



# **Examining *Virtual Facilitation* of Legal Processes in Saskatchewan: An Exploratory Inquiry**

*The Tenth Annual  
Dean's Forum on Access to Justice  
and Dispute Resolution*

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## EXECUTIVE SUMMARY

For the 10th meeting of the Dean’s Forum on Dispute Resolution and Access to Justice (the “Dean’s Forum”), we analyzed the use of technology in resolving legal problems in Saskatchewan during the COVID-19 pandemic. Over four weeks, our team consulted with various stakeholders who have been at the forefront of using technology in justice processes in Saskatchewan during the past two years. We spoke with nineteen lawyers practicing in Saskatchewan; eight judges from the Court of Appeal, Court of Queen’s Bench, or the Provincial Court in Saskatchewan; and ten other justice stakeholders, who provided feedback on our proposed findings or participated in an interview. In this paper, we present a summary of stakeholder experiences at the Court of Appeal, the Court of Queen’s Bench, the Provincial Court, and in mediations and tribunals. Additionally, we propose a preliminary framework that decision-makers could use to predict the effectiveness of resolving a legal matter with the assistance of teleconference or videoconference technology.

We hope these preliminary findings will help stakeholders separate those processes working well in the virtual context from those requiring further refinement or simply a return to their pre-pandemic, in-person state. As we move towards a post-pandemic reality, the justice sector must exercise caution to ensure the effective implementation of technology. *We learned that technology has the potential to transform the traditional administration of justice in Saskatchewan for the better, but stakeholders must pay special attention to access to justice issues.*

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## I. INTRODUCTION

The purpose of this year's Dean's Forum is to analyze the use of technology in resolving legal problems in Saskatchewan. Our analysis will determine a recommendation for decision-making bodies on how to best implement technology to increase access to justice. Our research explores approaches from jurisdictions across Canada and internationally on how various levels of court, tribunals, and dispute resolution processes have transitioned to online procedures in the COVID-19 pandemic. We conducted both preliminary and secondary research in the form of interviews of lawyers, judges, and external stakeholders. From our research, we created of a framework for evaluating electronic platforms for the delivery of justice and a questionnaire to determine what processes are best served online in the interests of accessibility, efficiency, and the administration of justice.

### A. *Defining “Virtual Facilitation” and “Digital Transformation”*

Our team found that there is a lack of clarity and consistency among legal scholars and practitioners regarding the terms used to describe different online methods to resolve legal disputes.<sup>1</sup> As such, we encountered difficulty finding terms to best define the facets of our research. We concede that a number of terms could be used, and this is an issue we will not seek to conquer. However, there is a significant distinction in the use of technology in the justice system that we want to make clear at the outset of our analysis, and we have chosen terms we believe will best serve the purpose of our research.

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<sup>1</sup> Richard Susskind, *Online Courts and the Future of Justice* (Oxford: Oxford University Press, 2019) at 5 [Susskind].

### *i. Virtual Facilitation*

We use the term “virtual facilitation” to define the use of technology to deliver the traditional justice system's ordinary functions. Virtual facilitation includes the use of teleconference and videoconference technology by the courts during the COVID-19 pandemic. The term “virtual” conveys the traditional justice system as being simulated via technology. The primary focus of the interviews we conducted with justice stakeholders surrounds their experiences with the virtual facilitation of the traditional court system during the pandemic.

**Virtual Facilitation:**  
*Using technology to deliver  
the traditional justice  
system's ordinary functions*

### *ii. Digital Transformation*

Digital transformation is the use of technology to transform the justice system through the implementation of online platforms. The British Columbia Ministry of Attorney General released a “Court Digital Transformation Strategy,”<sup>2</sup> which defined “digital” as “using online technologies to improve service to its users.”<sup>3</sup> The Ministry emphasized that the goal of digitalizing the justice system is to “enrich the experience of citizens or residents in the justice system” and not digitalization in and of itself.<sup>4</sup> As such, through using

**Digital Transformation:**  
*Using technology to  
transform the justice system  
beyond its ordinary functions*

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<sup>2</sup> British Columbia, Ministry of Attorney General, “Court Digital Transformation Strategy 2019-23” online (pdf): *Government of British Columbia* < [www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/digital-transformation-strategy-bc-courts.pdf](http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/digital-transformation-strategy-bc-courts.pdf) >.

<sup>3</sup> *Ibid* at 6.

<sup>4</sup> *Ibid*; see also No Turning Back: CBA Task Force Report on Justice Issues Arising from COVID-19 (Ottawa Canada, 2021) at 24, online (pdf): *Canadian Bar Association* < [www.cba.org/CBAMediaLibrary/cba\\_na/PDFs/Publications%20And%20Resources/2021/CBATaskForce.pdf](http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/Publications%20And%20Resources/2021/CBATaskForce.pdf) > [No Turning Back].

the term “digital transformation,” we seek to encapsulate a broad range of technological platforms that justice systems are developing to transform and improve the administration of justice. When it comes to digital transformation, instead of thinking about *what a court is like* as done in virtual facilitation, stakeholders and decision-makers ought to think about *what a court does* and how it can be altered to better its purpose.<sup>5</sup> For example, British Columbia has created the Civil Resolution Tribunal which digitally transformed how the justice system deals with small claims of up to \$5,000 in the province.<sup>6</sup> In Saskatchewan, The Ministry of Justice has undertaken the e-Justice initiative, whose stakeholders are developing Online Dispute Resolution (ODR) processes and a Legal Information Portal (LIP) which is accessible to the public.<sup>7</sup> The ODR platform will focus on consumer disputes and provincial offences and will cover all stages of dispute resolution, including intake, negotiation and mediation, and adjudication.<sup>8</sup>

## ***B. The Scope***

The key distinction between “virtual facilitation” and “digital transformation” is the implementation of technology to facilitate the traditional justice system, versus the implementation of technology that transforms the traditional justice system. Though our interviews focus on the former, our research aims to highlight how the experience with virtual facilitation during the

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<sup>5</sup> Susskind, *supra* note 1 at 53.

<sup>6</sup> Civil Resolution Tribunal (March 31, 2021) at 1, online (pdf): Civil Resolution <[civilresolutionbc.ca/wp-content/uploads/2021/11/CRT-Annual-Report-2020-2021.pdf](http://civilresolutionbc.ca/wp-content/uploads/2021/11/CRT-Annual-Report-2020-2021.pdf)>; Government of British Columbia, “Modernizing Justice and Public Safety” (2019) at 5, online (pdf): *Government of British Columbia* <[gov.bc.ca/assets/gov/british-columbians-our-governments/initiatives-plans-strategies/justice/digital-strategy.pdf](http://gov.bc.ca/assets/gov/british-columbians-our-governments/initiatives-plans-strategies/justice/digital-strategy.pdf)>.

<sup>7</sup> Law Foundation of Saskatchewan, “Stability in Uncertain Times: 2019-2020 Annual Report” at 14, online (pdf): *Law Foundation of Saskatchewan* <<https://www.lawfoundation.sk.ca/uploads/media/60414a85b7401/lfs-annual-report-2019-20-web.pdf?v1>>.

<sup>8</sup> *Ibid.*

pandemic can inform policymakers as we move forward with the virtual facilitation and digital transformation of justice processes in Saskatchewan.

Justice systems across Canada and the world have implemented virtual facilitation of justice processes since the onset of the pandemic in 2020.<sup>9</sup> This has created many forums and methods to research to determine what systems are most successful. We interpret our research with an application in Saskatchewan, with a narrow perspective on each decision-making body, including the Provincial Court, the Court of Queen’s Bench, and the Court of Appeal. In addition, to gather a holistic understanding of technology usage in justice processes, we included consideration of virtual facilitation and digital transformation occurring through tribunals and other dispute resolution processes at both the preliminary research and in the interview stages.

### ***C. The Problem***

The current court system in Canada leaves many individuals to fall through the cracks.<sup>10</sup> The formal system can be daunting, expensive, and even traumatizing for many people with sufficient reason to distrust the court system. The overall goal of an effective court system should be to ensure that courts reflect the society in which they reside.<sup>11</sup> In other words, if access to justice is not available for all, then the system cannot be considered functional or just.

The Canadian system is not working because it does not work for everyone. Legal scholars emphasize the significance of a justice system that is not just for all people but for all legal

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<sup>9</sup> *Ibid* at 8.

<sup>10</sup> Action Committee on Access to Justice in Civil and Family Matters, “Access to Civil & Family Justice: A Roadmap for Change” (2013) at 1, online (pdf): *CFCJ-FCJC* <cfcj-fcjc.org/sites/default/files/docs/2013/AC\_Report\_English\_Final.pdf> [A Roadmap for Change].

<sup>11</sup> *Ibid*.



problems.<sup>12</sup> Our current system is not necessary for all cases, and trials are expensive and – for many people – intimidating. Scholars also speak to the consistent congestion of family and civil court systems. People are awaiting trial and in the interim, are scared, losing money, and often confused about what their next steps should be.<sup>13</sup> Canadians, in general, perceive the courtroom as the exclusive authority for solving legal disputes when the reality is that only 2% of civil claims will use a trial to achieve resolution.<sup>14</sup> The CBA Task Force Report has underscored the need to place the “people first.”<sup>15</sup> It has provided evidence that a remote delivery is both functional and generally positive for those involved.

Despite technological advancements the justice sector has implemented to virtually facilitate court processes during the COVID-19 pandemic, Saskatchewan is still not using technology to its full potential. There is ample opportunity for digital transformation in the justice sector that can benefit lawyers, clients, judges, and self-represented individuals.<sup>16</sup> However, the solution is not as simple as forcing technology into each area of the traditional legal system. Decision-makers must recognize and have a consistent understanding of which areas of law, and matters within those areas, are appropriate for virtual facilitation or digital transformation, which are not, and why.<sup>17</sup>

The safety, understanding, aptitude and agency of those utilizing the courts must be at the forefront of any shift within the framework of the court system. A people-centred approach is a core principle for the changes we are proposing. The implementation of technology into our justice

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<sup>12</sup> *Ibid* at 15.

<sup>13</sup> *Ibid* at 4–5; see also 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 117 [Salter & Thompson].

<sup>14</sup> Salter & Thomson, *supra* note 13 at 117.

<sup>15</sup> No Turning Back, *supra* note 4 at 6–8.

<sup>16</sup> *Ibid*.

<sup>17</sup> *Ibid* at 16, 24.

system should not end with exclusion of even more people, and it is up to the justice sector to balance all of these demands.<sup>18</sup>

#### ***D. Objectives***

The current Saskatchewan system features a telephone option to appear in Provincial Court and the Court of Queen’s Bench (for civil, family, and child protection matters), and video conference at the Court of Appeal (as of March 2020). Many of these changes in Saskatchewan have been an answer to the global COVID-19 pandemic and are components of virtual facilitation. Our objective is to inform virtual facilitation and digital transformation of the justice sector in Saskatchewan. To see lasting change, policy makers must execute careful consideration that ensures an effective integration of virtual facilitation and digital transformation platforms, and lawyers and judges must be willing to work with the newly implemented changes.

## **II. BACKGROUND ON TECHNOLOGY IN JUSTICE PROCESSES**

### ***A. Foundational Literature Review***

At the outset of the project, our team conducted a foundational literature review to ground our work in previous scholarship on the topic of online justice processes.<sup>19</sup> In scholarship written prior to the pandemic, we identified a legal-system-wide theme of lethargy and resistance to technology. However, the urgency of the pandemic created a marked shift in the use of technology in the court system, and the corresponding opinions of its use. In response to this shift, authors have identified benefits and limitations regarding the digital transformation of court services. These scholars also

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<sup>18</sup> *Ibid* at 16–17.

<sup>19</sup> For a full summary of the literature reviewed, see Appendix A.

proposed models to address these concerns as society moves beyond COVID-19 into a future of technology-enabled court services.

In Canada, the use of technology in the court system prior to the pandemic was “at best, a story of slow adaptation, and at worse, one of active resistance.”<sup>20</sup> When the COVID-19 pandemic arrived in March 2020, courts quickly shifted to offering court services via teleconference and videoconference technology.<sup>21</sup> While the provision of services was generally limited to the most “‘urgent’ and ‘emergency’” matters,<sup>22</sup> the experience has further opened the minds of the legal profession to the possible benefits of virtual court services. As Justice Pringle of the Ontario Court of Justice noted: “One of the silver linings...[is that] we feel...we have been booted into the 21st century of technology by this crisis.”<sup>23</sup> The transition, however, has not occurred without, as would be expected, some challenges.

British thinker Richard Susskind identified in his book, *Online Courts and the Future of Justice*, published prior to the pandemic, that online court services, while promising, could create access to justice issues. These issues include potentially widening the socio-economic gap,<sup>24</sup> reducing transparency into the workings of the justice system,<sup>25</sup> hampering the ability to conduct a fair trial,<sup>26</sup> excluding anybody that lacks internet connectivity or access to necessary hardware,<sup>27</sup> and increasing the volume of litigation through ease-of-use.<sup>28</sup> Since the pandemic, legal scholars have

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<sup>20</sup> Kate Puddister and Tamara A Small, "Trial by Zoom? The Response to COVID-19 by Canada's Courts" (2020) 53:2 Can J Polit Sci 1 at 2 [Puddister & Small].

<sup>21</sup> *Ibid.*

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

<sup>23</sup> *Ibid* at 4.

<sup>24</sup> Susskind, *supra* note 1 at 187–188.

<sup>25</sup> *Ibid* at 193–195.

<sup>26</sup> *Ibid* at 201.

<sup>27</sup> *Ibid* at 215–216.

<sup>28</sup> *Ibid* at 223–225.

identified some of Susskind’s concerns in reality. For example, Kate Puddister and Tamara Small, writing of the Canadian context, identify the issue of a “digital divide,” experienced most strongly by those living in rural and remote communities, as well as Indigenous communities.<sup>29</sup> Colin Rule identifies varying ethical standards in the adoption of technology,<sup>30</sup> an issue exasperated by the speed at which the system had to adapt during the pandemic.

While the scholarship we reviewed quickly identified potential concerns, authors were equally alive to the potential benefits of the long-term implementation of technology in the justice system. As Shannon Salter and Darin Thompson identified in 2017, the provision of asynchronous justice processes online has the ability to “[free] people from the procedural barriers of synchronous justice processes, where all parties must travel to a particular place, at a particular time, for a particular activity, even if it requires great personal cost in terms of lost wages, or childcare and travel expenses.”<sup>31</sup> While the benefits are enticing, the adoption of technology long-term must be done carefully and methodically.

Several scholars have provided models for assessment to assist the careful integration of technology into legal processes. In “Designing Online Dispute Resolution,” Martinez proposes a Dispute System Design framework that incorporates analyzing goals; identifying stakeholders, along with their contextual and cultural expectations; iterating on process and structure; accounting for resources; and measuring success, accountability, and learning.<sup>32</sup> In the case of courts and tribunals, the goals of integrating technology might be efficiency, streamlining processes, and

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<sup>29</sup> Puddister & Small, *supra* note 20, at 3.

<sup>30</sup> Colin Rule, "Online Dispute Resolution and the Future of Justice" (2020) 16 Ann Rev L & Soc Sci 277.

<sup>31</sup> Salter & Thompson, *supra* note 13 at 125.

<sup>32</sup> Janet K Martinez, "Designing Online Dispute Resolution" (2020) J Disp Resol 135 at 140–144.

delivering justice; the stakeholders would be the litigants, lawyers, judges, and court staff; and the contextual considerations might include access to technology and level of competence and education.<sup>33</sup> Martinez stresses that the justice system must conduct an external analysis of the satisfaction of stakeholders to evaluate success.<sup>34</sup> It is on this foundation that our team interviewed justice stakeholders in Saskatchewan about their experiences with the virtual facilitation of court process during the pandemic.

## ***B. Existing Innovations***

Saskatchewan Courts are the primary focus of our investigation for this project. However, to appropriately measure the trends of our legal system holistically, we examined existing innovations domestically and internationally. The team conducted an analysis, exploring how areas outside of Saskatchewan have handled virtual facilitation and digital transformation with and without the barriers presented by the pandemic.<sup>35</sup>

The pandemic has accelerated an already technology-focused environment for many legal institutions;<sup>36</sup> for example, the United Kingdom's "cyber courts" have been in operation since 2001. However, the pandemic has also highlighted the areas in which the legal world is missing opportunities to utilize all the technological tools at its disposal. eFiling, a process where parties can register, file, search, and print documents online, as well as pay court fees is not consistently used throughout courts in Canada. Although, it is worth noting that the Court of Appeal for

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<sup>33</sup> *Ibid* at 145–146.

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

<sup>35</sup> A detailed summary of the existing innovations can be found in Appendix B.

<sup>36</sup> “Technology in Law is the New Norm” (3 August 2021), online (blog): *Thomas Reuters* <[legal.thomsonreuters.com/blog/technology-in-law-is-the-new-norm/](https://legal.thomsonreuters.com/blog/technology-in-law-is-the-new-norm/)>.

Saskatchewan does have an eFiling system.<sup>37</sup> Where eFiling is accepted, guidelines often demand that a physical copy accompanies any document a participant submits.<sup>38</sup> The absence of technology in the legal system can come at the detriment of some clients, lawyers, judges, court employees, and anyone else touched by this system. Many institutions subscribe to this sentiment and are working to ensure that the legal system utilizes, to the best of their ability, technology, and innovation in helping clients.

The ADR Institute of Canada (ADRIC) monitors the global ODR and makes recommendations that encourage respectful and sustainable online adjudication processes.<sup>39</sup> ADRIC has created a list of principles to consider to “guide and foster ethical ODR systems and practice in both the public and private spheres.”<sup>40</sup> The list of principles put forth by ADRIC informed the basis for our line of interview questions for both the lawyers and judges of Saskatchewan.

Through our research on existing innovations outside of Saskatchewan, we discovered significant technological advancements for mediations, tribunals, and arbitration with evidence to suggest that these processes could stay in place long after the pandemic ends.<sup>41</sup> In particular, our research revealed the BC Civil Resolution Tribunal,<sup>42</sup> the Vancouver International Arbitration Centre,<sup>43</sup> and

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<sup>37</sup> Hon. Robert Richards, “Welcome to The Court of Appeal for Saskatchewan – eFiling” (2010), online: *The Court of Appeal for Saskatchewan* <[ecourt.sasklawcourts.ca/?q=Home](http://ecourt.sasklawcourts.ca/?q=Home)>.

<sup>38</sup> “Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada” (27 January 2021), online: *Supreme Court of Canada* <[scc-csc.ca/parties/gl-ld2021-01-27-eng.aspx](http://scc-csc.ca/parties/gl-ld2021-01-27-eng.aspx)>.

<sup>39</sup> “Guiding Principles for Post-Pandemic Court Technology” (16 July 2020), online (pdf): *SRLN* <<https://www.srln.org/system/files/attachments/Guiding%20Principles%20for%20Post%20Pandemic%20Court%20Technology%20%28CCJ%3ACOSCA%202020%29.pdf>>.

<sup>40</sup> *Ibid.*

<sup>41</sup> Shannon Salter, “Civil Resolution Tribunal: Annual Report 2020-2021” (31 March 2021), online: *Civil Resolution Tribunal* <[civilresolutionbc.ca/wp-content/uploads/2021/11/CRT-Annual-Report-2020-2021.pdf](http://civilresolutionbc.ca/wp-content/uploads/2021/11/CRT-Annual-Report-2020-2021.pdf)>. The Civil Resolution Tribunal has been in place since 2015 and demonstrates no sign of slowing down, particularly in light of the pandemic.

<sup>42</sup> *Ibid.*

<sup>43</sup> “How to use Vaniac’s Online Arbitration Platform” (2020), online: *Vaniac* <[vaniac.org/arbitration/online-arbitration-platform/how-to-use-vaniac-online-arbitration-platform/](http://vaniac.org/arbitration/online-arbitration-platform/how-to-use-vaniac-online-arbitration-platform/)>

the Ontario Condominium Authority Tribunal.<sup>44</sup> Finally, Quebec has introduced a program called PARLe; an online platform that provides consumers with complementary services to resolve disputes privately.<sup>45</sup>

### III. METHODOLOGY

#### A. Consultation Process

In the fall of 2021, CREATE Justice at the College of Law, University of Saskatchewan launched an exploratory survey on “Reflections on the impact of COVID-19 on online dispute resolution and adjudication.” A total of 53 respondents completed the survey, with 39 of those respondents from Saskatchewan. Survey respondents were invited to answer how much experience they had with online adjudication in the last 2 years. 39.62% (n=21) answered they had extensive experience, 18.87% (n=10) responded they had some experience, 22.64% (n=12) responded they had minimal experience, and 20.75% (n=11) responded that they had not experienced online adjudication in the last 2 years.

Of the total number of respondents, 2.17% (n=1) was a party to the matter, 19.57% (n=9) were lawyers, 21.74% (n=10) were judges, 6.52% (n=3) were arbitrators, 23.91% (n=11) were mediators, none were court clerks, 15.22% (n=7) were observers, none were media, and 17.39% (n=8) identified that they had not experienced online adjudication in the last 2 years.

The types of online adjudication that respondents experienced were as follows: 26.19% (n=11) through Provincial Court of Saskatchewan, 19.05% (n=8) through Court of Queen’s Bench for

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<sup>44</sup> “Ontario Dispute Adjudication for Construction Contracts” (2021), online: *ODACC* <<https://odacc.ca/en/>>.

<sup>45</sup> “À propos de l’Office [About the Office]” (2016), online: *Gouvernement du Québec* <[opc.gouv.qc.ca/a-propos/parle/acces/](http://opc.gouv.qc.ca/a-propos/parle/acces/)>.

Saskatchewan, 7.14% (n=3) through Court of Appeal for Saskatchewan, 11.90% (n=5) through an arbitration in Saskatchewan, 33.33% (n=14) through a mediation in Saskatchewan, 21.43% (n=9) through a Saskatchewan administrative tribunal, and 23.81% (n=10) reported not experiencing online adjudication in the last 2 years.

Survey respondents were also asked a series of qualitative questions, specifically: If you have experienced an online adjudication process in the last 2 years, what worked well or did not work well, and what the detriments/limitations of online adjudication are from an access to justice perspective?

The results of this survey were used to inform the development of research questions for this project and act as a launching point to further investigate and examine virtual facilitation in Saskatchewan. Feedback obtained through the survey is situated within the findings presented in this paper. *The consultation process and interview questions were developed by seeking to understand (1) the experiences of lawyers and judges over the last 2 years of resolving disputes online/remotely due to the COVID-19 pandemic and (2) how virtual facilitation in Saskatchewan can be implemented or created to enhance service delivery and access to justice.*

Preliminary consultations with the Court of Appeal, Court of Queen's Bench, Provincial Court, and Ministry of Justice informed the creation of an interview guide to interview lawyers from various practice areas in Saskatchewan.<sup>46</sup> The interview questions addressed two lines of inquiry; the first examined lawyers' and judges' experiences over the last two years at each level of court (as well as at tribunals and other dispute resolution processes such as mediation). This line of inquiry allowed for a deeper understanding of particular experiences at, for example, each level of

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<sup>46</sup> For the list of interview questions, see Appendix C.



court to understand how justice is being virtually facilitated and to understand what is working well and what is not working as well as it could be. The second line of inquiry engaged with the consultees, including lawyers, judges, and other justice stakeholders by providing consultees with a list of principles that had been adapted from the International Council for Online Dispute Resolution (ICODR) which are essential for developing quality online dispute resolution processes. We sought to examine how our consultees saw these principles work in practice and which of the principles resonated with them most by asking questions about how, for example, they see elements such as accessibility and transparency, affecting online dispute resolution processes and other forms of virtual facilitation.

## ***B. Participants***

Data was generated through a series of one-on-one semi-structured interviews with three imperative groups of stakeholders: practicing lawyers, judges, and other justice stakeholders (e.g. Law Society of Saskatchewan, Ministry of Justice, etc.) *Nineteen interviews were conducted with lawyers practicing in Saskatchewan, eight interviews were conducted with judges from at the Court of Appeal, Court of Queen's Bench, and Provincial Court, and ten justice stakeholders were engaged to provide feedback on our proposed findings or to participate in an interview.*

The duration of each one-on-one interview was approximately 30 minutes and was conducted via videoconference or telephone. Of the 19 lawyers who were interviewed, 13 appeared at the Court of Appeal remotely in the last two years. All of the lawyers interviewed worked in a variety of practise areas and had prior experience resolving disputes remotely in court, as well as through

mediation, arbitration, and tribunals. The lawyers interviewed come from a variety of practice areas and work in-house, at private firms, for the Ministry, and at Legal Aid Saskatchewan.<sup>47</sup>

### **C. Limitations**

The findings discussed in this paper are limited to the feedback and experiences of those who were consulted for this project. Thus, the findings cannot be generalized to be representative of all virtual facilitation experienced in Saskatchewan over the last two years. An additional limitation of the findings presented in this paper include that ethical considerations did not allow us to interview clients, the public and self-represented litigants, however, understanding their experiences with virtual facilitation is imperative and this work has been ongoing. Pro Bono Law Saskatchewan (PBLs) and Pro Bono Students Canada (PBSC) have undertaken this work in partnership with a research project conducted by students at the College of Law on how courts and tribunals are adapting operations due to COVID-19. The project examines how changes at the courts due to COVID-19 have affected litigants and how they address their legal problems/matters. The perspectives of those who are accessing justice is important and PBSC students' research seeks to understand how the changes to court processes at the Provincial Court and Court of Queen's Bench as well as processes at the Office of Residential Tenancies have impacted PBLs clients and their abilities to address their legal matters. *Particularly, the results of the PBLs/PBSC project can be interpreted in tandem with the findings in this project, which will help to advance access to justice research and recommendations and provide further context to the unique challenges faced by litigants in Saskatchewan.*

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<sup>47</sup> For the list of consultees, see Appendix D.

The findings of this paper are situated within the CBA Task Force Reports, findings from previous Dean’s Forum reports and projects, a preliminary survey, as stated above, on “Reflections on the impact of COVID-19 on online dispute resolution and adjudication” conducted by CREATE Justice, as well as scholarly literature on virtual facilitation of court processes and digital transformation. In summary, the findings discussed, and recommendations proposed in this paper are exploratory and can inform future research and discussions regarding virtual facilitation and digital transformation in Saskatchewan.

The results of the consultations with stakeholders are presented below. The findings are descriptive in nature and reflect experiences at each level of court in Saskatchewan, administrative tribunals, as well as alternative dispute resolution processes such as mediation. The findings reflect and acknowledge the unique environment that each dispute resolution body operates in, with special consideration to the nature of the disputes that are adjudicated or resolved.

#### **IV. DESCRIPTIVE EXPERIENCES WITH DECISION-MAKING BODIES IN SASKATCHEWAN**

The effectiveness of virtual facilitation is highly contextual. For example, what works well for docket appearances at the Provincial Court might not work for an appellate matter being heard at the Court of Appeal. Despite the context specificity, we were able to reach some broad conclusions about the general effectiveness of the current processes offered at each level of court.

*To reach these conclusions, we analyzed our findings through the frame of six key principles: accessibility, human competency, legal intricacy, public transparency, personal impact, and cost.* These considerations are defined as follows:

1. *Accessibility*: the process must be easy for the participants to “arrive at” and participate in, without limiting their right to representation.

2. *Human Competency*: the provider must have the relevant expertise in managing the process and the supporting technology.
3. *Legal Intricacy*: the relevant evidence and witness requirements must be supported by the process and the supporting technology.
4. *Public Transparency*: open court principles must be followed, allowing open public access is necessary to maintain trust in the justice system.
5. *Personal Impact*: the process must maintain the proper measure of human-to-human connection.
6. *Cost*: the cost savings of implementing technology must be weighed against the potential losses in other categories.

#### ***A. Summary of Experiences (2020-present): Saskatchewan Court of Appeal***

The emerging theme from lawyers who appeared at the Saskatchewan Court of Appeal was that the online transition was an excellent experience. The consultees assessed their experience at the Court over the last two years of resolving disputes remotely as seamless. This was in part, because the Court of Appeal has worked to perfect using WebEx to make it both speedy and efficient. The Court transitioned to using WebEx seamlessly because it was done quickly which allowed the Court to continue their work during the past two years. Based on the research findings with consultees who have participated at all levels of court in Saskatchewan, employing online or remote processes has worked effectively at the Court of Appeal in part due to the nature of appellate advocacy, which appears to be well-suited for online or remote processes. For example, the Court of Appeal does not hear evidence from witnesses, which may eliminate some challenges experienced in other levels of court. It is a judge-led process with minimal involvement from litigants, as lawyers typically make oral submissions to the Court and the Court makes decisions based on an established standard of review, while the lower courts may have difficulties in terms of credibility, and the evaluation, and weight assigned to evidence. The Court of Appeal is also

situated at one court point in the province (in Regina), which lends itself to easier standardization of processes and delivery.

Some lawyers and consultees found that e-filing is a positive thing at the Court of Appeal. Many found that appearing through video is beneficial because it allows participation by lawyers and parties from distant points. Lawyers explained that clients could attend from anywhere and did not have to come up with the money, transportation, or spend days on travel.

Virtual facilitation of court processes has brought unique experiences to the Court of Appeal. *An example of this is the "slip and fall" example given by a lawyer. The lawyer explained that when they opened the appeal, they were advised that this was the first time that anyone would be watching a video as a part of the appeal. What occurred was that the appellant's counsel started the appeal off by showing a video of the expert. The participant stated that this experience was efficient because they all watched together and then went from there. This was unique because viewing the video was something that would be very difficult to do in person.*

The CREATE Justice survey showed those who have engaged with the Court of Appeal have the same outlook as those described above. One lawyer, one observer, and one party to a matter were represented in the survey. The lawyer and the observer stated what worked well was cost savings for travel, the ease of organizing meetings, and each party being present with audio and visual input. On the other hand, the lawyer described difficulty with connecting to the client personally, as there were fewer opportunities for one-on-one touchpoints. The main advantages surrounded travel and cost savings. In contrast, the main disadvantages surrounded issues such as communication of the legal process, lack of access for those who do not have WiFi and those who are unfamiliar with computers, and increased issues with language barriers. Having said this, the

respondent from the survey who was a party to a matter stated that virtual facilitation is ineffective, as is the entire justice system, and there is no transparency or accountability. As with all anonymous survey data, a critical eye is useful in interpreting results.

As stated above, not every party, lawyer or self-represented individual in the Court of Appeal is experienced and competent with video conferencing technology. Some consultees lamented the experiences of self-represented individuals having to understand both the appeal process and advocate for themselves in an online forum. This posed difficulties to all involved as technology while helpful, can make it more difficult to assist others through a screen.

In summary, the consultees found that the transition to remote and online proceedings was virtually seamless at the Court of Appeal. While there is room for improvement in particular with self-represented individuals, there is promise with hybrid models of in-person and virtual hearings.

The following matrices, presented for each level of court and type of dispute resolution process, are a summary of the findings in each section intended to visually illustrate areas in which virtual facilitation has gone well in general, has received mixed-reviews, or needs improving based on the feedback from interviews conducted. The court processes line item describes the difficulty level of shifting processes online depending on the number of parties and complexity of the matter.

As seen below, the Court of Appeal had few concerns in shifting the process online, save for the loss in public transparency, which is to be expected, and the additional support needed for self-represented litigants.

**Figure 1: Considerations for Virtual Facilitation at the Court of Appeal**

	<b>Green = Good</b> <i>(worked well for most matters)</i>	<b>Yellow = Moderate</b> <i>(worked well for some matters)</i>	<b>Blue = Consider Improving</b> <i>(some matters presented challenges)</i>
<b>Types of Matters</b>	Family Law, Corporate Law, Labour Law, Human Rights Matters, Insurance Law, Property Law, Wills and Estates etc.		
<b>Court Processes</b>	Both closed and open court proceedings with justice present		
<b>Accessibility</b>	Litigants: lawyers are predominant litigants; all have access to computers equipped with video conferencing software. Witnesses, experts and/or jury are not present Clients not generally present or required to travel Some limitations for self-reps with reduced access to technology		
<b>Human Competency</b>	Lawyers as litigants are generally competent in virtual facilitation of hearings Self-reps may find process more challenging		
<b>Legal Intricacy</b>	Lawyers are sophisticated participants, this allowed legal intricacies to be upheld Self-reps may pose challenges with communication of credibility, honesty, deference to the court, and transparency of the process		
<b>Public Transparency</b>	Attending hearings is possible online, if the public contacts the registrar to obtain access, not quite as accessible as in-person hearings		
<b>Personal Impact</b>	Clients are not generally present Self-reps may not experience the same impact or “feelings of justification” as an in-person hearing		
<b>Cost</b>	Low due to reduced travel costs and shorter hearings without witnesses or experts		

***B. Summary of Experiences (2020-present): Saskatchewan Court of Queen’s Bench***

Most of the lawyers interviewed had appeared remotely at the Saskatchewan Court of Queen’s Bench over the last two years, particularly for Chambers matters which were heard via the telephone. A common sentiment was expressed that remote appearances for Chambers matters such as pre-trial motions are generally effective and efficient. Particularly, time efficiency was a common theme identified by consultees as a benefit of virtual facilitation of hearings for both the lawyer and the client. The nature of virtual facilitation does not require that the lawyer wait in court for the matter to be heard and thus does not have to bill their client for time spent waiting in

the court room for the judge to hear their matter. *One lawyer commented that a Chamber's matter on the phone takes 12 minutes, versus, say, 2 hours if it was going to be heard in the physical courtroom, thus the client is only billed for 12 minutes, and the lawyer is able to spend the better part of 90 minutes on other matters. One lawyer expressed interest in Chambers remaining on the phone because it will allow them to spend extra time with their families during the summer if they are able to participate in Chambers over the phone. Similarly, lawyers expressed that travel time is saved because the lawyer does not have to travel to a different court point in the province because the matter is being heard via the telephone.* One of the only drawbacks identified by lawyers regarding Chambers matters heard remotely via the telephone was that sound quality could commonly be an issue. It appears that the predictability of sound quality was variable and anyone participating in the proceeding via telephone could be susceptible to poor audio quality for unknown reasons.

For contested matters, the consultees identified that the telephone is not as desirable as there is an inability to read body language and grasp whether arguments are 'landing' with the judge, particularly if the lawyer is unfamiliar with the judge presiding over the matter. Being able to gauge the reactions of those who lawyers are delivering arguments to was identified as being a key aspect of oral advocacy that is lost in virtual facilitation of court processes. In addition, the consensus from lawyers was that matters that have a high volume of documents involved, the cross-examination of witnesses, or technical witness testimony where everyone should be in the same room so that a full understanding of the material could be achieved is more challenging to do via videoconference, which has led to some matters being adjourned for a significant period of time (sometimes exceeding 12 months). Similarly, many of the lawyers who appeared at the Court of Queen's Bench expressed mixed opinions on the efficacy of pre-trial conferences held remotely,



as some felt that it is easier for a judge to manage the process and the parties when they are in the same room together to come to an agreement.

Pre-trial conferences, for the most part, continued to proceed in person but in larger spaces. However, some pre-trial conferences continue to be held online at the request of parties or counsel. When conducting pre-trial conferences online, some lawyers discussed the benefit of using breakout rooms, particularly for pre-trial conferences that involve several participations, however, there is sometimes a challenge in utilizing these features unique to the online context and lawyers must assist in, for example, helping the court use these features. Another challenge with pre-trial conferences being held online is that face-to-face dynamics and rapport building are lost through virtual facilitation, thus, based on anecdotal evidence, virtual facilitation of pre-trial conference is considered to be less successful.

Due to the challenges identified above, a majority of the lawyers believe that trials should be held in person if it is safe to do so, while pre-trial conferences may continue to be held online given that there is general consensus that the parties would like to proceed via video conference, particularly considering the location and technological capacity of the parties. When probed on why lawyers would like trials to proceed in person when it is safe to do so, the volume of evidence presented and the technical nature of the evidence or if credibility is a particularly important aspect of the case (e.g. in a parenting matter where there are allegations of domestic abuse), there is sentiment that the 'stakes are high' and lawyers are not necessarily comfortable proceeding particularly considering that nearly all of the lawyers we interviewed have not run a trial via videoconference.

One notable challenge identified by lawyers appearing at the Court of Queen's Bench was the absence of a secure and reliable e-filing system. Introducing e-filing would be significant in terms

of convenience and efficiencies, because there are currently limited processes for lawyers to ensure that the judge or opposing counsel has received relevant information.

Finally, it was identified that on the client-side, dealing with matters over the telephone can be a disadvantage for litigants who, for example, use English as a second language. However, the remote nature of the hearings can allow litigants who do not live near Saskatoon, Regina or Prince Albert to participate as they are not required to travel.

Respondents of the CREATE Justice survey expressed similar sentiment among those who have engaged with the Court of Queen's Bench as a lawyer or judge, that caucusing in break out rooms was enabled through the use of technology and parties were focused and committed to coming to resolutions. The same benefit that was communicated by a majority of consultees regarding reduced travel was also captured by survey participants which is of benefit to people in rural areas and reduces costs associated with accessing the courts. Technology can be a hindrance to dispute resolution if there is weak internet connection (particularly in rural areas), people speaking while muted, poor quality microphones, which, taken together, result in a certain degree of delay that is specific to the online/remote context. Delay results in less back and forth, spontaneous communication which can often be helpful in resolving a dispute efficiently and effectively.

In summary, consultees noted that the Court of Queen's Bench managed the transition to virtual facilitation of court proceedings, and this has resulted in many benefits to lawyers, namely efficiency and time saved by only having to spend time on the phone for their particular matter. It appears that the "number of moving parts" associated with a particular process at the court (i.e. technical witness testimony, domestic violence allegations in family law where credibility must be

assessed, pre-trial conferences with a number of participants) makes the virtual facilitation more challenging to manage and the likelihood of difficulties encountered increases.

The matrix below summarizes the experiences of consultees who appeared at the Court of Queen’s Bench. Chambers was accessible although there were issues with using the telephone as it was not always clear, and each person can be difficult to get on the line. Legal intricacies were a particular issue in Chambers as without being able to see the other lawyers, clients, and especially the judge, it was extremely challenging to communicate. All involved in the process recommended this format be changed to allow a visual element, a video call at minimum to assist with the lawyer’s ability to argue and the judge’s ability to evaluate the delivery and ask questions. Court appearances over the phone all were missing on the “personal impact” element as this format has the least human connection compared to the other methods of video calls or meeting in-person. The general sentiment is that a mix of in-person and video calls as opposed to phone calls would improve on the experience in the Court of Queen’s Bench.

**Figure 2: Considerations for Virtual Facilitation at the Court of Queen’s Bench**

	<b>Green = Good</b> <i>(worked well for most matters)</i>	<b>Yellow = Moderate</b> <i>(worked well for some matters)</i>	<b>Blue = Consider Improving</b> <i>(some matters presented challenges)</i>
<b>Types of Matters</b>	Family Law, Corporate Law, Labour Law, Human Rights Matters, Insurance Law, Administrative Law etc. (few limitations save for criminal law, tribunals and appeals)		
<b>Court Processes</b>	Both open and closed court proceedings with judge, litigants, and/or witnesses and members of the public Complexity of virtual facilitation increases with number of participants and varies based on sophistication of participants		
<b>Accessibility</b>	Lawyers have easy access to technology with video requirements Witnesses, self-reps, and experts may not have access to technology with video requirements, may be required to telephone in, accessibility does increase due to reduced travel costs and ability to participate in hearings from anywhere in the world		
<b>Human Competency</b>	Lawyers are generally competent in virtual facilitation of hearings		

	Witnesses, self-reps and experts may not be as competent with online hearings Participants are competent with the telephone
<b>Legal Intricacy</b>	Credibility, honesty and transparency are more difficult to evaluate in cross-examination online, issues may be present with communication and preserving confidentiality of the process Self-reps may experience increased difficulties with deference to court in a virtual forum
<b>Public Transparency</b>	Virtual facilitation is not as transparent as in-person hearings, bandwidth of video-conferencing software with many participants can be a concern
<b>Personal Impact</b>	Some personal elements lost in cross-examination; body language of judge, witnesses, opposing counsel is absent
<b>Cost</b>	Low due to reduced travel costs, but may increase duration of hearing due to technological difficulties and multiple participants

### ***C. Summary of Experiences (2020-present): Saskatchewan Provincial Court***

Similar to the other two levels of court discussed above, the Provincial Court of Saskatchewan has its own unique features and operations. The Provincial Court handles the vast majority of criminal matters in the province, including for youth criminal justice matters, as well as small claims cases and covers more than 60 circuit points in the province. Due to the nature of this project and some of the methodological limitations, we were unable to vastly canvas the virtual experience regarding criminal matters in the province. In addition, most of the lawyers interviewed were urban practitioners, thus the rural perspective is not well-captured in these findings, particularly when it comes to criminal matters. Future research should look at this intersection more closely.

The anecdotal evidence from a small sample of consultees who experienced Provincial Court in the last two years showed noteworthy benefits and challenges surrounding telephone and video conferencing in the Provincial Court. Telephone appearances for a wide variety of matters is sufficient, particularly for docket court appearances. *For example, in one case, the lawyer noted that it was “more efficient” to ask for an adjournment via telephone than to trek to the courthouse to make a “10-second appearance.” This has the natural effect of benefiting clients*

*as they do not need to go through what may be a nerve-inducing process for smaller matters. This saves time and money and allows lawyers to better balance their work and life. Lawyers also noted consistently that remote witnesses were not problematic in their cases where the material is not highly contested. In terms of videoconferencing, a lawyer made mention of a criminal matter that proceeded via video and was highly successful. They noted that people were able to see one another, families were present, translation was available, and an interpreter was able to help.*

On the more challenging side of using the telephone or videoconference for Provincial Court matters, one lawyer mentioned that there were significant telephone issues during one of their trials to the point where they could not understand what the client was saying. Finally, one lawyer indicated that there are significant barriers for clients when using remote methods. This lawyer asserted that there is no effective way in remote areas for incarcerated individuals to participate and found that they lost a number of clients during COVID-19 because they did not have physical court appearances to meet with them.

Benefits of virtual facilitation include the convenience that the process allows, particularly where witnesses may be called from other jurisdictions. However, the shortfalls were significant and potentially detrimental for clients. One issue in particular that was raised was safety; there may be instances in serious criminal matters where a client has to speak with a lawyer by telephone in front of other inmates. The nature of the crimes has the potential of making the accused a target by other inmates if the issues being discussed were highly delicate. Finally, sentiment was expressed by some that remote sentencing results in a certain reverence lost towards the accused when the sentencing is not in person because the accused does not have to directly ‘face’ the judge

when being sentenced. Some could perceive this as having the ability to create a different outcome in theory, although there is no suggestion that that is currently occurring in Saskatchewan.

The CREATE Justice survey indicated similar experiences expressed above. Those involved in the survey described their experiences with virtual facilitation as working well, with one respondent specifically mentioning WebEx as a success. More than one respondent highlighted positive experiences when equipment worked properly and when parties were in soundproof environments. One respondent noted that participant familiarity with a platform and participant ability to troubleshoot a platform was helpful. The challenges identified included background noise, bad microphone and webcam connection, loss of non-verbal communication through telephone appearance, and lack of participant familiarity with the platform. The main advantages of virtual facilitation included eliminating the need to transport participants, leading to decreases in cost and environmental impact, as well as increased timeliness and the reduction of delays in the system. Those surveyed stated a main limitation of virtual facilitation is the potential for loss of engagement that can lead individuals to be overlooked.

Overall, the consultees expressed that there were certainly advantages by utilizing telephone appearances particularly for routine docket matters. However, the disadvantages can have significant impacts on clients and should be considered due to the nature of criminal proceedings, and the outcomes the process can have on the accused and victims.

The matrix below entails areas to improve the Provincial Court process which we note is inhibited by legislation that insists on trials being held in person. The specific nature of criminal matters places particular emphasis on the personal impact principle on clients of this system which reveals the barriers of technology more fully than other court processes may display.

**Figure 3: Considerations for Virtual Facilitation at the Provincial Court**

	<b>Green = Good</b> <i>(worked well for most matters)</i>	<b>Yellow = Moderate</b> <i>(worked well for some matters)</i>	<b>Blue = Consider Improving</b> <i>(some matters presented challenges)</i>
<b>Types of Matters</b>	Criminal Law, Small Claims		
<b>Court Processes</b>	Both open and closed court proceedings with judge, litigants, and/or witnesses and members of the public Complexity of online court proceedings increases with number of participants and varies based on sophistication of participants		
<b>Accessibility</b>	Lawyers have easy access to technology with video requirements Witnesses and experts may not have access to technology with video requirements, may be required to telephone in, accessibility does increase due to reduced travel costs and ability to participate in hearings from anywhere Inmates may appear virtually, some issues with technology and moving in-mates within the facility, preserving confidentiality of lawyer discussions Jury trials have largely been adjourned due to gathering restrictions, difficulty of multi-participant online trials, and limitations in legislation requiring in-person juries		
<b>Human Competency</b>	Lawyers are generally competent in online hearings Witnesses, self-reps and experts may not be as competent with online hearings Participants are competent with the telephone		
<b>Legal Intricacy</b>	Credibility, honesty, and transparency are more difficult to evaluate in cross-examination online and through telephone, issues may be present with communication and preserving confidentiality of the process Individuals with English as a second language and self-reps may experience difficulties with understanding and respecting court in an online forum		
<b>Public Transparency</b>	Virtual facilitation is not as transparent as in-person hearings, bandwidth of video-conferencing software with many participants can be a concern		
<b>Personal Impact</b>	Some personal elements lost in cross-examination; body language of judge, witnesses, opposing counsel is absent Loss of substantial human element in criminal matters, especially sentencing		
<b>Cost</b>	Low due to reduced travel costs, but may increase duration of hearing due to technological difficulties and multiple participants		

***D. Summary of Experiences (2020-present): Mediations in Saskatchewan***

The interviews conducted with lawyers primarily focused on their engagement with the courts over the last two years, however some insights were gathered regarding lawyers’ participation in virtual facilitation of mediation sessions. It must be noted that these findings do not fully canvas the area of virtual mediations and future research should be conducted specific to mediation. Some benefits

were that virtual mediations were considered easy to schedule, clients can appear by videoconference from anywhere, virtual platforms can decrease animosity between parties, and effectively everyone who must be “in the room” can be. Mediation experiences can vary because the process is heavily dependent on how the mediator chooses to facilitate the session and there is no standardized delivery that can be expected, which makes the process highly variable.

Some of the challenges noted include technological delays that drastically increased the time spent in the session. There was an increase in time to bring up documents and complexities surrounding the potential high volumes of documents. Finally, and most importantly, lawyers noted that mediations lost some of the “human” aspects online and that this was palpable. The less personal format made for a less effective mediation process. On a practical note, there were also concerns about individuals being identified by their surroundings in their home or surreptitious recording of the mediation and this speaks to greater confidentiality and safety issues in general, particularly when mediating family disputes where there are allegations of domestic violence. However, these are contextual challenges that can be addressed by trained mediators and are noted to be considerations that attention should be paid to when conducting virtual mediations.

We heard directly from eleven mediators in the preliminary survey conducted by CREATE Justice, titled “Reflections on the impact of COVID-19 on online dispute resolution and adjudication” who noted that virtual mediations allow participants to feel more comfortable in their surroundings thus reducing stress and increasing the amount of time that parties are willing to invest in the process. The convenience and flexibility of not having to travel was highlighted by the mediators. Online platforms do allow parties to use breakout rooms to caucus and can utilize screen sharing to show documents, photos and videos. But, parties still have to be willing to ‘come to the table’ willing to engage, share information and listen. Utilizing videoconferences is preferable to the telephone



because facial expression and body language can be read. The mediator must meet a threshold of technological competence because they must know when and how to mute people, use breakout rooms, provide tech support, determine if others are ‘present’ but off screen, and facilitate the signing of documents and agreements digitally.

Some of the challenges identified by the mediators is that virtual facilitation can affect a mediator’s ability to ‘feel’ changes in peoples’ mood and parties can be too informal or distracting when they are participating from their home, such as having kids or pets in the background, which is particularly concerning if the mediator is mediating a family file where they do not want children overhearing anything from the mediation. Technological glitches such as poor sound quality, forgetting to unmute, rural internet connections, bad Wi-Fi, and limited band-width can all contribute to delay and require the mediator to be flexible and pivot during unforeseen circumstances.

Similar to the key advantages and benefits of virtual facilitation identified within the body of this paper, a great amount of time and money can be saved conducting mediations virtually as parties do not need to travel, find childcare, or take time off of work. Parties feel safer and more comfortable in their own home, particularly if interpersonal violence has been experienced.

The findings above from the CREATE Justice survey and interviews with lawyers suggest that mediators conducting virtual mediations must turn their minds to planning and preparation that is unique to the virtual context so that they can facilitate the mediation successfully in the face of potential technological glitches and challenges. Virtual mediations allow mediators to reach additional audiences that they could not reach previously due to geographical constraints, thus ideally leading to better outcomes for people experiencing legal disputes in Saskatchewan.

The matrix below is subjective based on the feedback from this set of mediators and lawyers interviewed in the process and is largely dependent on the experience level of the mediator with virtual mediation.

**Figure 4: Considerations for the Virtual Facilitation of Mediations**

	<b>Green = Good</b> <i>(worked well for most matters)</i>	<b>Yellow = Moderate</b> <i>(worked well for some matters)</i>	<b>Blue = Consider Improving</b> <i>(some matters presented challenges)</i>
<b>Types of Matters</b>	Administrative Law, Labour and Employment Law etc.		
<b>Processes</b>	Closed proceedings with only participants and mediator present		
<b>Accessibility</b>	Parties generally have access to technology with video requirements Witnesses and experts may not have access to technology with video requirements, may be required to telephone in, accessibility does increase due to reduced travel costs and ability to participate in mediation from anywhere		
<b>Human Competency</b>	Parties are generally competent in virtual facilitations, depending on mediator’s level of experience with the process online Witnesses and experts may not be as competent with online processes		
<b>Personal Impact</b>	Some personal elements lost in bargaining or negotiating between parties with inability to evaluate body language of mediator, opposing parties		
<b>Cost</b>	Low due to reduced travel costs, but may increase duration of process due to technological difficulties and multiple participants		

***E. Summary of Experiences (2020-present): Tribunals in Saskatchewan***

Only a small number of lawyers interviewed had appeared before tribunals and further research should be conducted in this area. The findings of the consultations revealed that lawyers who participated in the virtual facilitation of tribunals did not yield significantly different results than in person. Some minor technical issues regarding documents submitted and parties’ capacity to view all documents were mentioned. Conversely, one lawyer commented on how disruptions can occur in-person too, explaining how a hearing taking place at a hotel was disrupted by individuals

who were seeking directions. However, in general, the lawyers we spoke with did not take a strong stance regarding the effectiveness of virtual facilitation through tribunals.

Additional insight on experiences with tribunals during the pandemic from the CREATE Justice survey revealed that facilitating the attendance of parties located in different areas of the province is a benefit to virtual/remote processes as parties do not have to travel to Saskatoon or Regina for the hearings. Technological issues were also commonplace but have decreased in frequency as people become more familiar and comfortable with the technology. However, adjudicators have less opportunity to interact informally with the parties which loses the human element piece of dispute resolution, and it can feel less personal. The matrix below depicts that consultees did not have a specific preference for tribunals to be in person or online.

**Figure 5: Considerations for Virtual Facilitation at Tribunals/Administrative Bodies**

	<i>Green = Good</i> <i>(worked well for most matters)</i>	<i>Yellow = Moderate</i> <i>(worked well for some matters)</i>	<i>Blue = Consider Improving</i> <i>(some matters presented challenges)</i>
<b>Types of Matters</b>	Administrative Law, Labour and Employment Law, Traffic Law etc.		
<b>Processes</b>	Closed proceedings with only participants and decision-maker present		
<b>Accessibility</b>	Lawyers and other parties generally have easy access to technology with video requirements Witnesses and experts may not have access to technology with video requirements, may be required to telephone in, accessibility does increase due to reduced travel costs and ability to participate in hearings from anywhere in the world		
<b>Human Competency</b>	Parties are generally competent in online hearings, depending on level of sophistication Witnesses and experts may not be as competent with online processes		
<b>Legal Intricacy</b>	Lawyers and judges may or may not be present in process Lower deference to process than in-person		
<b>Personal Impact</b>	Some personal elements lost in bargaining or negotiating between parties with inability to evaluate body language of decision-maker, opposing parties		
<b>Cost</b>	Low due to reduced travel costs, but may increase duration of process due to technological difficulties and multiple participants		

## **V. THE PATH FORWARD: EMERGING FROM THE COVID-19 PANDEMIC**

In sum, our research indicates that the effectiveness of delivering justice processes via teleconference or videoconference is highly contextual. What works well for a docket matter before the Provincial Court might not work at all for an appearance at the Court of Appeal. Despite the context specificity, we were able to reach some broad conclusions about the general effectiveness of the current processes offered virtually, summarized in our matrices for each level of court, tribunals, and other dispute resolution processes above. We hope these preliminary findings will help stakeholders separate those processes that are working well in the virtual context from those that require further refinement or simply a return to their pre-pandemic, in-person state.

In addition to receiving feedback from stakeholders, we were also exposed to their thoughts about the path forward, which we have summarized below. Drawing on our interview findings and the literature we reviewed, we propose the following framework that could be used to predict the effectiveness of resolving a legal matter with the assistance of teleconference or videoconference technology.

### ***A. Suggestions from Justice Stakeholders***

In our conversations with lawyers, judges, and other stakeholders, we uncovered many insightful suggestions regarding how the justice system should think about the emergence from the pandemic. Most stakeholders we interviewed agreed that it would be a mistake to simply return to the old way of doing things. The world has changed, many suggested, and we should aim to build

on the progress that has been made. While this information is highly anecdotal, and should be read as such, we would be remiss if we did not include these thoughts for further discussion.

### **As the justice system emerges from the COVID-19 pandemic, what should we keep in mind?**

- Courts should not assume that litigants have the capacity to make appearances electronically; this is a significant barrier for a lot of people.
- We cannot lose the ‘human aspect’ of the law as we allow technology to play a bigger role.
- The way that lawyers practice may influence their willingness to utilize technology.
- Senior lawyers must continue to be mentors for junior lawyers even when much of the work is conducted outside of a physical office.
- Change needs to come from the top. If judges lead the way, the rest will follow.
- We must remain vigilant and acknowledge that online adjudication may not have the ‘teeth’ to undertake cases where the issue of human rights is in question.
- There is a ‘push and pull’ between access to justice, cost, and expediency. The right solutions will balance all three.

### ***B. A Preliminary Framework for Predicting the Effectiveness of Virtual Facilitation***

While we were able to engage a broad spectrum of lawyers and judges, the reality of the disparate nature of legal proceedings means that we were unable to comprehensively cover each kind of matter that may arise. In response to this shortcoming, we have drafted a preliminary framework for lawyers, judges, decision-makers, and other justice stakeholders to use when considering the implementation of virtual facilitation processes or digital transformation platforms in the future. The framework draws on findings from our preliminary research on the topic and incorporates conclusions drawn from the input of our consultees. The following questions can be asked by every participant in a matter to determine how accessibility, human competency, legal intricacy, personal

impact, public transparency, and cost may contribute to the ability of their issue to be handled remotely.<sup>48</sup> We hope that this customized approach will assist stakeholders in serving the specific needs of clients while retaining the benefits of technology in the justice sector.

### *i) The Threshold Questions: Accessibility and Human Competency*

While all the principles that we analyzed are important for predicting the success of a remote hearing, two threshold issues were raised consistently among the stakeholders we consulted: accessibility and human competency.

As one consultee aptly stated, if the parties do not possess a computer or a phone, a remote process will be rendered impossible. The same is true if the parties cannot reliably connect to the internet or cellular network for the duration of the proceedings. In addition, several consultees identified the importance of the courtroom as a private physical space to conduct a hearing. Even if the participants have access to the necessary hardware, it must be determined whether they have the physical, private space to use it effectively. Throughout our interviews, we heard stories of parties joining court proceedings from various locations, with varying degrees of success. Both the lack of hardware access and the lack of access to a private physical space were identified as nonstarters for the adoption of technology.<sup>49</sup>

#### **Sample Accessibility Questions**

1. Do the parties have access to the appropriate hardware required to facilitate the process?
2. If videoconference:
  - a. Do the parties have the necessary bandwidth to participate successfully in the proceedings?

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<sup>48</sup> The following framework is further summarized as a sample practice checklist in Appendix F. This section should be read against the backdrop of the reality of the current state of access to justice for many marginalized and vulnerable populations. Our summary of the relevant access to justice issues can be found in Appendix E.

<sup>49</sup> Puddister & Small, *supra* note 20, at 3.

- b. Do the parties have a private physical space in which they can join the proceedings?
3. If teleconference or phone:
  - a. Do the parties have reliable connectivity to participate successfully in the proceedings?
  - b. Do the parties have a private physical space in which they can join the proceedings?

The second half of the proposed threshold question deals with the parties’ ability to use the technology required. In its report, *No Turning Back: CBA Task Force Report on Justice Issues Arising from COVID-19*, the CBA Task Force notes that technological literacy presents a barrier to the effectiveness of remote hearings, especially in elderly and vulnerable populations.<sup>50</sup> The CBA Task Force’s conclusion was also largely born out in our interviews, with lawyers reporting varying success in mitigating the issue of technological literacy through training and technical support.

#### Sample Human Competency Questions

1. Do the parties understand how to use the proposed remote hearing technology?
2. Can training be made available to the parties in advance of the process?
3. Will the parties have access to technological support before and during the remote proceedings?
4. Does the process facilitator have a deep understanding of the proposed remote hearing technology?
5. Will the process facilitator have access to technological support during the remote proceedings?

#### *ii) The Balancing Factors: Legal Intricacy, Personal Impact, and Public Transparency*

Once the threshold requirements of accessibility and human competency have been established, we propose that the next set of considerations—legal intricacy, personal impact, and public transparency—be assessed to help determine the effectiveness of a prospective virtual facilitation process. These factors were raised by stakeholders as important considerations to be analysed in

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<sup>50</sup> *No Turning Back*, *supra* note 4.

the context of the specific matter to determine the appropriateness of virtual facilitation for a given process. Legal intricacy, personal impact, and public transparency are grouped together in this section as we heard consistently that concerns in one area could be overcome by gains in another.

The first consideration is the legal complexity inherent in the matter. The literature reviewed displayed a broad consensus that the simpler the legal matter, the more appropriate it is to be conducted with the aid of technology.<sup>51</sup> The interviews made it clear that the two most important considerations for complexity were the inclusion of witnesses and evidence within the process. The analysis, however, is not entirely straightforward as we heard competing considerations from several lawyers interviewed. For example, processes with many witnesses are *typically* more difficult to conduct remotely. However, if the witnesses are sophisticated and can appear from out of province without the added complexity of travel arrangements, those mitigating factors might outweigh sheer witness volume, making remote proceedings worthwhile.

### Sample Legal Intricacy Questions

1. Are there witnesses involved in the matter?
  - a. How many?
  - b. How sophisticated are they?
  - c. Can their credibility be measured through the remote medium in question?
  - d. Will they need to be cross-examined?
  - e. Can a cross-examination be reasonably accommodated through the remote medium in question?
2. Is there evidence involved in the matter?
  - a. How much and how important will it be to the matter?
  - b. What kind of evidence?
  - c. Can the evidence be effectively presented through the remote medium in question?

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<sup>51</sup> See e.g. Salter & Thompson, *supra* note 13 at 125.



The importance of personal impact is difficult to place in a framework but cannot be overstated. For example, we had lawyers describe that in the pursuit of deterrence, the solemnity of the court proceedings could be as powerful as the ultimate ruling for some clients. In this way, a remote hearing might not live up to the in-person experience. However, we also heard that during family matters, parties may feel more comfortable participating in a remote setting without the stress of proximity to an adverse party. In this way, remote settings can promote psychological safety.

#### Sample Personal Impact Questions

1. How personally important is the matter to the parties?
2. Will the parties feel safer appearing remotely?
3. How important is the solemnity of the proceedings to the resolution of the conflict?

Next, several lawyers mentioned the potential erosion of the open court principle when conducting remote hearings. Where the public might typically be able to stride into a courtroom and observe the proceedings, remote hearings require an element of logistics to allow access to the public.

#### Sample Public Transparency Questions

1. Is public access to the process important or required?
2. Can public access to the process be properly facilitated with the technology in question?

#### *iii) The Final Consideration: Cost*

Finally, the decision-maker needs to weigh the relative costs, both in time and money, for the process to proceed remotely through virtual facilitation or a digital transformation process. Throughout our interviews, we heard lawyers suggest that some virtual facilitation processes had provided cost savings for lawyers—and by extension clients, while other remote hearings inflated the cost. For example, a move to virtual facilitation for appellate matters before the Court of Appeal may lead to cost savings for northern lawyers who might have otherwise had to arrange a multi-

day trip to Regina. A shift to a remote process in this case may result in time and money saved. However, the opposite might be true of a civil matter before the lower courts. In this case, the complexity of managing multiple witnesses, and the increased chance of technical difficulties that comes with it, could extend the length of the hearing by several days, thus increasing the time and money required to resolve the dispute.

As above, our suggestion is that cost be analysed along a spectrum, and that its impact be balanced against the other factors at play. A significant process improvement identified by the previous factors may outweigh a costly remote setup. Likewise, significant time and cost savings can be overridden by a deterioration of the overall effectiveness and fairness of the process.

#### Sample Cost Questions

1. If the proceedings were to take place in-person, what would the cost be, in time and money?
2. If the proceedings were to take place remotely, what would the cost be, in time and money?
3. Who gains the most from cost savings, and is that fair?

Towards the end of our project, one consultee brought the following saying, often repeated in access to justice reform projects, to our attention: *Nothing about us, without us*. The refrain stands for the necessity of user consultation in the pursuit of finding effective solutions. While we have taken the first step in preparing this draft framework, there is still work to be done, including further consultations with users who are most impacted by the decision to move court processes toward virtual facilitation. In Appendix G, readers will find a general outline for the continuation of this important work and proposed ways in which progress might be measured. We invite readers to leverage their roles in the legal community to undertake the proposed steps that are appropriate within their organizations.

## VI. CONCLUSION

Throughout the course of the COVID-19 pandemic, the world has been presented with numerous challenges. Among them, and most relevant to our discussion, is the continued provision of essential legal services without the ability to gather in-person. The justice system in Canada was quick to adopt teleconference and videoconference technology to continue the provision of hearings and other adjudicative processes throughout the pandemic. During this shift, we have seen varying levels of success, coupled with plenty of opportunity.

To advance the conversation on the suitability of virtual facilitation and digital transformation of the justice sector, we analysed the satisfaction and perceived success of virtual facilitation of court processes implemented in Saskatchewan. We conducted interviews with lawyers, judges, and other justice stakeholders, through which, we provided anecdotal evidence of the success of the transition and drew several broad conclusions. Through our research, we found that the success of online justice processes is highly contextual. Whether or not decision-makers should deal with a legal dispute via teleconference or videoconference platforms going forward should be, to the extent that is possible, decided on a case-by-case basis with consent of the parties. Virtual facilitation and digital transformation of the justice sector should consider and uphold key factors such as accessibility, human competency, legal intricacy, public transparency, personal impact, and cost. We hope this paper and the associated proposed tools will help stakeholders identify which court processes should be digitally transformed and which processes should not be to facilitate a more efficient and accessible justice system both in person and virtually for all involved.

## **Appendix A: Literature Review Summaries**

### **Kate Puddister and Tamara A Small, "Trial by Zoom? The Response to COVID-19 by Canada's Courts" (2020) 53:2 Can J Polit Sci 1.**

Puddister and Small touch on the concepts of open court principles, court reporting, and technological changes to adjudication processes in Canadian courts. The authors state that: "The story of Canadian courts and technology is, at best, a story of slow adaptation, and at worse, one of active resistance" (at 2). Throughout the pandemic, the shift to online services has been swift, with "[a]lmost 91 per cent of cases courts reviewed are hearing matters deemed 'urgent' and 'emergency' via technology" (at 2). This included some family matters, criminal matters, bail, or release from custody. The author argues that appellate courts should be able to transition to online adjudication more easily because typically they only involve oral and written submissions from counsel.

Comparatively, the cautious approach in Canada is quite different than in the USA. For example, Texas issued an emergency order that allows courts to conduct civil or criminal proceedings through teleconference or videoconference (except for jury trials). This article discusses the idea of a digital divide, the quality and reliability of the technology used, and the inequalities that can exist between users who have access to quality digital technologies, and requisite skill and competence (at 3). In the Canadian context, these issues extend to Canadians in rural and remote areas, and Indigenous communities. As Justice Pringle of the Ontario Court of Justice noted: "One of the silver linings...we feel that we have been booted into the 21st century of technology by this crisis" (at 4).

### **Colin Rule, "Online Dispute Resolution and the Future of Justice" (2020) 16 Ann Rev L & Soc Sci 277.**

Rule believes that ODR has the potential to become the new default to achieving fast and fair resolution, but there are a lot of outstanding questions that need to be explored. Rule provides a bit of history around ODR, how technology is changing the law, and that long delays are simply out of sync with how we live in a digitalized age. Litigants desire faster, cheaper, and more efficient resolution. The common framework for designing ODR processes is the DNMEA model, which is diagnosis, negotiation, mediation, evaluation, and appeal. The author discusses each of these elements in detail and how issues are diagnosed, where 'humans' play a role in the process, how zones of potential agreement can be identified, and how effective communications can be achieved through asynchronous processes.

The author discusses the concept of the 'fourth party' in ODR, which is the metaphor that refers to the role of technology in the ODR process. The role of this fourth party can vary significantly depending on the type of ODR process used, but its capabilities are theoretically endless. Ethical standards related to ODR have been examined by the ICODR (The International Council for Online Dispute Resolution, which is an international non-profit).

**Janet K Martinez, "Designing Online Dispute Resolution" (2020) J Disp Resol 135.**

Martinez provides an in-depth analysis of dispute system design and provides a framework for Dispute System Design (DSD) based on an ODR panel review. The DSD framework includes analyzing goals, identifying stakeholders (includes the fourth party), context and cultural expectations, process and structure, resources, success, accountability, and learning.

Below is an ODR Design Example from the article:

DSD Element	Courts & Tribunals
Goals	Efficiency, streamlined user experience, and justice
Stakeholders	Courts, court staff, judges, the public, counsel, and litigants
Context and Culture	Public, diverse, formal, various levels of literacy, education, and comfort with technology
Processes	Settlement, mediation, and trial
Resources	Public funds, public employees, supporting non-profits
Evaluation	Internal and external evaluation programs and court satisfaction data
Designer	Court with external vendors and partners
Process Selection for Individual Case	Opt-in by filer/plaintiff

**Richard Susskind, *Online Courts and the Future of Justice* (Oxford: Oxford University Press, 2019).**

*Online Courts and the Future of Justice* was published immediately before the onset of the pandemic. Susskind has since released a paperback edition that begins with a comment on the significant shift toward delivering court services via telephone or teleconference. The focus of *Online Courts*, however, is relevant with or without discussion of the pandemic as Susskind is advocating for services that reach far beyond the provision of virtual court appearances. When Susskind thinks of online courts, he envisions two streams of internet-enabled court services that he calls online judging and extended courts. These services would be largely focused on resolving civil matters. Online judging is “the determination of cases by human judges...not in physical courtrooms. Instead, evidence and argument are submitted through an online service” (at 6). When judges deliver decisions in online judging, they do so in writing, without the need for a simultaneous gathering of the parties (at 6). When discussing extended courts, Susskind envisions “tools...that can help court users understand relevant law and the options available to them...[Extended courts] can also offer various forms of non-judicial settlement such as negotiation and early neutral evaluation” (at 6).

The solution that Susskind advances has several stages. First, online courts would fill the gaps in users' legal knowledge. An extended court service would therefore begin with a triage stage to "assess...the legal grievance" and "offer substantive legal advice" (at 121). Once a claim is identified, the case would be handled by a case officer that would attempt to settle the matter using online negotiation and mediation tools without the assistance of a judge (at 136). Susskind believes that 90% of civil matters could be resolved at this stage. For the remaining cases that are unresolved, the case would proceed to online judging. Here, the parties would submit all the relevant evidentiary documentation and written arguments to a judge who decides the case "on the papers" alone (at 144). The entire system, Susskind predicts, will eventually be navigable without the representation of a lawyer (at 153).

*Online Courts* also contains a discussion of some of the potential drawbacks of adopting internet-enabled legal services. Susskind covers the possibilities that the systems might widen the socio-economic gap (at 187-8), reduce transparency into the workings of the justice system (at 193-5), hamper the ability to conduct a fair trial (at 201), exclude anybody that lacks internet connectivity (at 215-6), and increase the volume of litigation through ease-of-use (at 223-5). While Susskind dismisses each objection with specific counterarguments, he primarily relies on two general assertions. First, Susskind believes that opponents of online courts fall into the trap of dismissing anything short of perfection. Second, he believes that opponents fail to take seriously imaginative solutions that look nothing like the current system.

Throughout the book, Susskind references seven principles of justice that he uses to measure the effectiveness of his proposed system. A similar framework could be useful for our purposes when examining systems that exist today. The seven principles are "substantive justice (fair decisions), procedural justice (fair process), open justice (transparent), distributive justice (accessible to all), proportionate justice (appropriately balanced), enforceable justice (backed by the state), and sustainable justice (sufficiently resourced)" (at 73). Susskind is also careful to orient the reader towards what he terms "outcome thinking" when imagining the future of court services. Instead of concerning ourselves with what a court *is*, we ought to think about what a court *does* (at 53).

**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.**

Salter and Thompson discuss how the justice system can be effectively reoriented toward users. This requires an understanding of the interests of users. To do this, court providers must address procedural barriers such as travelling to forums, being available at particular times, cost of lost wages, childcare, and travel expenses to participate in particular justice related activities (at 125). In addition, one of the primary pain points related to the justice system for users is delay. The authors examine a case study of the CRT in BC and provide much insight into its processes, including an online service provided through a platform called the 'Solution Explorer' that assists a user in understanding their dispute and provides self-help options to the user (at 129). If a case is started and cannot be negotiated, facilitation occurs at the CRT through an asynchronous web-based platform (at 132). Finally, adjudication of the dispute can also take place remotely and asynchronously (at 134).

## **Appendix B: Existing Innovations Summary**

**ADR Institute of Canada:** ADRIC has a team that monitors the global ODR and makes recommendations to ensure that they can be a leader in the ODR landscape. The ADRIC task force (ODRTC) has recommended an adoption of the principles of ODR made by the National Centre of Technology and Dispute Resolution. The principles listed are; Accessibility; Accountability; Competence; Confidentiality; Empowerment; Equality; Fairness; Honesty; Impartiality ; Informed Participation; Innovation; Integration ; Legal Obligation; Neutrality; Protection from Harm; Security and; Transparency.

**SRNL’s Justice Tech Entrepreneurs:** The Justice Tech Working Group was formed to provide information and resources to justice tech entrepreneurs as they develop products and services for self-represented litigants, courts, legal aid, pro bono, and bar programmes. The group aims to foster a problem-solving and knowledge sharing community.

**Guiding Principles for Post-Pandemic Court Technology (CCJ/COSCA 2020):** This initiative was published in July of 2020, by the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) with the goal of offering guidance to state courts as they navigate remote and virtual operations. As mentioned in their mission statement; “this national emergency led state courts to embrace online platforms like never before... with all of the advancements, court should not just rest on the accomplishments of the past quarter but should view this moment as an extraordinary opportunity to deliver better justice.”

**UK “Cyber Courts”:** The UK developed “cyber courts” in the year 2001. Money Claim Online offers online courts and tribunal services for claimants and defendants. Additionally, in 2006, Possession Claim Online was implemented, where individuals can bring an action to repossess property if someone is owed rent money, mortgage payments, or the tenant or mortgage holder refuses to pay.

**British Columbia Civil Resolution Tribunal:** The first of its kind in Canada, BC boasts this quasi-judicial, independent tribunal that operates under the Civil Resolution Tribunal Act (CRTA). The CRT currently handles a range of strata property disputes of any amount, small claims up to \$5,000, certain motor vehicle personal injury issues (including accident benefit disputes), as well as disputes involving incorporated societies and cooperative organizations for any amount.

**Vancouver International Arbitration Centre:** This arbitration platform was launched on December 10, 2021 and allows disputants to streamline a resolution for domestic and international commercial disputes. The claimant must complete an intake phase, submit and upload the Notice to Arbitration, upload the contract/agreement and pay all the commencement fees. VanIAC will then contact the claimant within 24 hours and a commencement letter will be posted on the platform.

**Manitoba’s plan to implement an “Integrated Case Management” system:** On June 24, 2020 the Manitoba government announced that they were “seeking vendor bids” to construct an Integrated Case Management system that would increase efficiency and access to justice in

Manitoba. The initiative proposed would be a “single province-wide system” that would enable online access to court records, ODR, and minimize the use of paper.

**Alberta Innovations:** In response to the pandemic, Alberta has introduced remote court through videoconferencing; this includes a family dispute resolution process. The court established process which came into effect on May 13<sup>th</sup> 2020, handles family cases in a highly efficient way that supports families experiencing the hardship of a legal battle.

**Ontario Dispute Adjudication for Construction Contracts (ODACC):** The ODACC has the capacity to conduct video-hearings for adjudications to make decision under the *Construction Act*.

**The Condominium Authority Tribunal (CAT):** This is the first fully online tribunal in Ontario. The CAT uses an online dispute resolution system (CAT-ODR) in order to help people resolve certain types of condominium-related disputes “conveniently, quickly, and affordably.” The 3-stage dispute resolution services are offered at a TOTAL cost of \$200.

**Community Legal Education Ontario (CLEO) current research work:** CLEO has four research projects underway: Evolving Legal Services Research Project, Measuring Outcomes and Impacts of Interactive Tools, Regulating Technologies to Advance Access to Justice, and Making “Smart” Forms Work for People. The most relevant is the Measuring Outcomes and Impacts of Interactive Tools project where they are developing an evaluation framework for interactive tools that support people that are completing court forms online and other law-related forms.

**PARLe:** Quebec’s “Online Dispute Resolution Support Platform” provides consumers and merchants with a fast and free service to resolve disputes. PARLe is a “neutral, private and secure environment in which to negotiate.” The results in 2016 boasted a “nearly” 70% settlement rate in disputes and a user satisfactory rate of “nearly 90%.”

**Nova Scotia Dispute Resolution Pilot Program:** The program held the objective of resolving “simple family law issues in a safe, easy and affordable manner,” and to increase access to justice. In its genesis, the program only allowed individuals who were represented by legal counsel. The goal is to move to eventually allowing self-represented litigants to utilize the platform.



## Appendix C: Interview Guide

**Thank you for your participation in the interview process for the 2022 Dean’s Forum on Dispute Resolution and Access to Justice (the Dean’s Forum) initiative.** Your thoughts and experiences are fundamental to moving our project forward, and we are very excited to meet with you.<sup>52</sup>

**This year’s topic is online adjudication.** Our goal is to provide insight into the experiences of justice community stakeholders and identify principles that are key to developing effective online adjudication processes and practices.

**If possible, we ask you to please consider the following question before our scheduled meeting to ensure we make the most of the time.** We will discuss each question in the interview, so there is no need to submit your answers beforehand.

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**1. Below is a list of principles that have been adapted from the International Council for Online Dispute Resolution (ICODR) which are essential for developing quality Online Dispute Resolution processes and practices. In your experience with online adjudication processes, where have you seen successes and where have you seen concerns regarding these principles?**

- **Accessibility:** Online adjudication must be easy for parties to find and participate in and not limit their right to representation. Online adjudication should be available through both mobile and desktop channels, minimize costs to participants, and be easily accessed by people with different physical ability levels.
- **Human Competency:** Online adjudication providers must have the relevant expertise in dispute resolution, legal, technical execution, language, and culture required to deliver competent, effective services in their target areas. Online adjudication services must be timely and use participant time efficiently.
- **Confidentiality:** Online adjudication must maintain the confidentiality of party communications in line with policies that must be made public around a) who will see what data, and b) how that data can be used.
- **Fairness/Impartiality/Equality:** Online adjudication must treat all parties equally and in line with due process, without bias or benefits for or against individuals, groups, or entities. Conflicts of interest of providers, participants, and system administrators must be disclosed in advance of commencement of online adjudication services.
- **Forward Integration:** Online adjudication presents more than another medium for court, but opportunities for further integration into the justice system to resolve disputes more efficiently and in a more cost-effective way. Implementation of online programs is a sustainable solution to integrate into society in all aspects to reduce access to justice concerns and expedite the administration of justice.
- **Legal Intricacies & Accountability:** Online adjudication must abide by and uphold the laws in all relevant jurisdictions. Online adjudication systems must be continuously accountable to the institutions, legal frameworks, and communities that they serve.
- **Transparency:** Online adjudication providers must explicitly disclose in advance a) the form and enforceability of dispute resolution processes and outcomes, and b) the risks and benefits of participation. Data in ODR must be gathered, managed, and presented in ways to ensure it is not misrepresented or out of context.

*\* Principles are adapted from the ICODR standards. For more information please see:  
(<https://icodr.org/standards/>)*

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<sup>52</sup> This interview guide was slightly adjusted for use with other consultees including judges and other justice stakeholders.

## **Interview Guide:**

### **1. Online/Remote Experience During COVID-19**

- a. What types of engagements have you had with the courts over the past two years?
  - i. Which courts and for which type of matters?
- b. Overall, how would you assess or evaluate your experience at the courts over the last two years resolving disputes remotely?
- c. What technology have you engaged with relating to these matters?
  - i. Telephone: What challenges have you encountered while engaged in court processes over the telephone?
  - ii. Videoconference: What challenges have you encountered while engaged in court processes over videoconference tools like WebEx and Zoom?
- d. What do you perceive as some of the benefits in participating in remote/online court processes?

### **2. Principles Based Questioning**

- a. Reflecting on your experiences over the last two years and what we have discussed previously, which sticks with you in your mind as the greatest success?

Probing questions:

1. Why?
2. How did it impact your client? (client meetings, preferences, level of participation, satisfaction with the process)
3. How did it impact you?
4. How did it impact the process or the outcome?
5. What is one thing that contributed greatly to the success that you think could be replicated in future processes?

- b. Reflecting on your experiences over the last two years and what we have discussed previously, which sticks with you in your mind as the greatest failure?

Probing questions:

1. Why?
2. How did it impact your client?
3. How did it impact you?
4. How did it impact the process or the outcome?
5. What would you do differently?

### **3. Principles Exercise**

Please review the list of principles on page five for this exercise. During the interview we will ask the participants to look at the list of principles and we will ask the following questions:

1. From the list of principles identified in the literature that are suggested to contribute to successful online dispute resolution processes, which of these principles resonate with you the most?
2. Do you have any examples or experiences that speak to any of these principles that we have identified from the literature?
3. Do you think any key principles are missing?

### **4. Closing**

- a. Is there anything else that you want to tell me or thought that I would ask?

## **Appendix D: List of Consultees**

### **Lawyers**

Beau Atkins, Evolve Family Law  
Bradley Berg, Blake, Cassels & Graydon LLP\*  
Brady Knight, Oykhman Criminal Defence  
Charmaine Panko, QC, Panko Collaborative Law & Mediation  
Dale Brown, Saskatchewan Government Insurance (SGI)\*  
David Thera, QC, McKercher\*  
Doug Richardson, QC  
James Vogel, QC, Nychuk & Company\*  
Jane Smith, Saskatoon Litigator\*  
David Stack, QC, McKercher LLP\*  
Jason Clayards, McKercher LLP\*  
Jennifer Pereira, QC, Robertson Stromberg\*  
Larry Seiferling, Seiferling Law  
Lisa Watson, Peszko & Watson\*  
Max Bilson, Ministry of Justice, Civil Law Branch\*  
Ronald Parchomchuk, QC, Parchomchuk Sherdahl Hunter\*  
Sean Sinclair, Robertson Stromberg\*  
Steve Seiferling, Seiferling Law  
Tyne Hagey, Legal Aid Saskatchewan\*

\* Lawyers with an asterisk appeared at the Court of Appeal remotely during COVID-19

### **Judges**

The Honourable Chief Justice R.G. Richards (Court of Appeal)  
The Honourable Mr. Justice Jeffery D. Kalmakoff (Court of Appeal)  
The Honourable Mr. Justice Robert W. Leurer (Court of Appeal)  
The Honourable Madam Justice Georgina R. Jackson (Court of Appeal)  
The Honourable Mr. Justice C.D. Clackson (Court of Queen's Bench)  
The Honourable Mr. Justice D.B. Konkin (Court of Queen's Bench)  
The Honourable Judge S. Anand, Associate Chief Judge (Provincial Court)  
The Honourable Judge L. Wieggers, Associate Chief Judge (Provincial Court)

### **Other Justice Stakeholders**

Carly Romanow, CLASSIC  
Chantelle Johnson, CLASSIC  
Glen Gardner, QC, Deputy Minister of Justice and Deputy Attorney General  
Julie Sobowale, Law Society of Saskatchewan  
Leah Howie, Law Reform Commission of Saskatchewan  
Lora Bansley, Ministry of Justice  
Martin Phillipson, University of Saskatchewan College of Law  
Melanie Hodges Neufeld, Ministry of Justice  
Sarah Buhler, University of Saskatchewan College of Law  
Tim Brown, QC, Law Society of Saskatchewan

## Appendix E: Access to Justice Discussion

*We hope the following findings will provide helpful context in using the practice checklist in Appendix F, especially as the threshold questions are concerned.*

In a 2016 report, the World Justice Index gave Canada “high marks”<sup>53</sup> in every single category measuring the justice system, with the exception of “civil justice.”<sup>54</sup> The categories examined included, inter alia; accessibility and affordability, unreasonable delay, and discrimination.<sup>55</sup> The Dean’s Forum was tasked with discussing the topic of access to justice and its relationship with online dispute resolution and adjudication. Access to justice is not easily defined and what access to justice “looks like” can vary from person to person. Through interviews with participants, access to justice considerations were identified by many client-facing lawyers. Four key themes emerged related to access to justice by the participants: i) cost, ii) personal impact, iii) capacity of vulnerable groups to access and participate in online/remote court processes, and iv) the impact on open court principles.

### *i) Cost*

In our interviews with lawyers, a common refrain was the concern surrounding costs for litigants. For many Canadians, a significant barrier to dealing with a legal matter is the cost. The average cost of the traditional route of the litigation and trial process in Canada is between \$10,000 and \$25,000.<sup>56</sup> This makes the already daunting process of a trial even more intimidating. The lawyers consulted were all extremely conscious of the costs for litigants and hopeful that online adjudication could mean less time spent on each case, and therefore lower costs for clients.

### *ii) Personal Impact*

One lawyer that interviewed made note that their fear in introducing more technology into the practice of law was the potential loss of personal impact and reverence for the process. They asserted that we, as public servants, must remain cognizant of the reasons we went into legal

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<sup>53</sup> Maxwell Jenkins, “Access to justice: The Great Gap in Canada’s Justice System” (October 2017) at 5 online (pdf): *Edmonton Social Planning Council* <edmontonsocialplanning.ca/wp-content/uploads/2017/10/edmontonsocialplanning.ca\_joomlatools-files\_docman-files\_ESPC-Documents\_PUBLICATIONS\_A.06.G-REPORTS\_ESPC-REPORT\_ACCESS-TO-JUSTICE\_20170930.pdf>, citing Juan Carlos Botero et al, “World Justice Project Rule of Law Index 2016” (2016) at 40, 67 online (pdf): *World Justice Project* <worldjusticeproject.org/sites/default/files/documents/RoLI\_Final-Digital\_0.pdf>.

<sup>54</sup> *Ibid* at 5.

<sup>55</sup> *Ibid* at 12.

<sup>56</sup> Legal Line, “Costs of Bringing a Lawsuit in Saskatchewan” (2022) online (blog): <legalline.ca/legal-answers/costs-of-bringing-a-lawsuit>.

practice in the first place. It is, first, our obligation to help the public see justice realized. For some, the barrier to seeing their legal matters settled is the daunting nature of the court system. Online adjudication may be less personal, but it may also be less intimidating for litigants. A balance must be weighed in determining what the best possible outcomes may be.

*iii) Capacity of Vulnerable Groups to Access and Participate in Remote Processes*

Another lawyer explained that many clients that belong to vulnerable groups struggle with access. While everyone has a phone, they may only have minutes which makes it difficult to have meaningful interactions. Further, there is no way to video chat with these clients so the capacity of vulnerable groups to access and participate in online/remote court processes decreases. Many vulnerable groups use public devices and Wi-Fi such as the computers at the library. Currently, Legal Aid has lost a lot of clients because they did not have physical court appearances to meet with these clients. Also, the financial feasibility for clients makes things difficult. For lawyers, participating in online/remote court processes saves an immense amount of time. But clients are impacted more negatively – most clients are on social assistance, or income is such that they would not qualify. This showcases that the online/remote court processes have not been the most effective for vulnerable groups and a balance needs to be determined to better meet everyone's needs.

*iv) The Impact of Remote Processes on Open Court Principles*

Many of the lawyers interviewed perceived that the open court principle, which means that court proceedings are open and available to the public, has been eroded for remote/online court processes. One lawyer noted how public attendance in court is one of the primary ways that the public is educated about the justice system and there is a lack of processes available for average citizens to follow to access the court, especially for those who find themselves as self-represented individuals. Similarly, lawyers interviewed indicated that they are responsible for dialing their client into the proceeding because conference lines are not to be shared among litigants or the public. Currently, on the Courts of Saskatchewan website, the Court of Appeal is the only level of court that has a notice on its court schedule webpage that states that you may contact the registrar if you wish to attend or observe a virtual hearing.

## Appendix F: Remote Process Effectiveness – Sample Practice Checklist

<b>Threshold Considerations</b> (the following considerations <i>must</i> be met to proceed with a remote process)	
<b>Accessibility</b>	
<input type="checkbox"/> Parties possess or have reliable access to teleconference/videoconference hardware (computer, microphone, speakers/headphones, webcam, telephone etc.)	
<input type="checkbox"/> Parties possess or have reliable access to the necessary internet bandwidth or cellular connectivity required to connect to the proceedings	
<input type="checkbox"/> Parties possess or have reliable access to a private physical space that is suitable for the proceedings	
<b>Human Competency</b>	
<input type="checkbox"/> Parties have demonstrated the technical competency necessary to access and fully participate in the proceedings	
<input type="checkbox"/> Parties have been offered technical support and/or training prior to the proceedings	
<input type="checkbox"/> Parties will have access to technical support throughout the proceedings	
<b>Balancing Considerations</b> (the following considerations ought to be balanced to identify possible gains and losses from a remote process)	
<b>Legal Intricacy</b>	
<i>Considerations in favour of a remote process</i>	<i>Considerations against a remote process</i>
<input type="checkbox"/> The matter involves few, if any, witnesses <input type="checkbox"/> The witnesses involved are sophisticated and accustomed to testifying remotely <input type="checkbox"/> The credibility of witnesses is not central to the matter <input type="checkbox"/> The witnesses are not subject to extensive cross-examination <input type="checkbox"/> The matter involves little, if any, consideration of evidence	<input type="checkbox"/> The matter involves a significant number of witnesses <input type="checkbox"/> The witnesses involved are unsophisticated and unaccustomed to testifying remotely <input type="checkbox"/> The credibility of witnesses is central to the matter <input type="checkbox"/> The witnesses will be subject to extensive cross-examination

<input type="checkbox"/> The evidence involved is largely written documentation and can be easily transmitted electronically	<input type="checkbox"/> The matter involves significant consideration of evidence <input type="checkbox"/> The evidence involved is complicated and cannot be easily transmitted electronically
<b>Personal Impact</b>	
<i>Considerations in favour of a remote process</i>	<i>Considerations against a remote process</i>
<input type="checkbox"/> The matter is routine and has a low personal impact on the parties <input type="checkbox"/> The parties will feel safer appearing remotely	<input type="checkbox"/> The matter is highly sensitive and personally important to the parties <input type="checkbox"/> The solemnity of the process is important to fulfil the goal of recidivism
<b>Public Transparency</b>	
<i>Considerations in favour of a remote process</i>	<i>Considerations against a remote process</i>
<input type="checkbox"/> Public access to the process is not important or required <input type="checkbox"/> Public access to the process can be facilitated by providing access to the remote proceedings	<input type="checkbox"/> Public access to the process is important or required <input type="checkbox"/> Public access to the process cannot be easily facilitated by providing access to the remote proceedings
<b>Final Consideration</b> (here, the findings from the balancing consideration are compared to the potential expense or cost savings that come with a remote process)	
<b>Cost</b>	
<i>Considerations in favour of a remote process</i>	<i>Considerations against a remote process</i>
<input type="checkbox"/> Remote proceedings present significant cost savings for the parties involved	<input type="checkbox"/> Remote proceedings increase the cost of attending the process for the parties involved <input type="checkbox"/> One party stands to gain or lose significantly more than the others in proceeding remotely

## Appendix G: Next Steps and Measuring Success

	<b>Proposed Activity</b>	<b>Measurement of Success</b>
<b>SHORT TERM</b>	A2J Network review the proposed framework and proposed practice checklist with appropriate stakeholders	Reviewing stakeholders are representative of the population that will make use of, and have an interest in the use of, the framework and checklist
	A2J Network revise the proposed framework and proposed practice checklist according to feedback	Reviewing stakeholders are reengaged to measure the inclusion of their feedback in the revised framework and checklist
	Post the revised practice checklist on the Law Society of Saskatchewan website and promote its use	Track page visits and downloads to measure use  Engage practitioners for ongoing feedback on usability
<b>MEDIUM TERM</b>	Courts review the current measures proceeding by virtual facilitation against the revised practice checklist	Clear decisions about matters to continue as virtual facilitation and matters to move back into in-person processes
	Courts to utilize the revised practice checklist in making decisions regarding new matters for virtual facilitation	Clear decisions about suitable new matters to proceed as virtual facilitation
<b>LONG TERM</b>	A2J Network to continue to use the Dean’s Forum on Access to Justice to introduce further projects that promote the digital transformation of the justice system in Saskatchewan	Future Dean’s Forum topics continue to include an element that considers technology
	Courts to continue to consider and implement digital transformation projects that promote access to justice	Cost of pursuing justice decreases  Vulnerable and marginalized populations gain access to the system