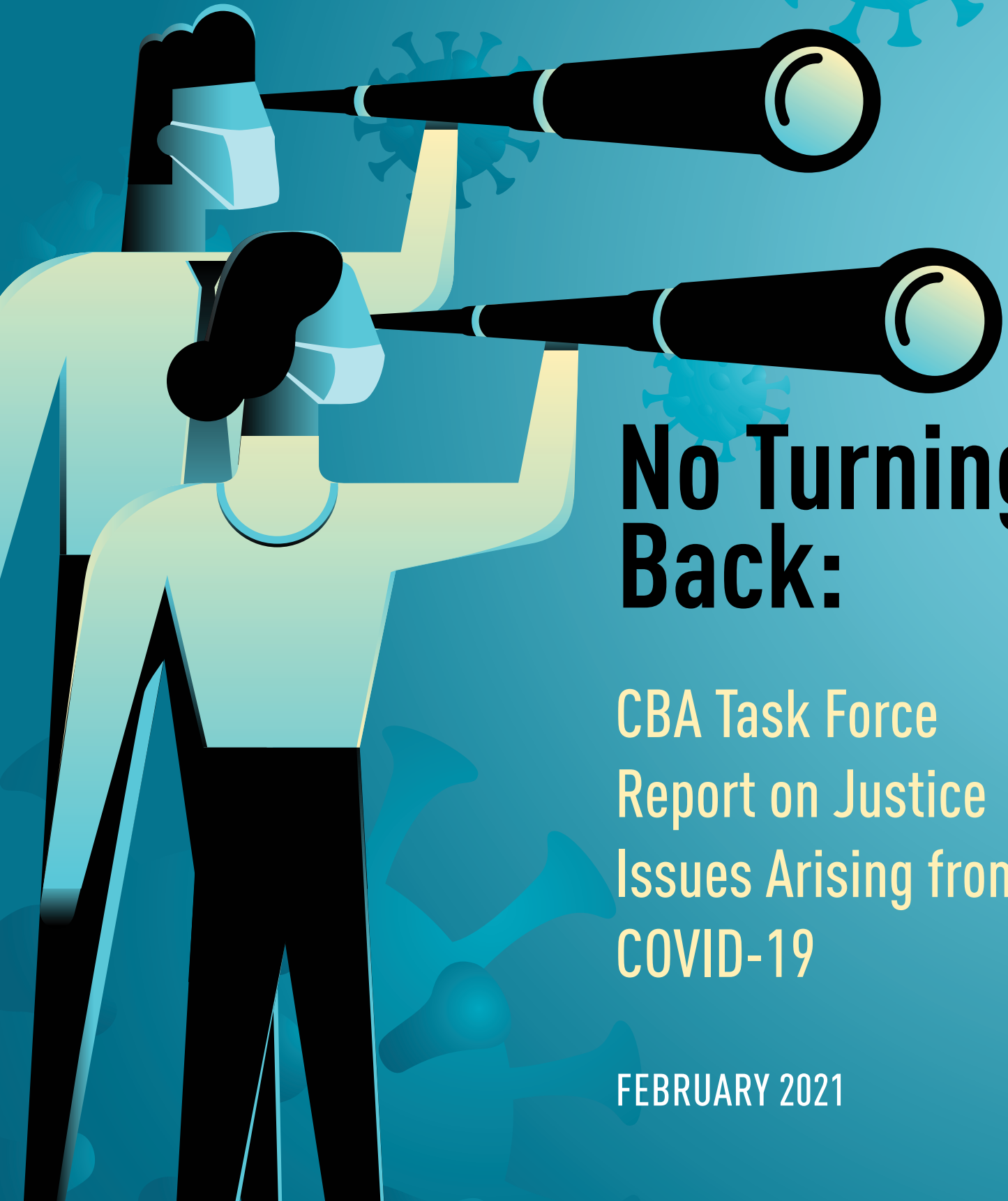




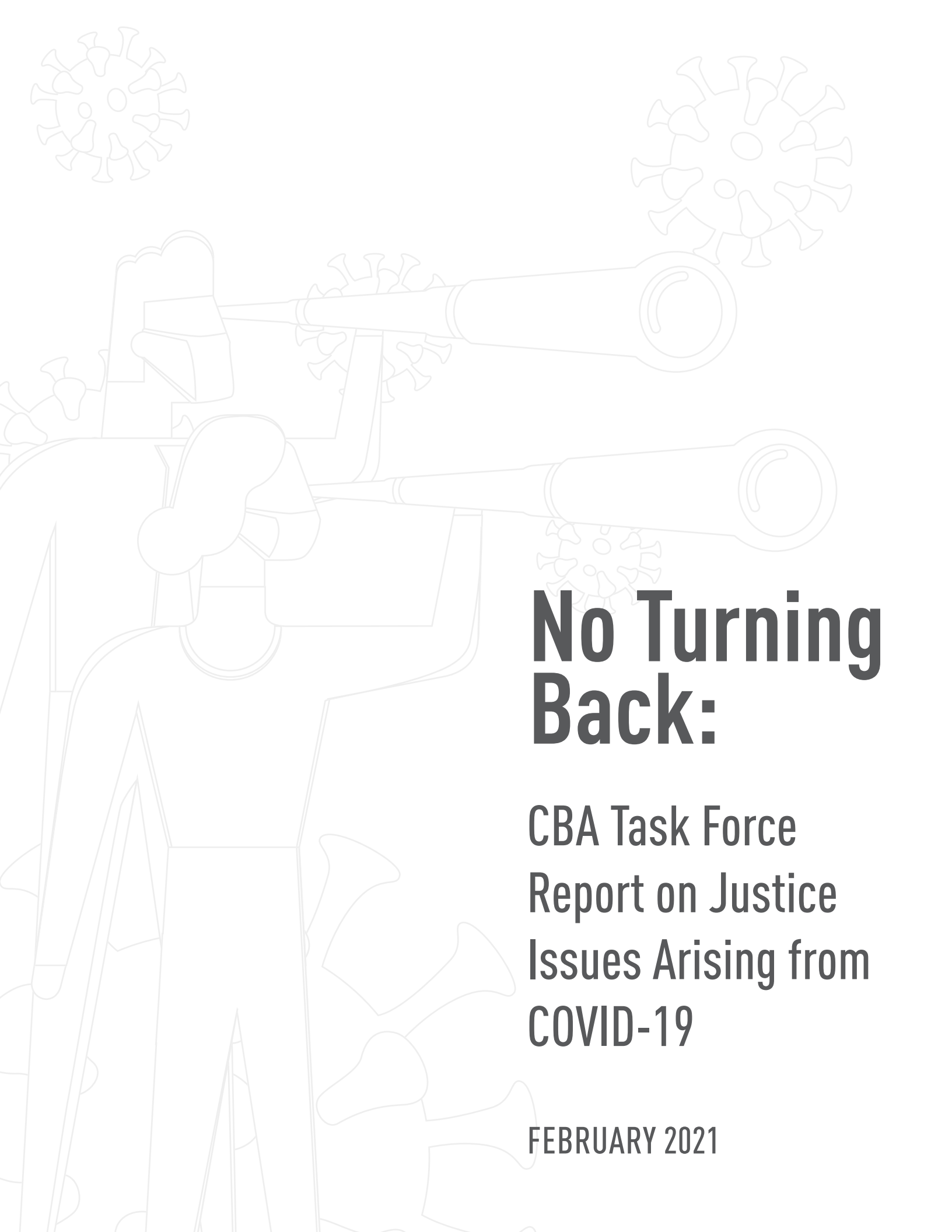
THE CANADIAN  
BAR ASSOCIATION



# No Turning Back:

CBA Task Force  
Report on Justice  
Issues Arising from  
COVID-19

FEBRUARY 2021



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# PREFACE

The Canadian Bar Association launched its Task Force on Justice Issues Arising from COVID-19 – with thought leaders from across Canada’s federal justice system – to assess the immediate and evolving issues for the delivery of legal services resulting from the COVID-19 pandemic.

After many months of fact finding, consultations and research, the Task Force is pleased to present its report. Our recommendations focus on how courts, tribunals and other dispute resolution bodies can adapt to meet the needs of justice system participants, including, most importantly, individuals seeking justice, both during and after the pandemic.

We thank all Task Force members for their kind participation:

## **Justice System Partners**

Rt. Hon. Richard Wagner, Chief Justice of Canada, in his capacity as Chair of the Canadian Judicial Council

Hon. Marc Noël, Chief Justice, Federal Court of Appeal

Hon. Paul Crampton, Chief Justice, Federal Court

Hon. Eugene Rossiter, Chief Justice, Tax Court of Canada

François Daigle, Associate Deputy Minister, Justice Canada

Owen Rees, Deputy Assistant Deputy Attorney General, Justice Canada

Morgan Cooper, President, Federation of Law Societies of Canada

Daniel Gosselin, Chief Administrator (former), Courts Administration Service

Francine Côté, Chief Administrator (interim), Courts Administration Service

Orlando da Silva, Chief Administrator, Administrative Tribunals Support Service of Canada

Robert Leckey, President, Council of Canadian Law Deans

Catherine Dauvergne, Past President, Council of Canadian Law Deans

These members partners participated in the Task Force’s information sessions and made valuable contributions to inform the report.

The report and the proposals and recommendations in it are from the CBA participants in the Task Force alone. They have not been adopted as official CBA policy.

## **CBA Members**

Brad Regehr, CBA President 2020-2021 and Co-chair

Vivene Salmon, CBA President 2019-2020 and Co-chair

Steeves Bujold and Tom Laughlin, Policy Committee

John Gillis, Access to Justice Subcommittee

Martine Boucher, Legal Futures Subcommittee

Lisa Hynes and Christopher Wirth, Administrative Law Section

Stuart Zacharias, Civil Litigation Section

Jody Berkes and Kathryn Pentz, Criminal Justice Section

Erin Brook and Sharon Kravetsky, Family Law Section  
Daniel Bourque, Canadian Corporate Counsel Association  
Steve Pengelly, Chief Executive Officer (interim)

In addition, several CBA sections and committees other than those officially represented on the Task Force contributed helpful information on their areas of practice. Thanks to the following Sections and Subcommittees:

Alternative Dispute Resolution Section  
Child and Youth Law Section  
Elder Law Section  
French Speaking Common Law Members Section  
Health Law Section  
Immigration Law Section  
Intellectual Property Section  
Labour and Employment Law Section  
Law Students Section  
Municipal Law Section  
Public Sector Lawyers Section  
Women Lawyers Forum  
Access to Justice Subcommittee  
Ethics and Professional Responsibility Subcommittee

The Task Force is indebted to Professor Karen Eltis for her expertise and invaluable assistance in drafting the report. We acknowledge the contributions of the other experts who shared their insights with the Task Force: Patricia Hebert, David Hutt, Jennifer Brun and Kerry Simmons. The Task Force also recognizes the valuable research of students Kara Bodie and Alexandra Nestorova.

This initiative has been supported by many CBA staff members, and we are grateful for their valuable work. Many thanks to project director Marc-André O'Rourke, Tamra L. Thomson, Louise Brunet-Hermus, Sebrina Vandor, Lyne Demmery, Kim Covert and Louis Robillard.

We trust that our efforts will contribute to repositioning Canada's justice system to be more accessible, modern and focused on the needs of individuals seeking justice.

Vivene Salmon  
President, 2019-2020

Brad Regehr  
President, 2020-2021

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# No Turning Back: CBA Task Force Report on Justice Issues Arising from COVID-19

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In my view, the simplest answer to this issue is, 'It's 2020'. We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is far more efficient and far less costly than personal attendance. We should not be going back.

— Justice Frederick L. Myers, *Ontario Superior Court of Justice*<sup>1</sup>

## I. INTRODUCTION

The precipitous advent of the novel coronavirus pandemic known as COVID-19 in March 2020 brought into focus the urgency of forging an accessible, modern and user-centered justice system. The pandemic forced all justice system participants to adjust to a new environment. It fast-tracked the adoption of different measures and technologies to deliver justice remotely. It further dispelled the notion that justice (and the legal profession), was somehow nobly removed from the fourth industrial revolution.<sup>2</sup>

These rapid and significant changes are occurring against a challenging backdrop: public confidence in the justice system is fragilized by a belief that access to justice is beyond the grasp of most individuals, an increasing number of self-representatives, and even individuals abstaining from seeking justice altogether — with costs deemed prohibitive or disproportionate to the actual value of the sought-after outcome.<sup>3</sup>

The CBA Task Force on Justice Issues Arising from COVID-19 was established to assess the immediate and evolving issues for the delivery of legal services resulting from the COVID-19 pandemic. The Task Force was mandated to report on changes to the justice system and to make recommendations on how courts, tribunals and other dispute resolution processes can deliver their services differently to meet the needs of stakeholders both during and after the pandemic.

The Task Force adopted the following Statement of Principles to guide its work:

**Access to justice:** The focus of the task force is on the people who seek justice and the ability of the legal and justice systems to advise and serve them in resolving their issues.

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<sup>1</sup> *Arconti v Smith*, (2020) ONSC 2782. at para 19.

<sup>2</sup> The “fourth industrial revolution” is characterized by the growing use of artificial intelligence, big data, cloud computing, robotics, 3D printing, etc. See [online](#).

<sup>3</sup> See Birnbaum, R., Bala, N., & Bertrand, L “The rise of self-representation in Canada’s family courts: The complex picture revealed in surveys of judges, lawyers and litigants”, *Canadian Bar Review*, 91 (2013), 67-95.

**Impact on self-represented litigants:** New measures and practices should address the needs, concerns, safety and security of self-represented litigants while also avoiding negative impacts on them. Wherever possible, judicial and tribunal procedures, technology, and decisions, should be easier to access, use, and read, to remove barriers to justice otherwise faced by self-represented litigants.

**Health and safety:** The health and safety of all justice system participants is paramount, and compliance with all applicable public health restrictions is essential.

**Innovative, effective and efficient:** The justice system has been stretched to its limit for years (backlog, unreasonable delays, etc.). This crisis has shown that the system needs meaningful reforms — short and long term — that emphasize innovation, effectiveness and efficiency.

**Sustainable (post pandemic) measures:** The Task Force has a particular focus on the opportunity to identify new and innovative measures and practices that are sustainable and can be permanently implemented to modernize and address long-standing challenges in the legal and justice system's ability to better serve the people who need to access it.

**Open courts:** All measures must maintain the transparency of the judicial process in accordance with the open courts principle recognized under section 2(b) of the Canadian Charter of Rights and Freedoms. Open courts are essential to a well-functioning democracy and judiciary and must be safeguarded against threats that would weaken its proper functioning.

**Coordination and communication among justice system partners:** All justice stakeholders have a role to play and must work together to identify and implement all measures as soon as possible. Effective communication among all stakeholders and jurisdictions is essential to share and maximize best practices.

**Investments and resources:** The Task Force will address investments and resources required to implement new measures, practices, and technologies. Investments and resources are required to address immediate needs, medium term issues and longer-term systemic changes to deliver justice more effectively.

The objective of this report is to assist in repositioning Canada's justice system to be concretely accessible, modern and focused on the individuals seeking justice. This in the anticipated aftermath — and current throes — of the protracted COVID-19 pandemic.

This report builds on lessons and recommendations of previous CBA initiatives. [Reaching Equal Justice: An Invitation to Envision and Act](#) (*Equal Justice Report*) sets out a strategic framework for reaching equal justice. It outlines the type of changes necessary to overcome barriers to equal justice. Many of its recommended actions remain unfilled and are eerily still relevant today. [Futures: Transforming the Delivery of Legal Services in Canada](#) (*Legal Futures Report*) is a comprehensive examination of the future

of the legal profession in Canada. It examines business structures and innovations, legal education, and ethics and regulation of the profession. The Legal Futures Report identifies access to justice as a foundational value underlying its work and offers some lessons for us today.

With an eye towards harnessing the promise of change for a more resilient, accessible and modern system beyond the pandemic, this report discusses how different Canadian jurisdictions and sister democracies are adapting their justice systems to address the pandemic. It then examines how best to properly implement new measures to avoid their main risks or unintended side-effects — paying particular attention to access to justice and confidence in the justice system, judicial independence, self-represented litigants and the open courts principle. The report also discusses the importance of sustainable investment in the justice system.

The report then makes recommendations on how the justice system can become more responsive to meet the needs of, first and foremost, individuals who rely on the justice system to resolve their legal problems.

Two principal themes underlie this report. First, there is no turning back. The pandemic propelled the justice system into a long-awaited modernization. We must continue forward and build on the measures, procedures and innovations implemented in response to the pandemic and focus on the needs of the users of the justice system. Second, new measures and technology must be deployed in a manner that enhances access to justice — rather than unintentionally inhibit it.

## **II. HOW CANADIAN JURISDICTIONS AND SISTER DEMOCRACIES ARE ADAPTING THEIR JUSTICE SYSTEMS TO ADDRESS THE PANDEMIC**

### **Delivering justice remotely — generally**

Given the nature of the pandemic and its restrictions on in-person gatherings, many changes were implemented to deliver justice remotely. In Canada and around the world, courts, administrative tribunals, other dispute resolution bodies, mediators and arbitrators are conducting their operations and proceedings by teleconference, videoconference, online/virtual hearings, various online dispute resolution mechanisms and other emerging technologies.

### **Information from the field**

To cast as wide a net as possible, we consulted all CBA Sections and policy-oriented Subcommittees to identify measures, procedures and technologies implemented in their area of law. We also asked them what is working and what is not. Here is a snapshot of what we heard.

### **What is working?**

Generally, there is a recognition that remote proceedings have been successful — especially for appeals, matters with lesser monetary value and less complex matters. Videoconference platforms for remote mediations, arbitrations and hearings, while not always ideal because of technical challenges, ensure



some level of continuity for the justice system. Working remotely also increases access to justice by eliminating geographical and financial constraints for some parties (income loss for time off work, travel costs, etc.).

Electronic filing of court documents (via secure drop box, online portals, email, etc.) as well as payment of court fees by telephone are widely seen by lawyers as major steps forward. Virtual witnessing of wills and powers of attorney was also a welcome change.

### **What is not working?**

A common concern is that complex, sensitive matters with many witnesses and experts are more difficult to conduct remotely. This is largely because counsel cannot support their client in person and credibility assessments can be less amenable to online proceedings.

For family law matters, halting in-person hearings and restricting remote hearings to only urgent matters at the beginning of the pandemic meant that parties and often their children were caught in the middle of a dispute with no mechanism to protect their interests. Unfortunately, the justice system was slow to regain its footing and adopt remote measures to address access, child support and preservation orders.

The Health Law Section reported that e-hearings by professional regulatory bodies were effective for certain types of disciplinary matters but not as effective for complex ones involving allegations of physical or sexual assault.

For criminal matters normally held in a courtroom, counsel can walk to the prisoner's dock for a short, discrete conversation with their client. This is not possible in a remote hearing. Last minute Crown disclosures are problematic when working remotely because it is difficult to arrange a quick meeting with a client to discuss the new information.

The Family Law Section noted that online platforms make it harder for bullied, abused or less outspoken individuals to speak up. It is also more difficult to observe body language or intimidating influences.

The Elder Law Section described use of technology as bittersweet. It reduces the risk of spreading COVID-19 and makes it easier for meetings to occur despite geographical hindrances. However, seniors can struggle with technology. Lawyers may have difficulty visiting a hospital with an outbreak to see a dying client (not from COVID-19) to sign a will. While virtual signings are permitted in some jurisdictions, it is not always possible in urgent situations. Public health measures and measures taken by hospitals and care facilities restrict people's access to lawyers and the justice system in general in some cases.

The Immigration Law Section raised security, privacy and confidentiality concerns with the web-based document delivery system to communicate with the Immigration and Refugee Board.

The Family Law Section commented on the risk that informal remote proceedings can create a lack of appreciation for the seriousness and decorum of the justice system. Appropriate screen backgrounds and

camera angles are not trivial and are important to maintain decorum. Formality and respect for the rules are important to ensure fairness and trust in the process.

### **Areas to monitor**

**Electronic Judicial Dispute Resolution Pilot Project:** On October 1, 2020, the Alberta Court of Appeal expanded its Judicial Dispute Resolution (JDR) Program as part of its continuing efforts to encourage early resolution.<sup>4</sup> The Court increased the number of JDR dates in Calgary and Edmonton. Electronic JDRs could be binding or non-binding and involve self-represented parties. The pilot project includes early intervention Appeal Conferences for Family Fast Track Appeals to increase access to justice and encourage resolution to reduce family conflicts and expenses.<sup>5</sup> The pilot project will run for a year and its effectiveness will be evaluated.

**Official languages:** As justice continues to be delivered through online platforms, it is important to fully protect a participant's choice of official language as guaranteed by the *Canadian Charter of Rights and Freedoms*. The recent report<sup>6</sup> of the Commissioner of Official Languages of Canada reiterates official languages must not be an afterthought even in times of crisis.

### **A look elsewhere**

In New York State, the emergence of virtual proceedings created an opportunity to improve a previously piloted program: Centralized Arraignment Parts (CAPs). CAPs operate on evenings and weekends to facilitate the right to counsel and the ability to arraign criminal defendants expeditiously. Several New York districts proposed CAP plans where judges could hold remote arraignments to increase access to justice.<sup>7</sup>

In the UK, the HM Courts and Tribunal Service (HMCTS) response for criminal courts targeted four pillars of recovery:<sup>8</sup>

1. Maximizing HMCTS' existing space by introducing plexiglass screens to separate jury members to safely use more courtrooms
2. Additional capacity through Nightingale (temporary) courts by using a variety of buildings (former courts, conference venues, etc.)
3. Using technology to continue remote or video hearings where appropriate
4. Considering adopting different operating hours to maximize HMCTS' own space

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<sup>4</sup> See [Alberta Courts Notice to the Profession and Public - Judicial Dispute Resolution Pilot Project](#)

<sup>5</sup> See [Alberta Courts Notice to the Profession and Public – Appeal Conference Pilot Project for Family Law Fast Track Appeals](#).

<sup>6</sup> Office of the Commissioner of Official Languages, "A Matter of Respect and Safety: The Impact of Emergency Situations on Official Languages", (October 2020), see [online](#)

<sup>7</sup> See [online](#).

<sup>8</sup> See [Update on the HMCTS Response for Criminal Courts in England and Wales](#) (September 2020)

## RECOMMENDATION

1. All dispute resolution bodies (courts, tribunals, boards, etc.) should permanently implement the following measures to improve access to justice, modernize and address long-standing challenges in the justice system:

- a) Remote (video, online, telephone) proceedings should be available for settlement conferences, examinations for discovery, various hearings, motions, trials and appeals. Remote proceedings should continue especially for procedural, uncontested, shorter and less complex matters. While the court, tribunal or other dispute resolution body should ultimately decide if a matter is to proceed remotely, the parties should be given an opportunity to be heard and present their position on proceeding remotely.
- b) Electronic filings (via secure drop box, online portals, email, etc.) of court documents and acceptance of service by email
- c) Ability to remotely view hearings, trials or motions via an online platform (e.g. Zoom, YouTube) [subject to addressing the concerns outlined in this report]

## III. HOW TO IMPLEMENT NEW MEASURES PROPERLY, TO AVOID RISKS OR UNINTENDED SIDE-EFFECTS

### A. Access to justice and confidence in the justice system

#### **Access to justice must not be deterred: Protecting the treasure trove of data in the surveillance economy**

Courts, tribunals and other dispute resolution bodies, eager to show they are not lagging behind the times, are embracing technology whose promise of simplicity and efficiency is difficult to ignore. However, in a sincere effort to expand access to justice, users of complex innovative tools may risk overlooking some inherent perils. In the surveillance economy,<sup>9</sup> these tools reveal personal information of users of the justice system, potentially exposing them to shaming, doxing, identity theft, blackmail, ransomware and witness intimidation.<sup>10</sup> Moreover, the practice of “mass-scraping data” has additional, not yet fully understood, geo-political implications.<sup>11</sup>

These realities deter access to justice and taint the courts and other bodies that are de facto responsible

<sup>9</sup> S. Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, PublicAffairs (2019). Zuboff explains that social media companies are driving the rise of surveillance capitalism. Where profits once flowed from goods and services under *industrial* capitalism, then financial speculation under *financial* capitalism, profits are increasingly derived from surveillance of platform users and service providers by the platforms, and the monetization of aggregate data through analysis and sale of insights to third parties.

<sup>10</sup> K. Eltis, “Courts, Litigants and the Digital Age” (2016) Irwin Law. See also J. Farrell discussion on identity theft and other problems related to openness of courts in “Public Records on the Internet: The Privacy Dilemma” (2002 posted; revised 2006) See [online](#).

<sup>11</sup> See for example, Chinese Firm Amasses Trove of Open Source Data on Influential Canadians (Globe and Mail, September 14, 2020). See [online](#).

for protecting valuable and delicate digital data. In the surveillance economy, courts and other dispute resolution bodies must recognize the changing value of personal information and their new role as publishers of data, which requires vigilance in guarding this treasure trove of information.

Enthusiasm for the proliferation of electronic court documents, recordings and webcasts must be balanced with sober thought about their implications, particularly the unintended disclosure of personal information in ways not anticipated by current rules and the resulting affront to the access to justice that digital files were meant to promote.

Information of this nature has always been public — with excellent reason. The distinction between past and present lies in the new conception of accessibility where an audience of incalculable numbers now has unprecedented and indiscriminate access to bits and pieces of sensitive and personal information.<sup>12</sup>

In this context, unrestrained disclosure can chill access to justice as individuals hesitate to forward their claims for fear of eternal shaming, being denied housing or employment, and other unintended but common side-effects of online posting.<sup>13</sup>

### **Vulnerabilities of videoconferencing platforms**

The increasing use of videoconferencing platforms<sup>14</sup> has highlighted vulnerabilities in these applications. For example, infiltration or digital hijacking (so-called Zoom-bombing) can disrupt business or compromise computer systems. Insufficient encryption and data protection could enable information gathering from malicious third parties.<sup>15</sup> These vulnerabilities can result in loss of confidentiality and credibility, with resulting economical and reputational damage.

Videoconference platforms in use across Canada vary widely (see Appendix A) with varying levels of security architecture, risks and limitations. Court administrators and other justice system participants need complete information to accurately assess the security of proprietary and novel platforms to make informed decisions on the short- and long-term implications of their use.

#### **RECOMMENDATION**

**2.** Justice system partners, including court and tribunal administrators, government officials and the CBA, should establish a working group to share information on best practices on the security of videoconferencing and to conduct a thorough evaluation of all videoconferencing platforms.

<sup>12</sup> See Canadian Judicial Council, Model Policy for Access to Court Records in Canada (Ottawa: Judges Technology Advisory Committee, 2005), [online](#). See also Rebecca Fairley Raney, “The Jury is Out on Online Court Records” Online Journalism Review (January 2002), [online](#).

<sup>13</sup> K. Eltis, “Courts, Litigants, and the Digital Age” (2016)

<sup>14</sup> These platforms include Zoom, Microsoft Teams, Cisco Webex, Slack, Google Hangout, etc.

<sup>15</sup> See [online](#).

## Protect data but foster innovation

The Legal Futures Report emphasized the importance of innovation and facilitating a national dialogue on innovation in the legal profession.<sup>16</sup> There is no question that the shift to delivering justice remotely creates opportunities for innovation.

While the security of data and personal information must always be paramount, justice system data should be made available in a controlled and secure environment to allow innovative legal solutions. For example, the development of applications to improve legal research and other tools to assist self-represented litigants are important considerations.

The recently created Legal Innovation Data Institute<sup>17</sup> (LIDI) aims to lower legal data access barriers in Canada and facilitate innovation. One of the LIDI's key objectives is to increase access to justice with innovation while shoring up the protection of personal privacy with emerging machine learning models that differentiate between justice system participants and private citizens engaged as parties or witnesses.<sup>18</sup>

### RECOMMENDATION

**3.** Courts, tribunals and other dispute resolution bodies should carefully examine whether and how justice system data can be made available in a controlled and secure environment to enhance access and improve the justice system.

## A step forward

In *A.B. v. Bragg*<sup>19</sup>, the Supreme Court of Canada began a cultural shift. It recognized that in the digital age (in contrast to its brick and mortar counterpart), allowing indiscriminate and often decontextualized access to information about justice system participants, based on the open courts principle as it was interpreted in days of yore, thrusts courts into an unfamiliar role of publisher (rather than custodian) of sensitive data.

## What must we do?

In Australia, the Government of Victoria reflected on the courts' role as custodians of digital data and underlined three main practical issues for the security of electronic documentation:

1. verify the identity of persons purporting to electronically sign or submit a document;
2. ensure the electronic document is received and stored in the same form in which it was sent;
3. prevent unauthorized access to documents either in transmission or storage.<sup>20</sup>

<sup>16</sup> [Legal Futures Report](#), page 68 (Recommendation no. 2)

<sup>17</sup> The Legal Innovation Data Institute (LIDI) was founded in September 2020. It is a not-for-profit organization that takes inspiration from public interest legal technology innovators and university research labs.

<sup>18</sup> See [online](#)

<sup>19</sup> [2012 SCC 46](#)

<sup>20</sup> See [online](#).

Another measure is to limit digital information to the minimum necessary — contextually and proportionally. Nefarious uses can be minimized by releasing only “meaningful data” online, following a qualitative triage aimed at holding back superfluous sensitive information, not directly connected to the underlying rationale of the open courts principle.

The experience in Belgium is instructive with its recognition that only personal details directly connected to the principle and purpose of open courts should be published, to attain equipoise between that important value (la publicité des audiences) and privacy of litigants, who might otherwise fear accessing justice if information superfluous to public consumption but sensitive to process participants were divulged.<sup>21</sup>

As the Belgian Privacy Commission stated, “[...] the purpose of publishing court decisions is to stimulate discussion on caselaw as a source of law — not to divulge participants’ names to third parties”.<sup>22</sup>

The Justice Lab UK<sup>23</sup>, an initiative of the Legal Education Foundation, has commissioned research<sup>24</sup> to gather information about the methods and approach various jurisdictions take to manage and share data generated by their justice systems. The aim is to identify what works well and how countries can learn from approaches taken elsewhere.

#### RECOMMENDATION

4. Courts, tribunals and other dispute resolution bodies should establish robust practices and procedures to safeguard sensitive data. These practices and procedures must ensure that publishing sensitive data is done purposefully and guided by the “atteinte minimale” principle to not compromise access to justice or undermine confidence in the justice system. They could consider collaborating with the Justice Lab UK.

### **Effective triage to facilitate early dispute resolution and to optimize online courts and online dispute resolution (ODR)**

The Equal Justice Report recognizes that the essence of a people-centered justice system is “the way people enter the system and the way they are treated on day one.”<sup>25</sup> There are many paths to justice and it is crucial to quickly and properly direct people to the appropriate venues including, where appropriate, online courts and online dispute resolution.

<sup>21</sup> K. Eltis, « La cyber diffusion des documents de la Cour: dans la quête d’un juste équilibre pour assurer l’accès à la justice dans l’ère numérique (‘Purposefully’ Posting Court Documents Online: Striking a Balance with an Eye Towards Protecting Access to Justice in the Digital Age Post A,B. v Bragg) (December 5, 2013). In Peter Oliver and Graham Mayeda (eds.), *Principles and Pragmatism: Essays in Honour of Louise Charron* (LexisNexis, 2014).

<sup>22</sup> *Ibid.*

<sup>23</sup> See [online](#)

<sup>24</sup> See [online](#)

<sup>25</sup> [Equal Justice Report](#), page 72.

For our purposes, online courts refer to existing processes and hearings transposed online. In Canada, this is largely what happened during the pandemic: existing proceedings were conducted remotely.

Online Dispute Resolution (ODR) uses *new* processes and technology (often a digital platform) to facilitate and expedite the resolution of disputes between parties, generally seeking to minimize the need for judicial supervision. ODR may involve different methodologies, including facilitated negotiation and early neutral evaluation (either with human input or artificial intelligence), digital communication (remote or video hearings and asynchronous messaging), and uploading and responding to evidence online.

The Civil Resolution Tribunal in British Columbia, discussed below, is an example of an ODR platform.

One key to improving access to justice is to distinguish between areas of law that more readily lend themselves to online courts in the short term and areas of law that require longer consultation and preparation for online courts or potentially ODR (or may never be suitable for these platforms).

In some Commonwealth democracies<sup>26</sup>, smaller (relatively less complex) private disputes and some family law disputes amenable to settlements best lend themselves to remote and ODR hearings. Criminal and immigration matters are more delicate and require separate reflection.

### **Family law – special considerations**

One of the biggest concerns in family justice is the ability for persons to access the justice system. Family law also presents unique issues of credibility and emotional elements. The reality is that there are few “simple” family law matters. There is also many self-represented parties, many of whom do not have the technology or the capacity to participate fully in a digital justice system. Any foray into online platforms is challenging in family law matters.

### **Publicly-integrated ODR**

ODR has traditionally been private where attempts to reach settlement between parties bypass the public justice system. It was initially developed in the commercial sphere to deal with high-volume, low-value, consumer disputes arising from online transactions on e-commerce websites such as Amazon, eBay and PayPal.

The potential of ODR to resolve disputes efficiently and effectively eventually attracted the attention of governments, courts and tribunals around the world. More recently, ODR has been incorporated into domestic justice systems and processes in several ways, including as an external process that feeds into a formal determination, as the default platform for a new tribunal, and integrated into a pre-existing court system.<sup>27</sup>

Given the importance of a strong and viable justice system (as the third branch of government) to a

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<sup>26</sup> Primarily the U.K, Australia with some attention to India.

<sup>27</sup> P.K. Cashman, E. Ginnivan, “Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions” (August 2019), *Macquarie Law Journal*, Vol. 19, 2019, at p. 3. See [online](#)

proper functioning democracy, ODR should not be relegated to the private sector. It should be properly integrated into the public justice system. Renewed reflection on how to integrate private ODR into the public system is helpful and timely.

### **Challenges of British Columbia’s Civil Resolution Tribunal**

The BC Civil Resolution Tribunal (CRT) is Canada’s first and only Online Dispute Resolution tribunal and one of the first in the world.<sup>28</sup> It uses digital technology to help resolve disputes in a way that is “accessible, speedy, economical, informal and flexible.”<sup>29</sup> There are four stages of a CRT application: Solution Explorer, Negotiation, Facilitation, and Tribunal Decision Process.

While the CRT is admirable in its goal of increasing access to justice, it is not without its faults. Critics have highlighted its stance against legal representation, lack of Tribunal independence and expertise, and accessibility restraints as areas requiring attention and improvement.<sup>30</sup> Appendix B gives a detailed discussion on the CRT, its advantages and limitations.

### **Not one-size-fits-all**

We underscore that remote hearings and ODR are not a panacea. Successful, transparent and fair implementation is contingent on distinguishing the areas of law suitable for them. Alternative digitized solutions in their multiple forms are not one-size-fits-all. Each area of law has its own challenges and apprehensions and cannot be lumped together with all private dispute resolution for digitizing.

#### **RECOMMENDATIONS**

- 5.** Short term: Justice system partners (including groups representing justice seeking individuals, court and tribunal administrators, bar representatives etc.) should establish a working group dedicated to exploring how to effectively triage matters that are more amenable to early resolution and matters that better lend themselves to remote proceedings.
- 6.** Medium term: The working group should explore which areas of law are potentially suited for ODR-type platforms and how to integrate all these matters into the public system.

### **Systemic racism, anti-poverty and biases in artificial intelligence**

The advent of AI in decision-making is already in place just south of us.<sup>31</sup> As it is likely to gain further traction in coming years, it entreats us to discuss its implications for access to justice and marginalized groups. Put simply, technology must serve the disadvantaged, “not perpetuate disadvantage”.<sup>32</sup> As Chief

<sup>28</sup> The CRT was established by the *Civil Resolution Tribunal Act*, SBC 2012, c 25, and began resolving matters in July 2016.

<sup>29</sup> *Civil Resolution Tribunal Act*, SBC 2012, c 25, s 2(2)(a).

<sup>30</sup> See *Canadian Bar Association, BC Branch, “CBABC Position Paper on The Civil Resolution Tribunal Amendment Act, 2018 (Bill 22)”*, (8 May 2018). See [online](#).

<sup>31</sup> *Loomis v. Wisconsin*, 881 N.W.2d 749 (Wis. 2016), cert. denied, 137 S.Ct. 2290 (2017), Comment [online](#).

<sup>32</sup> See [Stanford Law School Blog](#)



Justice MacCormack cautions, there is the “very real possibility that legal tech will make it easier for employers, creditors and landlords to bring cases against employees, debtors and tenants — not the other way around.”<sup>33</sup>

Courts, tribunals and other dispute resolution bodies, like other segments in society, are likely to introduce AI progressively for uses ranging from judgment writing to decision-making.<sup>34</sup> It is incumbent on us to consider the disparate impact these technologies may have on marginalized groups, in particular systemic racism against Black Canadians and Indigenous people in the criminal justice system.<sup>35</sup> Finding inclusive platforms — and insisting on inclusiveness in technology itself — is the essence as we digitize the justice system.

In employing AI for decision-making, we should be mindful of the risks of trying to apply “industrial ideas of efficiency to the judiciary”:<sup>36</sup>

[...] we will be asking them to abandon deliberation, independence, and the slow methods that give time for reason to trump emotion. Are we prepared to abandon, too, the idea that judges have good character? Alternatively, what are the values that will be brought to court by future judges who are digital natives? How might the current judiciary play a role in the creation of new legal culture? [...] For a democratic social order to survive, we must not think of justice as a profit center; we need to have a truly public sphere where we can nurture dreams of the public good.<sup>37</sup>

In sum, it is essential to nurture institutional norms and values because efficiency is a poor substitute for the integrity of the system.<sup>38</sup>

## RECOMMENDATION

**7.** All justice system stakeholders must consider the implications on access to justice for marginalized groups when implementing AI and other emerging technologies in the justice system and remove any negative impact.

<sup>33</sup> Supra, note 32

<sup>34</sup> See [AI Can Almost Write Like a Human – and More Advances are Coming](#).

<sup>35</sup> See J. Sealy-Harrington and J. Watson Hamilton, “Colour as a Discrete Ground of Discrimination” (2018) 7:1 Canadian Journal of Human Rights 1, See [online](#). See also Canada’s Courts Need a System Update to Deal with Internet Connected Juries, Globe and Mail, November 30, 2020

<sup>36</sup> See C. Spiesel’s review of Courts, Litigants and the Digital Age at “Eyes on the Horizon (December 1, 2012). McGill Law Journal.

<sup>37</sup> See note 36, C. Spiesel

<sup>38</sup> See Judicial Applications of Artificial Intelligence, edited by Giovanni Sartor, and Karl Branting, Springer Netherlands, 2010. ProQuest Ebook Central.

## Active management in the digital age

The objective of online justice, as Susskind remarks<sup>39</sup>, is not to “replicate inefficiencies” but to explore new models for courts and other dispute resolution bodies. In this vein, it may be worth exploring the suggestion that dispute resolution models encouraging more active management by the presiding member may be better suited for online hearings.<sup>40</sup> Active management by judges and administrative tribunal members can be more advantageous in the digital age and could palliate to some extent the proclivities of technologies and procedural challenges feared about moving online.

### RECOMMENDATION

**8.** Courts, tribunals and other dispute resolution bodies should explore the potential benefits of increasing the active management of presiding members to accommodate the shift to online justice.

## B. Safeguarding judicial independence: rise of the private platforms

Videoconferencing and other online platforms have suddenly become critical infrastructure of the justice system. Over-reliance (or abdication) of an integral part of the justice system to commercial parties can present significant challenges to judicial independence.

Part of the justice system is now hosted or mediated on platforms operated by large corporations whose for-profit model is based on surveillance capitalism.<sup>41</sup> The profits of many of these companies are derived from surveillance of platform users and the “monetisation of aggregate data through analysis and selling of insights to third parties.”<sup>42</sup> Exacerbating the problem is that these companies have now acquired a “scale and indispensability” and living without them “shackles social and cultural life.”<sup>43</sup>

We must consider the consequences of the justice system relying on commercial platforms that gather, analyze and sell information generated by users (in this case, justice system participants) for profit.

To address some concerns about the activities of major internet platforms, the European Union is preparing regulations<sup>44</sup> to increase transparency and require companies to open their algorithms to regulatory oversight and offer users more control.

<sup>39</sup> R. Susskind, *Online Courts and the Future of Justice*, (2019).

<sup>40</sup> See *supra* note 39 (Susskind) at p.335.

<sup>41</sup> See *supra* note 9, Zuboff

<sup>42</sup> Lawrence, M, “Building a Digital Commonwealth”, (March 2019), See [online](#)

<sup>43</sup> Plantin J-C, Punathambekar A. “Digital media infrastructures: pipes, platforms, and politics”. *Media, Culture & Society*. 2019;41(2):163-174. (December 2018). See [online](#)

<sup>44</sup> See Big Tech’s “Blackbox” Algorithms Face Regulatory Oversight under EU plan. See [online](#).

## RECOMMENDATION

**9.** Short term: Courts, tribunals and other dispute resolution bodies should examine how other industries and custodians of sensitive information (e.g. the financial services industry) have addressed the control of their data, curtailed their dependence on commercial platforms and protected their independence.

**10.** Long term: Courts, tribunals and other dispute resolution bodies should explore the possibility of developing their own platforms (or using open-source options). Alternatively, and perhaps more effective, the federal government should consider regulating private platforms or subjecting them to some level of oversight and scrutiny.

## C. Self-represented litigants

The Equal Justice Report recognized the most obvious consequence of the gap between the prevalence of legal problems and inadequacies of legal services in the exponential growth of unrepresented and under-represented litigants.<sup>45</sup>

For self-represented litigants especially, timely and relevant assistance is key to improving access to justice. Online resources and technology can be useful. Simplified procedures and well-resourced technology have tremendous potential for reducing inefficiencies<sup>46</sup> and empowering individuals, including self-representatives and those with accessibility issues.

However, delivering justice remotely has underlined the unequal access to technology (e.g. differences in software, hardware, internet speed, user skills) and its impacts on access to justice for self-represented litigants. These differences often reflect the participant's income, age, physical and mental conditions.<sup>47</sup>

Many people need human help to navigate the system. Closing courthouses and registry offices makes it more difficult to obtain legal information. In some areas of law, self-represented litigants experience greater barriers to access justice.<sup>48</sup>

Our consultations with CBA Sections revealed that implementation of some changes without proper consultation and assistance to self-represented litigants resulted in delays, expense and frustration. One suggestion was to appoint a court liaison officer to help parties understand the changes. Court registry personnel already walk a fine line between legal information (which they are authorized to offer) and legal advice (which they must not give) and are mindful to maintain that balance.

<sup>45</sup> [Equal Justice Report](#), page 44.

<sup>46</sup> See [online](#).

<sup>47</sup> J. McIntyre, A. Olinyk, K. Pender, Civil Courts and COVID-19: Challenges and Opportunities in Australia (Alternative Law Journal) May 2020. See [online](#)

<sup>48</sup> For example, the CBA Family Law Section reported that applications filed by self-represented litigants to see their children are delayed because of a backlog. Cases with legal representation are more likely to move forward because lawyers know who to contact to get the file triaged and scheduled.

## RECOMMENDATION

**11.** Courts, tribunals and other dispute resolution bodies should undertake consultations with self-represented litigants to determine the impact of new measures, practices and technologies on their needs, concerns, safety and security.

## D. Open courts

It is well established that “justice should not only be done, but it should manifestly and undoubtedly be seen to be done.”<sup>49</sup> In Canada, transparency of the justice system must be maintained in accordance with the open courts principle recognized under section 2(b) of the *Canadian Charter of Rights and Freedoms*. Open courts are essential to a well-functioning democracy and judiciary and must be safeguarded against threats that would weaken them.

### Challenges

The emergence of online proceedings can pose challenges to the public and media’s ability to access hearings. For example, in British Columbia, the courts require people to apply to attend virtual hearings, making it less open than simply walking into a courtroom. In Quebec, people wishing to attend hearings online must submit forms and wait for an answer. As a result, it is more difficult for the public to attend hearings.

In Australia, the Federal Court registry gives daily advice for members of the public who wish to observe an online hearing remotely.<sup>50</sup> The court may also require a person to give an email address (the court specifies that the address will only be used to send a link to the online hearing and will not be retained).<sup>51</sup>

In the UK, the Judiciary of England and Wales Protocol Regarding Remote Hearings<sup>52</sup> states that hearings can be open to the public “if technically possible” but recognizes that “in the exceptional circumstances presented by the current pandemic, the impossibility of public access should not normally prevent a remote hearing taking place.”

### Opportunities

While the shift online has created challenges to the open courts principle, it also creates opportunity. The easy access of court proceedings online (e.g. broadcast on YouTube or Zoom) is a boon to transparency and the open courts principle. People who would otherwise have to travel to the courthouse or have other obligations (such as childcare) can conveniently view proceedings by visiting an online platform.

The ease to view a remote hearing has also increased media presence at some professional disciplinary

<sup>49</sup> *R. v. Sussex Justices; Ex parte McCarthy* [1924] KB 256, 259 (Lord Hewart CJ).

<sup>50</sup> See [online](#).

<sup>51</sup> See [online](#).

<sup>52</sup> See [online](#).

body hearings.<sup>53</sup> On a larger scale, it was reported that the UK Supreme Court’s livestream of Brexit hearings attracted more than 29 million viewers.<sup>54</sup>

## RECOMMENDATION

**12.** Justice system participants including courts, tribunals, other dispute resolution bodies and bar and media representatives should prepare a tip sheet on best practices to ensure public and media access to courts in a way that respects open courts and privacy principles.

## E. Importance of investment in the justice system

The Equal Justice Report did not sugar coat the challenge of increasing equal justice. The report described a “world thick in law but thin in legal resources” and asked change agents to not “shy away from the dramatic level of change required.”<sup>55</sup>

The Equal Justice Report concluded that spending on the justice system<sup>56</sup> was roughly 1% of government budgets. Health and education funding is generally stable or gradually increases, while spending on justice is flat or declines from year to year. For more perspective, for every dollar spent on the justice system, governments spend about \$40 on health care.<sup>57</sup>

The Equal Justice Report explains that:

[...] justice has been devalued. We see it as a luxury that we can no longer afford, not an integral part of our democracy charged with realizing opportunity and ensuring rights. The justice system has been starved of resources and all but paralyzed by lack of coordinated leadership and competitive blaming between the major institutions and a tendency to focus on how justice institutions other than are own are contributing to the problem.<sup>58</sup>

An accessible and modern justice system is not a luxury: almost 50% of adult Canadians will experience a serious everyday legal problem in a three-year period.<sup>59</sup> An everyday legal problem includes matters related to family, employment, wills, incapacity, treatment by police, personal injury, discrimination or debt. Making matters worse is that an unresolved legal problem can result in other (otherwise avoidable) problems, like physical and mental health problems, loss of housing and relationship breakdown.<sup>60</sup>

<sup>53</sup> Reported by the CBA Health Law Section

<sup>54</sup> Gina Miller, “How I Won Against the Government – And What You Can Do Next”, The Guardian, December 7, 2019. [See online.](#)

<sup>55</sup> [Equal Justice Report](#), page 8.

<sup>56</sup> Includes spending on prosecutions, courts, victim and other justice services, and legal aid but excludes policing and corrections.

<sup>57</sup> [Equal Justice Report](#), page 51.

<sup>58</sup> [Equal Justice Report](#), page 51.

<sup>59</sup> The Canadian Forum for Civil Justice (CFCJ) describes an “everyday legal problem” as “an event or issue that happens during normal, daily life that has a legal aspect and a potential legal solution within the civil justice system”. See [online](#)

<sup>60</sup> See [CFCJ cost of justice/infographics everyday legal-problems and cos of justice](#)

These everyday legal problems have significant social and economic consequences. Each year, they cost governments \$248 million in social assistance payments, \$450 million in employment insurance payments and \$101 million in health care costs.<sup>61</sup>

The justice system also needs access to relevant information to ensure future decisions are evidence-based and made to improve the user's experience. In this vein, the Legal Futures report highlighted the importance of data to contemplate "transformation in ways that have not yet been seen envisioned."<sup>62</sup> However, the justice system has little information to help it understand what users prefer, demographics, volumes and other trends affecting the delivery of justice. While some progress has been made over the past twenty years, the empirical basis for decision making is still extremely limited.<sup>63</sup>

There is also no sugar coating the investments and resources required to implement the new measures, practices, and technologies discussed in this report. We recognize the recommendations in this report come with a high price tag. We also appreciate the financial challenges and pressures governments face, especially amid the pandemic. However, given the social and economic costs of an ill-resourced justice system and a clear return on investment in an accessible and modern justice system, we suggest investment in this area is justified.

## RECOMMENDATIONS

**13.** The federal government should appoint a Justice Innovation Champion to work with provincial and territorial governments to lead the permanent implementation of new measures, procedures and technologies to deliver justice remotely.

**14.** The federal, provincial and territorial governments should invest to ensure the timely and effective implementation of new measures, procedures and technologies to deliver justice remotely, including:

- Technology and virtual platforms for courts, tribunals and other dispute resolution bodies
- training for judges, members of administrative tribunals and boards, mediators, adjudicators, court personnel and other justice system partners
- training for self-represented, marginalized and other litigants who require support.

**15.** The CBA should revive efforts to establish a Professional Centre of Expertise and Information to be the authoritative source of data on the legal profession in Canada. This Professional Centre of Expertise and Information should collect feedback from individuals who use the justice system to resolve their legal problems. This input should be used to improve their experience and inform future decisions on triage, ODR, effectiveness of increased "active management" in proceedings, etc.

<sup>61</sup> Supra [CFCJ cost of justice/infographics everyday legal-problems and cost of justice](#)

<sup>62</sup> [Legal Futures Report](#), page 37

<sup>63</sup> [Equal Justice Report](#), page 51.

## F. Coordination and collaboration between justice system partners

The Equal Justice Report recognized that the greatest challenge is to simultaneously focus on individual innovations and the broader interdependence of all aspects of access to justice. Collaboration works best when based on a shared understanding of the problem and a shared vision of the end goals.<sup>64</sup>

We cannot lose sight of the fact that the public and parties themselves are justice system partners, and measures that may work for lawyers and decision-makers might not benefit those directly affected by the changes.

This report is meant to complement the work of other initiatives such as the National Action Committee on Access to Justice in Civil and Family Matters, the Action Committee on Court Operations in Response to COVID-19, the Advocates' Society and others. One example of a partnership is the Best Practices for Remote Hearings guide, a collaboration of The Advocates' Society, the Ontario Bar Association, the Federation of Ontario Law Associations, and the Ontario Trial Lawyers Association.

The National Action Committee on Access to Justice in Civil and Family Matters fosters engagement, pursues a strategic approach to reforms and coordinates the efforts of all participants concerned with civil and family justice. The Action Committee calls for a culture shift and a more cooperative and collaborative approach. It also emphasizes putting the public first as a guiding principle. The Action Committee is creating an inventory of innovations and changes to legal system operations to help build a national picture, encourage collaboration and support research.

### RECOMMENDATION

**16.** The CBA should collaborate with the National Action Committee on Access to Justice in Civil and Family Matters to optimize the inventory of innovations and share communications tools to increase access to justice awareness in the public.

The Action Committee on Court Operations in Response to COVID-19 was established by Chief Justice Richard Wagner and Justice Minister David Lametti, to give national leadership to support the work of provincial and territorial governments, individual courts and court administrators to restore full operation of Canada's courts while ensuring the safety of court users and staff.

### RECOMMENDATION

**17.** The CBA should collaborate with the Action Committee on Court Operations in Response to COVID-19 on complementary activities.

The Hague Institute for Innovation of Law<sup>65</sup> (HiIL) is a not-for-profit social enterprise devoted to user-

<sup>64</sup> [Equal Justice Report](#), at page 8.

<sup>65</sup> See [online](#)

friendly justice. Its goal is to ensure that by 2030, 150 million people will be able to prevent or resolve their most pressing justice problems. The HiiL stimulates innovation to find new ways to prevent and resolve pressing justice needs. Its Justice Accelerator programme offers peer learning, funding, access to a global network of justice institutions and potential investment opportunities. It funds, trains and scales a global cohort of justice startups each year that focus on people and user-centred approaches.

Similarly, the Legal Innovation Zone (LIZ) at Ryerson University, the world's first legal tech incubator, is a global hub focused on building better legal solutions to improve the justice system. It gathers entrepreneurs, lawyers, students, tech experts, government and industry leaders to drive legal innovation. The LIZ supports startups and works with companies, law firms, governments and organizations to help them bring their legal innovations from ideation to execution.

#### RECOMMENDATION

**18.** The CBA should collaborate with the Hague Institute for Innovation of Law and the Legal Innovation Zone where possible to develop innovative solutions to improve the justice system.

## IV. CONCLUSION AND RECOMMENDATIONS

Two principal themes underlie this report and recommendations.

First, there is no turning back. The pandemic propelled the justice system into a long-awaited modernization. We must continue forward and build on the measures, procedures and innovations implemented in response to the pandemic and focus on the needs of the users of the justice system.

Second, to enhance access— rather than unintentionally inhibit it — new measures and technology must be deployed in a manner that mitigates their adverse and unintended effects on access to justice, self-represented individuals, judicial independence and the open courts principle. To this end, technology is best construed as a targeted aide — not a crutch to defer to mindlessly.

It is not just about minimizing COVID-19 disruption — or playing the classic carnival ‘whack a mole’ game — it is also about harnessing innovations purposefully and sustainably, lest justice be relegated to an unfulfilled promise or unattainable luxury for most.

Implementing changes correctly in these circumstances is somewhat akin to “meditating in Times Square.”<sup>66</sup> A long-awaited new paradigm in the digital age that ultimately realigns the justice system with our digital reality is the “work of a generation to integrate tech and determine policy.”<sup>67</sup>

In the end, the secret of getting ahead is getting started.

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<sup>66</sup> Expression attributed to Arvind Narayanan. See Princeton Center for Information Technology Policy (CITP) Launch Initiative on AI and Policy (October 19, 2017). See [online](#).

<sup>67</sup> See Brookings “National Security for the AI Era”. See [online](#).



## Summary of Recommendations

1. All dispute resolution bodies (courts, tribunals, boards, etc.) should permanently implement the following measures to improve access to justice, modernize and address long-standing challenges in the justice system:
  - a) Remote (video, online, telephone) proceedings should be available for settlement conferences, examinations for discovery, various hearings, motions, trials and appeals. Remote proceedings should continue especially for procedural, uncontested, shorter and less complex matters. While the court, tribunal or other dispute resolution body should ultimately decide if a matter is to proceed remotely, the parties should be given an opportunity to be heard and present their position on proceeding remotely.
  - b) Electronic filings (via secure drop box, online portals, email, etc.) of court documents and acceptance of service by email
  - c) Ability to remotely view hearings, trials or motions via an online platform (e.g. Zoom, YouTube) [subject to addressing the concerns outlined in this report]
2. Justice system partners, including court and tribunal administrators, government officials and the CBA, should establish a working group to share information on best practices on the security of videoconferencing and to conduct a thorough evaluation of all videoconferencing platforms.
3. Courts, tribunals and other dispute resolution bodies should carefully examine whether and how justice system data can be made available in a controlled and secure environment to enhance access and improve the justice system.
4. Courts, tribunals and other dispute resolution bodies should establish robust practices and procedures to safeguard sensitive data. These practices and procedures must ensure that publishing sensitive data is done purposefully and guided by the “atteinte minimale” principle to not compromise access to justice or undermine confidence in the justice system. They could consider collaborating with the Justice Lab UK.
5. Short term: Justice system partners (including groups representing justice seeking individuals, court and tribunal administrators, bar representatives etc.) should establish a working group dedicated to exploring how to effectively triage matters that are more amenable to early resolution and matters that better lend themselves to remote proceedings.
6. Medium term: The working group should explore which areas of law are potentially suited for ODR-type platforms and how to integrate all these matters into the public system.
7. All justice system stakeholders must consider the implications on access to justice for marginalized groups when implementing AI and other emerging technologies in the justice system and remove any negative impact
8. Courts, tribunals and other dispute resolution bodies should explore the potential benefits of increasing the active management of presiding members to accommodate the shift to online justice

9. Short term: Courts, tribunals and other dispute resolution bodies should examine how other industries and custodians of sensitive information (e.g. the financial services industry) have addressed the control of their data, curtailed their dependence on commercial platforms and protected their independence.
10. Long term: Courts, tribunals and other dispute resolution bodies should explore the possibility of developing their own platforms (or using open-source options). Alternatively, and perhaps more effective, the federal government should consider regulating private platforms or subjecting them to some level of oversight and scrutiny.
11. Courts, tribunals and other dispute resolution bodies should undertake consultations with self-represented litigants to determine the impact of new measures, practices and technologies on their needs, concerns, safety and security.
12. Justice system participants including courts, tribunals, other dispute resolution bodies and bar and media representatives should prepare a tip sheet on best practices to ensure public and media access to courts in a way that respects open courts and privacy principles.
13. The federal government should appoint a Justice Innovation Champion to work with provincial and territorial governments to lead the permanent implementation of new measures, procedures and technologies to deliver justice remotely.
14. The federal, provincial and territorial governments should invest to ensure the timely and effective implementation of new measures, procedures and technologies to deliver justice remotely, including:
  - Technology and virtual platforms for courts, tribunals and other dispute resolution bodies
  - training for judges, members of administrative tribunals and boards, mediators, adjudicators, court personnel and other justice system partners
  - training for self-represented, marginalized and other litigants who require support.
15. The CBA should revive efforts to establish a Professional Centre of Expertise and Information to be the authoritative source of data on the legal profession in Canada. This Professional Centre of Expertise and Information should collect feedback from individuals who use the justice system to resolve their legal problems. This input should be used to improve their experience and inform future decisions on triage, ODR, effectiveness of increased “active management” in proceedings, etc.
16. The CBA should collaborate with the National Action Committee on Access to Justice in Civil and Family Matters to optimize the inventory of innovations and share communications tools to increase access to justice awareness in the public.
17. The CBA should collaborate with the Action Committee on Court Operations in Response to COVID-19 on complementary activities.
18. The CBA should collaborate with the Hague Institute for Innovation of Law and the Legal Innovation Zone where possible to develop innovative solutions to improve the justice system.

# APPENDIX A

## VIDEOCONFERENCING PLATFORMS IN CANADA

Courts	Platform
Supreme Court of Canada	Zoom
Federal Court of Appeal	Zoom
Federal Court	Zoom
Tax Court of Canada	None
British Columbia Court of Appeal	Zoom
British Columbia Supreme Court	Microsoft Teams
British Columbia Provincial Court	Microsoft Teams
Alberta Court of Appeal	Cisco Webex
Alberta Court of Queen's Bench	Cisco Webex
Alberta Provincial Court	Cisco Webex
Saskatchewan Court of Appeal	Cisco Webex
Saskatchewan Court of Queen's Bench	Cisco Webex
Saskatchewan Provincial Court	Cisco Webex
Manitoba Court of Appeal	GoToWebinar
Manitoba Court of Queen's Bench	Family Division - Microsoft Teams General Division - format arranged by the parties
Manitoba Provincial Court	None
Ontario Court of Appeal	Zoom
Ontario Superior Court	Zoom
Ontario Court of Justice	Zoom
Quebec Court of Appeal	Microsoft Teams
Quebec Superior Court	Microsoft Teams
Court of Quebec	Microsoft Teams
New Brunswick Court of Appeal	Microsoft Teams
New Brunswick Court of Queen's Bench	Microsoft Teams
New Brunswick Provincial Court	Microsoft Teams
Nova Scotia Court of Appeal	Skype for Business
Nova Scotia Supreme Court	Skype for Business
Nova Scotia Provincial Court	Skype for Business
PEI Court of Appeal	Cisco Webex. Zoom
PEI Supreme Court	Cisco Webex. Zoom
PEI Provincial Court	Cisco Webex. Zoom
Newfoundland and Labrador Court of Appeal	CourtCall (used in NL before the pandemic for circuit courts and to connect remote areas).
Newfoundland and Labrador Supreme Court	CourtCall, Skype for Business
Newfoundland and Labrador Provincial Court	CourtCall
Nunavut Courts	Government videoconferencing system (Cisco), Cisco Jabber
Yukon Court of Appeal	Cisco Movi, Cisco Jabber Guest, Zoom
Yukon Supreme Court	Cisco Movi, Cisco Jabber Guest, Zoom
Northwest Territories Court of Appeal	Telemerge
Northwest Territories Supreme Court	Telemerge

# APPENDIX B

## British Columbia Civil Resolution Tribunal

The BC Civil Resolution Tribunal is Canada's first and only Online Dispute Resolution tribunal and one of the first in the world. It uses digital technology to help resolve disputes in a manner that is "accessible, speedy, economical, informal and flexible."<sup>68</sup> It was established by the *Civil Resolution Tribunal Act*, amended in 2015 and 2018, and began resolving matters in July 2016.

### Jurisdiction

The CRT has jurisdiction over small claims disputes under \$5,000, motor vehicle injury claims occurring after April 1, 2019 of up to \$50,000, strata property disputes of any amount and societies and cooperative associations disputes up to any amount.

The CRT does not have authority to decide matters that affect land or terminating an interest in land, significant issues affecting an entire strata complex, claims of slander, defamation, or malicious prosecution or constitutional questions.

### Process

There are four stages of a CRT application: Solution Explorer, Negotiation, Facilitation, and Tribunal Decision Process.

### Solution Explorer

The Solution Explorer is a free online tool that asks plain language questions of the individual to properly classify their dispute. The Solution Explorer offers legal information and additional tools based on the individual's answers, with the hope that simple disputes can be resolved out of the CRT.

If deemed appropriate, the Solution Explorer will provide the necessary forms to open a claim with the CRT. Applicants who do not have access to a computer or prefer to work offline may begin their application in paper format.

The CRT fees vary by the type of dispute.<sup>69</sup> All online applications are granted a \$25 discount and, to increase access to justice, the CRT allows any party to apply to have all fees waived.

If the CRT accepts an application, it will give the applicant a Dispute Notice Package. Generally, the CRT also serves the other parties with the Dispute Notice to ease the burden of the applicant. The CRT provides instructions for respondents, including the option to make a third-party claim or counterclaim. The response of the served party, or lack thereof, determine the next steps.

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<sup>68</sup> [Civil Resolution Tribunal Act](#), SBC 2012, c 25, s 2(2)(a) (CRT Act)

<sup>69</sup> CRT Act, s 62(2)(m); [Civil Resolution Tribunal Rules effective May 1, 2020](#), r 1.6 [CRT Rules]; "Fees" *Civil Resolution Tribunal*, (2020), [online](#).

## **Negotiation**

Once a response is received by the CRT and communicated to the applicant, the CRT assigns a case manager to guide the dispute through the next phases. For all but minor injury determinations in motor vehicle injury claim, the next phase is negotiation. This is an opportunity for the parties to resolve the dispute themselves, with minimal supervision by the case manager to ensure there is no abuse. Negotiation can occur through whichever medium the parties agree to, such as in-person, email, phone calls, or the private messaging function on the CRT's website. If the parties reach an agreement through negotiation, they have the option to turn that agreement into an enforceable order at no additional cost.

## **Facilitation**

Should the negotiations fail to reach an agreement, the case manager will facilitate mediation. Case managers are neutral third parties, trained to assist in dispute resolutions. They can clarify the details of the dispute, help the applicant articulate what they want, determine if parties should be added or removed from the proceedings, and review communications before delivery to ensure they are respectful and productive.<sup>70</sup>

Case managers can propose orders, though they are entirely non-binding. If the parties agree with an order, they can request a Consent Resolution Order to have it turned into an enforceable order. Other ways a dispute might end at this stage are if the applicant asks the CRT to withdraw it, or if all parties agree to have it dismissed without a decision being made.

## **Tribunal Decision**

If the parties cannot reach an agreement through facilitation and choose to continue, their dispute will be resolved, for a fee, by the Tribunal Decision Process. The case manager from the previous stage will help the parties create a Tribunal Decision Plan from the CRT's website, which will set out timelines for giving evidence and arguments and prescribe the length of written submissions.

The final decision is made by a CRT member, not the case manager. All earlier communications are confidential, and the CRT member decides the matter solely on the evidence and arguments presented by the parties. Submissions are most commonly done online, in writing. If the CRT member thinks it necessary, or if either party requests it, there may be an oral hearing, likely conducted over the phone or by videoconferencing platform.

Most disputes are resolved in 60 to 90 days from commencing CRT proceedings. All decisions are in writing and are sent to all parties, with most published on the CRT website.

Parties who disagree with the CRT decision have different options depending on the type of dispute. For strata and motor vehicle injury decisions, parties can apply to the BC Supreme Court for judicial review within 60 days of the decision. For small claims disputes, parties must submit a Notice of Objection and restart a claim with the BC Provincial Court.

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<sup>70</sup> CRT Rules, r 5.3.

## Challenges of the CRT

### Restriction on Legal Representation

The most frequently cited concern of the CRT is the restriction on legal representation. Section 20 of the Act says that parties are to be self-represented, unless they are a child or person with impaired capacity, or the dispute is a motor vehicle injury claim.

The CRT does retain discretion to permit representation if the Tribunal Rules allow, or if it is otherwise in the interests of justice and fairness.

Representatives are distinguished from “helpers” in that, although helpers may assist parties behind the scenes, only representatives are allowed to speak to the CRT on one’s behalf. Though the tendency to prefer paper hearings means the issue does not arise frequently, the CRT’s general unwillingness to permit representatives has caused frustration for parties and lawyers.

### Lack of Independence and Expertise

CRT members do not enjoy the same independence from government as judges, who are appointed by the Lieutenant Governor in Council.<sup>71</sup> Lack of independence comes from the fact that there is no security of tenure: tribunal members are hired, paid and fired by the same government that appointed them and that can be party to certain claims. This conflict could be resolved by transferring the CRT to the judicial branch.

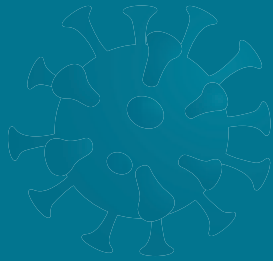
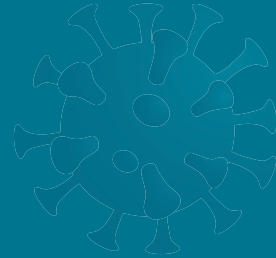
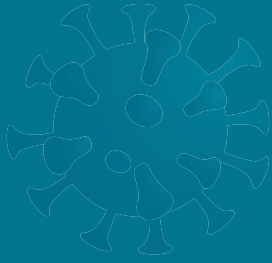
### Accessibility

Not everybody can use online platforms, and command of the language can be a challenge when negotiation, facilitation and hearings are all carried out in writing.

Though the CRT is committed to helping people “resolve their disputes using the communications method that best serves their needs,” most CRT proceedings occur online. This may discourage those with low technological literacy or limited access to technology — often society’s most marginalized individuals — from using these services.

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<sup>71</sup> CRT Act, ss 67(1), 68(1)-(2).



THE CANADIAN  
BAR ASSOCIATION

The Canadian Bar Association  
66 Slater Street, #Suite 1200  
Ottawa, Ontario K1P 5H1