“Taking a Shot: Access to Justice, Judging and eCourt”,

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TAKING A SHOT: ACCESS TO JUSTICE, JUDGING AND ECOURT

Justice R. James Williams

Access to Justice issues have shown us that our traditional adversarial dispute resolution model is slow, costly, divisive and complex - for both self represented litigants and those with lawyers. Addressing these issues through the provision of information to litigants has not been enough. Family Justice reports speak of the need for "culture change" and judicial leadership in affecting change. Judges have created options to the traditional adversarial model with processes such as Settlement Conferences, Binding Settlement Conferences, Informal Trials and Case Management. COVID19 has "forced" courts to embrace Virtual and telephone proceedings. There are now choices in Court based, Judicially-run dispute resolution processes. Nova Scotia's Supreme Court, Family Division has a process "add" - an eCourt Pilot instituting an electronic, chat-based Court process that gives litigants and Judges a new "choice" of process.

Practitioner's Key Points:

- The traditional adversary system cannot adequately address access to Justice issues such as slowness, cost, divisiveness, and complexity.
- Access to Justice issues exist for litigants with and without lawyers.
- Judges should be leaders in change.
- Case management and new Judicial dispute resolution processes (such as Settlement Conferences, Binding Settlement Conferences, Informal Trials) have been and should be part of the change needed to address Access to Justice issues.
- Nova Scotia has embarked on an eCourt Pilot - a Judge led chat room form of hearing to add another choice of process to the options available for addressing Judicial Family Law Dispute resolution.

Keywords: *eCourt; Electronic hearings; Nova Scotia Supreme Court, Family Division.*

Covid-19 closed Courts around the world to in-person hearings. Necessity, the mother of invention, has forced Courts everywhere to try to do things differently, to develop remote alternatives to in-person hearings, appearances and filings. The development of remote processes while dramatically accelerated is uneven, diverse and, at once, global and local. Different jurisdictions are addressing the same problems but doing so, in large part, separately. It is a challenge to keep up. Richard Susskind established the website "remotecourts.org." Its stated purpose is "to help the global community of justice workers….to share their experiences of 'remote' alternatives to traditional court."[1] I encourage you to visit and subscribe to the site - also referred to as "Remote Courts Worldwide".

As Susskind says, "None of us imagined that we would need to change so quickly."[2] Susskind also pointedly observes, however, that "… the main reason for the digital transformation of Court service is unrelated to Covid-19. Rather Court systems around the world are broken."[3] I do not disagree.

My area and my concern is Family Law. We need to change. Our traditional Family Justice System is limited, inadequate, and problematic. I firmly believe that there will always be some cases that will require a traditional adversarial trial process. I value our legal system and its traditions.

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I value the changes and improvements that legal and other professionals have brought to family law and the commitment to "do better" that is embedded in that ethic. I also believe that we are failing many of our "constituents."

There are significant problems with access to Family Justice. Our traditional way of resolving disputes is too slow, too divisive, too complex, and too costly. It is obscure to all but legal professionals. We can do better. One path to improvement is the development of new and different dispute resolution processes as alternatives to "the way we were." We should seek processes that might work better for some litigants, some disputes, and some Courts. Online Judicial Dispute Resolution is one such process. We have in recent months implemented an online Judicial Dispute Resolution process in Nova Scotia, an eCourt Pilot in family law. Our Pilot is limited in its scope - we are not trying to "boil the ocean."

This paper will mirror my own learning and express the views I have about judging, access to justice in family law, and some ways in which judges might address access to justice issues. It will outline our eCourt pilot in the Nova Scotia Supreme Court, Family Division. The paper will follow this outline:

A. Access to Justice in Family Law
B. Family Law
C. Our Traditional Adversary System
D. Responding to Access to Justice Difficulties: Focusing on Self-Represented Litigants is Not Enough
E. Pathways to Change in Judicial Process
F. Judicial Processes Within the Family Law Justice System Have and Are Changing
   1. Some New Processes
   2. The Growth of Case Management
   3. Online Judicial Dispute Resolution in Nova Scotia: An eCourt Pilot
G. Early Learning and Opportunity
   1. Early Learning
   2. Opportunity

I. ACCESS TO JUSTICE IN FAMILY LAW

> *"[T]here is a serious access to justice problem in Canada. The civil and family justice system is too complex, too slow and too expensive."*[4]

Virtually all common-law jurisdictions are struggling with access to justice in family law. A wide variety of reports[5] have identified problems within the Family Justice System as including: cost, complexity, divisiveness, delay, the unsurprising difficulties self-represented litigants have dealing with a system that is premised on one having legal representation, and the system's struggle to adjust to the increasing number of self-represented litigants.

The Cromwell Report spoke of need for a "paradigm shift," a change in culture within the family justice system. It noted the existence of an "implementation gap"[6] between reform ideas and real change in dispute resolution processes.[7] In the United Kingdom, the Interim "Norgrove" Report identified an additional concern with respect to change within the Family Justice System, and noted, "Strong leadership and management are needed for any organization or system to fulfill its individual or collective objectives. For Family Justice to begin to operate as a system it needs to have an owner."[8] The Interim "Norgrove" Report further elaborated that judicial culture and behavior must change if we are to more effectively deliver access to Family Justice.[9]

These are strong and appropriate messages. Change does not happen without leadership. Leadership comes in different ways. Change in judicial processes must come from judges.

II. FAMILY LAW

Family law disputes are about people who have been or are in relationships. They generally concern children, financial obligations (support) and/or property. These are deeply personal issues. Family law dispute resolution impacts personal identity and family roles. The disputes are most often about what will happen, not what did happen. These disputes are impacted by all that influences relationships including, but not limited to domestic violence, mental and emotional health, addiction(s), class, race, culture, poverty, gender, sexuality, and language.

The list of factors impacting family disputes is long and ever-changing (we might now add pandemics to the list). Relationships are generally restructured, not terminated. Relationships do not necessarily end with the adjudication or end of a particular family dispute. The interaction between disputants often continues after the resolution of a dispute. The disputes, like the disputants and relationships, evolve and change, and may, or are even likely to, resurface or reoccur in a different context. Our adversarial legal system is not designed for disputants who need to interact following litigation. The divisiveness inherent in adversarialism undermines a family's ability to maintain a positive and stable relationship both while seeking to resolve a dispute within the traditional legal process and after that legal process is over.[10]

The Family Justice System is embedded in the adversary system. Any talk of culture change or paradigm shift in the Family Justice System must consider this.

III. OUR TRADITIONAL ADVERSARY SYSTEM

There are three main elements to the traditional adversary system:[11]

1. An impartial, passive decision-maker with expertise on formal rules of procedure and evidence. This is the Judge.
2. Formal rules of procedure and evidence. These are the rules that govern the process and contest between the parties, and determine what information comes to, and may be relied upon by, the decision-maker. These rules of evidence and procedure are the technical rules of "the game." They are the specialized knowledge of lawyers and judges.
3. The parties have the responsibility to decide what issues are heard, gather the evidence, present the evidence and contest the evidence of other disputants. It is assumed that this is all done with the advice and guidance of legal counsel.

As D.A. Rollie Thompson has stated, "[i]n an adversarial system the parties and their lawyers are responsible for the investigation, preparation and prosecution and presentation of their own cases. The judge sits as neutral umpire."[12] The adversary system is said to be based on formal rules of evidence and procedure. These are the "rules" of the game – the rules Judges seek to have everyone follow. They are complicated.

The Rules of Evidence are cumbersome and littered with exceptions.[13] The Canadian Rules of Evidence have been described as dense, and at times, rigid.[14] The judicial response has been to layer on these rules, "a principled approach" that is flexible and considers necessity and reliability as general factors when considering the admissibility of evidence. Evidence rules remain complex.[15] This complexity adds cost because it expects and encourages litigants to seek professional assistance to work through the system.[16] Efforts to navigate the evidentiary rules create cost in monetary, time and emotional context.

Procedural Rules within the adversary system can be just as complex, often stemming from old rules that (again) create significant expense.[17]

These rules of evidence and procedure often apply conditionally and can be, and often are, waived by the parties or a court. They are unevenly, and even inconsistently, applied.

The Rejection of Evidence/Information where Rules of Evidence or Procedure are not followed is not uncommon, sometimes for "disciplinary" purposes.[18] This complexity, and at times, uneven

and rigid application of the Rules of Procedure and Evidence ratchets up cost and acrimony throughout the entire process. We too often act as if all cases are going to trial and insist that litigants prepare and file documentation accordingly. Systemically we tend to look for the information needed for trial rather than that necessary for resolution.[19]

Further, we often assert that the adversary system is based on fact finding and truth seeking. "Our adversary system is frankly based on the pragmatic assumption that the truth of the controversy between the parties…stands a reasonably fairer chance of coming out when each side fights as hard as it can to see to it that all the evidence most favorable to it …[is] before the court."[20] I am not sure how "pragmatic" that assumption is. Decisions are based on proof, not truth. Judges start decisions with the assertion, "I am satisfied that… based on the evidence," not "The truth is…" The judge generally is not to add evidence, even if it is relevant or helpful.

Finally, as stated, much of family law involves a restructuring of the family. Often there is no "truth" to be found. To be sure there are issues that, at times, require a factual determination - Did domestic violence occur? What is a person's income? Was a child abused? The task, however, is more often one of redistributing future time and responsibilities regarding children, money, and/or assets/debt. It is problem solving. While there are interests and contexts to be considered, in determining where a child will spend Christmas, there is not much "truth finding."

Truth is complicated, and there are typically multiple versions of the truth in each court case.[21] This can be said of no area of law more than family law. Robert Kagan speaks of "adversarial legalism" being "markedly inefficient, costly, complex, punitive and unpredictable."[22] It is described as procedurally formalistic.[23] Lawyers advocate, preparing and coaching witnesses, wearing down opponents, and using procedural and evidentiary rules as tools of advocacy. It is a contest. Waldron and Koritzinsky looked at the traditional adversarial model through the lens of game theory. They observed that the Family Justice System is designed for (legal) professionals (not customers), that it encourages zero-sum, win lose approaches, and that it fosters selfish strategies and escalation of disputes.[24] In a word it is divisive.

Our adversary system is a poor fit for family law disputes needing proportional, economical, constructive, capacity-building problem-solving.

Our system is based on a traditional adjudicative model. Our procedural and evidentiary rules are designed to manage litigation, adjudication and an adversarial process with litigants shepherded by experts, lawyers. Our narrative and our rules are built around litigation and adjudication processes. Not problem-solving. Not negotiation. Not avoiding escalation. Not accessibility. Not controlling cost. Not controlling time. Not ensuring processes are proportional to the issues in dispute. Not capacity-building. How can we do better? How can we not?

IV. RESPONDING TO ACCESS TO JUSTICE DIFFICULTIES: FOCUSING ON SELF-REPRESENTED LITIGANTS IS NOT ENOUGH

The ongoing increase in the number of self-represented litigants (SRLs) is expressed as a concern by every report and review on Family Law and Access to Justice.[25]

In Canada, The National Self-Represented Litigants Project[26] described the increase in the number of people representing themselves in family law proceedings as steadily moving above 50% of litigants.[27] That was 2013. The percentage is undoubtedly well beyond that now. It will continue to increase.

MacFarlane spoke to, and surveyed, self-represented litigants. She described them as hearing the "mantra" of "access to justice," but then experiencing it as misleading, or worse. The self-represented litigants she surveyed felt overwhelmed by volumes of paper, complex rules of evidence and procedure, the volume and diversity of "helping" information made available to them, and the distinction between legal information and advice.[28]

MacFarlane recommended the Family Justice System focus on helping the self-represented through the provision of simplified educational, supportive, coaching, and like programs. Put simply, she recommends they be given help in dealing with adapting to the legal system.[29]

Other reports and papers have concluded that:

a. More than half of family cases involve at least one self-represented litigant (SRL);
b. Lawyers feel that rules of evidence and procedure are applied differently to SRLs;
c. Lawyers believe settlement less likely with self-represented litigants; and
d. Lawyers and Judges believe that time (needed) expense increases if one side is self-represented[30].

Some may, depending on their personal context, see self-represented litigants as part of the problem.

In Canada, there is a "judicial duty to assist" self-represented litigants (SRLs).

The Canadian Judicial Council (CJC) has produced an electronic bench book to guide judges in dealing with self-represented litigants. Its "statements" include:[31]

A. Judges, the Courts and other participants in the justice system have a responsibility to promote opportunities for all persons to understand and meaningfully present their case, regardless of representation.
B. Judges, the Courts and other participants in the justice system have a responsibility to promote access to the justice system for all persons on an equal basis, regardless of representation.
C. All participants are accountable for understanding and fulfilling their roles in achieving the goals of access to justice, including procedural fairness.

The commentary that follows indicates a Judge can provide "information" (not legal advice) and explain relevant case law and its implications (depending on the circumstances).

The CJC Bench Book notes that court officials may be concerned or uncomfortable with assisting self-represented litigants, feeling unsure as to how far they may go in answering their questions. Logically, this leads to the need for additional training of all court personnel (including Judges).[32] Unfortunately, the distinction between legal advice and legal information is at best difficult, and at worst, illusory. It is unquestionably a problematic distinction for court personnel and judges to apply.

Further, the self-represented litigant who is told "I cannot give you legal advice" hears "I cannot help you." Significantly, Mnookin and Ross identify "restricted channels of information and communication" as an institutional barrier to conflict resolution.[33] The system is set up to function with lawyers. It does not function effectively without lawyers in its current structure.[34]

The challenge for judges – to help, but not too much, and not in a way that makes the other party feel that judicial impartiality is compromised – is obvious. This ambiguity between the provision of legal advice and provision of information is problematic for all – the self-represented, court staff, and Judges.[35] The CJC Bench Book echoes the Cromwell Report and the many other family court reports and reviews in saying: "The design of programs to assist self-represented litigants should be a collaborative effort involving the judiciary, the courts, and the Bar, legal aid providers, the public and relevant government agencies."[36]

I agree, to a point. Information, workbooks, and simplified forms should be pursued. Court staff and Judges having contact with SLRs should help them and assist them with the court processes. The ability of these initiatives to impact the access to justice issues facing the Family Justice System and assist its participants, however, is at best limited. A "Rosetta Stone" approach (teach SLRs the language of the law) and Judicial Assistance to improving their legal literacy may help but is unlikely to make them "fluent" in the law.

Importantly, most of the significant problems confronting the Family Justice System have little to do with self-represented clients. Divisiveness, cost, complexity and delay are problems for represented litigants and their counsel (as well as self-represented litigants). These access to justice issues in family law exist independent of the explosion and the number of SRLs.

To address the core issues with access to justice, we need to change judicial dispute resolution processes. We need to do more than seek to change, educate, and inform Self-Represented Litigants. Put another way, equipping every Self-Represented Litigant with a law degree would not solve our access to family justice issues. We need to do more. We need to change and expand our processes and culture.

V. PATHWAYS TO CHANGE IN JUDICIAL PROCESSES

Norgrove asserted that a culture change in the family law justice system cannot happen without leadership. Judges have called for, identified and embraced some pathways to process change. Two Canadian appeal courts have made it clear that the parties to litigation or a dispute may choose whatever dispute resolution process they wish.[37]

In both of these cases, the parties agreed to an alternative judicial process – a binding Settlement Conference, a sort of judicial med-arb if you will. These Appeal Courts endorsed the practice and held the parties to their choice of an alternative process.

In *Abernathy*, the Alberta Court of Appeal asserted, "Litigants are free to resolve a dispute in any manner they wish. They may, for example, agree to flip a coin, consult a Ouija Board, or let a third party decide."[38] In *Forrest v. Forrest*, the Nova Scotia Court of Appeal said, "Litigation is expensive and uncertain. It exhausts the resources of the parties and taxes those of the public … Less formal alternatives should not be lightly cast aside."[39]

The Supreme Court of Canada,[40] *Abernathy*[41] and *Forrest*[42] have recognized that judicial dispute resolution must evolve and change.[43] Protracted litigation causes expense, delay and prevents a fair and just resolution of cases. Ordinary individuals cannot afford to litigate most family disputes in the traditional way. When faced with expensive, complicated processes, people look for alternatives. They may attempt to represent themselves or give up.[44] The Supreme Court of Canada ("SCC") has said, "There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted… . This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial."[45]

The Court further pointedly observed that our justice system process is "illusory unless it is also accessible — proportionate, timely and affordable."[46] To do better we (judges, lawyers and litigants) require, in my view, new processes and new choices in how we go about resolving disputes.

VI. JUDICIAL PROCESSES WITHIN THE FAMILY LAW JUSTICE SYSTEM HAVE AND ARE CHANGING

A. SOME NEW PROCESSES

The role of judges has evolved in Canada. There has been change. There are now Judicial roles, not one Judicial role. Apart from the traditional trial process a number of resolution processes are now available through Courts.

Judicial settlement conferences, a process where a Judge facilitates settlement and problem-solving with the parties, are now mandated by rules or practice in virtually all Canadian jurisdictions (in civil and family matters). That process, judicial settlement conferencing has itself evolved, and binding settlement conferences (akin to med-arb in the private legal world) are now part of the Canadian Judicial landscape. In *Abernathy*, the Alberta Court of Appeal discussed the development of a "binding settlement conference." Judicially-assisted Dispute Resolution, or JDR, was described as a process where, if the parties were unable to reach a settlement, they would invite their JDR (settlement conference) judge to resolve their dispute by making a binding decision.[47] In *Abernathy*,

the parties agreed that the Judge would make a final binding decision, so, the judge decided. One party refused to implement the "settlement" and argued the process was illegal and that the judge was not acting in a "judicial capacity."[48] The Court observed that the judge was, however, acting in a judicial capacity pursuant to Court Rules, that the parties initiated the request for a binding settlement conference, and the process came before the judge as a result of the litigation.[49] The litigants were free to choose any dispute resolution mechanism they so desired.[50] They freely and voluntarily entered into a court-sanctioned process, and so they received "precisely what they bargained for."[51]

The Court commented on concerns about access to justice, cost and time – and noted that binding settlement conferences were one strategy to help address these concerns. Less procedure, less formality, and fewer rules meant a quicker, simpler, and less expensive legal process.

A number of jurisdictions have developed "informal trials."[52] Like settlement conferences, they are available to litigants with or without counsel and reduce time, delay, complexity and expense.[53]

The development and evolution of judicial settlement conferences, binding judicial settlement conferences, and informal hearings make it clear that judicial process change can and has occurred. While many family court sites offer litigants these options, they should be formalized in Court Rules so that Judges are expressly authorized to utilize them, and litigants and lawyers become more aware of their availability.

B. THE GROWTH OF CASE MANAGEMENT

Kagan and Thompson have called for Judges to take a more managerial role within the traditional adversarial system. In Kagan's view, change must involve "… shifting power from the parties and lawyers too… in the case of the litigative process… judges."[54] Thompson (focusing on the self-represented litigant) agrees and goes further, "The only way to accommodate self-represented litigants is for the court to assume greater responsibility for pre-trial fact gathering."[55] This shift requires judges to actively manage the legal process(es) within individual cases, considering the unique circumstances of the case.[56]

The Cromwell Report discusses the extent that Consensual Dispute Resolution values and processes have penetrated courts. It adopts the following as "more or less" describing Canadian Courts, especially unified family courts.[57]

> *The primary role of family courts has shifted from adjudication of disputes to proactive management of the family law-related problems of individuals. Thus family courts have moved from primarily umpiring to… a problem solving role. Under the old system, family courts were not expected to plan and manage cases, only adjudicate them.…*[58]

Norgrove's Interim Report describes inadequate case management as a process lacking Judicial continuity, not establishing a specific timetable for dispute resolution and allowing the parties too much control.[59] Party control of the litigation process is at the very core of our traditional adversary system - and, in my view, must change or at least evolve if we are to do better.

The robust judicial management of a dispute should organize it. It should include identifying issues, what judicial process options there are to resolve the dispute, the required disclosure and filings, timelines and time limits, and direct subject matter focus in filings and appearances. The focus should be on containment of the dispute and identifying what information is needed to resolve or decide the dispute. Judicial pronouncements that more and more information is needed should overtly consider the impact such orders have on the cost to the parties in that litigation.

In its traditional use, the adversary system leaves most of these matters to litigants caught in a complex web of rules. These are the same litigants we in family law often describe as being acutely emotional, vulnerable at times of family crisis, and intimidated by our Family Justice System (which is complex and difficult to understand). We should help people solve problems and give them options, not just say "we can't give you legal advice" and "figure it out."

The Rules of Family Procedure in the United Kingdom[60] are detailed in the expectations they create for case management by Judges.

Rule 1.1 of the Rules of Family Procedure asserts that the overall objective of the Rules is to enable the Court to deal with cases justly, and defines that as ensuring the case is dealt with expeditiously and fairly, deal with the case in ways that are proportionate to the case's complexity and the importance of the issues, save expense, ensure the parties are on an equal footing, and allow the case an appropriate share of the court's resources, taking into account the need to allow resources to other cases.[61,62]

A broad case management rule enables judicial creativity and flexibility in the ways hearings are conducted and in the dispute resolution choices given to litigants. Judges can enable and encourage problem-solving and negotiation as a first focus, step, and narrative. The initial focus should be on securing the information necessary to settle or resolve the dispute. It may well be less extensive than that required to fully litigate it. The focus should be on addressing the dispute, not escalating and complicating it. The initial "narrative" should emphasize resolution and alternative more focused dispute resolution approaches at least as much as the traditional adversarial process. Litigants should be given choices. So should lawyers. So should Judges.

The Court can help the parties structure an appropriate dispute resolution process – what happens next, what has to be done, when, how and what is disclosed, what process (trial, settlement conference, or other will be utilized to resolve the dispute), how the evidence is to be received (affidavit or oral), how much evidence there will be, how much time is allotted (for examination or cross-examination), what and when issues are to be addressed, and whether issues will be heard together or separately.

Assisting the self-represented client and fulfilling or attempting to fulfill the court duty to assist self-represented litigants is easier, more effective, and more likely to occur within an aggressive case management model than a "give information not advice" one. Guidance concerning how the matter might proceed, explanation of the processes available, choices and the setting of expectations are dispute management services that judges can effectively provide litigants. I would suggest that Judges seek to remedy process errors, attempt to ensure that the court receives relevant and focussed evidence and arguments, and ensure informed consent to a settlement.[63]

Individual judges and courts should, in my view, support the development of case management rules that enable and promote creativity, contain rather than escalate disputes, assert responsibility, and importantly, create expectations on the judge and through her/him, the parties to develop and choose dispute resolution options that attempt to address issues such as divisiveness, cost, delay and complexity. The U.K. rules (and others) provide a good starting place, but can and should be elaborated upon.

While we may seek to remove, contain or limit some of the control disputants have within the adversarial process, we should be aggressive in creating new dispute resolution processes and giving the disputants and judges more options, more choices, and more responsibility in selecting and creating the appropriate dispute resolution process for or within each case. We have taken significant steps to do so with Settlement Conferences, Informal Hearings and other Judicial Processes. There is much more that can be done. Indeed, there will always be ways that we can do better. Covid-19 has forced all Courts to develop virtual (video) and telephone-based court processes. This is to be applauded. In Nova Scotia, the Nova Scotia Supreme Court, Family Division has added (in August 2020) a new process – an eCourt – with online Judicial case management conferences, settlement conferences and adjudication.

C. ONLINE JUDICIAL DISPUTE RESOLUTION IN NOVA SCOTIA: AN ECOURT PILOT

Susskind asked, "Is a Court a service or a place?"[64] Covid-19 has answered this question - Court is not just a place. I believe that the changes to judicial processes, including settlement conferences, binding settlement conferences, informal hearings, and case management, demonstrate that Courts

are willing to adjust and change judicial dispute resolution processes to better serve disputants. Telephone and virtual/video processes are part of that.

Susskind also asserts that justice systems should be user-based, reflect the way people live and work and consider disputes expansively by promoting and considering their avoidance, containment and resolution.[65] Beverly McLachlin, the former Chief Justice of Canada, has said, “Susskind’s essential point - that the justice system should adapt to our changing and increasingly digital world – seems unassailable.”[66]

There is much happening, and much more to happen; much written, and much more to be written about the use and potential of technology in Courts.[67] E-Filing, negotiation platforms, wayfindings, public education, service of documents and notices, reminders, artificial intelligence (advice, decisions), and Virtual Video hearings, are but some examples of benefits that have come to the Justice System through technology. I am not addressing these.

Online (non-video) Dispute Resolution is common in today’s world. “ODR is essential to e-commerce because large online marketplaces and merchants (companies like e-Bay, Amazon, and Alibaba) must provide their users with fast and fair redress processes so as to bolster user trust.”[68] Colin Rule has suggested that ODR is ADR plus technology and that online dispute resolution provides new tools for mediators and arbitrators.[69]

Quek Anderson has written of there being a convergence of pressures from ADR (Alternative Dispute Resolution) and ODR (Online Dispute Resolution) on the Judicial System.[70] For Judges and Courts, the addition of problem-solving processes like Judicial Settlement Conferences, informal hearings, and judicial oversight (management) of dispute resolution processes means there are opportunities to create new dispute resolution processes. This is where our Pilot fits - another dispute resolution option, another choice - ODR with Judges or eCourt.

The online world is said to have initially mimicked ADR, incorporating negotiation and mediation processes.[71] Courts have much to learn from online dispute resolution processes established by international consumer commerce.[72] Such online processes offer significant potential benefits to the family justice system. An online model can be an alternative to in-person, video or telephone processes. If such a service is to be part of the way we seek to address our problems with access to family justice, it should have the potential to reduce cost, complexity, delay, and the escalation of family law disputes.

There are at least two different ways to envision eCourts and to introduce online Judging. The first would be a simplified court, where proceedings are conducted online with a judge, and the rules of the court would be streamlined and simplified from the traditional evidentiary and procedural rules that are so complex. The second would be an online system where participants can log in and comment upon their case within a realistic window of time, allowing the parties to clarify and explore the issues in their case. This second process would allow for flexibility in when the parties can participate, streamline schedules without any need to appear at a specific date and time (even online), and allow the judge to take on an inquisitive and problem-solving approach.[73]

It is worth noting that Susskind refers to these as ways to “introduce” online judging, not as an either-or choice. The first may evolve into the second. The second may be a pathway to the first. I hope that is so.

In February of 2017, the Nova Scotia Judiciary initiated steps to establish a pilot project that would provide Judicial adjudication of some family law disputes by (to use Susskind’s phrasing) grafting a simplified version of current processes into an online environment. We hope and anticipate that the advantages of our program will impact access to justice issues such as delay, cost, complexity and divisiveness for some litigants and some disputes. It is seen as being part of improvement, not the solution. It is no “silver bullet.” There is no “silver bullet.”

The pilot is to initially involve only parties with legal representation. We had three reasons for doing this. First, we felt a pilot would be easier to manage and have more likelihood of success with lawyers involved. We hope and plan to expand the program to self-represented litigants. Second, the pilot would be entered only where the parties and Court consented to this alternative process. Having lawyers would ensure that parties so consenting did so with appropriate legal advice.

Consent to the process is seen as important. It is seen as giving the Judge jurisdiction and authority.[74] Third, we felt it important to offer something to parties with counsel (whether private or legal aid) to address their access to justice issues such as cost, complexity and delay. Put another way we felt we might begin to expand the number of litigants who were represented if the process was more cost-effective and defined.

The pilot is Judgecentric. The Judge's consent to the process is required (in addition to that of the parties). The process is to be managed by a Judge who gives direction within the process, the issues to be dealt with, and the nature, content, and length of Affidavits or other material to be filed. Notices would be electronic. Material would be e-filed unless otherwise directed by the Court. The "hearing," appearance, and submissions would be in a time-specific electronic "chat room" or "chat rooms." The project allows a judge to have a private chat with individual parties thus allowing caucusing in a settlement conference process. There is no video. Communication is typed. The Judge would provide oversight to and containment of the dispute and set a specific time and date for the online "hearing."

The pilot was designed to address discrete family law disputes and conferences. An Advisory Committee quickly developed a list (that is growing) of well over 70 types of conferences/applications/hearings that might be expeditiously dealt with through an online process. Examples of such disputes that would be appropriate for Online Judicial Dispute Resolution/eCourt include: Case Conferences; Settlement Conferences; and hearings concerning specific issues such as permission to travel with a child; specific parenting time, e.g. Christmas; Orders for assessment; Costs; Disclosure; Table or termination of child support; Disputes over the form of an Order; Substituted Service; and ex-parte motions. The plan is that the pilot will, in time, expand to include self-represented litigants, other areas of law, and other levels of Court.

The pilot's possible advantages include freeing docket time for more complex cases, no "in the building" court waiting time for lawyers, a time-limited specific date and time for ehearings, fewer documents to file, briefer focused documents, a quicker hearing date, a narrowing of issues, and issuance of an electronic order, possibly at the time of the hearing. The ways the cost of litigation may be mitigated include minimizing or eliminating a lawyer's and client's time traveling to court and waiting at the courthouse, reduced court filings, no courtrooms and less demand for infrastructure at the courthouse, and the introduction of additional technology, such as e-filing, and electronic notices. Hopefully, the project will create potential efficiencies and savings of time and money for courts, lawyers and litigants. The process would be part of a "system" that enabled litigants to share responsibility for the choice of dispute resolution process with the Court. Some of the tradition of litigant control is maintained but the Court is given an oversight role. The use of vigorous judicial case management is embraced.

A number of concerns and cautions about the Pilot were raised.

There was concern over whether there would be a complete court file or record. For instance, in Nova Scotia court files are not electronically stored, meaning an eCourt proceeding would, in conclusion need to be printed and placed in the paper file. That is being done. Each paper file is complete.

Nova Scotia's Courts are open, and the Court is a "court of record." An eCourt proceeding cannot be walked into. The eCourt transcript, however, is immediately available to the parties and once placed in the Court file is available to the public in the same way any conventional court filing or document is. There is no need to wait for a transcript of an oral process to be prepared.

Flipping the open court coin, others have expressed concerns over the privacy and security of using online systems. Courts and the justice system tend to be risk averse. We are all risk averse to some degree. We should be. What could go wrong? Electronic security and privacy breaches are the main concerns.

Mitigating these risks are four factors. First, that risk will be acknowledged in "consents" to the process. Second, the information is public anyway as the court is an "open court." Third, training for all participants - initially lawyers and judges – has discouraged the filing of material that is seen as sensitive, such as bank account numbers, social insurance numbers, children's birth dates, etc. If

need be that material can be filed with an eCourt Judge in the traditional hard copy manner. Fourth and finally, the filings are overtly managed by a Judge who is in a position to emphasize that information that is inappropriately personal should not be e-filed.

The eCourt platform meets the highest standards for security and uses the same FileNet judicial information storage system as is currently used for other Nova Scotia Judicial information. FileNet is the same storage solution used for the Court's Decisions, among other things. FileNet is not cloud-based. The eCourt data (the documents uploaded, transcript, decision and/or order) is stored in FileNet for a 30-day period at the end of the eCourt proceeding. At the end of the 30-day period the data information (the documents uploaded, transcript, decision and/or order) are printed and placed in the physical court file at the courthouse. The FileNet data is deleted automatically after the 30-day period.

The Nova Scotia Supreme Court Family Division engaged stakeholders early in its effort to create an eCourt Pilot. Stakeholders included the whole Family Division of the Supreme Court of Nova Scotia; the entire Supreme Court of Nova Scotia; the Chief and Associate Chief Justices of all Courts; the Family Law Bar; and the Provincial Department of Justice. All stakeholders have supported the Pilot. The support could scarcely have been or be more positive or enthusiastic. We initiated the Pilot in August of 2020. Why were we so slow getting there?

The Provincial Department of Justice engaged the advice of other departments on the security of the proposed commercial software. This was appropriate to do. Identification of a satisfactorily secure software platform became an issue.

An issue identified by Cabral, et al.[75] has impacted us. They noted,

> [L]ack of knowledge about technology exists throughout organizations involved in advancing access to justice… [and] … to be most effective, courts, and organizations deploying access to justice technologies need to be able to build on and leverage these experiences and best practices and implement their projects as state-of-the art- and integrated solutions, rather than reinventing the wheel.[76]

In Nova Scotia Courts, Judges, the Bar, and the Provincial Department of Justice were on the same page. We did not have technology, platform and software expertise. That expertise was for all intents in a silo separated from us within government. This was a bump, not a barrier. We eliminated that silo through aggressive collaboration and the commitment of all involved (including the NS Department of Justice and Nova Scotia Digital Service). Covid-19 provided a "push." Nova Scotia created its own eCourt Platform. We did not adopt "wheels" from a commercial entity or other jurisdiction.

VII. EARLY LEARNING AND OPPORTUNITY

We have established an eCourt with online case management, settlement conferences and adjudication done by Judges, in the Nova Scotia Supreme Court, Family Division.

A. EARLY LEARNING

We went "live" with our Pilot in August 2020. We have "only just begun." Anecdotally, the Pilot has been impacted by Covid-19 in three ways:

- Fewer clients are engaging lawyers;
- There have been significantly fewer filings; and
- The Supreme Court of Nova Scotia has embraced telephone and virtual (video) conferences and trials. The telephone especially has some but not all of the advantages of eCourt.

This being said, the eCourt Pilot has moved beyond the originally envisaged discrete topic case conferences, hearings, and settlement conferences. The Pilot has successfully hosted complex case conferences and settlement conferences. One unforeseen benefit of the eCourt Pilot is that a Judge doing a settlement conference and caucusing in separate chat rooms can move between "rooms" almost instantaneously.

Our feedback has been, in a word, positive. It includes the following comments and observations from lawyers who have used the Pilot:

- The process was efficient and very easy to use.
- I have only used it for a Case Management Conference to this point and it was great for that purpose. It is very useful to have a transcript of the Court's directions available the next day. It will cut down on misunderstandings between counsel as to the details of the Court's directions.
- The process was excellent at keep parties focused on the issues. It was a great opportunity to have frank discussions with my client without the issue of leaving a room and coming back or leaving a conference call and scheduling a time to return.
- I would highlight the fact that it provided an opportunity for my client, who expressed fear of being in court and being in the same room as the other party, to participate in the settlement conference through me in a comfortable environment. I would emphasize this as an option for people suffering from mental health/anxiety concerns generally, and especially for victims of domestic violence.
- As with any new experience, there is an adjustment compared to the status quo but well worth it…. This was significantly better than a traditional conference as I was able to speak openly with my client while in communication with the Justice. It allowed time for discussion and clarification when answering the Court's questions which is not the case when appearing in person. Although the outcome of the conference wasn't what my client was hoping for, he still expressed his preference to the eCourt system over his past experiences with traditional settlement conferences.
- This system has a lot of potential and hopefully will be available for every case at some point in the future (i.e., uploading documents for filling, doing pretrial conference, etc.).

It seems clear that the development of the eCourt Pilot will bring a number of benefits beyond its' original contemplation. e-Filing will expand. Scheduling of Court matters and service of notices will increasingly be done electronically. Discomfort with personal appearances in Court can be mitigated. The Pilot, or pieces of it, will inevitably be used at different levels of Court or administrative tribunals.

B. OPPORTUNITY

The traditional adversarial judicial process has problems of cost, delay, complexity and divisiveness. In order to give judges the authority to conduct online hearings and to make them part of our judicial responsibilities, we had to pass a Court Rule. The Court in *Abernathy*[77] had noted that binding Settlement Conferences were a process offered by the Judiciary and referred to in the Alberta Court Rules. *Forrest* and *Abernathy* noted that litigants could choose their form of dispute resolution process. *Abernathy* and *Hryniak* noted that judicial processes must evolve, and that fairness could be had in a variety of processes. *Hryniak*, and various reports and Court rules in other jurisdictions emphasized judicial management of disputes.

We took our cues. Our new Court Rule, R. 59A,[78] resulted. That Rule is significant. It provides a shift and an opening up of Judicial Dispute Resolution processes. It gives the parties an opportunity to help choose the Judicial Dispute Resolution process.

The Rule (at 59A.05) gives judges broad authority over process management, including, the authority to identify, limit the issues in dispute, help the parties determine an appropriate judicial

dispute resolution process, limit and give direction on filings, page limits, and time use. R. 59A.05 (k) gives any direction and makes any order that is appropriate to promote the proportional, just, fair, timely, and cost-effective resolution of issues in dispute.

Our Rule goes beyond eCourt and existing Judicial processes. It challenges the court, counsel and litigants to be creative and to help identify dispute resolution processes that are new, different, more proportional, and better suited to the resolution of their particular circumstances. If the parties and a Judge can identify a better process and agree on its use, it may be used. Surely cost, complexity, proportionality, delay and other access to justice issues will be factors in such suggestions.

The Rule's significance (and perhaps that of the pilot project) is, I believe, in that invitation. It is an invitation to litigants and counsel to be part of the development of the Judicial Dispute Resolution Process in their case, and, to share (with judges) in a meaningful way, the responsibility of addressing the real problems with Access to Family Justice – cost, complexity, divisiveness, delay, and proportionality – in Court processes.

eCourt offers us advantages for some cases and in some disputes. It offers a doorway to further technological change in Nova Scotia and has led to the creation of a new court rule that will enable more change and equip lawyers and litigants with the opportunity to be part of the development of new Judicial Dispute Resolution processes that help to address Access to Family Justice issues.

Wayne Gretzky is a Canadian icon. He famously said, "You miss 100% of the shots you don't take." The Family Justice System should be taking lots of shots at addressing the many problems we have with Access to Family Justice. One of those shots taken in Nova Scotia is the creation of our eCourt Pilot. There should be many more shots taken – in Nova Scotia and elsewhere.[79]

ENDNOTES

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5. Erin Shaw, Action Committee on Access to Justice in Civil and Family Matters, Family Justice Working Grp., Family Justice Reform: A Review of Reports and Initiatives (2012). .
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7. *Id*.
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21. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern*, *Multicultural World* 38 Wm. & Mary L Rev. 5 (1996), at 5.

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27. *Id*. at 32–34.

28. *Id*. at 51–70.

29. *Id*. at 113–124. Today the Project's website, https://representingyourselfcanada.com, has portals on writing Affidavits, ordering Court transcripts, etc.

30. *See* John-Paul E. Boyd & Lorne D. Bertrand, Canadian Research Institute for Law and the Family, Self-Represented Litigants in Family Law Disputes: Contrasting the Views of Alberta Family Law Lawyers and Judges of the Alberta Court of Queen's Bench (2014); Rachel Birnbaum & Nicholas Bala, *Views of Ontario Lawyers on Family Litigants Without Representation*, 63 U. New Brunswick L.J. 100 (2012); Lorne D. Bertrand et al., Canadian Research Institute for Law and the Family, Self-Represented Litigants in Family Law Disputes: Views of Alberta Lawyers (2012); Rachel Birnbaum, *The Rise of Self-Representation in Canada's Family Courts*: *The Complex Picture Revealed in Surveys of Judges*, *Lawyers*, *and Litigants*, 91 Can. Bar Rev. 67 (2013); Victoria Gray, Family Law Conference, Nat'l Judicial Institute, Filling in the Blanks: Towards a More Inquisitorial Process (with Relevant and Organized Evidence) (2014) (Referenced with consent of Justice Gray and NJI).

31. Nat'l Judicial Institute, Ottawa, Electronic Bench Book: Self-Represented Litigants and Self-Represented Accused: Canadian Judicial Council 18–26 (2015).

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35. Engler, *supra* note 34.

36. Nat'l Judicial Institute, Ottawa, *supra* note 31, at 25.

37. *Abernethy Mgt. v. 705589 Alberta Ltd*. (2005) 367 A.R. 38, para. 26 (Can.); *Forrest v. Forrest* (2013) 325 N.S.R. (2d) 393, para. 22 (Can.).

38. *Abernethy Mgt*., 367 A.R. 38, at para. 36.

39. *Forrest*, 325 N.S.R.(2d) 393, at para. 22.

40. Hryniak v. Mauldin, [2014] 1 SCR 87 (Can.).

41. *Abernathy*, supra note 37.

42. *Forrest*, supra note 39.

43. *Id*. 33.

44. *Hryniak*, *supra* note 40, 23–33.

45. *Id*. 27.

46. *Id*. 28.

47. J.W. Abernathy Management and Consulting Ltd. v. 705589 Alberta Ltd. And Trillium Homes Ltd. (2005), 367 A.-R. 38, 1 (Can.Alta. Q.B.).

48. *See* Judges Act, R.S.C. 1985, cJ-1, § 56(1).

49. *Id* 23.

50. *Id* 36.

51. *Id* 30.

52. See: Oregon, Information Domestic Relations Trial, a pilot project in Deschutes County Circuit Court (effective May 29, 2013, SLR Supplementary Local Rule) 8.015,

Idaho, Informal Trial, Idaho Rules of Civil Procedure Rule 713

Utah, Informal Trial of Support Custody and Parent-time, R.4–904 Alaska, Informal Trials in Domestic Trials, Civil Rule 16.2, Effective April 15, 2015.

53. In an "informal trial", the rules of evidence and their complexity are waived, the process is shortened. The Judge has more control over the process and the securing of information. The parties have an opportunity to be heard, but their questions limited. Other forms of informal trial are possible, undoubtedly different jurisdictions might (and do) craft different models. Those in Oregon, Idaho and Utah are examples and vary slightly. Australia's "less adversarial trial" appears to have originated this approach.

54. Robert A. Kagan, Adversarial Legalism: The American Way of Law, 211 (Harvard U. Press 2001).

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57. *A Roadmap to Change*: *Access to Civil and Family Justice, Action Committee on Access to Justice in Civil and Family Matters*, *supra* note 4, 25.

58. John Lande, *Revolution in Family Law Dispute Resolution*, 24 J. Am. Acad. Matrimonial Lawyers, 411, 431 (2012).

59. *The U.K. Family Justice Review, Interim Report*, *supra* note 8, at 4.92 (there speaking of public family law).

60. Family Procedure Rules 2010, SI 2955 (Eng.) (They have been mimicked by the rules of the Ontario Court of Justice).

61. More importantly, Rule 1.4 creates an affirmative direction to judges:

1. *The court must further the over-riding objective by actively managing cases*.
2. *Active case management includes*:
   a. *setting timetables or otherwise controlling the progress of the case*.
   b. *identifying at an early stage*:
      - the issues
      - who should be a party
   c. *deciding promptly*:
      - *which issues need full investigation and hearing and which do not*
      - *the procedure to be followed in the case*
   d. *the order in which issues may be resolved*.
   e. *controlling the use of expert evidence*.
   f. *encouraging the parties to use a non-court method of dispute resolution*.
   g. *helping the parties settle all or part*.
   h. *encourage the parties to cooperate in the conduct of the proceeding*.
   i. *consider whether the likely benefits of taking a particular step justify the cost of taking it*
   j. *deal with as many aspects of case that it can on each occasion*.
   k. *deal with case without court attendance*.
   l. *use technology.*
   m. *give directions so the case proceeds quickly and efficiently.*

Id. at §1.4.

62. The Family Court of Australia was a leader in creating a judge driven process, the expectation being that the Judge at the first appearance (with the benefit of questionnaires from the parties) will:
"…decide what happens next after identifying,

- *The issues to be decided*;
- *The evidence to be heard and which witnesses, if any, will need to attend*;
- *Who should provide evidence in writing and what it should be about*;
- *What expert reports will be required*;
- *Whether a family report will be required (if parenting issues are in dispute)."*

63. Russell Engler, *Ethics in Transition*: *Unrepresented Litigants and the Changing Judicial Role*, 22 Notre Dame J.L. Ethics & Pub. Pol'y 367, 387 (2008); Russell G. Pearce, *Redressing Inequality in the Market for Justice*: *Why Access to Lawyers will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 Fordham L. Rev. 969 (2004).

64. Richard Susskind, Online Courts and the Future of Justice (Oxford U. Press, 2019).

65. *Id*.

66. Beverly McLachlin, "Access to Justice: Embracing Technology Through Online Courts" (Feb. 10, 2020) https://www.thelawyersdaily.ca/articles/17767/access-to-justice-embracing-technology-through-online-courts-beverley-mclachlin.

67. *See* John Greacen, *18 Ways Courts Should Use Technology to Better Serve Their Customers* (Oct.30, 2018), IAALS, https://iaals.du.edu/publications/eighteen-ways-courts-should-use-technology-better-serve-their-customers.

68. Colin Rule & Hiroki Hibuka, *The Promise and Potential of Online Dispute Resolution in Japan*, Int'l. J. of Online Disp. Resol. 2, 74, 75 (2017).

69. *Resolutions*: *A Podcast about Dispute Resolution and Prevention* (March 15, 2019), https://podcasts.apple.com/us/podcast/colin-rule-a-conversation-about-online-dispute-resolution/id1455143114?i=1000431855228.

70. Dorcas Quek Anderson, *The Convergence of ADR and ODR Within the Courts*: *The Impact on Access to Justice*, Civ. Just. Q. 38 (2019).

71. Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 SOUTH CAROLINA L. REV. 329.

72. *A Roadmap to Change*: *Access to Civil and Family Justice, Action Committee on Access to Justice in Civil and Family Matters,supra* note 4, at 16.

73. Susskind, *supra* note 64, at 145–146 (quoting Sir Ernest Ryder, Sir Ernest Ryder, The Modernisation of Access to Justice in Times of Austerity, 5th Annual Ryder Lecture at the University of Bolton (March 7, 2016).

74. *See Abernathy*, *supra* note 37; *Forrest*, *supra* note 39; Nova Scotia Family Division Civil Procedure Rule 59A, Judicial Dispute Resolution Process Management.

75. James E. Cabral, Abhijeet Chavan, Thomas M. Clarke, John Greacen, Bonnie Rose Hough, Linda Rexer, Jane Ribadeneyra & Richard Zorza, *Using Technology to Enhance Access to Justice*, 26 HARV. J. LAW & TEC 241, 305–323 (2012).

76. *Id*. at 313.

77. *Abernathy, supra* note 38.

78. **Scope of Rule 59A**

59A.01 This… Rule applies to every proceeding in the Supreme Court Family Division…

Object of Rule 59A

59A.02 The object of the Rule is to

a. promote the proportional, just, timely and cost-effective resolution of disputes;
b. minimize conflict and promote cooperation between the parties, and
c. reduce the negative impact that the Court…

Dispute Resolution Process

59A.03(1) A Judge may direct that the issues in dispute are to be resolved at a hearing, a trial, a focused hearing, or other appropriate process.

59A.03(2) A focused hearing is a hearing that separates or prioritizes the issues to be heard within a dispute…

59A.04(1) Provided they do so on the record or in writing, the parties and a judge may agree that some or all the issues may be resolved at:

a. a judicial settlement conference, which may include a binding or online settlement conference;
b. an online hearing or process;
c. an informal hearing;
d. any other appropriate dispute resolution process

supra note 74.

79. I agree with Norgrove's observations that Judicial leadership is required to affect meaningful change in Family Justice. I am fortunate and privileged to have been and be a member of the Supreme Court of Nova Scotia and more particularly the Supreme of Nova Scotia, Family Division. I have benefited from the commitment of our Puisne Judges, Associate Chief Justices and Chief Justices to improvement, change and "doing better" in Family Justice.

Finally, I want to acknowledge the work support efforts and ideas of Natasha Matthews, Coordinator Policy & Compliance, NS Department of Justice, in the preparation of this paper.

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