

A MODEST AND PRINCIPLED PROPOSAL FOR CIVIL JUSTICE REFORM IN ONTARIO

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Ontario's civil justice system is in crisis. The current system does not provide for "access to justice" under any sensible definition of the term and is increasingly inaccessible even for Ontario's middle class. Consequently, lawyers and pundits have called for a massive increase in funding to the justice system. Such funding might address perceived needs such as modernization of the system, expanded legal aid, and pro bono programs. Rather than add to calls for increased funding, we trace out reform efforts that are unlikely to require a significant uptick in governmental investment.

Specifically, we advocate for: the creation of an Ontario Civil Resolution Tribunal; reforms to the jurisdiction and operation of the Ontario Small Claims Court; reforms to the Simplified Procedure; the introduction of what American jurists have termed "rocket docket" procedures for claims over \$500,000; and multiple reforms to appellate procedures. In pursuing reforms to the civil justice system, we contend that the legislature and judiciary must keep in mind three underlying principles: (1) justice is an essential public service; (2) only through transparency can the judiciary attract public confidence; and (3) the justice system must be adaptive and flexible in implementing innovative policy changes.

Le système ontarien de justice civile est en crise. Dans son état actuel, il ne garantit pas un « accès à la justice » digne d'une définition raisonnable du terme, et il devient de plus en plus inaccessible même pour les Ontariens de la classe moyenne. Par conséquent, les juristes et les décideurs réclament un financement accru du système de justice. Ce financement pourrait répondre à des besoins perçus, tels que la modernisation du système, l'expansion de l'aide juridique et les programmes de justice bénévole. Plutôt que d'allonger la liste des appels à un financement majoré, les auteurs tracent les axes d'une réforme qui ne devrait pas demander de hausses importantes du financement étatique.

Plus précisément, les réformes envisagées incluent la création d'un tribunal de règlement en droit civil de l'Ontario, des modifications touchant

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la compétence et le fonctionnement de la Cour des petites créances, une réforme de la procédure simplifiée, l'introduction d'un système de mise au rôle accélérée pour les créances supérieures à 500 000 \$ (procédure connue sous le nom de « rocket docket » aux États-Unis) », ainsi que diverses réformes pour les procédures d'appel. En réclamant cette transformation du système de justice civile, il importe que le législateur et la magistrature tiennent compte de trois principes fondamentaux : 1) la justice est un service public essentiel, 2) c'est seulement par la transparence que la magistrature aura la confiance du public, et 3) le système de justice doit être flexible et capable de s'adapter en adoptant des changements de fond novateurs.

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I. Introduction

It is beyond dispute that, by any measure, the civil justice system in Ontario does not provide timely and accessible justice to users of the system. Delays plague the system, and it has become prohibitively expensive. The civil justice system is simply unaffordable for most individual litigants and thus unavailable. Consequently, civil courts serve only a tiny percentage of potential users—“those with the financial wherewithal to withstand the war of attrition that is modern-day civil litigation.”² However, even well-funded, sophisticated litigants engaged in high-stakes litigation are eschewing Ontario courts and opting for private arbitration or mediation.³

² Justice William Hourigan & Preston Jordan Lim, “The Case for a Canadian Panel on Multi-Jurisdictional Class Proceedings” (2024) 102:1 Can Bar Rev 240 at 242.

³ See Justice David Brown, “[Red Block, Yellow Block, Orange Block, Blue: With So Much Competition, What Do We Do?](#)” (Paper delivered at the 14th Annual Straight from the Bench Conference, London, 6 May 2019) online (pdf): <<https://tinyurl>.

This will damage the development of common law in the province as jurisprudential cases are removed from the public system.

Critics allege that underfunding at both the provincial and federal levels lies at the root of the problem. Access to justice advocates have called, for example, for the increased funding of pro bono programs,⁴ an expanded legal aid system,⁵ the adoption by courts of new technological tools,⁶ and the overall modernization⁷ of the judicial system. We take the view that massive financial investment in the civil justice system is not realistic to expect. Provincial governments tend to make spending choices that are driven by public policy priorities of the electorate, which rarely ranks civil justice reform as a material issue. In any event, we are also of the view that massive financial investment is unnecessary to achieve serious access to justice reforms. This paper proposes a series of modest and inexpensive reforms that can substantially alleviate delays and reduce costs. Our common law system is based on the notion that the law should develop incrementally and be faithful to the guidance of precedent. In the civil justice sphere, this has translated into a slavish commitment to the outdated view that it is necessary from a rule of law perspective to provide all litigants with a full panoply of procedural rights. As one observer has argued, the “idealization of the adversarial trial process can cause deep scepticism about [online dispute resolution] systems”—and, it should be added, about access to justice initiatives in general.⁸ Justice David Brown has gone so far as to suggest that since the “*Ontario Judicature Act, 1881*, the structure of Ontario’s public court civil adjudication system and its main rules have remained unchanged.”⁹

The costs of modern litigation, however, have rendered access to justice in the civil context a largely illusory right. There must be wider

com/2re7xm83> [perma.cc/HB9M-7829] [Justice Brown, “Red Block, Yellow Block, Orange Block, Blue”].

⁴ Chief Justice George R. Strathy, “[Ontario has one of the Best Justice Systems in the World ... and we can make it Even Better](#)” (31 August 2022) online: <<https://tinyurl.com/yuxud725>> [perma.cc/7AH6-8NSC].

⁵ *Ibid.*

⁶ Brandon Orct, “The Jury Strikes Back: Enhancing the Viability of the Civil Justice System in a Post-Pandemic Ontario” (2022) 13:1 U Western Ont J Leg Studies 1 at 28.

⁷ See Aidan Macnab, “[FOLA calls for Ontario to boost legal aid funding and court innovation](#)”, (15 February 2023), online (news): <<https://tinyurl.com/mtvmmenu>> [perma.cc/2PQN-3QV8].

⁸ Shannon Salter, “Online Dispute Resolution and Justice System Integration: British Columbia’s Civil Resolution Tribunal” (2017) 34:1 Windsor YB Access Just 112 at 126.

⁹ Justice Brown, “Red Block, Yellow Block, Orange Block, Blue”, *supra* note 3 at 3.

acceptance that abridged procedures are appropriate based on the amount in dispute. Lawyers and judges must take seriously the Supreme Court’s guidance to move “the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case.”¹⁰ The 2010 incorporation into the *Rules of Civil Procedure* of the principle of proportionality similarly makes clear that procedures “must be tailored to the nature of the dispute.”¹¹ Further, the challenges faced by the Ontario civil justice system are not unique to this province. The justice system must be open to adopting proven best practices from other jurisdictions. Our recommendations draw on field-leading developments, including British Columbia’s Civil Resolution Tribunal and procedures employed in the United States. We would note at the outset that the current Ontarian government and, in particular, Attorney General Doug Downey, have consistently emphasized the importance of access to justice and implemented much needed reforms. Our proposals below build on those efforts.

Our paper proceeds as follows. In Part II, we discuss different theories of “access to justice” and argue that Ontario’s civil justice system does not meet any reasonable understanding of that term.

In Part III—the core of this paper—we identify key access to justice reforms that the Ontario legislature and judiciary ought to pursue. We recommend: the creation of an Ontario Civil Resolution Tribunal; reforms to the Ontario Small Claims Court; reforms to the Simplified Procedure; the introduction of “rocket docket” procedures for claims over \$500,000; and reforms to the appellate process. Our proposed reforms fall into four broad categories: (i) adapting processes to be commensurate with the amounts at stake, (ii) restoring faith in the justice system, (iii) adopting best practices from other jurisdictions, and (iv) reforming the appeal process. The government should engage directly with the public before moving forward with changes to the system to ensure that the system is responsive to public needs, perceptions and expectations; following the establishment of any reforms, the government should continue to measure user satisfaction on a regular basis.

In Part IV, we offer some concluding thoughts. To avoid further delays in the implementation of access to justice reforms, we have chosen not to debate several significant policy issues in this paper but have identified them in the conclusion for future discussion. Part V contains a list of our key recommendations.

¹⁰ *Hryniak v Mauldin*, 2014 SCC 7 at para 2 [*Hryniak*].

¹¹ Suzanne E Chiodo, “Ontario Civil Justice Reform in the Wake of COVID-19: Inspired or Institutionalized?” (2020) 57:3 *Osgoode Hall LJ* 801 at 811.

Before articulating specific recommendations in this paper, it is necessary to articulate the principles that we contend should guide a realistic reform package. We suggest the following:

(1) **Justice as a Public Service:** The civil justice system is an essential public service.¹² When it works, it enhances economic certainty¹³ and provides a means for the peaceful resolution of civil disputes. All justice system members are privileged to participate in such an important service and have a duty to the public to embrace reform initiatives and put public service at the forefront of everything they do.

(2) **Transparency:** As we will discuss, the lack of public confidence in the civil justice system is troubling. Reform initiatives must aim to rebuild public trust in the civil justice system. The days when courts could operate opaquely, cloistered from the people they serve, are long past. The duty of transparency requires, at a minimum, that the justice system regularly publish data regarding performance metrics so that the people of Ontario can understand with precision if it is meeting its obligations to the public. One sign of the current opacity of data is that a researcher recently filed suit against the provincial government in his attempt to obtain comprehensive statistics on the functioning of the court system.¹⁴ Such data should already be publicly available. As Justice Brown has put it, the fact that official statistics on the length of trials at Superior Court are not published represents a “most scandalous state of affairs.”¹⁵ In addition, justice system participants, particularly judges, must deny the instinctive reaction to reject all criticism of the civil justice system as being beyond the pale. We embrace wholeheartedly the Auditor General of Ontario’s recent statement that the “courts are public assets, supported and financed by the people of Ontario, and the administration of justice is a public good ... [we] believe that it is within our mandate to review information that would be needed to assess the effectiveness of court operations and the efficient use of resources ...”¹⁶ External scrutiny will only strengthen the operation of the justice system. Courts and the public must engage in an

¹² See Judith Resnik, “Seeing ‘The Courts’: Managerial Judges, Empty Courtrooms, Chaotic Courthouses, and Judicial Legitimacy from the 1980s to the 2020s” (2024) 43:2 *Rev Litig* 193 at 271.

¹³ Chief Justice Strathy, *supra* note 4.

¹⁴ See *Lesage v Ontario (Attorney General)*, 2024 ONCA 500. See also Michael Lesage, “[Ontario Court of Appeal broadens judicial independence to preclude judicial accountability](https://www.canlii.org/ont/doc/2024/08/20240809_lesage.html)” *Canadian Lawyer* (9 August 2024), online: <<https://tinyurl.com/32zjfcu9>> [perma.cc/3896-SNZL].

¹⁵ Justice Brown, “Red Block, Yellow Block, Orange Block, Blue”, *supra* note 3 at 2.

¹⁶ Ontario, Office of the Auditor General of Ontario, *Annual Report 2019: Reports on Correctional Services and Court Operations*, vol 3 (Toronto: Queen’s Printer for Ontario, 2019) at 84 [Ontario, *Annual Report 2019*].

ongoing dialogue to ensure that the court system is meeting the needs of its users.

(3) **Flexibility:** The justice system must be adaptive and flexible in accepting innovative policy changes. The practice of major civil justice system overhauls every 30 years or so has been largely ineffective.¹⁷ Billed as generational fixes, these reforms are often ineffective and untethered to fundamental reform principles.¹⁸ To take one notorious example, the Ontario government launched the Integrated Justice Project in 1996, with the “aim of creating a centralized online system to coordinate electronic filing, case management, and courtroom services.”¹⁹ The project quickly ran into problems and was discontinued in 2002 after the government had already poured in some \$265 million.²⁰ The justice system should not prioritize grandiose reform efforts, but must instead adopt a mindset of continual reform.

II. Nature and Scope of the Problem

What does it mean to say that Ontario currently faces an access to justice crisis? While there is no universally accepted definition of access to justice, it is clear that the current Ontario civil justice system fails to comply with any sensible definition of the term. Take Alf Mamo’s definition of access to justice, which Justice Annemarie Bonkalo adopted in her 2016 report on family legal services: “the ability of a citizen to bring about a solution to his or her legal problems that is (a) financially affordable; (b) timely; (c) easy to understand; and (d) easy to manoeuvre through.”²¹ The current system is out of reach for all but the wealthiest Ontarians, is overwhelmed by delays, and is unforgiving to self-represented litigants. Noel Semple has urged lawyers to conceive of access to justice reforms as targeting both “better access” and “better justice.”²² Under the current system, litigants’ lack of access nullifies their right to justice.

How does the public conceive of access to justice or view the civil justice system? Public attitudes about the efficacy and fairness of the justice system are concerning. Roughly a decade ago, Dean Trevor Farrow conducted a survey, in which he gauged the views of members of the public in the

¹⁷ See Chiodo, *supra* note 11 at 812.

¹⁸ Justice Brown, “Red Block, Yellow Block, Orange Block, Blue”, *supra* note 3 at 12.

¹⁹ Chiodo, *supra* note 11 at 814.

²⁰ *Ibid.*

²¹ See Justice Annemarie E. Bonkalo, “[Family Legal Services Review](#)” (Toronto: Government of Ontario, Ministry of the Attorney General, 31 December 2016), online: <<https://tinyurl.com/39hjwzv7>> [perma.cc/SX7X-A9U6].

²² Noel Semple, “Better Access to Better Justice: The Potential of Procedural Reform” (2022) 100:2 *Can Bar Rev* 124 at 131, 136.

Greater Toronto Area on access to justice.²³ Respondents indicated that money and class shape access to justice. They indicated that “[p]eople with money have access to more justice than people without” and that “[t]he higher class have more access to justice.”²⁴ While the dominant view of respondents was that the justice system is of fundamental importance, many expressed a feeling of alienation from the justice system, and made such comments as, “I don’t have much faith in the lawyers and the system” and “[t]he language of justice tends to be a bit ... foreign to most people.”²⁵ Respondents also consistently expressed the view that the justice system is too slow, complex and costly. They stated that the justice system “needs to be transparent and understandable,” “less complex,” and “user-friendlier.”²⁶ In the years since the survey, the civil justice system has not sufficiently adapted to assuage these fears. For example, in 2023, the Advocates’ Society reported that in Ontario it takes nearly a year and a half before a judge in Toronto can hear a motion longer than two hours and four to five years between commencement of a civil action and trial on the merits.²⁷ In addition, the World Justice Project’s Rule of Law Index ranks Canada relatively poorly compared to other developed countries on access to civil justice. Since 2016, Canada’s overall index score has declined year-over-year. The World Justice Project evaluates civil justice across several subcategories; Canada ranks particularly poorly in the “unreasonable delay” subcategory, ranking 62nd out of the 142 countries evaluated.²⁸

In recent years, the amount of Canadian public opinion research on civil justice has increased. The Department of Justice’s 2023 National Justice Survey found that 37% of Ontarians believed the civil justice system was not accessible to all people and that 41% of Ontarians believed that the civil justice system was not fair to all people.²⁹ These findings are worrying and, as a point of comparison, are broadly consistent with data from the United States, where researchers and organizations have done a much better job of assembling data on public interactions with the civil justice system over the years. A 2022 survey of registered voters conducted by the

²³ Trevor C.W. Farrow, “What is Access to Justice?” (2014) 51:3 *Osgoode Hall LJ* 957.

²⁴ *Ibid* at 972.

²⁵ *Ibid* at 975–74.

²⁶ *Ibid* at 978.

²⁷ Advocates Society, “[Delay No Longer. The Time to Act is Now](#)” (29 June 2023) at 3, online (pdf): <<https://tinyurl.com/y2fzmn6b>> [perma.cc/5B67-A2JQ].

²⁸ [World Justice Project, “Canada”](#) (2024), online: <<https://tinyurl.com/4fd7k6pn>> [perma.cc/7U34-VBDD].

²⁹ Department of Justice, “[National Justice Survey 2023: methodological report: Data Tables—Banner 3—CSV](#)” (2023), online: <<https://tinyurl.com/yc3uu4a>> [perma.cc/FXW3-QHT9].

National Center for State Courts found that fewer than two-thirds (60%) of voters had either a “great deal” or “some” confidence in state courts.³⁰

The conclusions we can draw from this research on public perceptions of the civil justice system are manifest. These negative views of the civil justice system should serve as a wake-up call to decision-makers and members of the judiciary. Members of the public desire a system that provides timely and cost-efficient access to justice and wish to see the justice system stripped of its unnecessary complexity. Some view the system as rigged in favour of those with financial means.

We make several additional points about the current access to justice crisis in the province. First, the lack of publicly available data has compounded the ongoing crisis. No official data regarding performance statistics in the Superior Court exists.³¹ The message this conveys to justice system users is concerning and contrary to the notion that courts have a public service duty to the people of Ontario. Despite the absence of official data, Justice Brown has conducted his own investigation of the available information to estimate the average time it takes a case to wind its way through the Superior Court. As of 2019, he estimated that, on average, it took a civil case 38 months to go from start to finish in the Superior Court.³² The addition of the average appeal time means that a litigant spends four years in the civil court system before a lawsuit comes to an end.³³

When courts decline to gather and disseminate user data, they make it difficult “to identify disparities, especially in who is being sued, who is participating in the court process, and what outcomes people receive.”³⁴ The practical result is that Ontario residents are prevented from understanding whether the justice system is serving their needs. According to Pew Charitable Trusts, transparency in the civil justice system has significant positive impacts, including improving public trust, increasing the effectiveness of funding, assisting users in obtaining information about their cases, permitting courts to exercise better control over case management systems and data, and facilitating external research analyzing data.³⁵ Courts must overcome historical-based reticence to provide

³⁰ Erika Rickard, “[How to Make Civil Courts More Open, Effective, and Equitable](https://tinyurl.com/yc86ps59)” (last modified 13 December 2023), online: <<https://tinyurl.com/yc86ps59>> [perma.cc/SFK7-LNPU].

³¹ We note that the Supreme Court publishes such data in its annual “Year in Review” reports, thereby allowing for sophisticated critique and analysis.

³² Justice Brown, “Red Block, Yellow Block, Orange Block, Blue”, *supra* note 3 at 2.

³³ *Ibid.*

³⁴ Rickard, *supra* note 30.

³⁵ *Ibid.*

performance data, recognizing that, although they are independent institutions, they remain accountable to the public. As Ontario's former Auditor General Bonnie Lysyk observed in her 2019 report on court services, government decision-makers, legislators, and the public have a right to data on the judicial system.³⁶

In her recommendations regarding court reform, Lysyk has stressed the need for openness regarding court data. Lysyk recommended that the Ministry of the Attorney General cooperate with the judiciary to “establish targets for key performance indicators,” “monitor and measure actual performance against targets,” and share results with the public.³⁷ Additionally, Lysyk recommended that the Office of the Chief Justice of the Ontario Court of Justice and the Office of the Chief Justice of the Superior Court conduct reviews of their respective court scheduling systems and share those results with the Ministry of the Attorney General as well as the public.³⁸ Both of these recommendations are eminently reasonable. In the Auditor General's 2023 and 2024 reports on the status of past recommendations, the Auditor General noted that the recommended action on case tracking had not yet been fully implemented; the 2024 report also noted that several other actions, such as one pertaining to the establishment of performance indicators for the timeliness of case dispositions, would not be implemented.³⁹

Second, the establishment of a properly functioning civil justice system should rank higher as a political priority for all Ontarians and Canadians. The problems with the civil justice system are not academic topics of interest only to judges and lawyers. A properly functioning civil justice system is essential to attract business investment in the province.⁴⁰ Investors need to be assured that there exist effective legal means to enforce their rights. Otherwise, they may choose to invest elsewhere. More fundamentally, if the civil justice system is deemed ineffective, the risk that people will engage in self-help remedies and effectively take justice into their own hands increases.⁴¹ Ultimately, we recognize that civil justice is

³⁶ Ontario, *Annual Report 2019*, *supra* note 16 at 6.

³⁷ *Ibid* at 120.

³⁸ *Ibid* at 100.

³⁹ Ontario, Office of the Auditor General of Ontario, *Annual Report 2023*, vol 2 (Toronto: Queen's Printer for Ontario, 2013) at 3, 12; Ontario, Office of the Auditor General of Ontario, *Annual Report 2024: Status of Audit Recommendations from the 2019 Annual Report* (Toronto: 2024) at 37–38.

⁴⁰ See IMF, *Italy: 2013 Article IV Consultation*, IMF Country Report No. 13/299, September 2013.

⁴¹ See Paul Hoffman, “[Vigilantism: The Last Resort of the Unprotected](https://tinyurl.com/3dfbart4)” (19 September 2012), online: <<https://tinyurl.com/3dfbart4>> [perma.cc/2KC7-BULK].

unlikely to ever rank as a top political priority for the public; consequently, reforms to the justice system need to be realistic.

Finally, it is essential to identify one factor that continues to adversely impact the civil justice system. In *R v Jordan*,⁴² the Supreme Court held that “criminal prosecutions in which a trial does not conclude by a set deadline will be presumed to breach the right to be tried within a reasonable time”—a right protected by the *Charter*.⁴³ The ramifications of *Jordan* continue to affect the civil justice system. This case has led to the diversion of scarce resources to the criminal justice system. What is left over is invested primarily in the family law system. As Justice Brown has colourfully noted, “[t]he bodies thrown at the *Jordan* monster do not tend to come at the expense of family law adjudication.”⁴⁴ As a result, the civil justice system has been “sacrificed” and relegated to the status of a “poor third cousin.”⁴⁵ In pointing out this disparity in resource allocation, we are not advocating that civil justice reforms necessitate significant financial investments by the government. On the contrary, as discussed below, we believe meaningful change can be achieved without the expenditure of substantial funds. Further, any modest cost increase will likely be offset by the tax revenue generated by making Ontario a more attractive jurisdiction in which to invest.

III. Proposed Reforms

The proposed reforms seek to move lower-value claims out of the Superior Court and provide a process that permits, where possible, litigants to access the justice system without a lawyer. While the Small Claims Court was created, at least in part, to address this concern, we believe that it would be insufficient to focus solely on further changes to that body’s procedures. As noted, we are advocating for a sliding scale of procedural safeguards based on the quantum of damages claimed in the dispute, in line with the Supreme Court’s emphasis in *Hryniak v Mauldin* on proportionality.⁴⁶ In addition, the reforms seek to eliminate costly steps in litigation that cause undue delay. We are also recommending changes to the appeal process, recognizing that appeals are often misused to delay the inevitable day of reckoning when restitution must be paid.

⁴² 2016 SCC 27 [*Jordan*].

⁴³ Léonid Sirota, “Was the Supreme Court right to change the law on the right to a speedy trial?” (2017) 26:3 *Const Forum Const* 1 at 1.

⁴⁴ Justice Brown, “Red Block, Yellow Block, Orange Block, Blue”, *supra* note 3 at 7.

⁴⁵ *Ibid.*

⁴⁶ *Hryniak*, *supra* note 10 at para 2.

(a) Ontario Civil Resolution Tribunal

With respect to low-value claims, we recommend the creation of an Ontario Civil Resolution Tribunal. The Tribunal would be based upon British Columbia’s Civil Resolution Tribunal, which multiple access to justice advocates have identified as an ideal template for Ontarian reform efforts.⁴⁷

British Columbia passed the *Civil Resolution Tribunal Act* in 2012 in response to an access to justice crisis.⁴⁸ The tribunal operates fully online, although parties who face digital barriers can resort to “telephone-based or paper-based services.”⁴⁹ As observers have noted, the BC Tribunal’s jurisdiction expanded over time.⁵⁰ Although its jurisdiction was limited to strata property claims when it started handling cases in 2016, the tribunal assumed jurisdiction over small claims up to \$5,000 in 2017.⁵¹ In 2019, the tribunal assumed jurisdiction over motor vehicle injury disputes up to \$50,000 and over disputes involving societies and housing and community service cooperative associations.⁵² In 2022, the tribunal assumed jurisdiction over claims regarding Insurance Corporation of British Columbia assessments of responsibility for motor vehicle accidents.⁵³ In 2024, the Tribunal received authority to resolve claims regarding the non-consensual sharing of intimate images. The provincial legislature has evinced a continued willingness to expand the CRT’s jurisdiction.⁵⁴ This gradual expansion in jurisdiction has meant that the tribunal has had time to deal with birthing pains before addressing more complicated disputes. We recommend that the proposed Ontario Civil Resolution Tribunal generally operate online, just like its British Columbia counterpart, and cover claims up to \$25,000. While this might seem a high amount, especially given the fact that the BC Tribunal initially assumed jurisdiction over relatively small claims, it is important to note that the Ontario Tribunal

⁴⁷ Justice Brown, “Red Block, Yellow Block, Orange Block, Blue”, *supra* note 3 at 12; Chiodo, *supra* note 11 at 831; Orct, *supra* note 6 at 27.

⁴⁸ *Civil Resolution Tribunal Act*, SBC 2012, c 25.

⁴⁹ Salter, *supra* note 8 at 123.

⁵⁰ Katie Sykes et al, “Civil Revolution: User Experiences with British Columbia’s Online Court” (2022) 37:1 Windsor YB Access Just 161 at 164.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Government of British Columbia, “[Civil Resolution Tribunal Act](#)” (last updated 26 July 2023), online: <<https://tinyurl.com/4cakx8th>>.

⁵⁴ Civil Resolution Tribunal, “[CRT Decisions under the Intimate Images Protection Act \(IIPA\)](#)” (25 June 2024), online (blog): <<https://tinyurl.com/8usd3z8h>> [perma.cc/H43B-A6B6]. See also Civil Resolution Tribunal, “[BC Legislature Expands the CRT’s Small Claims Jurisdiction](#)” (1 April 2025), online (blog): <<https://tinyurl.com/2dvmf8nr>> [perma.cc/7H2Y-YH2E].

would not be starting from scratch but would instead apply best practices from BC's experiences.

Shannon Salter, a former Chair of the Civil Resolution Tribunal, usefully describes the BC Tribunal process as consisting of four stages. First, a person with a dispute uses an online tool called the Solution Explorer, which allows a person to “learn more about their dispute so that they can make informed choices.”⁵⁵ Second, if a person elects to proceed with the dispute and serves the notice of claim, then the parties have an opportunity to negotiate: the negotiation phase represents a “low intervention area” for the tribunal.⁵⁶ Third, if the parties do not negotiate a settlement, they proceed to facilitation, wherein an “expert facilitator will help the participants to reach a consensual agreement.”⁵⁷ The facilitators tend not to be lawyers.⁵⁸ Fourth, if the parties do not reach an agreement at the facilitation phase, they proceed to a hearing before the tribunal member, who issues a binding decision.⁵⁹ The hearing stage is designed to be informal and efficient and to resolve disputes on a quick timeline. There is a presumption that all parties are self-represented, although there are exceptions to the self-represented rule.⁶⁰ The parties can still obtain other forms of legal assistance, such as explanations of case law and the tribunal process, organization of a party's evidence, and the drafting of written submissions.⁶¹

The BC Tribunal has produced the following easy-to-understand infographic explaining its process:⁶²

⁵⁵ Salter, *supra* note 8 at 120.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* at 121.

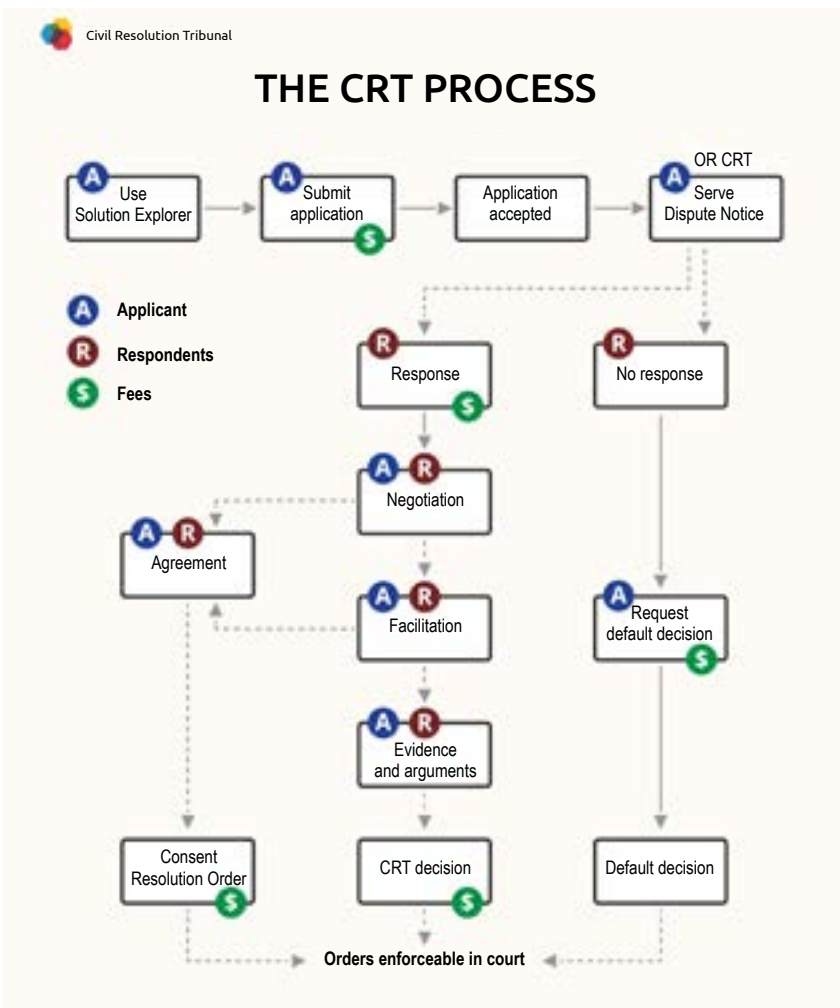
⁵⁹ *Ibid.*

⁶⁰ *Civil Resolution Tribunal Act*, *supra* note 48, ss 20, 20(2)–(5), 20.1.

⁶¹ Sykes et al, *supra* note 50 at 183.

⁶² Civil Resolution Tribunal “[The CRT Process](https://tinyurl.com/z3rtxjaw)”, online: <<https://tinyurl.com/z3rtxjaw>> [perma.cc/V67T-3UD5].

Figure 1



The above infographic outlines the key stages of the BC Civil Resolution Tribunal Process.

Consistent with the principles of transparency and accountability, annual reports of the BC Tribunal are available on its website. Its most recent report includes the following highlights:

- There was a 7.6% increase in claim applications received from April 1, 2023 to March 31, 2024, as compared to the period from April 1, 2022 to March 31, 2023.

- 54.7% of disputes were resolved by consent or withdrawn.
- The average time to resolve all dispute types was 152.8 days.
- The majority of disputes at the tribunal were in the small claims jurisdiction.⁶³

The Supreme Court of British Columbia can judicially review the tribunal's decisions. The most recent data shows that only a fraction of users decide to file for judicial review:

- 17 applications for judicial review were filed of a decision in a small claims dispute.
- 4 applications for judicial review were filed of a decision in a strata dispute.
- 1 application for judicial review was filed of a decision in an accident benefit dispute.
- 1 application for judicial review was filed of a decision in a society and cooperative associations dispute.⁶⁴

Other scholars have surveyed users' experiences with the BC Tribunal. Users' experiences were generally favourable. 67% of those surveyed who had previously been to court reported that the BC Tribunal was easier or somewhat easier than court, and 62% reported that they were somewhat or much more satisfied with their experience at the BC Tribunal than at court.⁶⁵ In addition to more expeditiously and easily resolving claims than court, the BC Tribunal increased access to justice in a measurable way. 18% of respondents indicated that if the BC Tribunal had not been available, they would not have brought their claim at all.⁶⁶

The adoption of this model in Ontario would remove lesser-value claims from the jurisdiction of the Small Claims Court and provide timely justice at a low cost. In transplanting the British Columbia model to Ontario, legislators should keep in mind three lessons that explain the BC Tribunal's success. First, the BC legislature and Civil Resolution Tribunal have evidently paid close attention to public needs and criticisms. The

⁶³ British Columbia, Civil Resolution Tribunal, *2023/2024 Annual Report* (British Columbia CRT, September 2024) at 17, 26, 33, 34.

⁶⁴ *Ibid* at 32.

⁶⁵ Sykes et al, *supra* note 50 at 177.

⁶⁶ *Ibid* at 178.

tribunal regularly organizes participant surveys of people who have gone through the tribunal process and acts upon participant comments.⁶⁷ The tribunal and the legislature have proven themselves receptive to public criticism. For example, following academic criticism of the Notice of Objection mechanism, whereby a party could render a tribunal decision on a small claims dispute void and unenforceable without having to state any reason,⁶⁸ the legislature removed the Notice of Objection mechanism for disputes with final decisions given after July 1, 2022.⁶⁹ Second, the BC legislature did not embark on a project of free-wheeling and grandiose reform. The contrast with Ontario's expensive and failed Integrated Justice Project is instructive. In developing its case management system, the BC Tribunal used an off-the-shelf platform, called Salesforce, and then customized it.⁷⁰ Third, the Tribunal has prioritized transparency. Although "[s]ettlement communications in the facilitation phase are confidential", final decisions by the tribunal itself are publicly available in line with the open courts principle.⁷¹ In keeping with the objective of accessibility, the Tribunal posts helpful information for parties online and the Solution Explorer provides useful advice for users. We note that the provincial government has retained the service provider that developed and implemented the British Columbia Tribunal's software to do the same for Ontario's Landlord Tenant Board.⁷²

(b) Small Claims Court Reform

The Ontario Small Claims Court provides efficient and cost-effective justice for claims up to and including \$35,000. We recommend building on that success with a series of reforms. First, we recommend that the process be conducted entirely online, via Zoom hearings, to improve access to justice, particularly for Ontario residents living outside urban centres. The transition to online services should not be a particularly burdensome one, considering that COVID-19 forced litigants and parties

⁶⁷ See e.g. Civil Resolution Tribunal, "[Participant Survey—June 2024](https://tinyurl.com/2s3wvxr4e)" (5 July 2024), online (blog): <<https://tinyurl.com/2s3wvxr4e>> [perma.cc/N8CE-8EDH].

⁶⁸ Rebecca Dickson, "Does the Notice of Objection Mechanism Available to Civil Resolution Tribunal Small Claims Parties Enhance Access to Justice?" (2021) 54:1 UBC L Rev 119.

⁶⁹ Civil Resolution Tribunal, "[BC Government Proposes Amendments to the Civil Resolution Tribunal Act](https://tinyurl.com/4ks7awb6)" (4 March 2022), online (blog): <<https://tinyurl.com/4ks7awb6>> [perma.cc/5E6E-GR43].

⁷⁰ Chiodo, *supra* note 11 at 831.

⁷¹ Salter, *supra* note 8 at 121.

⁷² For criticisms of the adoption of digital-first measures by the Landlord Tenant Board, see Olivia Bowden, "[Landlord and tenant board's 'digital-first' approach fueling continued case backlog, say advocates](https://tinyurl.com/2c7e7m36)", *CBC News* (19 November 2023), online: <<https://tinyurl.com/2c7e7m36>> [perma.cc/D39R-E54K].

to employ online and telephone-based advocacy and that most Small Claims hearings are conducted remotely.⁷³ Moreover, since the rules of evidence and trial procedure are relaxed in the Small Claims context, and the amounts at issue are relatively low, there are relatively few access to justice drawbacks to taking Small Claims trials online. Second, the court's monetary jurisdiction should be increased from \$35,000 to \$70,000. With respect to monetary jurisdiction, regard may be had to the jurisprudence associated with section 96 of the *Constitution Act, 1867*.⁷⁴

Section 96 provides: "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."⁷⁵ As two of us have noted elsewhere, Canadian courts have interpreted section 96 as "*the* line of defence against provincial encroachment on superior courts' inherent jurisdiction."⁷⁶ In a series of cases, the Supreme Court has relied upon the narrow wording of section 96 to preclude provincial and federal governments from transferring superior courts' historic or core jurisdiction to inferior courts or administrative tribunals.⁷⁷ In effect, the Supreme Court has built out a body of jurisprudence that stretches the plain wording of section 96 to permit the blockage of civil justice reform. The Supreme Court's jealousy guards the jurisdiction of superior court judges.

In the *Quebec Code Reference*, the Court thwarted the Quebec government's attempt to set the limit to the exclusive monetary jurisdiction of the provincial court at less than \$85,000. As part of its analysis, the court observed that the proposed \$85,000 limit outstripped the historical ceiling of \$100, which corresponded in 2021 dollars to between \$63,698

⁷³ Justice David M. Brown, "[COVID-19 and Ontario's court system: How to seize the pandemic's silver lining](#)" (Presentation to the Thunder Bay Law Association, online, 29 October 2020) at 3, online (pdf): <<https://tinyurl.com/986t5z5z>> [perma.cc/8URR-QHUQ] ["Justice Brown, "COVID 19 and Ontario's court system"].

⁷⁴ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 96, reprinted in RSC 1985, Appendix II, No 5.

⁷⁵ *Ibid.*

⁷⁶ Justice Hourigan & Lim, *supra* note 2 at 259. See also Paul Daly, "Section 96: Striking a Balance between Legal Centralism and Legal Pluralism" in Richard Albert, Paul Daly & Vanessa MacDonnell eds., *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019) 84 at 86; *Poorkid Investments Inc. v Ontario (Solicitor General)*, 2023 ONCA 172 at paras 23–24.

⁷⁷ See *Re Residential Tenancies Act*, 1981 CanLII 24 (SCC); *MacMillan Bloedel Ltd. v Simpson*, 1995 CanLII 57 (SCC); *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59; *Reference re Code of Civil Procedure (Que.)*, art. 35, 2021 SCC 27 [*Quebec Code Reference*].

and \$66,008.⁷⁸ The Court also observed that the monetary ceiling “must be considered in its context in order to determine whether it undermines the role of the Quebec Superior Court.”⁷⁹ The majority articulated a multi-factorial test. To determine whether an interference with the core jurisdiction of the superior courts has occurred, a court must consider: “the scope of the jurisdiction being granted, whether the grant is exclusive or concurrent, the relationship between the proposed monetary limit and the historical monetary ceilings, appeal mechanisms, the impact of the jurisdiction-granting provision on the superior court’s caseload, and whether there is an important societal objective.”⁸⁰

The Small Claims Court, though a branch of the Superior Court of Justice, is not a section 96 court. It is unlikely, in our view, that an increase in the Small Claims Court’s monetary jurisdiction will offend the section 96 jurisprudence. The Ontario situation differs in germane ways from the situation portrayed in the *Quebec Code Reference*. In the case of the Ontario Small Claims Court, it is worth noting that a party can appeal to the Divisional Court under certain circumstances, whereas in the *Quebec Code Reference*, parties had to appeal from provincial court decisions straight to the Quebec Court of Appeal.⁸¹ The majority in the *Quebec Code Reference* stated that a right of appeal directly to the provincial court of appeal is problematic, for it indicates that the court in question “functions as a parallel court.”⁸² Moreover, an analysis of the relationship between the proposed monetary limit and the historical monetary ceilings should militate against a finding that the Ontario Small Claims Court, armed with jurisdiction over larger claims, is a parallel court. As the Supreme Court noted, the \$100 monetary limit represents a figure that “had, in 1867, circumscribed the involvement of the inferior courts of the four founding provinces in the area of jurisdiction at issue.”⁸³ In 2024 dollars, this amount translates to between \$72,959.06 and \$75,604.91, according to the Bank of Canada’s Inflation Calculator.⁸⁴ An increase in the monetary jurisdiction of the Ontario Small Claims Court to \$70,000 is reasonable in light of the inflation calculations. To analyze the final factor, it cannot be denied that the expansion of jurisdiction of the Ontario Small Claims Court would serve an important societal objective—namely, expanding access to justice.

⁷⁸ *Quebec Code Reference*, *supra* note 77 at para 118.

⁷⁹ *Ibid.*

⁸⁰ *Ibid* at para 132.

⁸¹ *Ibid* at para 122.

⁸² *Ibid* at para 121.

⁸³ *Ibid* at para 107.

⁸⁴ See [Bank of Canada, “Inflation Calculator”](https://tinyurl.com/58a34uy6), online: <<https://tinyurl.com/58a34uy6>> [perma.cc/DM37-K9Y7].

Finally, we recommend the use of evaluative mediation for these claims. Pursuant to this mediation approach, mediators make recommendations and suggestions. They express opinions about the likely outcome of a case and make a settlement recommendation. Parties are not bound to accept the mediator's recommendation, but if they choose to proceed to trial and achieve a result that is less favourable than the mediator's assessment, they should suffer adverse cost consequences. The mediator should have the option to forward a confidential mediation report to the trial judge; such an option balances the need for confidentiality on the one hand with the need to encourage evaluative mediation on the other. This approach is premised on the idea that the right to a full trial is not guaranteed to litigants and that trials should be held only where necessary. Rule 13 of the *Rules of the Small Claims Court* already requires settlement conferences, which are "private meeting[s]" with the judge and "less formal" than trials, in every Small Claims action.⁸⁵ These settlement conferences bear similarities to mediation. A simple tweak to Rule 13 would allow a deputy judge hearing a settlement conference to employ the powers that we propose for mediation.

While mandatory mediation has attracted well-founded criticism, it is important to note that mediation is already mandatory in many contexts.⁸⁶ For example, Rule 24.1 of the *Rules of Civil Procedure* requires, with some exceptions, mandatory mediation in actions commenced in Toronto, Ottawa, and the County of Essex.⁸⁷ As mentioned, settlement conferences are mandatory under Rule 13 of the *Rules of the Small Claims Court*.⁸⁸ Mandatory mediation is already cognizable to the civil justice system, and extending it to other contexts is rooted in the Supreme Court's embrace of the principle of proportionality in *Hryniak*. Extension of its use reflects the realities of the 21st century and the excellence of alternative dispute resolution personnel across the country. Alternative dispute resolution mechanisms can always be improved, but the continued vaunting of the full trial as the gold standard in the justice context will lead to worse outcomes for most Ontarians.

⁸⁵ Government of Ontario, "[Getting Ready for Court](https://www.ontario.ca/getting-ready-for-court)" (23 March 2022), online: <<https://tinyurl.com/4fm85p5d>> [perma.cc/W8ZR-SUJV].

⁸⁶ See e.g. Owen Fiss, "Against Settlement" (1984) 93:6 Yale LJ 1073 at 1075; Nayha Acharya, "Exploring the Role of Mandatory Mediation in Civil Justice", (2023) 60:3 Alta L Rev 719 at 720–21; David Rosenberg, "Indigenization of Civil Litigation: Barriers and Opportunities" (2024) 6:1 Lakehead LJ 25 at 29.

⁸⁷ *Rules of Civil Procedure*, RRO 1990, Reg 194, r 24.1 [*Rules of Civil Procedure*].

⁸⁸ *Rules of the Small Claims Court*, O Reg 258/98, r 13.

(c) Simplified Procedure

Rule 76 of the *Rules of Civil Procedure* permits parties to proceed under the Simplified Procedure for claims up to \$200,000.⁸⁹ As one commentator has put it, the purpose of Rule 76 “is to reduce the cost of litigating claims of relatively modest amounts by reducing the amount of civil procedure available in such actions.”⁹⁰ The Simplified Procedure incorporates the following aspects, among others:

- The parties must agree on a trial management plan.
- There is no option to proceed by way of jury.
- Trials are limited to five days.
- Evidence is produced through affidavits only, which are subject to limited cross-examination.
- The parties are limited to three experts.
- Recoverable costs are capped at \$50,000, and disbursements are limited to \$25,000.⁹¹

These attenuated procedures are to be encouraged because they make the civil justice system more efficient and cost-effective. The Supreme Court has noted that “[a]ccess to justice can ... be promoted through features like a simplified procedure.”⁹² Our primary recommendation is that the jurisdiction of the Simplified Procedure be increased from \$200,000 to \$500,000.⁹³ Even for significant claims seeking hundreds of thousands of dollars in damages, the economic calculus does not justify the added expenses associated with the full panoply of procedural rights available under the ordinary procedure.

Again, evaluative mediation is recommended for these claims, with costs consequences, as discussed above, if a party chooses to proceed to

⁸⁹ *Rules of Civil Procedure*, *supra* note 87, r 76.

⁹⁰ Elizabeth Kurz, “Rules of Civil Procedure Chapters, Particular Proceedings, Rule 76 - Simplified Procedure” in Noel Semple, ed, *Civil Procedure and Practice in Ontario*, 1st ed (online: Canadian Legal Information Institute, 2021) <<https://canlii.ca/t/tbj2>>.

⁹¹ Victoria Edwards, “[Should I sue in Simplified Procedure and when do I need to decide?](https://tinyurl.com/43n4evf9)” (3 January 2023), online: <<https://tinyurl.com/43n4evf9>> [perma.cc/YL3V-E36C].

⁹² *Quebec Code Reference*, *supra* note 77 at para 127.

⁹³ See also Justice Brown, “COVID 19 and Ontario’s court system”, *supra* note 73 at 12.

trial and achieves a less favourable result than the mediator's assessment. As mentioned, the mediator can simply forward a confidential mediation report to the trial judge to facilitate the judge's evaluation of costs.

We also recommend that proceedings be moved out of the courtroom. In particular, we recommend that virtual trials be continued and that virtual hearings become the default for interlocutory motions. Virtual trials are convenient for the parties and reduce the need for court staff and courtrooms. In addition, interlocutory motions often lead to unnecessary expense and delay. Currently, the wait time for motions in Toronto is excessive. As of July 2023, one commentator noted that motions longer than 2 hours take almost 1.5 years to be heard by a judge in Toronto.⁹⁴ There is rarely *viva voce* evidence before the motion judge. Therefore, there is no need for in-person hearings. We recommend that these motions proceed in writing unless a judge orders that an oral hearing is necessary. While this proposal alone will not be a silver bullet—a Superior Court justice will still require time to review the motion and write their disposition—it will cut down the time devoted to motions processing.

This recommendation aligns with the argument advanced by Claire Houston, Rachel Birnbaum, and Nicolas Bala. After conducting an online survey and follow-up interviews, Houston, Birnbaum, and Bala conclude that, in Ontario's family justice system, “[t]here are generally cost savings to represented parties making use of virtual court appearances, and virtual hearings can increase access to lawyers and other professionals, including for Legal Aid clients.”⁹⁵ These benefits must not, however, lead to the automatic implementation of a virtual hearing in all cases. Judges must balance these benefits against the possibility that certain vulnerable parties will not have access to the necessary technology.⁹⁶ While the authors write in the context of the family justice system, their observations easily extend to the civil justice system. By moving civil proceedings out of the courtroom while also allowing judges residual discretion to order an in-person hearing, the legislature can decrease costs and wait times.

⁹⁴ Zena Olijnyk, “[Advocates’ group cites coming crisis in civil and family court delays, makes plea for more resources](https://tinyurl.com/4rste7m)” (14 July 2023), online (blog): <<https://tinyurl.com/4rste7m>> [perma.cc/L39V-W3PU].

⁹⁵ Claire Houston, Rachel Birnbaum & Nicolas Bala, “Exploring the Costs and Benefits of Virtual Family Law in Ontario: Perspectives of Professionals”, (2024) 102:3 Can Bar Rev 569 at 573.

⁹⁶ *Ibid* at 573–74.

(d) Claims for Over \$500,000

For significant claims seeking over \$500,000 in damages, our recommendation is to speed up the process through the adoption of best practices from other jurisdictions. In our view, Ontario courts should adopt the “Rocket Docket system” currently in operation in some US courts.

While jurists employ the term rocket docket in a very flexible manner today, it originally referred to a specific jurisdiction: the US District Court for the Eastern District of Virginia (“EDVA”). Judge Albert Bryan, Jr. converted the EDVA into a rocket docket in the early 1960s. The court gained a reputation for “resolving motions without extensive briefing, hearing cases on an expedited basis, and actively managing cases to identify the key issues necessary to reach resolution.”⁹⁷ EDVA judges have stated that there are several reasons for their district’s efficiency and success: “(i) scheduling conferences are promptly set; (ii) trials are set about six months from the first conference; (iii) a very high threshold has to be met for a continuance; and (iv) judges manage the dockets for the convenience of the parties, not for the lawyers.”⁹⁸ By instituting the rocket docket, the EDVA transformed itself into one of the most efficient federal courts in the entire country. In 2015, for example, the court had the “fastest trial docket in the nation for the eighth year straight.”⁹⁹ Both judges and lawyers play a crucial role in upholding the EDVA norms; that is, the EDVA’s success stems from the introduction of new procedures and changes in legal culture.

Given the EDVA’s success in converting itself to one of the most—if not *the* most—efficient districts in the United States, courts across the country have followed suit. Trial courts have had little trouble adopting the EDVA’s innovations into their procedures. Indeed, many trial courts across the country have adopted EDVA-like measures, such as: “(1) early scheduling of conference and pre-trial procedures, (ii) a completion of discovery which adheres to strict and short deadlines, (iii) strict limitations on the scope of discovery, (iv) a policy of consenting to almost no continuances (adjournments), (v) certain and early trial dates, and (vi) trials which are strictly managed and shorter than average.”¹⁰⁰

⁹⁷ Timothy J. Schutz, “The Judge’s Role in Case Management” (2008) *Colo Lawyer* 103 at 104.

⁹⁸ Nicolas Kryiakides, Arunima Shrikhande & Lexi Stefanatos, “The Rocket Docket System: A Model for Active Case Management in Countries Facing Judicial Delays” (2021) 34:2 *NY Intl L Rev* 79 at 90.

⁹⁹ *Ibid* at 81.

¹⁰⁰ *Ibid* at 89.

Ontario would see substantial efficiency gains from adopting rocket docket-like practices at the trial level. Rule 77 of the *Rules of Civil Procedure* provides a case management system for actions and applications commenced in or transferred to Ottawa, Toronto, and the County of Essex.¹⁰¹ Accelerated case management should be the default, not the exception. The time for piecemeal case management and pilot projects is past. Ontario must commit to making active case management essential to every civil case. Justice Brown has stated the following about case management, which we wholeheartedly endorse: “Single-judge case management is a useful means to control access to judicial time while moving a case toward a resolution on the merits expeditiously and at a reasonable cost. Single-judge case management offers huge potential for creative innovation on how best to use judicial time.”¹⁰² We also endorse his suggestion that a cap of 18 months should be imposed for a case to move from start to finish in the Superior Court.¹⁰³ Our proposed reforms of case management and a time cap on case resolution promise to transform the Ontario Superior Court into a rocket docket.

(e) Appeals

We do not intend to suggest that the Superior Court is the sole source of delay in our civil justice system. We commend Chief Justice Geoffrey Morawetz’s efforts to prioritize reform of the *Rules of Civil Procedure*.¹⁰⁴ The Civil Rules Review has already published a Phase I report and we encourage judges and members of the bar to engage with the report’s findings.¹⁰⁵ A clear implication of that report, with which we agree, is that reform at the trial level cannot come without reform at the appellate level.

Appeals to the Court of Appeal for Ontario (“OCA”) allow the Court to develop the common law and guide lower courts. Yet litigants and parties often misuse appeals to delay the payment of damages that are properly found to be owed. The Ontario legislature, which can amend the *Courts of Justice Act*, and the Civil Rules Committee, which can propose regulations for approval by the Attorney General of Ontario for the amendment of the *Rules of Civil Procedure*, should implement reforms to eliminate unmeritorious appeals that delay the final determination of

¹⁰¹ *Rules of Civil Procedure*, *supra* note 87, r 77.02(1).

¹⁰² Justice Brown, “Red Block, Yellow Block, Orange Block, Blue”, *supra* note 3 at 10.

¹⁰³ *Ibid* at 11.

¹⁰⁴ See Ontario Superior Court of Justice, “[Civil Rules Review—Terms of Reference](https://tinyurl.com/a8ku6n6w)”, online: <<https://tinyurl.com/a8ku6n6w>> [perma.cc/K78F-QG8W].

¹⁰⁵ See Ontario, [Civil Rules Review: Phase I Report](https://tinyurl.com/56jfyfa9) (Ontario: Ministry of Attorney General, 2024) online (pdf): <<https://tinyurl.com/56jfyfa9>> [perma.cc/E8TH-KZ4F].

cases. Moreover, the OCA should adopt best practices from certain US jurisdictions. We focus on the following five recommendations.

First, the Civil Rules Committee should recommend amendments to the *Rules of Civil Procedure* to end the long-simmering debate regarding final versus interlocutory orders. There is confusion at the bar about whether an order is final or interlocutory; this debate plays out regularly in courts. This question has wasted countless hours of court time over the last several decades. Drawing on the OCA's internal records, we reviewed the success rate of civil motions to quash for jurisdiction: 90% of the motions we identified were successful in challenging the jurisdiction of the OCA, indicating the problematic nature of many appeals. The *Rules* should provide that final orders are restricted to orders that end a proceeding.

Second, leave to appeal, obtained in writing, should be required for all appeals of final orders. Currently, a party has an "automatic right to appeal most final orders."¹⁰⁶ A leave requirement, like the one in the Supreme Court of Canada, will clear out unmeritorious appeals.

Third, the legislature should amend the *Rules* to end the automatic stay of money judgments upon appeal. An appellant should be required to bring a motion in writing to obtain a stay, and judges should have the discretion to order the posting of security for the judgment as a stay term. This reform resembles but also exceeds in rigour the current approach under rule 62(b) of the US Federal Rules of Civil Procedure, which "permits a party seeking to stay the execution of a judgment pending appeal to post a bond or other security to [automatically] secure the payment of the judgment to the judgment creditor."¹⁰⁷

Fourth, the legislature should amend the *Courts of Justice Act* to eliminate automatic panel reviews of orders of single judges of the Divisional Court and OCA. Regarding panel reviews of non-originating motions (that is, of single judge motions other than motions to extend time to file an originating document), we conducted a review of internal OCA records: one hundred percent of the motions we identified for the year 2023 were dismissed. Panel reviews of single judge orders are not *de novo* hearings, and the power to overturn an order of a single judge is to be exercised sparingly.¹⁰⁸ Yet, parties continue to bring applications despite their remote chances of success. Appellants who are seeking to delay a final

¹⁰⁶ Brooke MacKenzie, "[Rule 61—Appeals to an Appellate Court](#)" in Noel Semple, ed., *Civil Procedure and Practice in Ontario*, 2nd ed, (online: Canadian Legal Information Institute, last modified 2024) online: <<https://canlii.ca/t/7hzzv>>.

¹⁰⁷ *Fuchich Contracting, Inc. v Shread-Kuyrkendall & Associates, Inc., et al.*, 2023 WL 4201756 (EDist Ct La).

¹⁰⁸ *Iqbal v Mansoor*, 2022 ONCA 198 at para 2.

order and vexatious litigants tend to employ these applications. By adding a leave requirement, the OCA can weed out panel reviews triggered by an improper purpose or lacking in merit.

Finally, the OCA must be open to adopting best practices from other jurisdictions. Just as the Superior Court should adopt rocket docket procedures, so too should the Court of Appeal. For example, there is a benefit in emulating the practices of the Vermont Supreme Court's Rocket Docket. The Vermont Supreme Court is Vermont's highest court. Unlike in many other states, there is no intermediate appellate court: appeals go from the Vermont Superior Court to the Vermont Supreme Court, and thus, the Vermont judiciary is at least facially similar to Ontario's. The Vermont Supreme Court implemented a rocket docket in 1991; while the success of a rocket docket may depend primarily on a shift in culture, an implementation of rocket docket procedures may also spur that necessary cultural shift.¹⁰⁹ The purpose of rocket docket procedures "is to expeditiously resolve those cases that do not necessarily require consideration by the full Court."¹¹⁰ Appeals are not appropriate for disposition on the rocket docket if "(1) the Court may be establishing a new rule of law, altering or modifying an existing rule, or applying an established rule to a novel fact situation; (2) the case involves a legal issue of substantial public interest; (3) the Court may be criticizing existing law; or (4) the Court may be resolving conflict or apparent conflict between three-justice panels of the Court."¹¹¹

There are several steps to Vermont's Rocket Docket procedure. First, staff lawyers select cases for potential assignment to the Rocket Docket. Second, one justice serves as a screening justice for three months and, during that time, reviews factums and selects additional cases for potential designation to the rocket docket. Third, staff prepare a memorandum on each case selected by either screening method. In that memorandum, they recommend whether the case should be placed on the Rocket Docket. Fourth, the entire bench, which consists of five justices, receives these memoranda and must vote on each case. Only a unanimous decision by all five Justices results in assignment to the rocket docket. Finally, a panel of three justices hears a list of rocket docket cases. Staff counsel usually prepare a draft opinion for the justices. During the hearing and final conference, the justices can request that the case be reassigned for hearing by the full Court. Finally, the decision to have an oral argument resembles the decision in regular docket cases. If neither party requests

¹⁰⁹ See Noel Semple, "[Courting Culture Change for Access to Justice](https://tinyurl.com/mrxk2fa6)" (16 September 2024), online (blog): <<https://tinyurl.com/mrxk2fa6>>.

¹¹⁰ Benjamin D Battles, "A Short Guide to Vermont Appellate Practice" (2022) 48:1 Vt BJ 28 at 30.

¹¹¹ *Ibid* at 30.

an argument, then the case is submitted on the briefs. Vermont Rocket Docket cases result in unpublished opinions. The Court publishes these brief summaries as “entry orders,” which can provide no further guidance for similarly situated parties in later cases.¹¹²

The Vermont Supreme Court’s methods, with some alterations, might work well at the OCA. Simple cases might be shunted to a rocket docket. All cases on the rocket docket might be heard by one justice sitting alone or by a three-justice panel. It is important to keep in mind Judith Resnik’s famous criticism of the rise of “managerial judging” and the increased opacity of judicial methods in the US.¹¹³ As Ontario increasingly adopts techniques of managerial judging, judges and legislators must ensure that most judicial orders and other instances of judicial reasoning remain public. Thus, the dispositions of and reasons for decision in appellate rocket docket cases in Ontario should be published and should hold precedential value. Furthermore, so long as there are multiple opportunities to divert a rocket docket case for full panel review, any fairness concerns can be alleviated.

IV. Conclusion

In *Hryniak*, the Supreme Court called for a “culture shift” to promote “timely and affordable access to the civil justice system” in Canada.¹¹⁴ In our submission, the proposed reforms in this paper are responsive to that call for a culture shift. By taking a principled approach to reform and recognizing that reform is an ongoing enterprise, the legislature and judiciary can achieve efficiencies and restore public confidence in the civil justice system.

The lack of faith in the civil justice system is a serious concern. No matter what reforms are implemented, they will only prove effective if they enjoy public support. Several of our recommendations represent simple measures that the legislature and courts can implement to rebuild trust in the justice system. For example, it should not be a difficult policy decision for all Ontario courts to follow the example of the Supreme Court of Canada and publish annual reports that include performance data. Surely it is beyond debate that taxpayers who fund the justice system are entitled to this basic information.

¹¹² Tracy Bach, “To Expediency and Beyond: Vermont’s Rocket Docket” (2002) 4:1 J App Pr & Pro 277 at 287.

¹¹³ Resnik, *supra* note 12 at 224–25.

¹¹⁴ *Hryniak*, *supra* note 10 at para 2.

It will be difficult to obtain buy-in from the judiciary regarding the right of members of the public to criticize the justice system and demand accountability. Judges must accept that the concept of judicial independence does not negate their position's substantial public service obligations. Instead of reactively dismissing public criticism, judges and courts should encourage public feedback and adjust their justice service delivery accordingly.¹¹⁵ In sum, the judiciary and legislature must not lose sight of the following three principles as they respond to the access to justice crisis; the civil justice system (1) offers an essential public service, (2) must embrace and promote transparency, and (3) must prioritize adaptability and flexibility.

While we have focused our analysis on what we view as top priorities for civil justice reform, we recognize that other access to justice issues remain under-studied. Some of these issues are controversial: advocacy for change with respect to these issues could stymie progress with regards to other reforms. Potential reform ideas that merit deeper analysis and debate include the elimination of civil jury trials in Ontario,¹¹⁶ the transfer of medical malpractice cases from the justice system to an administrative tribunal,¹¹⁷ and the repeal or amendment of the anti-SLAPP provisions of the *Courts of Justice Act*.¹¹⁸

V. Key Recommendations

Recommendation #1: The creation of The Ontario Civil Resolution Tribunal for claims up to \$25,000. The Tribunal would be based on the BC Civil Resolution Tribunal.

Recommendation #2: To improve access to justice, the Ontario Small Claims Court process should be conducted entirely online.

Recommendation #3: The legislature should increase the monetary jurisdiction of the Ontario Small Claims Court from \$35,000 to \$70,000.

Recommendation #4: Evaluative mediation should become mandatory for Small Claims Court and Simplified Procedure cases. If a party rejects a proposed settlement, proceeds to trial, and achieves a result that is less

¹¹⁵ See Rickard, *supra* note 30.

¹¹⁶ See Joshua JA Henderson, "Striking the Civil Jury Trial in Ontario" (2016) 45 *Adv J Q* 286; Orct, *supra* note 6.

¹¹⁷ See Valarie Blake, "[Jury is Still Out on Health Courts](https://tinyurl.com/2s3u4btd)", online: <<https://tinyurl.com/2s3u4btd>> [perma.cc/RX3E-E25T].

¹¹⁸ See Howard Winkler, "[Anti-SLAPP legislation is failing. Here's a possible fix](https://tinyurl.com/239my5bv)" (8 February 2022) online: <<https://tinyurl.com/239my5bv>> [perma.cc/S2P7-B273].

favourable than the mediator's assessment, they should suffer adverse cost consequences.

Recommendation #5: The legislature should increase the jurisdictional amount under the Simplified Procedure from \$200,000 to \$500,000.

Recommendation #6: All interlocutory motions for Simplified Procedure cases should be in writing unless a judge orders that an oral hearing is necessary.

Recommendation #7: For claims over \$500,000, Ontario courts should adopt the "Rocket Docket system" currently in operation in some US courts, or at the very least, Ontario must commit to making active case management an essential part of every civil case.

Recommendation #8: The Superior Court should impose an 18-month cap on cases from the time a case enters the system until a final judgment is rendered.

Recommendation #9: The Civil Rules Committee should amend the *Rules of Civil Procedure* to end the debate regarding final versus interlocutory orders and to ensure that final orders are restricted to orders that end a proceeding.

Recommendation #10: Leave to appeal, obtained in writing, should be required to appeal a final order to the OCA.

Recommendation #11: The legislature should amend the *Courts of Justice Act* to eliminate automatic panel reviews of orders of single judges of the Divisional Court and the OCA. Such reviews should require leave from a panel of the court to seek a review of a single judge's order.

Recommendation #12: The OCA should emulate and adapt the Vermont Supreme Court's Rocket Docket practices.

Recommendation #13: The Civil Rules Committee should amend the *Rules of Civil Procedure* to end the automatic stay of money judgments. Instead, an appellant should be required to bring a motion in writing to obtain a stay, and judges should have the discretion to order the posting of security for the judgment as a stay term.

Recommendation #14: All courts in Ontario should annually report to the people of the province and provide easy-to-understand performance data.