>15</sup>

The civil justice system is also extremely hard to navigate for non-lawyers. In family law proceedings in Ontario, approximately 64 per cent of litigants are self-represented. In civil claims in the ONSC, self-represented litigants outnumber represented litigants by 1.6 to 1. They report feeling overwhelmed, struggling to navigate court forms, inability to determine which resources are useful out of the volume of information available online, and feeling alienated from court processes and anxious about court appearances.<sup>16</sup> Many litigants represent themselves because of the cost of legal services. The average fees for a two-day trial in Canada were \$31,330 in 2015 (they would undoubtedly be higher today).<sup>17</sup> The median after-tax income of Canadian households in 2019 was \$61,400.<sup>18</sup> A household must risk half of its annual income just to proceed to trial in a legal matter.<sup>19</sup> It is therefore not surprising that, of the 12 million adult Canadians that will have a legal problem they consider serious in a given three-year period, many of them will not rely on the courts to provide a resolution.<sup>20</sup>

These chronic issues of delay, accessibility, and cost had plagued Ontario's civil justice system for decades before the COVID-19 pandemic arrived. What changes has the pandemic wrought?

### **Suspended Courts, Virtual Hearings – Changes Necessitated by the Pandemic**

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now a presumptive ceiling of eighteen months between the charges and the trial in a provincial court without preliminary inquiry, or thirty months in other cases (*ibid*).

<sup>13</sup> Interview of Justice David M Brown by Suzanne Chiodo (7 May 2020) [Brown interview]. On 13 May 2020, Justice Roberts of the ONCA reported that more than 100 scheduled appeals had to be adjourned due to the pandemic. See *4352238 Canada Inc v SNC-Lavalin Group Inc*, 2020 ONCA 303 at para 6 [*SNC Lavalin*].

<sup>14</sup> Elizabeth Raymer, "Ontario's court of appeal ramps back up to 15-20 appeals per week" (10 June 2020), online: *Canadian Lawyer* <[www.canadianlawyermag.com/news/general/ontarios-court-of-appeal-ramps-back-up-to-15-20-appeals-per-week/330396](http://www.canadianlawyermag.com/news/general/ontarios-court-of-appeal-ramps-back-up-to-15-20-appeals-per-week/330396)> [perma.cc/J7BQ-QCKV].

<sup>15</sup> The courts began resuming in-person proceedings at the beginning of July 2020. See John Schofield, "Everything is on the table as Ontario eyes a return to courts, says attorney general" (9 June 2020), online: *The Lawyers Daily* <[www.thelawyersdaily.ca/articles/19445](http://www.thelawyersdaily.ca/articles/19445)>.

<sup>16</sup> The statistics in the first half of this paragraph are taken from Dr Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self Represented Litigants (Final Report)* (Treasurer's Advisory Group on Access to Justice, 2013) at 33-34, 53-63, 64-65, 97-104.

<sup>17</sup> Shannon Salter & Darin Thompson, "Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal" (2017) 3 McGill J Disp Resol 113 at 118 [Salter & Thompson 2017], citing Michael McKiernan, "The Going Rate" (1 June 2015), online: *Canadian Lawyer* <[www.canadianlawyermag.com/staticcontent/images/canadianlawyermag/images/stories/pdfs/Surveys/2015/CL\\_June\\_15\\_GoingRate.pdf](http://www.canadianlawyermag.com/staticcontent/images/canadianlawyermag/images/stories/pdfs/Surveys/2015/CL_June_15_GoingRate.pdf)> [perma.cc/MPR8-7T6S]. See also Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Canadian Forum on Civil Justice, 2013) at 4 [Roadmap].

<sup>18</sup> Statistics Canada, "Canadian Income Survey, 2018", for Canadian families and unattached individuals, online: <[www150.statcan.gc.ca/n1/daily-quotidien/200224/dq200224a-eng.htm](http://www150.statcan.gc.ca/n1/daily-quotidien/200224/dq200224a-eng.htm)>.

<sup>19</sup> Salter & Thompson 2017, *supra* note 17 at 118.

<sup>20</sup> *Ibid* at 122, citing Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Department of Justice Canada, 2007) 2 at 10-12.

Effective 17 March 2020, as a result of the state of emergency declared by the Government of Ontario due to COVID-19, the ONSC and other Ontario courts suspended their regular courthouse operations.<sup>21</sup> The ONSC and the ONCA stated that they would use virtual methods to hear urgent matters only.<sup>22</sup> In the ONSC, civil matters scheduled for the immediate future<sup>23</sup> were adjourned *sine die*, to be rescheduled after 1 June 2020. On 2 April 2020, the ONSC issued further Notices to the Profession, expanding the scope of matters that would be heard in each region.

The courts suspended operations, but they did not close.<sup>24</sup> The ONSC and the ONCA continued to hear matters in writing, by telephone, and by video conference, without the need to obtain consent or a court order.<sup>25</sup> Electronic filing became more widely available,<sup>26</sup> and service by email is now permitted without the need for the other party's consent. Facts can be hyperlinked to cases, without having to file Books of Authorities. Affidavits can be sworn remotely.<sup>27</sup> Judgments, endorsements, and orders of the court became effective the date they were made, without the requirement to issue and enter formal orders. Following the implementation of virtual hearings in the ONSC and the ONCA, the Honourable Geoffrey B Morawetz, ONSC Chief Justice, declared that "we cannot go back".<sup>28</sup>

The Ontario E-Hearings Task Force<sup>29</sup> subsequently released its Best Practices for Remote Hearings, which provides guidance for lawyers about the preparation and conduct of a virtual hearing.<sup>30</sup> The Attorney General also announced that the Ontario government would not

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<sup>21</sup> The following timeline is taken from the Ontario Superior Court of Justice, "Consolidated Notice to the Profession, Litigants, Accused Persons, Public and the Media Re: Expanded Operations of Ontario Superior Court of Justice, effective May 19, 2020" (13 May 2020), online: *SCJ* <<https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/consolidated-notice/>> as well as the Court of Appeal for Ontario, "Practice Direction Regarding the Electronic Conduct of Matters during the COVID-19 Emergency" (6 April 2020), online: *COA* <[www.ontariocourts.ca/coa/en/notices/covid-19/practice-direction-electronic-conduct.pdf](http://www.ontariocourts.ca/coa/en/notices/covid-19/practice-direction-electronic-conduct.pdf)>.

<sup>22</sup> The ONCA stated it would also hear non-urgent appeals in writing: "COVID-19: Notice to the Profession and the Public" (17 March 2020). The ONSC issued notices to the Profession on 15 March 2020 identifying the types of matters that were considered "urgent."

<sup>23</sup> From 17 March 2020 to 31 May 2020.

<sup>24</sup> The Ontario Small Claims Court was only hearing urgent matters by telephone or videoconference during the suspension of operations, but subsequently began scheduling settlement conferences in non-urgent matters. In-court matters for all courts were suspended up until 6 July 2020.

<sup>25</sup> The ONCA continued to hear matters via the CourtCall service. See The Court of Appeal for Ontario, "Notice Regarding Videoconference and Teleconference Appearance Technology (CourtCall)" (27 March 2020), online: <[www.ontariocourts.ca/coa/en/notices/tele-video.htm](http://www.ontariocourts.ca/coa/en/notices/tele-video.htm)>. The Divisional Court of the ONSC operated on a limited docket but heard cases virtually at the discretion of the judges. See Superior Court of Justice, "Notice to the Profession: Divisional Court" (2 April 2020).

<sup>26</sup> Ministry of the Attorney General, "Notice to the Legal Profession regarding the Civil Claims Online service" (23 March 2020). However, other than the documents that could be filed through the CCO or the Small Claims Court online filing services, the courts only accepted electronic filing of documents for urgent matters. Counsel and parties also had to file the same materials in paper format, with the requisite filing fee, following the resumption of regular court operations (the same applied to the Small Claims Court). The ONCA accepted filings by email.

<sup>27</sup> This was later confirmed by Schedule 4 (amending the *Commissioners for Taking Affidavits Act*) of the *COVID-19 Response and Reforms to Modernize Ontario Act, 2020*, SO 2020, c 7 (assented to 12 May 2020).

<sup>28</sup> The Advocates' Society, "Virtual Fireside Chat with Chief Justice Geoffrey B Morawetz" (6 April 2020).

<sup>29</sup> The E-Hearings Task Force was a collaboration of The Advocates' Society (TAS), the OBA, the Federation of Ontario Law Associations, and the Ontario Trial Lawyers Association. TAS has since launched a Modern Advocacy Task Force to look at longer-term changes in the wake of COVID-19; it will report in April 2021.

<sup>30</sup> E-Hearings Task Force, *Best Practices for Remote Hearings* (13 May 2020), online (pdf): The Advocates' Society

<[www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/BestPracticesRemoteHearings/Best](http://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/BestPracticesRemoteHearings/Best)



proceed with the Halton Region Consolidated Courthouse construction project, and would instead use those funds “to invest in technology, modernize processes and expand access to justice across the province” based on the “[e]xperience gained during COVID-19... there is broad consensus we cannot go back to the way things were done before the public health emergency.”<sup>31</sup> Given that the estimated total capital cost of the project was expected to be in the range of \$200-\$499 million, that is a significant investment, although it is doubtful the entire amount will be put towards modernization.<sup>32</sup>

### **The After Times: Are the Changes Here to Stay?**

Given the projected financial investment in the modernization of Ontario’s justice system, there is hope for the time after COVID-19. The experience with virtual hearings also indicates that the After Times are here to stay.

Lawyers and judges who have participated in virtual hearings have reported positive results.<sup>33</sup> Participants have experienced occasional technological disruptions, and counsel report that they have had to change their way of presenting because judges receive and hear submissions differently in a virtual hearing. Overall, however, “it’s just like whenever you appear at a different court for the first time.”<sup>34</sup> Counsel have also reported that virtual hearings are much more focused than their in-person equivalents.<sup>35</sup>

Courts are also adapting to the “new normal”. The Ontario Commercial List had 181 audio hearings, 41 video hearings, and 131 hearings in writing between 17 March 2020 and 28 April 2020.<sup>36</sup> During the suspension of court operations, the ONCA heard appeals in writing as much as possible, with a short video conference in the minority of cases if judges had questions about the materials.<sup>37</sup> Judges were unsympathetic to arguments that matters could not proceed by videoconference on the basis that parties needed to be with their counsel to assist with documents, or that lack of physical presence “deprives the occasion of solemnity and a morally persuasive environment”.<sup>38</sup> In answer to such arguments, Justice Myers of the ONSC famously retorted, “[i]t’s 2020.”<sup>39</sup> He went on to say that becoming proficient with virtual hearings and other technology is a basic requirement of civil litigators and courts.<sup>40</sup>

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[\\_Practices\\_for\\_Remote\\_Hearings\\_13\\_May\\_2020\\_FINAL\\_may13.pdf](#)> at para 7 [Best Practices]. I use the terms “remote hearing” and “virtual hearing” interchangeably.

<sup>31</sup> Ontario, Ministry of the Attorney General, “News Release: Ontario Investing in Innovative Ways to Modernize the Justice System” (8 May 2020), online: MAG <[www.news.ontario.ca/mag/en/2020/05/ontario-investing-in-innovative-ways-to-modernize-the-justice-system.html](http://www.news.ontario.ca/mag/en/2020/05/ontario-investing-in-innovative-ways-to-modernize-the-justice-system.html)>.

<sup>32</sup> The funds will also be used for immediate infrastructure needs at the Milton and Burlington courthouses: *ibid.*

<sup>33</sup> Ewa Krajewska and Shaun Laubman, “See you in (Online) Court – Tips for Virtual Hearings” (30 April 2020), Ontario Bar Association Webinar Series, “Maintaining Your Litigation Practice in a Remote Work Environment”.

<sup>34</sup> *Ibid.*

<sup>35</sup> Sandra Forbes, “Maintaining Your Litigation Practice in a Remote Work Environment” (14 May 2020), Ontario Bar Association Webinar Series.

<sup>36</sup> The Advocates’ Society, “Update on Changes to Commercial List operations in light of COVID-19” (5 May 2020) at para 3, online (pdf): *The Advocates’ Society* <[www.advocates.ca/Upload/Files/PDF/COVID-19/Ontario/CLUC\\_Updates\\_on\\_changes\\_to\\_operations\\_at\\_Commercial\\_List\\_in\\_light\\_of\\_COVID\\_19\\_May\\_5\\_2020\\_final\\_may15.pdf](http://www.advocates.ca/Upload/Files/PDF/COVID-19/Ontario/CLUC_Updates_on_changes_to_operations_at_Commercial_List_in_light_of_COVID_19_May_5_2020_final_may15.pdf)>.

<sup>37</sup> Brown interview, *supra* note 13.

<sup>38</sup> *Arconti v Smith*, 2020 ONSC 2782 at para 18.

<sup>39</sup> *Ibid* at para 19. Justice Myers noted that for more than twenty years, r 1.08 has provided for the option of videoconferencing in motions, applications, and trials (*ibid* at para 20).

<sup>40</sup> *Ibid* at para 33.

Justice Myers has reviewed the Rules to determine which might require revision to facilitate potential reforms to Ontario’s civil justice system,<sup>41</sup> as part of a Judicial Working Group of the ONSC.<sup>42</sup> The recommendations are indicative of a “paradigm shift” away from in-person oral hearings and towards written advocacy and virtual hearings, using videoconferences and teleconferences.<sup>43</sup> In addition to recommending changes to facilitate the implementation of electronic filing and hearings, they state that “presentation of evidence and argument orally in open court will no longer be considered the default or even a superior mode”; instead, in accordance with the principle of proportionality,<sup>44</sup> “[t]he default should be the mode that is most expeditious and affordable, having regard to the nature of the case.”<sup>45</sup> For all steps except trial, parties would have to seek leave for an in-person hearing.<sup>46</sup> Applications and summary trials could become the default, with parties required to show why a trial is necessary for the fair, expeditious and affordable adjudication of their dispute.<sup>47</sup> Since then, the Superior Court of Justice has indicated that motions on consent, and contested short motions, are to be heard in writing as the default.<sup>48</sup>

As discussed further below, this “paradigm shift” away from oral argument has drawn particular ire from the Bar, partly on procedural justice grounds. While a hearing by videoconference may serve as an acceptable substitute for an in-person hearing, telephone or written hearings give rise to objections that litigants are losing their “day in court”.<sup>49</sup> Others have stated that any curtailment of the adversarial hearing impinges on the accuracy of the result.<sup>50</sup> Critics have claimed that the move away from traditional oral hearings will result in “second tier justice.”<sup>51</sup>

However, according to the proportionality principle,<sup>52</sup> which has been part of the Rules since 2010, not every litigant will be entitled to every procedural step. Procedures must be tailored to the nature of the dispute. If the proportionality principle is to address the issues of cost and

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<sup>41</sup> Justice Fred Myers & Stephen Cavanagh, *List of Rules Potentially Affected by Reforms to Civil Justice System, Including E-Filing and Virtual Hearings* (ONSC Judicial Working Group, 22 May 2020) [Myers & Cavanagh]. The Federation of Ontario Law Associations, representing local law associations across Ontario, is soliciting feedback on the document. Any changes to the Rules would have to be considered by the Civil Rules Committee. See *supra* note 6.

<sup>42</sup> The Working Group is co-chaired by Regional Senior Justices Firestone and MacLeod, and includes judges from various regions, members of the Bar, and representatives from the MAG and Court Services Division. See Ontario Bar Association, “Fireside Chat with Superior Court of Justice” (28 May 2020) [Morawetz Fireside Chat].

<sup>43</sup> Myers, *supra* note 41 at 1.

<sup>44</sup> Rules, *supra* note 5, r 1.04(1.1) states that, “[i]n applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding” (*ibid*).

<sup>45</sup> Myers, *supra* note 41 at 3-4; Rules, *supra* note 5, r 1.08(5)(a). This relates to the “general principle” in r 1.08(5)(a) (regarding teleconference and videoconference hearings) “that evidence and argument should be presented orally in open court” (*ibid*).

<sup>46</sup> Myers, *supra* note 41 at 3.

<sup>47</sup> *Ibid* at 8-9, 19.

<sup>48</sup> Ontario Superior Court of Justice, “Toronto Expansion Protocol for Court Hearings During COVID-19 Pandemic” (29 June 2020), online: *SCJ* < [www.ontariocourts.ca/scj/notices-and-orders-covid-19/notice-to](http://www.ontariocourts.ca/scj/notices-and-orders-covid-19/notice-to)>.

<sup>49</sup> For a summary of these arguments, see Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (Courts and Tribunals Judiciary, 2016) at paras 6.77 to 6.84. See also Susskind, *supra* note 4 at 206.

<sup>50</sup> These objections are addressed in AAS Zuckerman, “No Justice without Lawyers: The Myth of an Inquisitorial System” (2014) 33 *CJQ* 355.

<sup>51</sup> See Susskind, *supra* note 4 at 187-91 (Susskind refers to “economy-class justice”).

<sup>52</sup> Rules, *supra* note 5, r 1.04(1.1).

delay in the civil justice system, then a paradigm shift – or, as the Supreme Court of Canada called it in *Hryniak v Mauldin*, a “culture shift” – is indispensable.<sup>53</sup>

A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

The objection that removing key procedural steps somehow renders a process unfair can be addressed by changing our view of procedural justice. Adrian Zuckerman and Rabeea Assy have both argued in favour of this paradigm shift, whereby cost and time are also seen as elements of justice.<sup>54</sup> Justice is not done where it can only be provided to the wealthiest in society, and “justice delayed is justice denied.”<sup>55</sup> If the time and cost of litigation (to all parties) are included in the definition of procedural justice, then using technology to make litigation speedier and more affordable actually promotes justice.<sup>56</sup> This is true even if some procedural steps must be sacrificed. Proportionality balances the goals of accuracy and efficiency, and thereby enables more justice and more court resources to be dispensed to a wider segment of society.<sup>57</sup>

It is the principle of proportionality, then, that militates most in favour of the shift to virtual hearings. How far will these changes go, and how effective will they be? The answers to these questions depend on several factors, some of which will facilitate civil justice reform, and some of which will stand in its way.

## Highways and Roadblocks on The Path to Modernization

### 1. Roadblocks: Institutional Governance and Professional Resistance

The history of change in the Ontario civil justice system is not encouraging. Numerous proposals for reform have been produced over the years, yet these have been largely ineffectual. None has led to a reduction in the cost and delay that plague the justice system, because none has facilitated a fundamental paradigm shift in the province’s approach to civil justice.

For example, the Rules of Civil Procedure have been modified on several occasions. The Williston Committee’s *Report of the Civil Procedure Revision Committee*<sup>58</sup> had the mandate of simplifying the language of the Rules and reducing their number, as well as “developing innovative measures to ensure that the procedure in civil litigation is understandable by members of the public, the steps necessary to finalize a dispute are minimal and the cost of

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<sup>53</sup> *Hryniak v Mauldin*, 2014 SCC 7 at para 28 [*Hryniak*]. See also Roadmap, *supra* note 17 at 6-9.

<sup>54</sup> AAS Zuckerman, “A Reform of Civil Procedure – Rationing Procedure Rather Than Access to Justice” (1995) 22 *JL & Soc’y* 155 at 162 [Zuckerman 1995]; Rabeea Assy, “Briggs’ Online Court and the Need for a Paradigm Shift” (2017) 36 *CJQ* 70 at 70, 80, 82, 84.

<sup>55</sup> Zuckerman 1995, *supra* note 54 at 162.

<sup>56</sup> Similar sentiments were expressed by Allison Speigel, “How courts can step up to save drowning civil justice system” (23 April 2020), online: *Canadian Lawyer* <[www.canadianlawyermag.com/news/opinion/how-courts-can-step-up-to-save-drowning-civil-justice-system/328967](http://www.canadianlawyermag.com/news/opinion/how-courts-can-step-up-to-save-drowning-civil-justice-system/328967)>; and by OBA President Colin Stevenson on CHCH-TV, “Inside the Story: Part 1” (29 May 2020), online: *CHCH* <<https://www.chch.com/shows/inside-the-story/>>.

<sup>57</sup> Zuckerman 1995, *supra* note 54, at 158, 160-62, 167.

<sup>58</sup> *Civil Procedure Revision*, *supra* note 3.

such procedure is reasonable.”<sup>59</sup> While subsequent reform in 1985 changed or clarified the Rules on several points,<sup>60</sup> the nearly 300 pages of revisions failed to make any fundamental changes to the overall process of civil litigation.<sup>61</sup> The MAG’s Civil Justice Review in 1996 recommended reducing cost and delay through case management, mandatory mediation, and trial as a last resort, yet civil actions take almost as long today as they did then.<sup>62</sup> The 2010 changes to the Rules were the result of the Civil Justice Reform Project completed in November 2007.<sup>63</sup> They included a general principle of proportionality, as well as expanded summary judgment procedures, reforms to reduce costs and delay associated with discovery, and mandatory pre-trial conferences.<sup>64</sup> Again, no fundamental changes were made to the process of civil litigation in Ontario, and the expanded summary judgment procedures did not bring about the timely and affordable access to justice that the SCC called for in *Hryniak*.<sup>65</sup>

These efforts have largely failed due to institutional governance and professional resistance, each of which will be addressed below. Without institutional support and stakeholder buy-in, change is usually limited to “tinkering at the edges” of reform. The danger is that the recent changes, incremental as they are, will suffer the same fate and for the same reasons.

#### (a) Institutional and Governance Issues

The responsibility for the transformation of Ontario’s civil justice system lies with the MAG. Unfortunately, as far as the civil justice system is concerned, the MAG has shown a consistent track record of institutional malaise and resistance to change.

This can partly be explained by the failure of previous reform projects, such as the Integrated Justice Project (IJP).<sup>66</sup> This launched in 1996 with the aim of creating a centralized online system to coordinate electronic filing, case management, and courtroom services. The project experienced significant cost increases and delays, with projected costs almost doubling between March 1998 (\$180 million) and March 2001 (\$359 million).<sup>67</sup> There were also significant concerns regarding internal audit controls and data privacy.<sup>68</sup> The IJP was eventually shelved in October 2002, at a cost of \$265 million. Its collapse “has cast a long shadow of fear of failure, paralyzing initiatives to modernize Ontario’s courts.”<sup>69</sup>

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<sup>59</sup> *Ibid* at 2.

<sup>60</sup> For a summary of the changes, see *ibid* at 15-33; Rules, *supra* note 5, r 1.03(2). These include the introduction of the requirement that “[t]hese rules shall be liberally construed to secure the just, least expensive and most expeditious determination of every civil proceeding on its merits” (*ibid*).

<sup>61</sup> Justice David M Brown, “Sacred Cows and Stumbling Blocks: Whither Civil Procedure Reform?” (Paper delivered at the Law Society of Upper Canada, Toronto, 31 May 2011) [unpublished] at para 6 [Brown 2011].

<sup>62</sup> Ontario, Ministry of the Attorney General, *Civil Justice Review, Final Report* (Queen’s Printer, 1996). The average duration of a civil action was thirty-two months at that time, compared to thirty months today (or 904 days – see above).

<sup>63</sup> Honourable Coulter A Osborne, Q.C., *Civil Justice Reform Project* (Ministry of the Attorney General, 2007).

<sup>64</sup> Ontario, Ministry of the Attorney General, “Backgrounder: Civil Justice Reform in Ontario” (Ministry of the Attorney General, 2011) [Backgrounder].

<sup>65</sup> *Hryniak*, *supra* note 53. Justice David M Brown has noted that, in the wake of *Hryniak*, it still takes more than three years for a case to proceed through the ONSC, and it takes an average of 2.5 years for a case to be disposed of by way of summary judgment. See Justice David M Brown, “Red block, yellow block, orange block, blue. With so much competition, what do we do?” (2019) 38 Adv J 14 at paras 10, 15.

<sup>66</sup> Interview of Justice David M Brown by Suzanne Chiodo (23 May 2020) [Brown interview 2].

<sup>67</sup> Auditor General of Ontario, *Annual Report 2001, Chapter 3, Reports on Value for money (VFM) Audits, 3.03 Integrated Justice Project* (Office of the Auditor General of Ontario, 2001) at 69 [Auditor General’s Report 2001].

<sup>68</sup> *Ibid* at 70.

<sup>69</sup> Brown interview 2, *supra* note 66; Kirk Makin, “Computer lawsuit costs Ontario \$63-million”, *The Globe and Mail* (1 June 2005), online: <www.tgam.ca/398GIBK> [Computer lawsuit].

The lessons that can be learned from the failure of the IJP will be covered later in this article. However, the reason the IJP failed was because, like similar projects in other provinces, it was too ambitious.<sup>70</sup> The project was huge in its scale and scope, spanning three Ministries (Attorney General, Solicitor General, and Correctional Services), and affecting approximately twenty-two thousand employees at 825 different locations across Ontario, as well as municipal police forces, judges, private lawyers, and the general public.<sup>71</sup> It attempted to link up disparate parts of the justice system that had never been integrated either organizationally or technologically, and relied for most of its funding and implementation on a partnership with private industry, a form of partnership that itself was relatively untested.<sup>72</sup> Proponents of the IJP described it as “the largest justice technology project under way in the world today.”<sup>73</sup>

Even with this acknowledgement, it appears that those responsible for managing the IJP significantly underestimated its complexity and the magnitude of the change it would bring about, and therefore the time, cost, and consultation it would require.<sup>74</sup> This was particularly true with regard to the court system, which “had been operating with largely paper-based information- and document-management systems. The original plan to implement [the IJP] in [an] eighteen-month period incurred a measure of resistance from court staff and the Judiciary.”<sup>75</sup> This resistance, as well as the ballooning of time and cost involved in the project, meant that it was eventually more cost-effective to shelve it entirely.

The current-day institutional malaise in the MAG can also be explained by the division of responsibilities between the judiciary and the Ministry. The executive model of courts administration<sup>76</sup> means that the staff who provide administrative services to the courts and the judiciary (such as court filing, scheduling, and information technology, as well as services in the courtroom itself) answer to the Attorney General.<sup>77</sup> As a result, most court functions are beyond judicial control.<sup>78</sup> The judiciary is largely unable to set goals to keep court administrators accountable, and it lacks discretion over spending. This has led to a lack of measurable goals and objectives and a lack of appropriate infrastructure for data collection and analysis.<sup>79</sup> Judges therefore find it very difficult to schedule and manage cases, because these require that court administrators maintain materials in a consistent and organized fashion and keep a reliable and accessible inventory of cases. This stymies one of the key efficiencies of the civil litigation process – judicial case management.<sup>80</sup>

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<sup>70</sup> Carl Baar, “Integrated justice: privatizing the fundamentals” (1999) 42:1 Canadian Public Administration 42 at 45-46, 49-52, 54 (describing failed initiatives to integrate systems in British Columbia and New Brunswick) [Baar].

<sup>71</sup> Auditor General’s Report 2001, *supra* note 67 at 67.

<sup>72</sup> Baar, *supra* note 70 at 55; Michael Jordan, “Ontario’s Integrated Justice Project: profile of a complex partnership agreement” (1999) 42:1 Canadian Public Administration 26 at 29 [Jordan].

<sup>73</sup> Jordan, *ibid*, at 27; Auditor General’s Report 2001, *supra* note 67 at 71-72.

<sup>74</sup> Auditor General’s Report 2001, *ibid*, at 70, 76.

<sup>75</sup> *Ibid* at 76.

<sup>76</sup> Canadian Judicial Council, *Alternative Models of Court Administration* (Canadian Judicial Council, 2006) at 9, cited in Brown 2011, *supra* note 61 at para 25. Both the CJC Report and Justice Brown criticize the executive model of courts administration.

<sup>77</sup> Auditor General’s Report, *supra* note 10 at 88.

<sup>78</sup> Chief Justice Frank Callaghan, “The Financing and Administration of the Courts: A Threat to Justice” (1992) TAS J at 4.

<sup>79</sup> See Susskind, *supra* note 4 at 79. This in turn has an impact on the principle of open justice, which “demands a clear window on the court system” (*ibid*).

<sup>80</sup> Brown 2011, *supra* note 61 at paras 28-35.

These governance issues have also affected the pace of modernization in the Ontario court system. The Ministry has been subject to “ongoing, consistent criticism from [justice] sector stakeholders regarding the pace of modernization,”<sup>81</sup> yet the court system is still heavily paper-based.<sup>82</sup> There is no up-to-date information technology system in the Ontario courts for the filing and management of court documents, and to track and schedule court cases. FRANK is a system that tracks criminal, civil, and small claims cases received by the ONSC, but it has not been updated since 2014.<sup>83</sup> It is unable to facilitate accurate entry of data or generate user-friendly reports. Because judges and court staff cannot rely on it, they are still dependent on physical files. This affects the efficient scheduling and management of cases.<sup>84</sup> The poor state of the FRANK system has been confirmed by the Auditor General of Ontario,<sup>85</sup> the Law Commission of Ontario,<sup>86</sup> and judges that have attempted to use the system.<sup>87</sup>

Civil servants and institutions play a major role in change processes,<sup>88</sup> and their resistance can prove fatal to fundamental reform efforts. Just as the “capture” of intangible resources such as access to empirical data and knowledge of organizational culture can assist civil servants in their campaigns for reform,<sup>89</sup> it can also assist them in their attempts to block it. Overcoming such resistance within the MAG will be essential in the enactment of any lasting civil justice reform.

#### (b) Resistance to Change in the Legal Profession

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<sup>81</sup> Auditor General’s Report, *supra* note 10 at 104.

<sup>82</sup> *Ibid* at 7 (paper made up more than 96 per cent of the 2.5 million documents filed in the Ontario court system in 2018-2019). Limited steps towards digitization in Ontario have included electronic filing of pleadings (and a limited number of other documents) which was introduced in November 2017. See “File civil case documents online” (last modified 10 July 2020), online: *Government of Ontario* <[www.ontario.ca/page/file-civil-claim-online](http://www.ontario.ca/page/file-civil-claim-online)>. Small claims may also be filed online, see “File small claims online” (last modified 10 July 2020), online: *Government of Ontario* <[www.ontario.ca/page/file-small-claims-online](http://www.ontario.ca/page/file-small-claims-online)>. Once the court receives the documents via these portals, they are simply printed out and put in the paper file (they are not placed in dedicated electronic files). The portals are therefore not part of an end-to-end digitized system. The ONCA is currently undergoing a digitization project by an outside provider; this is predicted to be completed in 2022 (email correspondence to Suzanne Chiodo from Justice David M Brown, 31 May and 18 June 2020). With regard to tribunals, the Condominium Authority Tribunal allows for the online filing of applications, but its jurisdiction is very narrow. Self-funding tribunals such as the Ontario Energy Board and the Ontario Securities Commission have digitized processes such as electronic filing.

<sup>83</sup> Auditor General’s Report, *ibid*, at 92.

<sup>84</sup> *Ibid* at 85-86, 107-108.

<sup>85</sup> The MAG took up to two months to provide the Auditor General with several key documents, a delay the latter had encountered on previous audits in 2003 and 2008. The Auditor General concluded that it was “concerned that these delays are part of a recurring pattern at the Ministry of the Attorney General” (*ibid* at 98).

<sup>86</sup> See *Class Actions, Objectives, Experiences and Reforms* (Law Commission of Ontario, 2019) [LCO Report]. In preparing its report on class actions, the LCO found that the lists of class action files taken from the FRANK database (and provided by the MAG) “were inconsistent, incomplete and contained many inaccuracies and duplications” (*ibid* at 104). The MAG could not provide even a basic record of important milestones in each action, and could not identify whether a particular case was ongoing, completed, or dormant (*ibid* at 104). The LCO concluded that the Ministry did not have a robust court information system that could collect and aggregate a broad range of class actions statistics, and that such a system was not likely to be available in the near future (*ibid* at 68).

<sup>87</sup> Some judicial frustrations have been noted, see *Bon Hillier v Milojevic*, 2010 ONSC 435 at para 37; *Charles Estate (Re)*, 2009 CanLII 57448 (ONSC) at paras 12-13; *Pershad Singh v Thompson (Trustee of)*, 2010 ONSC 4943 at paras 55-60; see Brown 2011, *supra* note 61 at para 66.

<sup>88</sup> Lucia Quaglia, “Civil Servants, Economic Ideas, and Economic Policies: Lessons from Italy” (2005) 18 *Governance* 545 at 559; Kathleen McNamara, “Rational fictions: Central bank independence and the social logic of delegation” (2002) 25 *West Eur Pol* 48; Michael King, “Epistemic communities and the diffusion of ideas: Central bank reform in the United Kingdom” (2005) 28 *West Eur Pol* 94.

<sup>89</sup> Quaglia, *ibid*, at 546-47.

Another roadblock to reform is resistance to change in the legal profession. As Darin Thompson has observed, “the change-resistant culture of most justice systems is especially pronounced when it comes to new technology. This observation is true for justice system providers such as lawyers, judges and many alternative dispute resolution providers.”<sup>90</sup>

In Ontario, for example, lawyers have shown a great deal of resistance to the imposition of written hearings at the appellate level. Following the ONCA’s decision in *SNC Lavalin*, the appellant has moved to have the decision set aside by a panel of the Court, on the basis that the Rules and the *Courts of Justice Act*<sup>91</sup> mandate an oral hearing of a civil appeal unless the parties consent to an appeal in writing.<sup>92</sup> This resistance has also manifested itself in the Bar generally.<sup>93</sup> The tradition of oral advocacy is strongly ingrained in lawyers, and some commentators have noted that the pull of the majesty and collegiality of the courtroom is also strong.<sup>94</sup> This may be why, until the pandemic, so few lawyers used the ONCA’s teleconference and videoconference service (CourtCall).<sup>95</sup>

While such resistance is by no means universal,<sup>96</sup> it could ultimately harm the legal profession, however, and “[t]he law ... risks losing influence over citizens by not recognizing how much the online environment needs new justice models.”<sup>97</sup>

Even worse, any reforms that are implemented may be co-opted by the very system whose complexities and delays they were introduced to counteract. A major driver for civil justice reforms such as class proceedings “was the search for a remedy for an expensive, slow, complex, inaccessible, and overburdened court system.”<sup>98</sup> However, as with ADR, lawyers have used these procedures “not for the accomplishment of a ‘better’ result, but as another weapon in the adversarial arsenal to manipulate time, methods of discovery, and rules of procedure for perceived client advantage.”<sup>99</sup> As Carrie Menkel Meadow has pointed out, this

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<sup>90</sup> Darin Thompson, “Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution” (2015) 1 Intl J Online Disp Resol 4 at 44.

<sup>91</sup> *Courts of Justice Act*, RSO 1990, c C-43.

<sup>92</sup> *SNC Lavalin*, *supra* note 13. See also *Carleton Condominium Corporation No 476 v Wong*, 2020 ONCA 244.

<sup>93</sup> Cristin Schmitz, “Post-COVID courts could see less oral advocacy, more paper-based and remote adjudication: SCC’s Wagner” (21 May 2020), online: *Lawyer’s Daily* <thelawyersdaily.ca/articles/19174/post-covid-courts-could-see-less-oral-advocacy-more-paper-based-and-remote-adjudication-scc-s-wagner> [Schmitz, “Wagner”]; Brown interview 2, *supra* note **Error! Bookmark not defined.**; Tom Curry, “Maintaining Your Litigation Practice in a Remote Work Environment” (14 May 2020), Ontario Bar Association Webinar Series [Curry]; John Schofield, “Task force aims to help modernize justice system and role of advocates” (17 June 2020), online: *Lawyer’s Daily* <www.thelawyersdaily.ca/articles/19608/task-force-aims-to-help-modernize-justice-system-and-role-of-advocates>.

<sup>94</sup> Schmitz, “Wagner,” *supra* note 93 (per Federal Court Justice James O’Reilly); Curry, *supra* note 93; Brown interview 2, *supra* note 66.

<sup>95</sup> Curry, *supra* note 93; Brown interview 2, *supra* note 66. However, this may also be because CourtCall has experienced numerous technical issues and does not work as well as more up-to-date technologies such as Zoom.

<sup>96</sup> See the motion to the Law Society of Ontario, asking it to lobby the provincial government, the Civil Rules Committee, and courts administration to adopt innovations such as electronic filing and remote hearings. Law Society of Ontario, “Notice to the Professions” (20 March 2020), online: *LSO* <bit.ly/3hFW6JS>.

<sup>97</sup> Ethan Katsh & Orna Rabinovich-Einy, *Digital Justice* (Oxford University Press, 2017) at 174-75 [*Digital Justice*].

<sup>98</sup> *Ibid* at 178.

<sup>99</sup> *Ibid* at 3; see also *ibid* at 17.

is a result of “resolv[ing] disputes using new forms within old structures.”<sup>100</sup> Lawyers “infect” new processes with adversarial formalisms such as evidentiary objections,<sup>101</sup> and so the new wine suffers from being put into old wineskins.<sup>102</sup>

For example, when class proceedings were enacted in the early 1990s, they were hailed as a panacea to the access to justice problems that were endemic in Ontario’s justice system,<sup>103</sup> including the delays and inconvenience associated with bringing individual actions for small claims.<sup>104</sup> In the nearly three decades since the *CPA* was enacted, however, class proceedings have become mired in delays caused by multi-jurisdictional issues, skirmishes between competing law firms, and interlocutory appeals. As the Law Commission of Ontario noted in its recent report, “[m]any of the usual obstacles to access to a judicial determination in a reasonably timely manner are compounded in the class action setting. Virtually everyone consulted by the LCO cited delay as a significant issue in class action litigation.”<sup>105</sup>

This phenomenon is also exemplified by the suspension of the courts during the pandemic. Lawyers created a new battle-front out of the ONSC’s statement that it would initially only hear urgent matters, thereby commanding even more of the court’s limited resources. In *Wang v 2426483 Ontario Limited*, Justice Myers observed that “[t]he court is now routinely receiving submissions on the merits and ostensibly on the issue of “urgency” both before and even after the court has scheduled a matter for hearing.”<sup>106</sup> This is one of the reasons why the BC CRT does not generally permit users of the system to be represented by a lawyer, other than in motor vehicle accident cases,<sup>107</sup> a decision that was vehemently opposed by members of the BC Bar.<sup>108</sup>

Nevertheless, the unique nature of this moment of crisis may mean that such institutional and professional resistance is overcome. This will depend on a number of facilitators of change.

## 2. Highways – Internal and External Facilitators of Institutional Change

One of the greatest facilitators of change is crisis. As Richard Susskind has said, “[a]nyone who reads about change theory knows that the first step to change is creating a sense of urgency – and this is what the pandemic has done”.<sup>109</sup> It was crisis that precipitated the creation of online courts in British Columbia. The *CRT Act*<sup>110</sup> was passed when a number of other matters,

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<sup>100</sup> Carrie Menkel-Meadow, “Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or ‘The Law of ADR’” (1991) 19 Fla St UL Rev 1.

<sup>101</sup> *Ibid* at 35 and 38.

<sup>102</sup> When the BC *Civil Resolution Tribunal Act*, SBC 2012, c 25, s 20 [*CRT Act*] was being debated, it was pointed out that there had previously been a presumption that the Small Claims Court would only be used by self-represented parties, but that lawyers had become more ubiquitous over time: BC Legislative Assembly, Official Report of Debates (Hansard), 39-4, p 1738 (8 May 2012) (Leonard Krog).

<sup>103</sup> Ministry of the Attorney General, News Release, “Class Proceedings Legislation Expands Access to Justice” (7 January 1993). See also Suzanne Chiodo, *The Class Actions Controversy: The Origins and Development of the Ontario Class Proceedings Act* (Irwin Law, 2018) (outlining the debate and enactment of class proceedings legislation).

<sup>104</sup> *Ibid* at 48, 76.

<sup>105</sup> LCO Report, *supra* note 86 at 5-6, 18, 23, 30, 92.

<sup>106</sup> 2020 ONSC 2040, at para 7; see also *Haaksma v Taylor*, 2020 ONSC 2656.

<sup>107</sup> *CRT Act*, *supra* note 102, s 20.

<sup>108</sup> Cristin Schmitz, “Tribunal aimed at streamlining deals out lawyers, prompting ire”, *The Lawyer’s Daily* (3 April 2015) (Lexis).

<sup>109</sup> Schmitz, “Wagner,” *supra* note 93.

<sup>110</sup> *CRT Act*, *supra* note 102.



including traffic violations and civil forfeiture, were shifted out of the court system and into administrative tribunals. This shift occurred in order to relieve pressure on the court system.<sup>111</sup> For some years previously, delays in the criminal justice system had led to the stay of proceedings against numerous accused persons, leading to a public outcry.<sup>112</sup> Several reports commented on the “culture of delay”<sup>113</sup> that pervaded the BC justice system generally.<sup>114</sup> The movement of matters from the courts to tribunals was an effort “to obtain greater process efficiencies and better outcomes” in both.<sup>115</sup>

The history of change in the Ontario court system, as well as the literature on institutional change generally, provide useful insights into the factors that will encourage change now. The literature on institutional change discusses endogenous (internal) and exogenous (external) explanations for the timing of change.<sup>116</sup> A key exogenous factor is financial crisis.<sup>117</sup> The current COVID-19 crisis has not yet led to financial crisis, but that may not be far off.<sup>118</sup> Ontario’s under-resourced justice system is already facing an overwhelming backlog, and the courts’ inability to function at full capacity – combined with the spike in litigation that is sure to follow the pandemic – could lead to a breakdown of the system altogether, leaving it no choice but to modernize.<sup>119</sup> As with the BC CRT, this may open up “a rare window of opportunity” for leaders “to pursue reform measures that may have been impossible in the absence of crisis”.<sup>120</sup>

Another exogenous factor is the existence of reform in other influential jurisdictions. Institutions operate within the “logic of organizational mimicry” and reform is “determined by a social process of crossnational institutional diffusion.”<sup>121</sup> Through norm internalization, ideas

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<sup>111</sup> BC Legislative Assembly, Official Report of Debates (Hansard), 39-4 (8 May 2012) at 1449 (Kathy Corrigan) and 1820 (Jagrup Brar).

<sup>112</sup> This may happen across Canada in the wake of COVID-19: Olivia Stefanovich, “Justice minister says he’s ready to legislate if pandemic delays lead to charges being tossed”, *CBC News* (15 July 2020), online: *CBC* <<https://www.cbc.ca/news/politics/stefanovich-jordan-decision-covid19-cases-delay-1.5638893>>.

<sup>113</sup> *A Criminal Justice System for the 21st Century* (BC Justice Reform Initiative, 2012) (Chair: D Geoffrey Cowper) at 4 [Cowper Report].

<sup>114</sup> British Columbia, Minister of Justice and Attorney General, *Modernizing British Columbia’s Justice System: Green Paper* (Ministry of Justice, 2012) at 9; British Columbia, Ministry of Justice, *White Paper on Justice Reform, Part One: A Modern, Transparent Justice System* (Ministry of Justice, 2012) at 3; British Columbia, Ministry of Justice, *White Paper on Justice Reform, Part Two: A Timely, Balanced Justice System* (Ministry of Justice, 2012) at 22.

<sup>115</sup> Cowper Report, *supra* note 113 at 166; see also *ibid* at 163-66. Although the Cowper Report focused on the criminal justice system, it also reviewed the “Policy Context” of the movement towards tribunals, including the CRT (*ibid* at 164-65).

<sup>116</sup> Caner Bakir & K Aydin Gunduz, “When, Why and How Institutional Change Takes Place: A Systematic Review and a Future Research Agenda on the Importance of Policy Entrepreneurship in Macroeconomic Bureaucracies” (2017) 36 *Pol’y & Soc’y* 479 at 485 [Bakir].

<sup>117</sup> See, for example, Tsuyoshi Kawasaki, “Policy ideas and change in Japanese bureaucratic politics: The ministry of finance in international monetary crisis, 1969–1971” (1993) 13 *J Pub Pol’y* 111.

<sup>118</sup> The International Monetary Fund predicts that the world economy will shrink by 3 per cent in 2020, compared to a 0.1 per cent dip in the 2008 recession. See United States, *World Economic Outlook, April 2020: The Great Lockdown* (International Monetary Fund, 2020), online (pdf): *IMF* <[www.imf.org/en/Publications/WEO/Issues/2020/04/14/World-Economic-Outlook-April-2020-The-Great-Lockdown-49306](http://www.imf.org/en/Publications/WEO/Issues/2020/04/14/World-Economic-Outlook-April-2020-The-Great-Lockdown-49306)>.

<sup>119</sup> King, *supra* note 88 at 99.

<sup>120</sup> Joo-Youn Jung, “Reinventing the interventionist state: The Korean economic bureaucracy reform under the economic crisis” (2008) 23 *Pacific Focus* 121 at 132-33.

<sup>121</sup> McNamara, *supra* note 88 at 48-49.

filter down from supranational institutions and across from comparable jurisdictions.<sup>122</sup> This was certainly true for class actions reform in Ontario in the late 1980s and early 1990s. The existence of class proceedings legislation in the US and Quebec exerted a profound influence on the reform movement in Ontario.<sup>123</sup> Similarly, the existence of a developed online tribunal in British Columbia, as well as a push towards online courts around the world,<sup>124</sup> could prove influential in Ontario today.<sup>125</sup> Developments in other jurisdictions provide a “laboratory” for Ontario to see if online courts are sufficiently effective, and Ontario can then implement those policies.<sup>126</sup> However, although much of the international and academic discussion has looked to the online processes of BC and England & Wales in particular, the debates in the Ontario Bar have been fairly insular<sup>127</sup> and have generally not considered developments in other jurisdictions.

Endogenous facilitators of change include political will and “policy entrepreneurs” who shape the nature and direction of reform.<sup>128</sup> Policy entrepreneurs are able to steer change at all levels of public policy, playing the role of politician, bureaucrat, academic, spin-doctor, and mediator between interest groups. They “build broad coalitions supporting their entrepreneurship activity in the domestic political economy.”<sup>129</sup> The policy entrepreneur at the helm of class action reform in Ontario was Attorney General Ian Scott, who filled each of the aforementioned roles in his efforts to bring about reform.<sup>130</sup> With a background in environmental law, Scott was passionate about access to justice and the funding of public interest litigation.<sup>131</sup> The subject of class action reform had languished at the MAG for at least a decade before Scott took up the subject.<sup>132</sup> It was his determination to mediate a consensus between warring interest groups, and to fight resistance in his own Ministry, that finally led to the enactment of the *Class Proceedings Act, 1992*.<sup>133</sup>

Does the same political will and leadership exist in the current climate? Perhaps. The Attorney General has stated on several occasions that he wishes to use the current crisis as an opportunity

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<sup>122</sup> Juliet Johnson, “Two-track diffusion and central bank embeddedness: The politics of Euro adoption in Hungary and the Czech Republic” (2006) 13 Rev Intl Pol Econ 361.

<sup>123</sup> Chiodo, *supra* note 103 at 20-26, 39-44, 65.

<sup>124</sup> Remote Courts Worldwide provides a comprehensive list of initiatives, see “Remote Courts Worldwide” (last visited 12 July 2020), online: *Remote Courts Worldwide* <remotecourts.org>.

<sup>125</sup> An influential supranational institution is the United Nations. See the United Nations Office on Drugs and Crime, *Ensuring Access to Justice in the Context of COVID-19* (May 2020), online (pdf): UNODC <www.unodc.org/documents/Advocacy-Section/Ensuring\_Access\_to\_Justice\_in\_the\_Context\_of\_COVID-191.pdf>. The recent report of the UN Office on Drugs and Crime emphasized the importance of addressing the backlog of cases (including in civil proceedings), understanding the need for people-centred justice, and providing legal empowerment strategies (at 36-38). The report stated that this could be done by “building on some of the ICT [information, communication, and technology] gains that may have been achieved during the crisis and continuing with remote court hearings and other judicial proceedings” (*ibid* at 36).

<sup>126</sup> Bakir, *supra* note 116 at 485. See also King, *supra* note 88 at 99.

<sup>127</sup> Brown interview 2, *supra* note 66.

<sup>128</sup> King, *supra* note 88 at 96, 113, 117; Kawasaki, *supra* note 117 at 125; see also Bakir *supra* note 116 at 485, 489.

<sup>129</sup> Bakir *supra* note 116 at 489.

<sup>130</sup> Chiodo, *supra* note 103 at 171-88.

<sup>131</sup> Ian Scott and N McCormick, *To Make a Difference: A Memoir* (Stoddart, 2001) at 57, 134-35, 175; Ian Scott and Raj Anand, “Financing Public Participation in Environmental Decision Making” (1982) 60 Can Bar Rev 81 at 114-19; Chiodo, *supra* note 103 at 52, 136-37.

<sup>132</sup> In November 1976, Attorney General Roy McMurtry wrote to Allan Leal, Chairman of the Ontario Law Reform Commission, asking the OLRC to research the advisability of enacting class actions legislation in Ontario. Scott first conducted consultations on reform in December 1988: Chiodo, *supra* note 103 at 54-55, 174.

<sup>133</sup> Chiodo, *ibid*, at 142-46, 159-60, 174-78, 180-82.

to modernize Ontario's justice system, and has spoken of "hav[ing] the system deal with the reality" of self-represented litigants.<sup>134</sup> Chief Justice Morawetz has reported that Downey is lending full support to the process of modernization, and ensuring that his Ministry's bureaucracy does so too.<sup>135</sup> The specifics are somewhat lacking, however, and appear to be limited to digitizing existing processes and expanding the use of hearings by videoconference.<sup>136</sup> Nevertheless, Downey could play the role of a "policy entrepreneur". His experience as a real estate lawyer, court clerk and court registrar,<sup>137</sup> as well as his Master's degree in judicial administration, would give him a good knowledge of the workings of the court system, as well as the potential for reform. He has drawn upon the example of Teranet, Ontario's online real estate search and registration system, which brought about a radical transformation in the practice of real estate law in the province.<sup>138</sup> He therefore understands that law is a service, not just a profession, and that most clients do not want lawyers – they want a solution to their legal problem.<sup>139</sup>

Chief Justice Morawetz has also noted the need for a "full end-to-end electronic filing system" with e-filing available to the profession and e-document delivery for the judiciary, and is leading the ONSC in this regard.<sup>140</sup> He reports that such a system could be up and running within a year (at least on an interim basis), with e-scheduling available in the medium- to long-term.<sup>141</sup> The implementation of e-scheduling alone would save thousands of hours that are currently wasted in scheduling court (where the numerous individuals that are required to wait around also constitute a health hazard).

Other "policy entrepreneurs" are also calling for fundamental reform, although their power to effect change in Ontario is limited. Supreme Court of Canada Chief Justice Richard Wagner has supported the move towards written advocacy and virtual hearings, and is also open to the solutions proposed by Susskind, involving "online judging that leans on paper-based adjudication and asynchronous means to communicate with parties."<sup>142</sup> Chief Justice Wagner leads the Action Committee on Court Operations in Response to COVID-19 with Federal Minister of Justice and Attorney General of Canada David Lametti, and the Action Committee has emphasized that "decisions around resumption of court operations [should be] framed

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<sup>134</sup> See, for example, Marg Bruineman, "Justice system is in flux; 'we're not going back to normal,' says Downey" (22 May 2020), online: *Orillia Matters* <[www.orilliamatters.com/coronavirus-covid-19-local-news/justice-system-is-in-flux-were-not-going-back-to-normal-says-downey-2368811](http://www.orilliamatters.com/coronavirus-covid-19-local-news/justice-system-is-in-flux-were-not-going-back-to-normal-says-downey-2368811)>.

<sup>135</sup> Morawetz Fireside Chat, *supra* note 42.

<sup>136</sup> Bruineman, *supra* note 134; Anita Balakrishnan, "MAG Doug Downey commits to permanent modernization for remote notarizing, commissioning" (14 May 2020), online: *Canadian Lawyer* <[www.canadianlawyermag.com/resources/professional-regulation/mag-doug-downey-commits-to-permanent-modernization-for-remote-notarizing-commissioning/329628](http://www.canadianlawyermag.com/resources/professional-regulation/mag-doug-downey-commits-to-permanent-modernization-for-remote-notarizing-commissioning/329628)>; John Lancaster, "How COVID-19 helped push Ontario's low-tech justice system into the 21st century" (4 June 2020), online: *CBC News* <[www.cbc.ca/news/canada/toronto/covid-19-technology-courts-ontario-1.5596643](http://www.cbc.ca/news/canada/toronto/covid-19-technology-courts-ontario-1.5596643)>.

<sup>137</sup> Bruineman, *ibid*.

<sup>138</sup> Elizabeth Raymer, "Justice modernization 'window is open', says BC's top judge, speaking on courts, virtual advocacy" (23 May 2020), online: *Canadian Lawyer* <[www.canadianlawyermag.com/practice-areas/litigation/justice-modernization-window-is-open-says-b.c.s-top-judge-speaking-on-courts-virtual-advocacy/329843](http://www.canadianlawyermag.com/practice-areas/litigation/justice-modernization-window-is-open-says-b.c.s-top-judge-speaking-on-courts-virtual-advocacy/329843)>.

<sup>139</sup> This outcome-based approach is endorsed elsewhere, see Brown interview 2, *supra* note 66; Susskind, *supra* note 4 at 47-53; Roadmap, *supra* note 17 at 9.

<sup>140</sup> Amanda Jerome, "'Paper-based system is not going to exist anymore,' Chief Justice Morawetz says of post-COVID-19 court" (15 April 2020), online: *The Lawyer's Daily* <[www.thelawyersdaily.ca/articles/18576](http://www.thelawyersdaily.ca/articles/18576)>; Brown interview 2, *supra* note 66.

<sup>141</sup> Morawetz Fireside Chat, *supra* note 42.

<sup>142</sup> Schmitz, "Wagner," *supra* note 93; Susskind, *supra* note 4.

within a wider vision of courts modernization.”<sup>143</sup> Similarly, former Chief Justice of Canada Beverley McLachlin has invoked Susskind’s work in calling for a “vision-based” transformation of the justice system.<sup>144</sup>

The prospects for virtual hearings and electronic processes are promising and they are likely to remain post-pandemic. However, more fundamental transformation is needed in order to address the ills of cost, delay, and access that have plagued the civil justice system.

## **Beyond Tinkering – Online Courts**

### **1. Zoom and Gloom – The Problem with Digitizing Existing Processes**

While the recent changes are a move in the right direction, they have raised questions about how innovative and effective they are. Civil procedure remains largely unchanged except for the fact that some steps are now online. The path currently being pursued by Ontario’s justice stakeholders would seem very familiar to earlier developers of online dispute resolution systems. These developers did not attempt to disrupt or transform existing processes, but simply mimicked existing processes and offered online equivalents.<sup>145</sup> As Ethan Katsh and Orna Rabinovich-Einy have observed:<sup>146</sup>

[T]he initial impulse is to create online mirror images of the ‘live’ or offline process. In such instances, some agencies aim to replicate exactly their current processes online. Public agency staff may have been using the existing system for so long that it may be difficult for them to envision the new system as something other than an online replica of their offline process.

Replace “public agency staff” with “lawyers”, and this observation applies to the situation in Ontario.<sup>147</sup> Lawyers report that virtual hearings are just like attending a different court for the first time. The “Best Practices for Remote Hearings”<sup>148</sup> is regarded as the new companion to the Rules of Civil Procedure, and it is likely to be formally incorporated into the Rules in the near future. Colin Stevenson, President of the OBA, has stated that, in the wake of COVID-19, “we were able to launch virtual courtrooms and to train judges to manage hearings in a way

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<sup>143</sup> Cristin Schmitz, “National COVID-19 action committee issues first guidance for reopening courts during pandemic” (28 May 2020), online: *The Lawyer’s Daily* <[www.thelawyersdaily.ca/articles/19244/national-covid-19-action-committee-issues-first-guidance-for-reopening-courts-during-pandemic](http://www.thelawyersdaily.ca/articles/19244/national-covid-19-action-committee-issues-first-guidance-for-reopening-courts-during-pandemic)>.

<sup>144</sup> Beverley McLachlin, “Access to Justice: Visionary thinking to update a legacy system” (12 May 2020), online: *The Lawyer’s Daily* <[www.thelawyersdaily.ca/articles/19008/access-to-justice-visionary-thinking-to-update-a-legacy-system-beverley-mclachlin](http://www.thelawyersdaily.ca/articles/19008/access-to-justice-visionary-thinking-to-update-a-legacy-system-beverley-mclachlin)>; Beverley McLachlin, “Access to Justice: Justice in the time of social distancing” (31 March 2020), online: *The Lawyer’s Daily* <[www.thelawyersdaily.ca/articles/18386/access-to-justice-justice-in-the-time-of-social-distancing-beverley-mclachlin](http://www.thelawyersdaily.ca/articles/18386/access-to-justice-justice-in-the-time-of-social-distancing-beverley-mclachlin)>.

<sup>145</sup> Richard Susskind describes this phenomenon as automation (using technology to deliver old services) as opposed to transformation (using technology to deliver services that would have been unthinkable without technology). See Susskind, *supra* note 4 at 34. See also James Allsop, “Technology and the Future of the Courts” (2019) 38 UQLJ 1 at 10.

<sup>146</sup> *Digital Justice*, *supra* note 97 at 33.

<sup>147</sup> See also Anuj Moudgil et al, “Virtual hearings: are they really the answer?”, *Lexology* (17 April 2020), online: *Lexology* <<https://www.lexology.com/library/detail.aspx?g=1f282802-62f6-4cc6-890a-6a5a8ee5ecee>> [Moudgil].

<sup>148</sup> Best Practices, *supra* note 30.

that approximated a real court as closely as possible.”<sup>149</sup> Our court system has simply moved online, replacing physical courtrooms with virtual ones.<sup>150</sup>

This is reminiscent of the early days of the automobile. Early vehicle prototypes were simply horseless carriages, with a small combustion engine replacing the horse. While this removed the inconvenience of feeding, stabling, and cleaning up after horses, the new mode of transport was just as slow, reaching speeds of up to 16 km/h – about the same as a trotting horse.

This is why the recent changes will not be very effective in solving the problems that have plagued the civil justice system for decades. Expecting hearings by Zoom to address issues of cost, delay, and accessibility is like expecting a Benz Patent-Motorwagen to outrun a horse and buggy. This is because the use of virtual courts, while removing the cost and inconvenience of travel to court, does not result in the removal of any procedural steps. The cost and time savings will therefore be relatively modest.<sup>151</sup> The scheduling of hearings will still depend on the availability of judges and counsel, as well as the availability of the technology in the courts concerned. The volume of materials will continue to grow. Self-represented litigants will still struggle to navigate the system.<sup>152</sup> The experience of hearings by videoconference and teleconference in other jurisdictions has raised serious concerns about accessibility and other issues.<sup>153</sup> If we simply “graft a digital layer onto the existing procedural systems”, then “they can generate compounding negative externalities at a systemic level”, including procedural unfairness.<sup>154</sup> Richard Susskind confirmed this when giving evidence to the House of Lords Constitution Committee on the implications of COVID-19, stating that the aim of reform should not be to “take the English justice system and drop it into Zoom” but to “radically redesign the system” to improve access to justice.<sup>155</sup>

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<sup>149</sup> Colin Stevenson, “Leading the way forward: Modernizing access to justice” (25 May 2020), online: *The Lawyer’s Daily* <[www.thelawyersdaily.ca/articles/19190](http://www.thelawyersdaily.ca/articles/19190)>.

<sup>150</sup> Even the technology is not particularly new. Although the functionality of videoconferencing has improved in recent years, it has been around since the early 2000s; Skype was established in 2003. Electronic filing has been widely available in British Columbia since December 2008.

<sup>151</sup> Dr Natalie Byrom’s Rapid Review of the civil justice system in England & Wales following COVID-19 suggests that remote hearings are not necessarily cheaper, and that savings relate mostly to elimination of travel and accommodation costs. See UK Civil Justice Council, *The Impact of COVID-19 on the Civil Justice System* (CJC, 2020) at paras 5.1, 5.89-5.92 [CJC Report]; Moudgil, *supra* note 147.

<sup>152</sup> For example, the Best Practices is 42 pages long. See Best Practices, *supra* note 30. It refers repeatedly to the numerous practice directions issued by the various levels of court in Ontario in the wake of COVID-19, which some lawyers have called “almost impenetrable” (although some have since been consolidated): Paul-Erik Veel and Chantelle Cseh, “Practicing Litigation Remotely” (7 April 2020), Ontario Bar Association Webinar Series, “Maintaining Your Litigation Practice in a Remote Work Environment”.

<sup>153</sup> Amy Salyzyn, “‘Trial by Zoom’: What Virtual Hearings Might Mean for Open Courts, Participant Privacy and the Integrity of Court Proceedings” (17 April 2020), online: *Slaw* <[www.slaw.ca/2020/04/17/trial-by-zoom-what-virtual-hearings-might-mean-for-open-courts-participant-privacy-and-the-integrity-of-court-proceedings](http://www.slaw.ca/2020/04/17/trial-by-zoom-what-virtual-hearings-might-mean-for-open-courts-participant-privacy-and-the-integrity-of-court-proceedings)>; CJC Report, *supra* note 151; Nuffield Family Justice Observatory, *Remote hearings in the family justice system: a rapid consultation* (NFJO, 2020). These publications raised concerns about virtual hearings involving self-represented litigants, as well as the “open court” principle, issues regarding the “digital divide” (access for those without the resources to purchase required technology), and privacy. Salyzyn notes that videoconferencing can have potentially adverse impacts on credibility assessments and emotional connections between courtroom participants.

<sup>154</sup> Philip Holdsworth, “Virtual law in a post-COVID-19 era: will justice thrive in a Zoom future?” (9 May 2020), online: *Medium* <[medium.com/@philipholdsworth/virtual-law-in-a-post-covid-19-era-will-justice-thrive-in-a-zoom-future-d640a1743e91](http://medium.com/@philipholdsworth/virtual-law-in-a-post-covid-19-era-will-justice-thrive-in-a-zoom-future-d640a1743e91)>.

<sup>155</sup> Michael Cross, “Let’s be modest with change says online courts guru Susskind” (4 June 2020), online: *Law Society Gazette* <[www.lawgazette.co.uk/practice/lets-be-modest-with-change-says-online-courts-guru-susskind/5104504.article](http://www.lawgazette.co.uk/practice/lets-be-modest-with-change-says-online-courts-guru-susskind/5104504.article)>.

The legal system in Ontario has been modernized by twenty-five years in twenty-five days, as the Attorney General said, but this has simply brought the legal system from the age of the fax machine to the age of the Internet. Our courts are still twenty years behind. The risk of “tinkering at the edges” of civil procedure “is that the wholesale introduction of virtual hearings could lull parties and [courts] into thinking that they have been innovative enough in moving to a virtual environment.”<sup>156</sup> The somewhat self-congratulatory tone surrounding many of the recent reforms indicates that that risk is alive and well in Ontario.

Simply moving hearings online is a missed opportunity to take a more sophisticated approach to the civil litigation process, and cure many of its ills along the way. Jurisdictions such as British Columbia and England & Wales have taken an innovative approach to the resolution of certain disputes, and Ontario would do well to learn from them.

## 2. Online Courts – A True Transformation for Access to Justice

In the wake of the COVID-19 pandemic, Ontario’s civil justice system moved from physical courtrooms to virtual hearings. This is one small step in the right direction. A giant leap, however, would be the use of online courts. Richard Susskind defines online courts as “an online service to which appropriate cases will be allocated; a court with a simplified body of rules; constructed from the ground up on the back of technology rather [than] grafting technology onto existing court processes; and designed to be accessible to non-lawyers.”<sup>157</sup>

The simplification of processes and the use of technology to transform civil justice, instead of simply facilitating existing processes, is the key to addressing issues of cost, delay, and accessibility. This is exemplified in the BC CRT, which has four stages to its process:<sup>158</sup>

1. **Exploration:** The Solution Explorer is a web-based system that guides parties as to the nature of their legal problem and potential solutions. This provides self-help tools that may help solve the problem before it becomes a fully-fledged dispute. If further help from the CRT is required, then a case will formally be started.
2. **Negotiation:** The opportunity to negotiate directly with the other party in order to resolve the matter, with little intervention from the CRT.<sup>159</sup>
3. **Facilitation:** A CRT facilitator helps the parties come to a consensual agreement.
4. **Adjudication:** A CRT member adjudicates the dispute and reaches a binding decision.

Each of these stages is remote (so that parties are not required to attend a physical courthouse) and asynchronous (so that parties can make submissions and deal with their disputes at times that are convenient to them). They increase accessibility, because they are designed to simplify the process and guide self-represented litigants with plain language and pre-populated forms. They also reduce cost, because they “triage” disputes such that dispute resolution by an adjudicator is the step of last resort. Finally, they reduce delay, because, if the dispute is not

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<sup>156</sup> Moudgil, *supra* note 147.

<sup>157</sup> Susskind, *supra* note 4 at 63.

<sup>158</sup> Salter & Thompson 2017, *supra* note 17 at 128-34. These cover three areas of Susskind’s four-stage process: dispute avoidance, dispute containment, and dispute resolution. See Susskind, *supra* note 4 at 114. The Solution Explorer also touches on Susskind’s fourth stage: legal health promotion (helping people know about the benefits and remedies to which the law entitles them).

<sup>159</sup> Stages 1 and 2 help users understand the relevant law and the options available to them, and also offer negotiation and early neutral evaluation. In this sense, the CRT fits within Susskind’s definition of an extended court. See Susskind, *supra* note 4 at 6, 61.

resolved early on in the process, then the issues are sufficiently narrowed by the last stage that a determination can be arrived at relatively quickly.

The CRT recently reached its first decision on liability and damages in a motor vehicle accident (MVA) dispute, with the decision being released just ten months after the MVA itself:<sup>160</sup> three times faster than an almost identical case that had previously been decided by the Supreme Court of British Columbia,<sup>161</sup> and three times faster than the resolution of the average civil claim in the ONSC.<sup>162</sup> Simpler claims before the CRT are resolved in an average time of 3.5 months:<sup>163</sup> four times faster than the resolution of a claim in Ontario's Small Claims Court.<sup>164</sup> This is justice at light speed.<sup>165</sup> Those who argue that it is *too* fast must contend with the proportionality principle: that the amount of time and money spent on a dispute must be proportionate to the amount involved and the importance and complexity of the issues. As noted above, cost and time are also elements of justice.

### 3. An Online Court for Ontario

Ontario should address the cost and delay endemic to its civil justice system by adopting British Columbia's approach. In doing so, the MAG should be guided by lessons from the failure of the IJP and similar projects,<sup>166</sup> as well as the success of the CRT. These lessons can be summarized as follows:

- (i) Start small. Grandiose projects like the IJP leave a lot of room for failure, and are much more prone to unrealistic timelines and costs projections.<sup>167</sup> The MAG would be wise to heed Richard Susskind's "call for realism and humility"<sup>168</sup> and focus on a small, manageable area in which to pilot an online court.<sup>169</sup> Piloting allows new systems to be tested and then refined with feedback from users,<sup>170</sup> which is what the CRT has done and continues to do.<sup>171</sup>

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<sup>160</sup> *Williams v Balogh*, 2020 BCCRT 551 [*Williams*].

<sup>161</sup> *Kelly v Yuen*, 2010 BCSC 1794.

<sup>162</sup> Auditor General's Report, *supra* note 10 at 98-99.

<sup>163</sup> Civil Resolution Tribunal, *2018/2019 Annual Report* (Civil Resolution Tribunal, 2019) at 6.

<sup>164</sup> Auditor General's Report, *supra* note 10 at 98-99.

<sup>165</sup> Since the CRT began operations, notices of objection have been filed in 2.5 per cent of all small claims disputes, and appeals have been filed in 2.5 per cent of all strata disputes. See "CRT Statistics Snapshot – November 2019," online: CRT <[civilresolutionbc.ca/crt-statistics-snapshot-november-2019](http://civilresolutionbc.ca/crt-statistics-snapshot-november-2019)> [[perma.cc/3DMY-R4WP](https://perma.cc/3DMY-R4WP)].

<sup>166</sup> As noted above, British Columbia and New Brunswick also failed in their attempts to integrate their justice systems, around the time of the failure of the IJP: Baar, *supra* note 70 at 45-46, 49-52, 54. Richard Susskind describes the failure of similar projects in England & Wales: *supra* note 4 at 243-44.

<sup>167</sup> The MAG seems to have implicitly acknowledged this, as changes in the last fifteen years or so have been incremental and largely restricted to certain sectors of the civil justice system: for example, the Digital Hearing Workspace for the Commercial List in the Toronto Region (introduced in March 2019), and the Online System for Court Attendance Reservations (OSCAR) piloted on the Estates List in October 2007 and expanded to the Commercial List by early 2009.

<sup>168</sup> Susskind, *supra* note 4 at 244.

<sup>169</sup> Carl Baar discussed Nova Scotia's much more modest (and successful) re-engineering of the Courts and Registries Division of the Department of Justice. This involved automating customer services in the small Registry of Joint Stock Companies, which handled all registrations relating to business entities and provided public information about businesses in Nova Scotia: Baar, *supra* note 70 at 52.

<sup>170</sup> Susskind, *supra* note 4 at 247.

<sup>171</sup> Shannon Salter, "Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal" (2017) 34 Windsor YB Access Just 112 at 128 [Salter].

- (ii) Start with low-value claims. The jurisdiction of the CRT includes small claims up to \$5,000 and strata (condominium) disputes. Now the tribunal has been operating effectively for several years, its jurisdiction has expanded to include motor vehicle accidents (MVAs) up to a value of fifty-thousand dollars, and it will soon cover almost all MVA personal injury claims.<sup>172</sup> As Susskind has noted, “so-called ‘disruptive technologies’ ... are most successful when they start experimentally and modestly at the lower end of any given market,”<sup>173</sup> so that the impact of any errors or issues is minimized. As the systems become refined and enhanced, they can take on more complex work, and “[i]n time, they become the standard way of working.”<sup>174</sup>
- (iii) Start new. While I conclude in this article that, for the time being, modernization is likely to stop at the digitization of current court processes, there is no reason why a fully online tribunal for certain claims could not be established at the same time. In fact, this is almost exactly what Susskind recommends.<sup>175</sup> That would avoid many of the problems with “tinkering” and institutional malaise described above, and would enable the capture of data (so that the system could be tested and refined) in a way that is not possible in the current system. Disseminating data about the tribunal’s work would also promote the open court principle.<sup>176</sup> The exclusion of lawyers (as in the CRT’s small claims and strata disputes) would avoid the problems with professional capture of new processes.
- (iv) Start nimble. Bespoke IT solutions generally prove cumbersome and expensive. The CRT is proof that the risk of government technology failure, as well as the glacial pace of traditional procurement processes, can be minimized by using an off-the-shelf platform and then customizing it.<sup>177</sup> In the CRT’s case, its case management system is powered by Salesforce, which was customized by local software design and development companies to create the Solution Explorer and the CRT’s communications portal. In Ontario in the wake of COVID-19, courts have begun to abandon older technology such as CourtCall in favour of newer, widely available, and enormously popular solutions like Zoom.<sup>178</sup> Any off-the-shelf platform must also take into account privacy concerns. While the use of Zoom

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<sup>172</sup> Civil Resolution Tribunal, “The CRT’s Jurisdiction Over Motor Vehicle Personal Injury Claims Is Expanding” (Accessed 11 May 2020), online: *Civil Resolution Tribunal* <<https://civilresolutionbc.ca/expanding-jurisdiction-over-motor-vehicle-injury-claims/>>.

<sup>173</sup> Susskind, *supra* note 4 at 247.

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*: “it is hard to change a wheel on a moving car. The solution to this dilemma ... is to build a new car, run the old and the new in parallel, and, over time, transfer the passengers from old to new.”

<sup>176</sup> This is one of the reasons the CRT makes monthly “Statistics Snapshots” and annual reports available on its website.

<sup>177</sup> See also Susskind, *ibid.*, at 249. However, the example of the IJP again serves as a warning: in that case, most of the software for the new systems also consisted of “off-the-shelf” applications, but project management underestimated the time it would take to customize those applications and integrate them with other systems. In addition, four Ontario courts were already using one of the applications and had found it to be deficient; IJP project management knew the application was inadequate for use in the courts, yet inexplicably selected it anyway. See Auditor General’s Report 2001, *supra* note 67 at 76-77.

<sup>178</sup> Court of Appeal for Ontario, “Notice Regarding Videoconference Appearance Technology (Zoom) (6 July 2020)”, online: OCA <<https://www.ontariocourts.ca/coa/en/notices/covid-19/zoom.htm>>. Courts in other jurisdictions have been scheduling hearings with Doodle, an online meeting scheduling tool: see Salt Lake City Justice Court, “Schedule Your Court Date”, online: SLC <<https://www.slc.gov/courts/2020/06/15/bookable-calendars/>>.



initially raised such concerns, password protection and the introduction of end-to-end encryption seems to have alleviated them.

Based on these lessons, the MAG would be well advised to circumvent the court system altogether and create an entirely new tribunal to handle certain types of claims, as happened in BC. Such a tribunal could be established relatively quickly, using customized off-the-shelf software, and rely on filing fees for a good part of its revenue. It would also be self-contained and restricted in scope, thereby reducing its potential for failure.

Participation in the tribunal would be voluntary, so that litigants concerned about procedural fairness can still utilize the traditional courts system. Concerns with procedural fairness could also be addressed by way of iterative user feedback. For example, through user satisfaction surveys, the CRT discovered that users find the Solution Explorer much more useful when they had someone to help them (a lawyer, friend, or family member). The CRT is now looking at the possibility of making low-cost legal helpers available for users struggling with the process.<sup>179</sup> The CRT also makes an offline process available for those who have difficulties accessing the Internet,<sup>180</sup> and this should also be available in any online tribunal in Ontario in order to address concerns about the “digital divide”.<sup>181</sup>

I would suggest that, as in BC, the new tribunal should be focused entirely on small claims up to a certain figure. The thirty-five thousand dollar limit in Ontario’s small claims court would probably be too high – something closer to the CRT’s limit of five thousand dollars would be a better start – but the amount could be increased if the tribunal is a success (i.e. if it attracts a significant number of litigants that would otherwise have gone to small claims court, and they are satisfied with the tribunal’s performance based on certain indicators). The new tribunal would be almost entirely online, and able to function without the need for in-person hearings. This would differentiate it from Ontario’s small claims court, which has suspended operations for non-urgent matters until 2 November 2020<sup>182</sup> – thereby barring access to justice for small claims for more than half a year.

## **Conclusion – Looking to the Future**

Given the limited prospects for fundamental reform in Ontario’s civil justice system, then, what hope is there for online courts in the province? If the backlog becomes as overwhelming as it did in British Columbia, the Attorney General may, as I have recommended in this article, choose to outsource smaller value civil claims to a separate online tribunal. It is unlikely that this will happen in the near future, however.<sup>183</sup> Justice priorities in the immediate future will almost certainly be focused on addressing the backlog by modernizing the existing court system.

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<sup>179</sup> BC Civil Resolution Tribunal, “Study Update” (25 May 2020), online: *CRT* <<https://civilresolution.trubox.ca/2020/05/25/study-update/>>. The CRT states that the cost of lawyers means they are not a realistic solution.

<sup>180</sup> Salter, *supra* note 171 at 114.

<sup>181</sup> This concept is defined *supra* note 153.

<sup>182</sup> Superior Court of Justice – Small Claims Court, “Continued suspension of Small Claims Court operations due to COVID-19”, online: SCJ <<https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/continued-suspension-scc-operations/>>. Settlement conferences in non-urgent matters are being heard remotely.

<sup>183</sup> *Contra* Jordan Furlong, “Pandemic III: Justice Reconstructed” (2 April 2020), online: *Law21* <[www.law21.ca/2020/04/pandemic-iii-justice-reconstructed](http://www.law21.ca/2020/04/pandemic-iii-justice-reconstructed)>. Furlong predicts that, “by the end of this year, most Canadian provinces will have their own CRTs either in rapid development or up and running” (*ibid*).

It therefore seems that reform will stop at the digitization of the existing system. That is a good start, but it is not sufficient. As Jordan Furlong has stated, “[y]ou can’t apply a Band-aid when you need a DNA replacement.”<sup>184</sup> There is general agreement that the court system in Ontario has been too slow, too costly, and inaccessible for too long, and that the current crisis will only exacerbate the backlog. Moving current procedures online will not reduce this backlog and will only replicate the errors of the past. We need to do better and begin to fundamentally transform our justice system in the interests of those who come to it for the resolution of their disputes. It would do little good to modernize our courts, only to be left with a system that is as slow, expensive, and inaccessible as the old one.

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<sup>184</sup> Jordan Furlong, “Pandemic II: Justice system down” (2 April 2020), online: *Law21* <[www.law21.ca/2020/04/pandemic-ii-justice-system-down](http://www.law21.ca/2020/04/pandemic-ii-justice-system-down)>.