Ontario's Pandemic Procedure

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This article explores the relationship between procedural changes made as a result of the pandemic and pre-existing trends in global civil procedure. Part I explains some of the core similarities and differences between global civil procedure and civil procedure that is part of a global pandemic response. Part II examines changes made to Ontario's civil procedure as a result of COVID-19. It focuses on the role of the internet in shifts away from traditional elements of the common law civil litigation process such as juries, continuity, and frequent oral proceedings. Part III argues that pandemic procedure ought to accord with Ontario's procedure values, including access to justice and legality.

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Introduction

Around the world, courts have scrambled to adapt to an environment in which even dropping off documents poses a risk and small courtrooms with closed windows are often an unacceptable danger. Now urgent solutions are starting to gel into new policies. In Ontario, and elsewhere, these policies often rely on procedural borrowing. This sort of borrowing was going on before the pandemic and many of the solutions that are emerging reflect these existing trends. In examining these trends, it is useful to distinguish two types of procedural borrowing that share a family resemblance.

The first is global civil procedure, which is drawn from "the procedural rules, practices, and social understandings that govern transnational litigation and arbitration".[1] A global civil procedure norm is one adopted "with the purpose of making that jurisdiction or provider more competitive in attracting transnational litigation or arbitration", although that reason may not be the sole reason reformers want it.[2]

The drivers of pandemic procedure have less to do with attracting more litigation business than with managing what already exists. However, both pandemic procedure and global civil procedure developments have been driven by comparison and by coalescence around a few solutions. These solutions are not necessarily best practices, but they are common ones, and that ubiquity by itself is an advantage. Ontario's pandemic procedure could accelerate trends that also exist in global civil procedure, including moves away from trans-substantivity and common law-style trials. Global civil procedure has less to say to the value judgments underlying procedural choices. Although borrowing procedure can be a good strategy, Ontario should be sure that it aligns its changes with broader procedural values so that they support access to justice and legality.

1. Alyssa S King, "Global Civil Procedure" (2021) 62:1 Harv Intl LJ 223 [forthcoming] at 224.

2. *Ibid* at 225–27.

I. Global Civil Procedure and Pandemic Procedure

Global civil procedure and pandemic procedure overlap in terms of the people and discourses that help develop and spread them and in their reliance on the ubiquity of a rule as a reason for adopting it. Global civil procedure users are not just multinational businesses and law firms who serve them, but also foreign parties and the international human rights organizations and lawyers they may engage in their causes.[3] Often, procedure that is familiar to these parties, and especially to their lawyers, is valuable because it is familiar and the lawyers know how to use it. Relative ubiquity then becomes an independent reason for other jurisdictions to adopt this procedure, especially if, like London or Singapore, they want to invite foreign parties in.[4] As procedure becomes more common, it also becomes common sense, and so global civil procedure can spread far beyond its original context, eventually becoming part of reform proposals that do not factor in transnational litigation at all.

Mobility plays a part in procedural harmonization. Lawyers at multinational firms may work in a variety of jurisdictions. Arbitrators, who are sometimes former judges, may leave their home jurisdictions to sit somewhere else. We academics play our part. We bring in students and hire colleagues from abroad. We fly off (or Zoom in) to conferences. Those of us in international and comparative law depend on these exchanges to do our work. Even those who do not think of themselves as comparativists will find themselves comparing to other provinces and other countries. If you want to answer questions such as "what methods might a judge use to control the costs of e-discovery?" comparison is how you do it.[5]

Competition for and the demands of transnational parties are factors in the choice to adopt global civil procedure. Eventually, procedural rules that seem to be successful can take on a life of their own, with more and more jurisdictions adopting them because others already have. An example is the creation of rules allowing class or collective actions. The existence of class actions in the United States, a major trading jurisdiction, helped encourage their spread abroad. Others, notably European countries, offered alternative models.[6] Parties that could

3. A recent example in Canada is *Nevsun Resources Ltd v Araya*, 2020 SCC 5, in which plaintiffs sued Nevsun Resources for its part in running a mine in Eritrea in which they were allegedly forced to work indefinitely.

4. See King, *supra* note 1 at 249–52.

5. See *Warman v National Post Company*, 2015 ONSC 267 at paras 42–47 (citing both English and American authors discussing the need for proportionality in discovery generally and e-discovery especially).

6. See King, *supra* note 1 at 260.

not get into US court sometimes wanted access to collective tools at home.[7] Along with some demands in this mode, the European Union's market integration efforts have pushed its member-states towards a model that more closely resembles the US federal rules.[8] Class actions developed in Canada to the point that they were common sense—the Supreme Court of Canada decided that it was within the authority of an Alberta court to create a class, despite the province not having a statute.[9] Comparisons continue to shape class action law in Ontario. The Supreme Court of Canada struck down Uber's arbitration clause in *Uber Technologies Inc v Heller* because the clause offered access to an expensive individualized process as opposed to a collective one,[10] an issue much debated in the US. The Ford government's bid to control class actions by adopting a stricter commonality requirement recalls rules developed by conservative US jurists, and reactions to it may reflect opinions of the US experience.[11]

As COVID-19 spread, the pressure was on to adapt court procedures as fast as possible, and it was often directed at personnel with limited time and resources. It is difficult to imagine a more perfect situation for borrowing and for the quick emergence of global norms. Pandemic procedure is unlike global civil procedure in that the transnational is not necessarily an important part of the equation, even at the outset. Jurisdictions are trying to develop solutions for a wide variety of users at once rather than focus on the needs of transnational users. Yet some similarities also exist. The development of pandemic procedure in Canada has relied heavily on comparison and on the mobility of, or in this case Zoom access to, global procedural experts.[12] As with global civil procedure,

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7. See e.g. Michael Palmisciano, "Going Dutch: The Effects of Domestic Restriction and Foreign Acceptance of Class Litigation on American Securities Fraud Plaintiffs" (2012) 53:5 Boston College L Rev 1847.

8. See EC, *Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC*, [2020] OJ, L 409/1; "Class-action Lawsuits to Become EU Law", *Deutsche Welle* (24 November 2020), online: <dw.com/en/class-action-lawsuits-to-become-eu-law/a-55711222> (the law was adopted in part to give Europeans greater access to class remedies after EU consumers found they had less access than Americans).

9. See *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 48. See also *King & Dawson v Government of PEI*, 2019 PESC 27 at para 108 (where the Supreme Court of Prince Edward Island did the same thing in 2019).

10. 2020 SCC 16 at para 98.

11. See e.g. Christine Dobby & Sean Fine, "Proposed Changes to Ontario's Class-Action Laws Would Make It Harder to Sue Corporations and Government, Experts Say", *The Globe and Mail* (9 February 2020), online: <theglobeandmail.com/business/article-proposed-changes-to-ontarios-class-action-laws-would-make-it-harder>.

12. See e.g. "No Turning Back: CBA Task Force Report on Justice Issues Arising from

common solutions are emerging, and ubiquity is a value in and of itself. As I argue below, some of these solutions have their roots in global civil procedure.

Global experts were well-placed to offer their services in response to COVID-19. One prominent expert, United Kingdom academic Richard Susskind, began to track developments around the world in an effort to determine best practices across jurisdictions.[13] Law firms have joined in, documenting changes across the jurisdictions they work in.[14] International arbitration providers leapt into action, creating model rules for remote hearings.[15] Although language remains a significant barrier, lawyers and court personnel in most countries have access to online translation tools that allow them to understand the gist of each other's orders.

In the context of global civil procedure, I have argued that as procedural approaches become more ubiquitous, they may be adopted almost entirely for that reason. In a crisis, ubiquity is valuable because court users are being asked to adapt to a large variety of changes very quickly. Copying even small things, like the wording of closure notices, can help provide consistency and save time during a crisis. Ubiquity also allows courts to adopt off-the-shelf solutions, saving development costs.

II. Common Solutions

Ontario's pandemic procedure is still developing, but already it has globalized—if not global—aspects to it. Especially relevant are the adoption of

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COVID-19" (12 February 2021), online (pdf): *Canadian Bar Association* <cba.org/CBAMediaLibrary/cba_na/PDFs/Publications%20And%20Resources/2021/CBATaskForce.pdf> [CBA, "No Turning Back"] (throughout its report, the CBA Task Force compares Canadian jurisdictions with other "sister democracies").

13. See "Remote Courts Worldwide" (last visited 24 May 2020), online: *Remote Courts Worldwide* <remotecourts.org>.

14. See e.g. "COVID-19 and the Global Approach to Further Court Proceedings, Hearings" (April 2020), online: *Norton Rose Fulbright* <nortonrosefulbright.com/en/knowledge/publications/bbfeb594/covid-19-and-the-global-approach-to-further-court-proceedings-hearings>.

15. See "Virtual Hearings" (last visited 24 May 2020), online: *American Arbitration Association—International Centre for Dispute Resolution* <go.adr.org/covid-19-virtual-hearings.html>; "ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic" (9 April 2020), online (pdf): *International Chamber of Commerce* <iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf> ; "HKIAC Guidelines for Virtual Hearings" (last modified 14 May 2020), online (pdf): *Hong Kong Arbitration International Centre* <hkiac.org/sites/default/files/ck_filebrowser/HKIAC%20Guidelines%20for%20Virtual%20Hearings_3.pdf>.

online platforms, and further changes to reliance on orality and trial in civil cases. This response is not unique to Ontario, but reflects a conversation being had across common law systems about the challenges that the pandemic poses to common law procedure.[16]

Disputes in Ontario have gone online. When Attorney General Douglas Downey spoke to the Empire Club in December, he touted online dockets as a major achievement—which they are.[17] Online dockets make it possible for court staff and lawyers to access documents safely and reduce the costs in lawyer and court time associated with filing and tracking physical copies. The Supreme Court of Canada's decision to adopt online filing, for instance, means that parties no longer need to hire a lawyer in Ottawa.[18] Ontario is not an early adopter of such a system, which gives it the advantage of being able to use an off-the-shelf solution rather than design its own. Remote or partially remote trials could also become a new norm. Judges and arbitrators have been unsympathetic to parties requesting in-person hearings.[19] In doing so, they cite each other for support, building up a body of video-hearing endorsements that cross jurisdictional boundaries.[20] The move online and the closure of courthouses accelerates trends away from trans-substantivity and from the common law trial.

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16. See Lise Embley for the Joint Technology Committee, "Judicial Perspectives on ODR and Other Virtual Court Processes" (18 May 2020), online (pdf): *National Center for State Courts* <ncsc.org/__data/assets/pdf_file/0023/34871/2020-05-18-Judicial-Perspectives.pdf>.

17. See Empire Club, "Empire Club – Hon. Doug Downey, Attorney General of Ontario" (3 December 2020), online (video): *YouTube* < www.youtube.com/watch?v=M0PnLVRqq7A>.

18. See Brandon Kain et al, "The Supreme Court of Canada's Rules Are Changing" (7 January 2021), online (blog): *McCarthy Tétrault* <mccarthy.ca/en/insights/blogs/canadian-appeals-monitor/supreme-court-canadas-rules-are-changing>.

19. See *Ontario Nurses' Association (ONA) v St Mary's General Hospital*, 2020 CanLII 86670 (OLRB). See also *Labourers' International Union of North America*, *Local 183 v Innovative Civil Constructors Inc*, 2020 CanLII 42431 (OLRB).

20. See *Rodrique Levesque et al v Syngenta Canada Inc et al*, 2020 NBQB 209 at para 11, citing *Arconti v Smith*, 2020 ONSC 2782; *Mostafa Altalibi Professional Corporation v Lorne S Kamelchuk Professional Corporation*, 2020 ABQB 673 at para 4, citing *Arconti v Smith*, *supra* note 20; *Bélanger et Gagnon*, 2020 CanLII 96545 (CJAQ), citing *Arconti v Smith*, *supra* note 20; *Arconti v Smith*, *supra* note 20 at paras 34, 41, citing *Capic v Ford Motor Company of Australia Limited*, [2020] FCA 486; *Association of Professional Engineers v Rew*, 2020 ONSC 2589; *Australian Securities and Investments Commission v GetSwift Limited*, [2020] FCA 504 (remote trial may proceed with one party being located outside of Australia).

A. Challenges to Trans-Substantivity

New forms of subject-specific online dispute resolution (ODR) offer ease of access but are not trans-substantive. ODR is a particularly attractive solution for the small claims portion of global civil procedure. The internet has made it possible for individuals and small businesses to trade across borders, but these parties are unlikely to be able to access each other's courts, let alone international commercial arbitration providers. The latter often deal in high-value cases, with filing fees to match. Instead, low-value disputes end up with entities such as eBay's internal dispute resolution service.[21] The EU offers an online dispute resolution process aimed at making it easier for merchants and customers from different parts of the EU to resolve disputes.[22] ODR thus facilitates small scale trade and can be a component of reforms meant to make a jurisdiction (like France) or a private platform (like eBay) a more attractive marketplace.

For at least some parties, the Ontario government is proposing ODR as a response to the pandemic. Ontario's revamped Condominium Authority Tribunal is modeled on BC's Civil Resolution Tribunal (CRT).[23] The CRT, a purely online forum, was able to run as usual during the pandemic.[24] It is designed to be used by self-represented litigants and starts off with processes of diversion. Prospective claimants must first follow a set of steps requiring them to consider options besides the tribunal. Following, they may then submit a claim for mediation.[25] Only after mediation has failed does the claim

21. 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 YB Arbitration & Mediation 204.

22. See EC, *Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)*, [2013] OJ, L 165/63; EC, *Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)*, [2013] OJ, L 165/1.

23. See "The Condominium Authority Tribunal" (last visited 25 March 2021), online: *Condominium Authority of Ontario* <www.condoauthorityontario.ca>.

24. See Elizabeth Raymer, "BC's Civil Resolution Tribunal Keeps 'Doors Open' During Pandemic", *Canadian Lawyer* (27 March 2020), online: <www.canadianlawyermag.com/practice-areas/adr/b.c.s-civil-resolution-tribunal-keeps-doors-open-during-pandemic/328037>.

25. See BC, Civil Resolution Tribunal, *Rules effective May 1, 2020*, r 5.1, online (pdf): <civilresolutionbc.ca/wp-content/uploads/2020/04/CRT-Rules-in-force-May-1-2020.pdf>.

move to adjudication by a tribunal member, who will typically rely on written submissions.[26] This decision is subject to court review.[27]

Former Chief Justice of Canada Beverley McLachlin CJ has endorsed such a move, drawing heavily on Susskind's work.[28] So has the Canadian Bar Association.[29] The type of ODR Ontario is adopting represents an attempt to help resolve local, low-value cases, the very opposite of what jurisdictions chase when tuning their procedures to international, high-value litigation. Still, the rhetoric surrounding ODR touts its global credentials. Proponents are quick to point to its use in England, Wales, Australia, and British Columbia.[30]

B. The Trial

Ontario's pandemic procedure also accelerates the existing movement away from common law specific elements of the civil trial, such as juries, continuity, and more frequent oral proceedings. The pandemic has made it difficult and dangerous for juries to sit, postponing trials and leading jurisdictions to experiment with new formats.[31] The jury crisis could have three lasting effects. First, civil juries are likely to further fade from the scene.[32] Throughout summer

26. See *ibid*, r 7.1; Bo Kruk, "Access to Justice and Pixie Dust: Civil Resolution Tribunals", *The Lawyer's Daily* (4 June 2020), online: <thelawyersdaily.ca/articles/19380/access-to-justice-and-pixie-dust-civil-resolution-tribunals-bo-kruk>.

27. See *Civil Resolution Tribunal Act*, SBC 2012, ch 25, s 16.4.

28. See Beverley McLachlin, "Access to Justice: Embracing Technology Through Online Courts", *The Lawyer's Daily* (10 February 2020), online: <thelawyersdaily.ca/articles/17767/access-to-justice-embracing-technology-through-online-courts-beverley-mclachlin> [McLachlin, "Embracing Technology"].

29. See CBA, "No Turning Back", *supra* note 12.

30. See Shannon Salter & Darin Thompson, "Public-Centered Civil Justice Redesign" (2016–2017) 3:1 McGill Dispute Resolution J 113 at 113, 119; Kruk, *supra* note 26; McLachlin, "Embracing Technology", *supra* note 28.

31. See Dominic Casciani, "Covid and the Courts: 'Grave Concerns' for Justice, Warn Watchdogs", *BBC News* (19 Jan 2021), online: <bbc.com/news/uk-55712106>; Zoe Schiffer, "A Court in Texas is Holding the First Jury Trial by Zoom", *The Verge* (18 May 2020), online: <theverge.com/2020/5/18/21262506/texas-court-jury-trial-zoom-remote-virtual-verdict>; Elizabeth Raymer, "Chief Justice Suggests Jury Trials May Resume Soon, New Court Guidelines Coming", *Canadian Lawyer* (18 June 2020), online: <canadianlawyermag.com/news/general/chief-justice-suggests-jury-trials-may-resume-soon-new-court-guidelines-coming/330675>.

32. See Colleen Mackeigan, "The Beginning of the End? What Recent Decisions Could Mean for Jury Trials in Ontario" (24 September 2020), online: *Mondaq* <mondaq.com/canada/

and fall 2020, Ontario judges alternated between a "wait and see" approach to civil juries and decisions to strike a jury notice due to the pandemic.[33] Civil parties who want their cases adjudicated more quickly could avoid juries, perhaps under pressure from a judge looking at a docket full of delayed proceedings.

Second, courts will have additional incentives to decide matters without trial, using motions to strike or summary judgment. None of these pressures are new, but they are intensified. The Supreme Court of Canada's decision in *Atlantic Lottery Corp Inc v Babstock* (*Atlantic Lottery*) suggests that it will be open to these efforts.[34] *Atlantic Lottery* draws on *Hryniak v Mauldin*, in which the Supreme Court of Canada called the 2010 reforms to Ontario's civil rules a "culture shift" that deemphasized trial as an end goal and instead made the goal an expeditious resolution of the dispute.[35] There, the Court endorsed resolving factual disputes on summary judgment if a court could do so based on limited evidence.[36] The 5–4 *Atlantic Lottery* majority endorsed the idea that courts should decide purely legal questions on a motion to strike, narrowing or eliminating the case at the earliest opportunity.[37]

Finally, the crush of cases may create incentives to move them out of court. One way to do so is to expand existing mediation rules from Toronto, Ottawa, and Windsor to the rest of the province, but court-annexed mediation still requires public resources and court supervision.[38] Another possible move is strict and swift enforcement of Ontario's domestic and international arbitration statutes. Canadian provinces, like many other jurisdictions around the world, passed these statutes in a bid to be "arbitration friendly", a posture widely perceived as friendly to international business.[39]

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professional-negligence/987736/the-beginning-of-the-end-what-recent-decisions-could-mean-for-jury-trials-in-ontario>.

33. See *Smith et al v Muir*, 2020 ONSC 8030. In his reasons, Nicholson J catalogues the cases where motions judges have adopted a "wait and see" approach and the cases where the jury notice was struck (*ibid* at paras 38–39). Justice Nicholson ultimately refused to strike a jury "at this time" (*ibid* at para 64).

34. 2020 SCC 19 at para 18 [*Atlantic Lottery*]; Gerard Kennedy, "Moving to Strike" (24 November 2020), online (blog): *Advocates for the Rule of Law* <ruleoflaw.ca/moving-to-strike/>.

35. See *Atlantic Lottery*, *supra* note 34 at para 18; *Hryniak v Mauldin*, 2014 SCC 7 at para 2; Kennedy, *supra* note 34.

36. See *Hryniak v Mauldin*, *supra* note 35 at para 28.

37. See Kennedy, *supra* note 34.

38. See *Courts of Justice Act*, RSO 1990, c C.43, s 24(1).

39. See Janet Walker, "Canada's Place in the World of International Arbitration" (2020) 1:1 Can J Commercial Arbitration 1 at 7–9.

In short, things in Ontario will look more like they do outside of the common law world. With no possibility of a jury, civil law judges can hear parts of the case and ask for more evidence as necessary.[40] Civil law courts have also historically favoured documentary evidence and given less place to oral evidence.[41] Although Ontario did not set out to please transnational litigants, it has hit on some of the same solutions—moving away from some aspects of common law procedure such as trans-substantivity, orality, and the continuous trial as well as developing ODR. The province may yet see a turn towards arbitration. In figuring out how to implement these changes, the Ministry of the Attorney General should look to successful examples elsewhere. Doing so, however, will require defining what success is.

III. What Are Ontarian (and Canadian) Procedural Values?

Global civil procedure offers tested solutions, and an existing network of service providers to go with them. However, it does not offer a deep theory of why these solutions are good. Shallowly, it offers a "law market" conception that may be attractive to the rule-makers of a free-market bent. According to the law market view, jurisdictions with "better" procedural law will be more attractive places to conduct litigation.[42] Being a more attractive place to conduct litigation might give businesses greater confidence in local rule of law. Moreover, it brings with it businesses providing services related to law—lawyers, certainly, but also accountants, litigation funders, and conference venues. However, I and others have argued that such competition is more likely to favor procedure that is familiar to the relevant players, not necessarily procedure that is better than anywhere else.[43] And what would "better" mean in this context? The measure of whether any procedural reform, global or not, is desirable should be whether it creates a system that accords with one's values. In Ontario, these values include access to justice and legality.

A. Access to the Multi-Link Courthouse

Some possible values might be found in the thrust of pandemic procedure itself, chief among them, access to justice. The move online and the move to

40. See John Henry Merryman & Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 3rd ed (Stanford: Stanford University Press, 2007) at 112–13.

41. See *ibid* at 115.

42. See King, *supra* note 1 at 250.

43. See *ibid* at 250–53.

new formats like ODR reflect concern with maintaining access to adjudication during the pandemic and with building systems that make it easier for people to access adjudication after the pandemic is over. Observers have expressed urgent concern about access and about the effect on legality if people of modest means cannot find a hearing for their disputes.[44] The solution they have hit on might once be called "the multi-door courthouse", a system that would offer different types of processes tailored to the type of dispute and disputant.[45] The Ministry of the Attorney General's plans for "justice hubs" that would help channel disputes to appropriate fora reflect this ideal.[46]

ODR promises to offer parties access to judging without the need for courts or lawyers, but it is not without its own set of access challenges. To make such access possible, ODR procedures are broken down into subject-specific steps. By definition, such processes are unlikely to be trans-substantive in the way that the Rules of Superior Court Practice aspire to be. As ODR processes proliferate, one question that common law jurisdictions will have to ask is at what point does the multi-link courthouse have too many links, such that it begins to resemble the old forms of action? Common law jurisdictions largely did away with the forms of action because they were too cumbersome for litigants to use. Choosing the wrong form could derail one's whole case and ensure that litigants could never access the remedy they sought. A multi-link courthouse must avoid this trap.

Justice should not only be done, but also be seen to be done.[47] Public access to video hearings and electronic dockets has improved after some initial challenges.[48] Pandemic procedure offers innovations that could make access much easier. Even as hearings resume in person, court personnel are now more familiar with how to set up a video link and might consider doing so regularly for matters heard in smaller courtrooms. Dockets that are online could be dockets

44. See e.g. Beverley McLachlin, "Access to Justice: Will COVID-19 Justice Become the Norm?", *The Lawyer's Daily* (23 November 2020), online: <thelawyersdaily.ca/articles/22606/access-to-justice-will-covid-19-justice-become-the-norm-beverley-mclachlin>.

45. See Hon Gladys Kessler & Linda J Finkelstein, "The Evolution of a Multi-Door Courthouse" (1988) 37:3 Cath U L Rev 577.

46. John Chidley-Hill, "Ontario's Attorney General Says COVID-19 Has Jumpstarted Justice System Modernization", *The Toronto Star* (3 December 2020), online: <thestar.com/news/gta/2020/12/03/ontarios-attorney-general-says-covid-19-has-jumpstarted-justice-system-modernization.html>.

47. See Judith Resnik, "A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations" (2018) 96:3 NCL Rev 605.

48. See e.g. "Media Access to Courts in Times of Covid" (19 August 2020), online: *Canadian Bar Association* <cba.org/Our-Work/cbainfluence/Public-Policy-and-Advocacy/2020/August/Media-access>.

that are searchable from a journalist's or researcher's desk, but they currently are not. These groups are an important constituency of users to consider on matters such as price and searchability. Moreover, the Ministry of the Attorney General might consider how to use electronic docketing to generate and publish its own statistics.

B. Legality

Another procedural value in Ontario is that case outcomes should reflect the substantive law.[49] Doing so requires that courts have opportunities to rule on what the law is and could require a more robust conception of rights to appeal and review to accommodate processes run in part by non-lawyers.[50] Appeal is valuable for error correction and precedent creation. In a democracy, it can also function as a way of clarifying legal problems such that they are brought to the attention of the legislature.

The common law world has historically been comfortable with "coordinate" judicial authority, in which various parts of the system are largely left to their own devices and appeal is curtailed.[51] With a multi-link courthouse, however, coordinate authority may be less desirable. Regular appellate review could prevent tribunals with a high volume of cases presented by lay people (who may not be in a position to do much accurate research on precedent) from spinning off an original interpretation of a statute or common law rule that begins to differ markedly from how it is interpreted elsewhere in the province.

Conclusion

The pandemic will permanently alter civil procedure around the world, and Ontario is no exception. Faced with a common problem, those in charge of rules here and elsewhere have looked to common solutions that may move us away from traditional common law models. Pandemic procedure is likely to bring us reforms that make civil proceedings less trans-substantive, less oral, and more discontinuous. Some parts of these solutions had already been developed with the needs of transnational litigation in mind, as they addressed problems such as distance, the perceived inefficiency of common law procedures, foreign parties' fear of juries, and preferences for arbitration. Now they are brought to bear on a new more pervasive problem that affects all types of parties.

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49. See *Courts of Justice Act*, *supra* note 38, r. 1.04(1). See also Robert G Bone, "Securing the Normative Foundations of Litigation Reform" (2006) 86:5 BUL Rev 1155.

50. See *Atlantic Lottery*, *supra* note 34 at para 21.

51. Mirjan R Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986) at 69.

Ontario has to do something, and existing solutions are a good place to start. In implementing them however, rule-makers need to be guided by procedural values deeper than the logics of efficiency and competition. As pandemic procedure begins to gel, it should come with a conversation about what the justice system ought to be and who it ought to serve. This conversation is one that can be enriched by voices from other democracies and common law systems. As long as we are using comparison, Ontarians may want not only to look outward at the common law world or the world of other democratic jurisdictions that share our values, but inward as well. Ontario has already begun the process of figuring out how Indigenous legal systems might run along aside and interface with the common law one. No discussion of our collective procedure values can be complete without them.