

The Case for AI-Powered Legal Aid

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The authors argue that the digital transformation toward remote justice in response to the COVID-19 pandemic was not a paradigm shift; the root of this transition lies in the long-standing access to justice problem which was exacerbated, not caused, by the COVID-19 pandemic.

The authors suggest that the role of technology in access to justice is much greater than simply a digitization of long-standing practices. Rather, technological innovations in the legal field provide opportunities to improve access to legal representation and to refine court processes. Non-state initiatives, such as MyOpenCourt, can help alleviate the gaps in access to justice. Long term, the authors suggest that using direct-to-public (DTP) tools, such as legal assistance systems powered by artificial intelligence (AI), can help push toward their vision of a consistent global system of online dispute resolution. However, the use of DTP tools also raises concerns regarding privacy, security, and the unauthorized practice of law. In light of this, the authors call for greater research on the legality of DTP AI tools.

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Introduction

I. The COVID-19 Justice Transformation

II. AI Legal Help

III. Opportunities and Challenges

Conclusion

Introduction

According to a recent Organization for Economic Co-operation and Development (OECD) study, half of the human beings on the planet are deprived of the “protections, entitlements, and benefits that the law can and should afford”.¹ Canada is not a special case.² In fact, Canada lags behind other “developed” nations in ensuring that all citizens can effectively access our justice system, including finding legal help.³ The number of people forced to represent themselves has ballooned over the last twenty years, and the COVID-19 pandemic has only exacerbated the access to justice problem. Chief among the causes of this phenomenon are the high cost of litigation and the complexification of legal issues and court processes. This does not affect only low-income Canadians—many people with average incomes are also priced out of the justice system. Hiring a lawyer for low-cost disputes makes little financial sense in most cases, as the legal fees are often higher than the value of the disputes.

1. This is how Richard Susskind, a leading thinker on access to justice and technology, ends his latest book. See Richard Susskind, *Online Courts and the Future of Justice* (Oxford, UK: Oxford University Press, 2019) at 299. Susskind also notes that “[a]ccording to the OECD, more than 4bn people live beyond the protection of lawyers, the law and courts”. See Richard Susskind, “Covid-19 Shutdown Shows Virtual Courts Work Better”, *Financial Times* (7 May 2020), online: <www.ft.com/content/fb955fb0-8f79-11ea-bc44-dbf6756c871a> [Susskind, “Virtual Courts”].

2. See Brandon Fragomeni, Kaila Scarrow & Julie Macfarlane, “Tracking the Trends of the Self-Represented Litigant Phenomenon: Data from the National Self-Represented Litigants Project 2018/2019” (January 2020), online (pdf): *National Self-Represented Litigants Project* <www.representingyourselfcanada.com/wp-content/uploads/2020/01/Intake-Report-2019-Final.pdf>.

3. See Jena McGill, Suzanne Bouclin & Amy Salyzyn, “Mobile and Web-Based Legal Apps: Opportunities, Risks and Information Gaps” (2017) 15:2 CJLT 231–34; Julie Macfarlane, “The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants—Final Report” (May 2013), online (pdf): *National Self-Represented Litigants Project* <www.representingyourselfcanada.com/wp-content/uploads/2016/09/srreportfinal.pdf>; “Rule of Law Index 2015” (2015), online (pdf): *World Justice Project* <www.worldjusticeproject.org/sites/default/files/documents/roli_2015_0.pdf>.

While litigation costs and the complexity of court processes represent serious hurdles for litigants, effective access to justice requires more than simple access to courts and lawyers.⁴ We believe technology may constitute one avenue for improving effective access to justice and especially legal help. As argued by the Right Honourable Beverley McLachlin CJ, the legal profession needs to “accept the idea of change”, including the reality that some tasks that have traditionally been performed by lawyers can now be more effectively executed through technological means.⁵ As the coronavirus has spread and courts around the world have closed in response to the pandemic, a radical technological transformation has taken place. New methods of communication have been adopted with remarkable speed; however, in the legal context, “dropping hearings into Zoom has not been a shift in paradigm”.⁶ Grafting technology onto processes that date as far back as 900 years is a misguided strategy insofar as the root cause of the digital transformation is unrelated to COVID-19. Court systems around the world have been broken for a long time. The challenge is to develop customized solutions that change how the justice system operates, not to computerize broken practices.⁷

While there are many possible solutions that deserve separate articles (or books) of their own, this piece focuses on accessible legal aid technology, especially artificial intelligence (AI) and data science technology. A new generation of direct-to-public (DTP) AI tools can improve access to justice by providing the minimal level of legal help for meeting basic legal needs. Open AI technology has the potential to determine whether someone has a legitimate legal claim, help lawyers increase the efficiency of their service delivery, and help litigants for whom litigation is otherwise out of reach.

In this paper, we first discuss the problem of access to justice and the technological transformation triggered by the COVID-19 pandemic. Second, we discuss how open access technology, especially data science and AI research, can promote effective access to justice by providing accessible

4. See Kent Roach & Lorne Sossin, “Access to Justice and Beyond” (2010) 60:2 UTLJ 373; Trevor CW Farrow, “What Is Access to Justice” (2014) 51:3 Osgoode Hall LJ 957.

5. Rt Hon Beverley McLachlin, “The Legal Profession in the 21st Century” (Remarks delivered at the 2015 Canadian Bar Association Plenary, Calgary, 14 August 2015), online: *Supreme Court of Canada* <www.scc-csc.ca/judges-juges/spe-dis/bm-2015-08-14-eng.aspx>. See also Commission on the Future of Legal Services, “Report on the Future of Legal Services in the United States” (2016) at 41, online (pdf): *American Bar Association* <static1.squarespace.com/static/5a429514f9a61e1bb329a685/t/5a455a9353450a6f05d77e8f/1514494612845/Report+on+the+Future+of+Legal+Services+in+the+US+2016.pdf>.

6. Richard Susskind, “The Future of Courts” (2020), online: *Harvard Law School Center on the Legal Profession* <thepractice.law.harvard.edu/article/the-future-of-courts/> [Susskind, “Future of Courts”].

7. See *ibid.*

and individualized legal help and dispute resolution solutions. In particular, we examine a recent initiative launched at the Queen's University, Faculty of Law in 2020: MyOpenCourt,⁸ an AI-powered legal aid system designed to help self-represented litigants and small to medium sized enterprises (SMEs). Finally, we approach legal aid technology from a legal perspective. We explore whether there is a legal argument to be made in favour of the development of technological legal aid mechanisms, including open access legal information and legal aid systems. We also discuss the legality of DTP technology and the risks associated with its use.

I. The COVID-19 Justice Transformation

In March 2020, in response to the rapid spread of a newly identified coronavirus, SARS-CoV-2, court buildings around the world began to close. Within a fortnight, there was a technological upheaval as the justice system moved from a world in which almost all court hearings were held in person to one in which where almost none were.⁹ To ensure ongoing access to justice, governments and judiciaries rapidly introduced various forms of “remote court”: audio hearings (largely by telephone), video hearings (for example, via Skype and Zoom), and paper hearings (decisions delivered on the basis of written submissions only).¹⁰ Remote Courts Worldwide notes that participants from fifty-six countries have adopted new digital processes in response to the pandemic, whether they are video, phone, or email.¹¹ While many judges and lawyers may have initially had visceral negative reactions to the prospect of virtual hearings, they quickly adapted. Two important questions remain: First, what is the underlying cause of this transformation in the justice system? Second, does the digitalisation or “Zoomification” of court operations constitute a radical paradigm shift?

COVID-19 may have triggered or accelerated the digital transformation in the justice system, but the root cause is found elsewhere. The reality is that the access to justice crisis is a long-standing problem, and the pandemic has only exacerbated this crisis. According to a 2016 OECD report, more than four billion people live beyond the protection of lawyers, courts, and the law.¹² In

8. See MyOpenCourt (last visited 8 March 2021), online: *Conflict Analytics Lab* <myopencourt.org>.

9. See Susskind, “Future of Courts”, *supra* note 6.

10. See generally “Remote Courts” (last visited 7 February 2021), online: *Remote Courts Worldwide* <remotecourts.org>.

11. See Susskind, “Future of Courts”, *supra* note 6. As of today, Remote Courts Worldwide reported over 150 countries with remote hearing processes (*ibid*).

12. See Organization for Economic Co-operation and Development & Open Society

some countries, the backlog is staggering: some eighty million cases in Brazil, for instance, and thirty million in India. Even in advanced legal systems the process is often understandable only to lawyers, is too expensive for most people, and civil cases take far too long.¹³

According to Julie Macfarlane, Canada is no exception.¹⁴ Canadians are losing confidence in the legal profession. This is the result of a myriad of financial, psychological, informational, and physical barriers faced by Canadians in accessing lawyers, legal processes, and legal information, leading many Canadians to consider representing themselves.¹⁵

Emerging evidence suggests that the COVID-19 crisis is only exacerbating the vulnerabilities of individuals that were already at higher risk. Disadvantaged groups are likely to experience increased legal needs.¹⁶ As a result, the COVID-19 pandemic has substantially increased the importance and magnitude of the access to justice demand. It is anticipated that individuals will face risks at the intersection of legal issues and benefits, employment, housing, family, health, and debt, which could increase the complexity of the needs experienced by citizens, and in turn the complexity of cases confronting justice systems. For SMEs, these increased concerns are likely to relate to taxes, regulation, employment, debt, payment of invoices, enterprise restructuring, and bankruptcy procedures.¹⁷

In light of these findings, it can hardly be argued that the court shutdown is the sole precipitant of the digital transformation. COVID-19 has exacerbated the access to justice crisis, but it is the myriad of hurdles described earlier that have laid the ground for a genuine transformation. As Richard Susskind observes, the COVID-19 shutdown constitutes a huge unscheduled pilot—a great experiment in the use of a variety of technologies in our courts.¹⁸ It is

Foundations, “Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for All” (2016), online (pdf): *OECD* <oecd.org/gov/delivering-access-to-justice-for-all.pdf>.

13. See Susskind, “Virtual Courts”, *supra* note 1.

14. See Macfarlane, *supra* note 3.

15. See *ibid* at 35–36. For confirmation of this evidence, see Scarrow & Macfarlane, *supra* note 2.

16. See “Access to Justice and the COVID-19 Pandemic” (23 September 2020) at 3, online (pdf): *Organisation for Economic Co-operation and Development & Law and Justice Foundation of New South Wales* <read.oecd-ilibrary.org/view/?ref=136_136486-rcd8m6dvng&title=Access-to-justice-and-the-COVID-19-pandemic>.

17. See “Justice in a Pandemic: Briefing Two—Justice for All and the Economic Crisis” (July 2020), online (pdf): *Pathfinders for Peaceful, Just, and Inclusive Societies* <www.bf889554-6857-4cfe-8d55-8770007b8841.filesusr.com/ugd/6c192f_0658a70ac607408098643815ab855a65.pdf>.

18. See Susskind, “Future of Courts”, *supra* note 6.

clear that “dropping our current court system into Zoom” does not constitute a transformation, let alone a paradigm shift.¹⁹ While these recent developments should be applauded, we are at the foothills of the transformation.²⁰ The COVID-19 virus intervened and generated the sense of urgency that triggered superficial innovation under constraints. We quickly moved from a world in which almost all court hearings took place in person to one in which almost all hearings took place online, thus creating an opportunity—whether welcome or not—to embrace technology.

However, there is a much more significant role that technology can play. The idea is not to support the old ways and digitalize processes that are suboptimal. Regrettably, most of the recent developments do not constitute a transformation. Rather, they have been designed in response to the pandemic and essentially constitute a digital version of traditional courts. Although recent data suggest that the level of satisfaction with video hearings among legal users is high, there have been clear difficulties, including for the elderly, those requiring translation, and those with a poor internet connection.²¹ Thus, policy-makers and legal technologists must seize the opportunity to accelerate the development of new judicial methods. This includes, but is not limited to, improving access to legal representation and refining court processes. In fact, more work needs to be done to determine what kinds of cases or issues are best suited to what types of disposition, whether it be a physical, audio, video, or paper hearing. In addition, there needs to be more consideration of DTP legal help technology, which includes decision trees, diagnostic systems that can help court users understand their entitlements, guides that help identify the options for resolution that are open to users, tools that can help non-lawyers organize their evidence and formulate their arguments, and mediation and other services in the spirit of alternative dispute resolution (ADR). Such technology can operate as a stand-alone system or as an integral part of an “extended court” service.²²

19. *Ibid.*

20. See Susskind, “Future of the Courts”, *supra* note 6.

21. In one of the few rigorous and systematic reviews of remote courts, undertaken under the auspices of the Civil Justice Council in England and Wales, 1,077 people (871 of whom were lawyers) were surveyed about their experiences, which related to 480 civil hearings held mainly at the start of May 2020. The research and the report that followed found that “[b]roadly speaking, the lawyers who completed this survey were satisfied with their experience of remote hearings: 71.5% of respondents described their experience as positive or very positive.” See Natalie Byrom, Sarah Beardon & Abby Kendrick, “Rapid Review: The Impact of COVID-19 on the Civil Justice System—Report and Recommendations” (2020), online (pdf): *Courts and Tribunals Judiciary of England and Wales* <www.judiciary.uk/wp-content/uploads/2020/06/FINAL-REPORT-CJC-4-June-2020.v2-accessible.pdf>.

22. Susskind, “Future of Courts”, *supra* note 6.

II. AI Legal Help

For some lawyers and judges, the digitalization of courts may constitute a radical shift—one that should be applauded (while still being despised by others). However, we argue that it is only a first step in the evolution of the justice system. A genuine transformation should extend beyond judging over Zoom. One solution is to extend the role of the courts beyond their primary function of delivering authoritative binding adjudications. This is what Susskind calls the extended court.²³ The idea is that technology can provide a service with a much wider remit than the traditional court. These additional offerings would include DTP tools to assist litigants with a broad range of tasks and functions across a wide swath of law. We refer to tools that can help members of the public with the location and identification of legal information, as well as provide assistance with routine questions, legal system navigation, contract analysis, legal document generation, and outcome prediction. The aim of these tools is to offer a myriad of services to help users dissolve or divert disputes before they resort to the traditional adjudication service of the courts.

The first generation of self-help tools—rule-based expert systems—dates back to the 1980s.²⁴ Some of these were developed by the public sector as an extended court system, while others were developed by the private sector. For instance, the Solution Explorer of the Civil Resolution Tribunal in British Columbia provides a guided pathway through the law, integrated with an online negotiation facility that allows users to reach informal agreements themselves.²⁵ If the negotiation does not work, a case manager helps facilitate an agreement. Then, if a settlement has still not been achieved, an adjudicator can render a formal decision, akin to a court order.

However, besides extended court tools, there are a variety of legal help tools—some of them integrated with online dispute resolution systems—that have been developed by the private sector. As of August 2019, almost one hundred DTP legal tech tools have been identified as operating in Canada.²⁶ Some

23. See *ibid.*

24. See Richard E Susskind, “Expert Systems in Law: A Jurisprudential Approach to Artificial Intelligence and Legal Reasoning” (1986) 49:2 *Mode L Rev* 168; Donald Berman & Carole Hafner, “The Potential of Artificial Intelligence to Help Solve the Crisis in our Legal System” (1989) 32:8 *Communications ACM* 928.

25. See generally “Civil Resolution Tribunal” (last visited 8 March 2021), online: *Civil Resolution Tribunal* <civilresolutionbc.ca>.

26. Amy Salzyn, “Direct-to-Public Legal Digital Tools in Canada” (last visited 8 March 2021), online: *University of Ottawa* <techlaw.uottawa.ca/sites/techlaw.uottawa.ca/files/direct-to-public_legal_digital_tools_in_canada_31-jul-19.pdf>.

of these tools have proven successful in helping users to resolve or avoid disputes. Similar tools have been cropping up in other countries as well. One example is a United Kingdom system called Resolver, which has already served more than 3.5 million users.²⁷ A second example is a Chinese company called iFlytek, which is developing an AI-enabled system to assist courts in judging criminal cases.²⁸ A third example is the high volume of e-commerce disputes in online marketplaces such as eBay. For instance, eBay's Resolution Center now resolves more than sixty million disputes annually.²⁹

We believe that legal help tools should ideally be part of the public court service and not outsourced to the private sector. The combination of available legal websites and tools can confuse users insofar as they often overlap and are inconsistent in style and tone. It is also difficult for non-lawyers to determine whether the materials are accurate or up to date. While these shortcomings can be addressed by more individualized solutions such as flowcharts or guided pathways, integrating legal tools into court systems would enhance confidence in the quality and legitimacy of the tools. Furthermore, it would bolster the rule of law by positioning courts at the centre of legal dispute resolution.

While we are inclined to agree with this argument, courts will have little time for such technological ambitions given that in the foreseeable future, they will be fully occupied in trying to tackle the backlog caused by keeping traditional services available. This is all the more true when it comes to predictive AI tools, which require significant upfront investment and research efforts. As a result, most leading AI legal initiatives remain the result of private sector initiatives for the benefit of the legal profession. For instance, recent advances in data science have created unprecedented opportunities for lawyers and litigants to approach the task of dispute settlement differently, notably by moving from a speculative strategy to a data-driven strategy.

In general, AI has the potential to shed light on how legal decisions are made and to improve the consistency and predictability of judicial decisions. Thus, leading legal technology companies, including Lex Machina, Blue J Legal, and

27. See generally Resolver (last visited 8 March 2021), online: *Resolver* <www.resolver.co.uk>; Resolver, "Financial Year Statistics 2019" (2019), online (pdf): *Amazon Web Services* <s3-eu-west-1.amazonaws.com/press-releases-upload/Financial+Year+statistics+2019.pdf>.

28. See Shunsuke Tabeta, "China's iFlytek claims breakthrough in AI-powered voice recognition" (last visited 8 March 2021), online: *NikkeiAsia* <asia.nikkei.com/Business/Technology/China-s-iFlytek-claims-breakthrough-in-AI-powered-voice-recognition>; Samuel Dahan, Maxime Cohen & Colin Rule, "Conflict Analytics: When Data Science Meets Dispute Resolution" *Management Business Review* [forthcoming in 2021], online: <conflicanalytics.queenslaw.ca/sites/conflicanalytics/files/img/research/Conflict%20Analytics-MBR-Revised-Version.pdf>.

29. See Louis F Del Duca, Colin Rule & Kathryn Rimpfel, "eBay's De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers" (2014) 6:1 *Arbitration L Rev* 204 at 205.

Ross, have used analytics to develop predictive tools capable of determining how courts will rule on a specific legal issue, as well as the odds of winning a case. Once the facts relevant to the case are identified, an algorithm can situate these facts within the domain of applicable legal precedents and predict what a court would decide if the negotiation were to fail.

Although the market for AI DTP tools is in its infancy, it is worth noting that several (non-state) AI-powered tools have been introduced. Several leading research institutions, such as CodeX at Stanford Law, Cyberjustice at the University of Montreal, SMART Law at HEC Paris, and the Conflict Analytics Lab (CAL) at Queen's University, have also engaged in data analytics research. It is important to note that these institutions have mainly focused on using technology to improve access to justice, or have undertaken a more theoretical agenda. For instance, the CAL launched an AI-powered legal aid system during the pandemic—MyOpenCourt—to help workers and SMEs. It uses AI to determine the odds of winning a case in the field of employment law by calculating severance, determining the legality of a layoff or wage cut, factoring in the existence of harassment, and determining whether a worker is an independent contractor or an employee. Should the algorithm conclude that a user has a legitimate legal claim, MyOpenCourt offers the option of using the Queen's Online Mediation Program, where mediation caseworkers attempt to resolve the disputes online. If mediation is unsuccessful, the CAL connects users to lawyers at no cost to the users. Considering that the tool has already attracted more than 10,000 users, the researchers are now considering building an assisted negotiation algorithm trained on past negotiation agreements.

II. Opportunities and Challenges

While AI technology alone is not a panacea, a computational approach to law will be instrumental in the democratization of legal services and access to justice in at least two ways. First, legal technologies—when employed responsibly—can lower the barriers that people face in accessing the legal system, including financial, psychological, informational, and even physical barriers. Second, by harnessing advanced AI capabilities, open access legal aid tools can help self-represented litigants and SMEs build their case and guide parties in negotiations, or at least determine whether they have a case at all and should consider hiring a lawyer. Artificial intelligence and analytics research, especially text analytics and deep learning, can help litigants move beyond intuitive negotiation and instead exploit more data-driven negotiation strategies based on accurate legal predictions. For example, advanced data science techniques can reveal trends and patterns in past disputes based on simple descriptions of the disputes by the litigants. For instance, people who have been terminated by their employers may be offered less notice than what they are legally entitled to, but under the current system, most employees have no way of knowing this, nor how much

notice they should claim.³⁰ This is one of many flaws in the current legal system that can be mitigated by the application of legal technology.

These tools are still in the early stages of development. However, significant progress is being made in AI research around the world, and we anticipate that further capabilities will be unlocked to address the gaps in access to justice. For instance, data science and machine-learning research have not yet explored small claims dispute resolution, let alone pre-trial settlement and mediation agreements. Instead, the current research paradigm is mainly concerned with more clearly defined areas of law, such as tax and patent law, where there is a market for expensive analytics services. This is problematic given that most legal disputes are resolved through negotiation;³¹ as such, predictive models that focus exclusively on legal data reveal only part of the judicial picture. Furthermore, advanced legal analytics and intelligent negotiation system technologies are not accessible to self-represented litigants, a group that constitutes a significant number of litigants in Canada and has very little access to legal help.³² In light of these observations, the CAL has undertaken a unique scientific approach. We are developing an intelligent predictive system in under-explored areas of law—one based not only on legal trends, but also on negotiation data.

AI initiatives have already benefited the legal profession in delivering legal services. Many legal research databases have begun to integrate AI techniques and processes into their existing search capabilities, using natural language processing and machine learning elements to more effectively retrieve and sort relevant jurisprudence. AI has also enabled automated document generation, in which a technical process sorts through data to fill out legal documents such as statements of claim. Open access AI legal tools such as MyOpenCourt may encourage a large-scale democratization of predictive legal analytics within the legal profession, but these tools are not yet available to most lawyers—they are currently the domain of large business law firms and their corporate clients. Similar to the CanLII model, we believe that the legal profession should have access to a free version of these tools, as this would level the playing field across the profession.

30. This is explored in a separate study. The author studied the reliability of precedents in predicting reasonable notice and the viability of predictive analytic tools for complex legal tests. See Samuel Dahan et al, “The Unpredictable Nature of Termination Notice: A Data Science Experiment”, McGill LJ [forthcoming in 2021], online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3595769>.

31. See Theodore Eisenberg & Charlotte Lanvers, “What Is the Settlement Rate and Why Should We Care?” (2009) 6:1 J Empirical Leg Studies 111; Leandra Lederman, “Which Cases Go to Trial: An Empirical Study of Predictors of Failure to Settle” (1998) 49:1 Case W Res L Rev 315; Marc Galanter & Mia Cahill, “‘Most Cases Settle’: Judicial Promotion and Regulation of Settlements” (1994) Stanford L Rev 1339.

32. See Macfarlane, *supra* note 3 at 121–22; McGill, Bouclin & Salyzyn, *supra* note 3 at 229.

Provided that these tools are widely available to the legal profession, we believe that the application of AI research to the legal domain also has the potential to disrupt long-standing intuitive legal reasoning and encourage a more data-driven approach to law and negotiation. It will shed new light on how judges make decisions, revealing whether judicial biases actually do drive judicial decision-making, as well as clarifying the social-expressive impact of court judgments. For instance, data on the calculation of damages for wrongful termination of an employee has shown that while prominent Supreme Court of Canada judgments direct judges to consider five coequal variables to determine the appropriate quantum of damages, judges in fact tend to focus primarily on a single variable: the length of the employee's service. This variable alone accounts for the majority of outcomes in past cases.³³ Importantly, the application of data science to non-legal data and especially dispute settlement could significantly disrupt the way in which we currently resolve medium-sized disputes, as well as how we approach law and dispute resolution more generally. This is particularly significant, as most disputes are resolved through negotiation. In short, this research could transform our understanding of how parties negotiate within the shadow of the law.

While we do not believe AI tools should operate as a full legal service, we believe that litigants should receive at least a basic level of legal support to be able to evaluate whether they are being treated fairly. This raises a series of important questions that deserve to be explored in detail, but an extensive analysis is beyond the scope of this article. Briefly, however, we will examine: (1) whether there a legal argument can be made for legal aid technology, and (2) if so, whether the state should be the sole provider, or whether private actors should be empowered to bridge society's persistent gap in unmet legal needs.

Legal aid has traditionally been conceived of as a method of access to justice, which is a basic principle of the rule of law. The concepts of rule of law and effective access to justice are two interlinked preconditions for a functioning democracy.³⁴ The rule of law—one of the constitutive, foundational values of Canadian democracy—mainly refers to the existence of laws and rules governing how society should function.³⁵ One of the most important conditions for the establishment of the rule of law is effective access to justice, which concerns the

33. See Dahan et al, *supra* note 30.

34. See Graham Greenleaf & Ginevra Peruginelli, "A Comprehensive Free Access Legal Information System for Europe" (2012) UNSW Law Research Paper No 2012-9, online (pdf): <papers.ssrn.com/sol3/papers.cfm?abstract_id=2012956>.

35. See *Reference Re Language Rights Under s. 23 of Manitoba Act, 1870 & s. 133 of Constitution Act, 1867*, [1985] 1 SCR 721 at 749, 19 DLR (4th) 1. See also *Trial Lawyers Association of British Columbia v British Columbia (AG)*, 2014 SCC 59 (writing for the majority of the Court, Beverley McLachlin CJ stating that access to justice is fundamental to the rule of law).

ability of ordinary citizens to avail themselves of the instruments of the law—that is, the system of justice.

While effective access to justice is a core principle of Canadian democracy, it is not an absolute right—at least not in practice. In fact, the right of access to justice was formerly understood narrowly as an aggrieved individual’s formal right to litigate or defend a claim. The concept has, however, evolved from a mere formal right of access to a more comprehensive right, incorporating greater enforcement aspects and the right to legal aid.³⁶ While this discussion deserves its own in-depth analysis in a separate paper, it may be argued that not only are the availability, affordability, and quality of legal assistance essential for the realization of the right to access justice, but that they may also in fact have strong grounding in Canadian law.³⁷ There may even be legal arguments to be made in favour of the development of technological legal aid mechanisms, including open access legal information and legal aid systems.

Finally, DTP AI tools raise several issues as to their legality and trustworthiness. While we are in support of tools that are developed by the private sector, it must be acknowledged that many of these tools highlight regulatory tensions between public protection risks and access-to-justice opportunities. These risks are especially challenging for tools that are aimed at the legal consumer. As argued by the Technology Task Force of the Law Society of Ontario (LSO), these tools could fall well short of the standards required by people seeking assistance with their legal problems.³⁸ Thus, regulatory bodies have high expectations insofar as most self-represented litigants are not capable of assessing the quality of such tools. While consumers of law may believe that they are making educated choices about the reliability of the information provided by apps, this may not always be the case if the regulator does not ensure the accuracy and reliability of the information provided.

36. See Canada, Department of Justice, *Riding the Third Wave: Rethinking Criminal Legal Aid Within an Access to Justice Framework* (Research Report), by Albert Currie, RR03-5c (Ottawa: Research and Statistic Division, 15 June 2004), online (pdf): <www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr03_5/rr03_5.pdf>; Farrow, *supra* note 4.

37. This question is examined elsewhere. See Samuel Dahan, “AI-Powered Trademark Dispute Resolution” (Expert Opinion, European Union Intellectual Property Office, 2021), online (pdf): *SSRN* <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=3786069> [unpublished] (exploring whether there is a legal case for the development of an AI-powered system for trademark dispute resolution).

38. For an exhaustive analysis on the regulatory dimensions of legal tech tools, see Will Morrison, “Technology Task Force: Update Report” (29 November 2019) at 17, online (pdf): *Law Society of Ontario* <img1.wsimg.com/blobby/go/63f6349d-d85d-4511-bc5f-4314d54b45d0/downloads/Law%20Society%20Technology%20Taskforce%20Reportn%20Nov%20202.pdf?ver=1575987940596>.

In that regard, a recent study by Jena McGill, Suzanne Bouclin, and Amy Salyzyn suggests that there is no comprehensive data regarding the accuracy or currency of the information and advice offered by legal apps.³⁹ There is also a risk of a digital divide and unequal access to these apps, mostly because of the costs associated with the use of technology (e.g., smartphones, tablets, and access to internet connections in rural areas).⁴⁰ In addition, many free apps have hidden costs associated with upgrades or advanced features that affect the apps' accessibility and potential reach.⁴¹ Finally, studies have shown that internet and other text-based solutions are of limited use to people who do not have the computer literacy skills to use them, or to use them effectively.⁴² It is thus important to design these technologies in a way that does not exacerbate the access to justice gap. For instance, vulnerable people may need to receive direct services rather than rely on self-help through digital or paper-based resources.⁴³

Regarding the legality of these AI tools, questions arise about the “unauthorized practice of law” (among many other issues such as privacy and security).⁴⁴ In most countries, legal services can only be provided by a licensed lawyer, and no person—other than a licensee whose licence is not suspended—is permitted to practise law.⁴⁵ The delivery of legal services by non-lawyers is known as the unauthorized practice of law. This statutory prohibition was designed to protect the public from entrusting its legal affairs to untrained professionals. However, while non-lawyers cannot deliver legal services, they can provide legal information. That being said, the line between legal information and legal services remains unclear.⁴⁶

39. See McGill, Bouclin & Salyzyn, *supra* note 3 at 250.

40. See James E Cabral et al, “Using Technology to Enhance Access to Justice” (2012) 26:1 Harv JL & Tech 241 at 246.

41. See McGill, Bouclin & Salyzyn, *supra* note 3 at 246–47.

42. See Karen Cohl & George Thomson, “Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services” (December 2008) at 35, online (pdf): *Law Foundation of Ontario* <lawfoundation.on.ca/download/connecting-across-language-and-distance-2008/?wpdmdl=11778>.

43. See *ibid* at 52.

44. Morrison, *supra* note 38 at 18.

45. In Ontario, section 26.1(1) of the *Law Society Act* provides that “no person, other than a licensee whose licence is not suspended, shall practise law in Ontario or provide legal services in Ontario”. See *Law Society Act*, RSO 1990, c L.8, s 26.1(1).

46. See Jennifer Bond, David Wiseman & Emily Bates, “The Cost of Uncertainty: Navigating the Boundary Between Legal Information and Legal Services in the Access to Justice Sector” (2016) 25:1 J L & Soc Pol’y 1.

Given this reality, many bar associations in Canada and the United States, are rethinking this traditional distinction, as it is not clear whether the notion of providing legal services should be understood in the same way when it comes to technological tools, especially those featuring the involvement of non-human intelligence. In the US, initial regulatory responses sought to defend the status quo, as illustrated by legal battles against LegalZoom, a DTP technology provider.⁴⁷ Many bar associations have issued letters stating that LegalZoom document preparation services amount to an unauthorized practice of law. However, recent evidence suggest that regulators and bar associations are willing to accommodate new approaches to the practice of law.⁴⁸

In Ontario, the LSO has launched a Technology Task Force to explore a suitable regulatory response. While it is not clear what approach the LSO will follow in the long term, it is currently exploring the following options: (1) prohibiting any non-licensee-delivered legal services; (2) requiring the licensure, accreditation, or certification of legal tech tools and services; (3) requiring the registration of legal tech tools and services, with communications to the public about the risks and benefits of using them; and (4) relying more heavily on insurance requirements, particularly for legal tech tools and services that do not directly involve a licensee.⁴⁹ In the short term, the LSO has considered implementing a “regulatory sandbox” that would serve as a “safe space” in which innovative legal tech products, services, business models, and delivery mechanisms that could benefit the public can be test-driven under regulatory supervision without immediately incurring regulatory consequences for engaging in those activities.⁵⁰

47. LegalZoom faced numerous lawsuits across the US, alleging that the company engages in the unauthorized practice of law and unfair competition. See e.g. *Janson et al v LegalZoom*, 271 FRD 506 (Mo Dist Ct 2010) (where the plaintiffs alleged that LegalZoom went beyond self-help due to the role of human employees in preparing legal documents); *LegalForce v LegalZoom*, 2019 WL 1170777 (Cal Dist Ct 2019) (where, in addition to the unauthorized practice of law, the plaintiffs alleged that LegalZoom engaged in unfair competition, as it is not required to run conflict checks, maintain malpractice insurance, or employ attorneys to sign off on its legal documents). Both of these cases ended in settlement. See Caroline Shipman, “Unauthorized Practice of Law Claims Against LegalZoom—Who Do These Lawsuits Protect, and is the Rule Outdated?” (2019) 32:4 *Geo J Leg Ethics* 939.

48. Following *LegalZoom v North Carolina State Bar*, 2015 NCBC 96, the North Carolina State Bar agreed to support legislation, passed in 2016, which amended the state’s definition of the practice of law to include websites that offer interactive legal documents. See Debra Cassens Weiss, “Online Interactive Legal Documents Would Be Legal in North Carolina Under Bill Passed by Legislature”, *ABA Journal* (22 June 2016), online: <www.abajournal.com/news/article/online_interactive_legal_documents_would_be_legal_in_north_carolina_under_b>.

49. See Morrison, *supra* note 38 at 35.

50. *Ibid* at 36–37. A regulatory sandbox is also referred to as an “innovation waiver”. As noted

Conclusion

In March 2020, the COVID-19 crisis paralyzed many institutions around the world, including most courts. Given those circumstances, legal professionals should be applauded for successfully transitioning to a model of remote justice. Not long ago this approach would have been considered unacceptable. However, in this paper we have argued that dropping hearings into Zoom does not constitute a dramatic transformation, let alone a full-blown paradigm shift. While COVID-19 may have accelerated this digital transformation, the roots of the shift are found elsewhere. The access to justice crisis is a long-standing problem that has been exacerbated, not caused, by the pandemic.

The role of technology in justice is much greater than simply digitalizing suboptimal practices. In fact, the door is now open—even if only slightly—to engaging in new techniques to improve access to legal representation and refine court processes, including through DTP tools such as AI-powered legal assistance systems. This paper sets out more attractive options than a mere digitalization of the status quo. We envisage a world in which court systems can harness the COVID-19 experience and adopt a consistent global system of online dispute resolution with integrated AI-powered legal help. In meantime, we argue that non-state initiatives such as MyOpenCourt can experiment with legal help systems to alleviate the gaps in access to justice.

Finally, while we believe that DTP tools (including AI tools) present great opportunities, they also raise concerns with regard to privacy, security, and the possible unauthorized practice of law. Lawyers and regulators are beginning to address the potential risks and benefits of legal aid technology. We suggest that there is a pressing need for specific research on the legality of DTP AI tools and an exploration of whether there is an economic and a legal argument to be made in favour of legal aid technology.

by Morrison:

The first legal regulator to adopt this model was the Solicitors Regulation Authority, which regulates solicitors in England and Wales . . . Legal regulators of several other American jurisdictions are also currently considering the sandbox model. The Utah Supreme Court recently approved a new regulatory sandbox model which will allow certain non-traditional legal entities to provide legal services in the state under regulatory supervision.

See *ibid.*

