

Online Dispute Resolution (ODR): New Approaches to Enhance Initiatives of Civil Dispute Resolution

D R . B R Y A N P . S C H W A R T Z *

M I K A L S O K O L O W S K I **

L A U R A B A L A G U S ***

I. INTRODUCTION & OVERVIEW

When Online Dispute Resolution (ODR) was developed in 1996, it focused primarily on disputes that originated online.¹ The belief was that disputes that originated on the web could be easily resolved via the internet.² More recently, however, ODR has expanded its focus to non-financial disputes and disputes that do not originate online.³ The legal

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¹ John Zeleznikow, "Can Artificial Intelligence and Online Dispute Resolution Enhance Efficiency and Effectiveness in Courts" (2017) 8:2 Intl J for Court Administration 30 at 35.

² *Ibid.*

³ *Ibid.*

community has recognized the potential for ODR to enhance and facilitate access to justice.⁴

The use of ODR has the potential to improve access to justice on a number of levels:

By facilitating a citizen's ability to interact and communicate with courts and officials, well-designed [ODR] systems will keep litigants better informed about their rights, remedies, and the ongoing status of their disputes. By reducing the need for travel and limiting unnecessary delay, and by mitigating the confusion and fear that accompany visits to court, an [ODR] system can make using our courts less gruelling to citizens on multiple dimensions.⁵

This paper proposes that Manitoba take several new initiatives to enhance ODR based on a new approach to civil dispute resolution.

The key points in the proposal are as follows:

- (a) the initiatives would share the same conceptual framework of “avoidance/containment/resolution” that was adopted by the UK Civil Justice Council in 2015:⁶
 - (i) avoidance: means providing easily accessible platforms to help citizens understand the law, identify if they have a valid concern, and determine if the issue can be resolved without filing a claim;
 - (ii) containment: means facilitating dispute resolution if a claim is filed – e.g., mediation; and

⁴ *Ibid.*

⁵ *Ibid.*

⁶ See UK Civil Justice Council Online Dispute Resolution Advisory Group, “Online Dispute Resolution for Low Value Civil Claims” (February 2015), online (pdf): *Courts and Tribunals Judiciary* <judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf> [perma.cc/8VES-YV5T].

- (iii) resolution: involves expeditious, efficient and accessible adjudication;
- (b) perhaps these initiatives could be put together under the rubric of “FAIR”: “fast, accessible, innovative resolution of disputes”;
- (c) the initiatives would build on successful models in comparable jurisdictions;
- (d) all the initiatives would make extensive use of the latest technology, including online platforms and/or videoconferencing;
- (e) Manitoba could also be a leader in recognizing that some people are not adept with new technology or do not have convenient access to it. Innovative means could be developed to facilitate access to the minority who are on the wrong side of the “digital divide”;
- (f) Manitoba might move swiftly to adopt:
 - (i) the British Columbia civil-dispute-resolution model for small claims and condominium disputes; and
 - (ii) the UK model for traffic-ticket disputes;
- (g) the June 2018 Manitoba report on family-law disputes is conceptually consistent with the FAIR framework.⁷ The Family Law Modernization Report’s framework could be developed in a manner that increases the use of some of the ideas that are presented in this paper, including

⁷ “Modernizing Our Family Law System: A Report from Manitoba’s Family Law Reform Committee” (June 2018), online (pdf): *Government of Manitoba* <gov.mb.ca/justice/pubs/familylawmodern.pdf> [perma.cc/7AG5-3E9P] [“Family Law Modernization Report”].

making extensive use of online platforms and assisting individuals in accessing those platforms;

- (h) the initiatives suggested in this paper can all be adopted on their own or in coordination with each other; and
- (i) the province could also work with various government departments, agencies and consumer groups to promote the establishment of a consumer-complaint-management system, such as the UK's Resolver⁸ or Plateforme d'Aide au Règlement des Litiges en ligne (PARLe)⁹ in the Province of Québec. Resolver permits consumers who have issues with service providers (e.g., utility companies) or commercial vendors to identify, package and maintain a record of their complaint, and to contact the appropriate official for resolution. While Resolver does not include adjudication (rather, it facilitates direct settlement of complaints), PARLe assists consumers by providing access to mediation and adjudication.

II. WHAT IS THE CONCEPTUAL FRAMEWORK?

The proposed set of reforms set out in this paper – let's use the conceptual framework "FAIR," to coin a term – are based on the following ideas set out by the UK Justice Council in a very clear and informational paper issued in 2015.¹⁰ As explained in that paper, a dispute should be managed by the system in the following way:

- (a) avoidance: first, at the earliest stages, a government platform (e.g., an interactive website)

⁸ See "Resolver – Free Online Tool for Complaints and Claims" (2021), online: *Resolver* <resolver.co.uk/> [perma.cc/VBR3-KB9D].

⁹ See "What is PARLe ?" (3 May 2020), online: *Quebec Office de la Protection du Consommateur* <opc.gouv.qc.ca/en/opc/parle/description/> [perma.cc/7FTU-CNVN].

¹⁰ UK Civil Justice Council, *supra* note 6.

should help a citizen understand what the law is, determine if they have a valid concern, and identify ways to solve the dispute without filing a claim. The citizen who wishes to file a claim is also helped to state it clearly and file it simply;

- (b) containment: the parties are supported in resolving the matter through alternative dispute resolution methods, including facilitation and mediation; and
- (c) resolution: if necessary, a resolution is made as convenient and accessible as possible.¹¹

There would be extensive use of online technology, but also active and innovative measures to make that technology accessible to persons who are not ordinarily comfortable with it. This technology would undoubtedly include websites, which can be made increasingly interactive and helpful as IT science, including artificial intelligence, develops. As the UK Civil Justice Council report notes, as and when “live” hearings are needed, there could be increased use of forms of videoconferencing, akin to a very high-quality version of a Skype call.¹²

The conceptual framework set out in the 2015 UK Civil Justice Council report was in relation to studying the resolution of low-value claims. Its general principles, however, can be applied to higher-value claims. In applying these principles, policymakers can consider the concept of proportionality: that resources invested in resolving a dispute by the parties and government may reasonably vary with the stakes involved.

III. AVOIDANCE AS A PART OF THE CONCEPTUAL FRAMEWORK

At this earliest stage of the conceptual framework, an under-considered portion of the UK Civil Justice framework is the avoidance stage that attempts to avoid disputes by increasing

¹¹ *Ibid* at 17–21.

¹² *Ibid* at 24.

awareness and accessibility to the layman by providing an easy-to-use justice service.¹³ The UK has done an exceptional job in implementing services that assist at this stage in accordance with the ideas set out by the UK Justice Council; they have several initiatives that are focused on the avoidance stage that will be outlined in what follows. One of these services is the UK Resolver, a consumer-focused complaint resolution system that connects consumers with companies to resolve disputes around flight delays, package deliveries, mobile phones, online shopping, parking tickets, and train delays.¹⁴ Focusing on these critical areas, Resolver gives simplified information about rights, information on each company's policies and how to connect with them and recommend resolving the issue for free.¹⁵ In a similar vein, the UK's Financial Ombudsman Service offers a free complaint service for consumers with financial problems relating to debt, where they look into the complaints to resolve them as early as possible without going through the court system.¹⁶

Other countries have recognized the value of implementing avoidance services for their citizens. One of the most notable implementations of this was the Dutch Rechtwijzer program that offered an online self-help tool for divorce.¹⁷ The early version of Rechtwijzer allowed people to solve their divorces by providing "general information, ... question-and-answer tools, or 'guided pathways,' that offered users information that fit their specific situation and directed them to relevant support services."¹⁸ This was aimed at the early stages of divorce, allowing people to solve divorces on their own. A subsequent version of Rechtwijzer was released in 2014 and improved upon the earlier version by promoting the couple to have a dialogue. This sophisticated system assisted in creating the actual divorce agreement that was finalized

¹³ *Ibid* at 17.

¹⁴ See "About" (2021), online: *Resolver* <resolver.co.uk/about> [perma.cc/NH47-A3NU] [*Resolver*].

¹⁵ *Ibid*.

¹⁶ See "Financial Ombudsman Service – Homepage" (2021), online: *Financial Ombudsman Service* <financial-ombudsman.org.uk/> [perma.cc/2MHA-8GUF] [*Financial Ombudsman Service*].

¹⁷ Laura Kistemaker, "Rechtwijzer and Uitelkaar.nl. Dutch Experiences with ODR for Divorce" (2021) 59:2 Family Court Rev 232.

¹⁸ *Ibid* at 233.

in court.¹⁹ Although Rechtwijzer garnered international interest for its unique and innovative approach to separation, and was described by a Dutch national newspaper as an easy-to-use tool with a strong focus on conflict prevention, it was eventually discontinued due to cost concerns.²⁰ The original goal of Rechtwijzer was to be financially self-sufficient from online dispute resolution income, but it failed to do so, and as a result, the Dutch government decided to subsidize the project no longer.²¹ However, the early version of Rechtwijzer is still available online,²² and a spin-off version of Rechtwijzer called Justice42 has been released.²³ While it is reassuring to see Justice42 continue Rechtwijzer legacy, it, unfortunately, has not received as much interest as Rechtwijzer, and as of writing, it primarily acts as a contact page.²⁴

In Canada, British Columbia has been at the forefront of avoidance services. Most notably, in conjunction with Rechtwijzer, the Legal Services Society of British Columbia released MyLawBC.²⁵ MyLawBC is a free service that offers pathways for legal issues, separation, family violence, missed mortgage payments, wills, child support, parenting arrangements, and separation agreements.²⁶ The plan to deal with these issues is a three-pronged approach that starts with a diagnosis of the problem, then triages the problem, and lastly provides a custom action plan for the specific problem.²⁷ In practice, once a legal issue is selected that pertains to your situation, MyLawBC asks several questions to help refine your case and then offers you a plan to deal with your issue

¹⁹ *Ibid* at 233.

²⁰ *Ibid* at 233.

²¹ *Ibid* at 233.

²² *Ibid* at 233.

²³ See “Justice42 – Homepage” (accessed 20 July 2021), online: *Justice42* <justice42.com/?lang=en> [perma.cc/84NT-6Y3V].

²⁴ *Ibid*.

²⁵ Kistemaker, *supra* note 17 at 233.

²⁶ See “My Law BC – Homepage” (2021), online: MyLawBC <mylawbc.com> [perma.cc/34ZZ-2BBV] [MyLawBC].

²⁷ Alka Tandan & Phillip Djwa, “MyLawBC: Understanding Outcomes” (18 March 2019), online (pdf): *Legal Aid BC* <legalaid.bc.ca/sites/default/files/2019-06/MLBCunderstandingOutcomesFINAL.pdf> [perma.cc/8WWY-EJEV] at 5.

with a step-by-step process, options that you have (such as alternative dispute resolution), videos that can assist you, and services that can help you.²⁸ This is all offered for free and simplifies the law to be more approachable for an average citizen. Like MyLawBC, British Columbia also has the Civil Resolution Tribunal (CRT) to resolve disputes involving vehicle accidents, small claims, condominiums, and societies or cooperative associations.²⁹ The CRT starts by presenting legal information about your problem, then promotes negotiation and an agreement to be resolved before taking the issue further to court.³⁰ Lastly, British Columbia also has the Justice Education Society that offers free guides, info sheets, and videos that simplify and help citizens navigate legal issues for a plethora of legal matters.³¹ The Justice Education Society also offers free chat, call, and text services for free legal help.³² Overall, British Columbia's avoidance initiative is somewhere that places throughout the world can look to for implementing avoidance services in the future.

Like many other areas in the world, Manitoba lacks avoidance services and, in comparison to British Columbia, is behind in adopting these services. One service available in Manitoba is the Legal Help Centre that currently offers telephone and drop-in legal information, summary advice, and referrals for low-income people of Winnipeg.³³ Manitoba, like other provinces, also has the Community Legal Education Association that similarly provides legal information and referrals.³⁴ The Association offers a "Frequently Asked Questions" section on their website that answers various common questions for legal issues related to a

²⁸ MyLawBC, *supra* note 26.

²⁹ See "Civil Resolution Tribunal - Homepage" (2021), online: *Civil Resolution Tribunal* <civilresolutionbc.ca/> [perma.cc/N9TF-7E6X] [*Civil Resolution Tribunal*].

³⁰ *Ibid.*

³¹ See "Justice Education Society - Homepage" (2020), online: *Justice Education Society* <justiceeducation.ca> [perma.cc/UXH5-5BCQ].

³² *Ibid.*

³³ See "Legal Help Centre - Homepage" (2021), online: *Legal Help Centre* <legalthelpcentre.ca/> [perma.cc/KX3W-T98F] [*Legal Help Centre*].

³⁴ See "Community Legal Education Association - Homepage" (2021), online: *Community Legal Education Association* <communitylegal.mb.ca/> [perma.cc/9G3K-R7WD].

variety of legal areas, including employment law, criminal law, business law, wills and estates, real estate, and consumer law.³⁵ The Association also offers videos with common legal questions, legal processes, and legal information. Although these services are a step in the right direction, Manitoba generally lacks sophistication in avoidance services and should look towards the UK and British Columbia for advancement in this area.

Looking toward the future, a novel idea that can be associated with avoidance services is the future implementation of Artificial Intelligence (hereinafter referred to as AI). As previously discussed, current avoidance services rely heavily on rudimentary questionnaires (MyLawBC) or labour (Justice Education Society and Legal Help Centre), so AI intervention into these services would be a considerable step forward. Theoretically, a citizen could ask their legal questions to a program utilizing AI and receive a real-time response to those, and subsequent, questions from AI.

AI is already being used in the private sector, where several organizations are focused on offering AI services to legal professionals. One of these services is Alexsei, where legal professionals submit a legal question to the program, AI reviews the issue, synthesizes the issue, and then outputs a memo to the lawyer.³⁶ Unsurprisingly, Alexsei is offered for a price that depends on the firm's use, size, and practice. Theoretically, this service could answer questions that any person has about a legal issue by providing them with a simplified memo with less legal jargon. In the public sector, Queens University offers MyOpenCourt as an avoidance service that uses AI with several of its tools, such as the "Classification Tool (Employee or Contractor)," "Termination Compensation Calculator," "Wage Cut Tool," and "Layoff Tool."³⁷ All of these tools help self-representing litigants decide if they have a legitimate legal claim by using AI to determine their legitimacy.³⁸ If it is concluded that they do have a legitimate claim, it recommends Queen's mediation program, and if that is

³⁵ *Ibid.*

³⁶ See "Alexsei - Homepage" (2021), online: Alexsei <alexsei.com/> [perma.cc/LY7M-KG84].

³⁷ See Conflict Analytics Lab, "My Open Court - Homepage" (2020), online: MyOpenCourt <myopencourt.org/> [perma.cc/TQ5R-HJXZ] [MyOpenCourt].

³⁸ *Ibid.*

unsuccessful, they are referred to a lawyer.³⁹ The last AI avoidance service to be considered here is the Australian National Disability Insurance Scheme (NDIS) project, and a virtual assistant named Nadia whose task was to help people who use the NDIS to navigate the new system.⁴⁰ To promote receiving information on an equal basis, Nadia was developed with AI to respond to people with disability-related questions through voice and video software that showed Nadia's face reacting to the question in real-time while adapting to the questions she was asked.⁴¹ This was considered to be on the cutting-edge of innovation, especially for the public sector. The project cost upwards of \$3.5 million and development went as far as to record 20 hours of dialogue with actress Cate Blanchett.⁴² However, the AI for NDIS was eventually shelved indefinitely. Although there were no concrete details as to why, it is theorized that the project ended due to bureaucratic, cost, and risk-aversion concerns.⁴³

The proposal of increased avoidance-service methods begs the question of who should provide the funding or pursue such a venture? The most straightforward answer is through government initiatives to improve access to justice and legal information to the average citizen, as they have an incentive to reduce the strain on the court and improve public legal knowledge. In theory, this may seem like the best way. However, governments likely lack the technical knowledge and sophistication to execute avoidance services effectively. As a result, many avoidance services utilize private organizations to assist in their development; for instance, NDIS used IBM's Watson to assist in its AI development;⁴⁴ Rechtwijzer was developed with the ODR software company Modira;⁴⁵ and

³⁹ *Ibid.*

⁴⁰ Stephen Easton "Nadia: the curious case of the digital missing person", *The Mandarin* (3 April 2019), online: <themandarin.com.au/106473-nadia-the-curious-case-of-the-digital-missing-person/> [perma.cc/FUU6-FB4J].

⁴¹ *Ibid.*

⁴² Andrew Probyn "NDIS' virtual assistant Nadia, voiced by Cate Blanchett, stalls after recent census, robo-debt bungles" *ABC News* (21 September 2017), online: <abc.net.au/news/2017-09-21/government-stalls-ndis-virtual-assistant-voiced-by-cate-blanchett/8968074> [perma.cc/C7KE-FKZ6].

⁴³ Easton, *supra* note 40.

⁴⁴ Probyn, *supra* note 42.

⁴⁵ Kistemaker, *supra* note 17 at 233.

Resolver with MoneySavingExpert.com.⁴⁶ There is also a trend of private organizations, such as law firms, sponsoring these services, as we see with Manitoba's Legal Help Centre⁴⁷ and MyOpenCourt.⁴⁸ Lastly, there is an apparent synergy with other government entities and even across these avoidance services – as observed with MyLawBC, which worked with the Rechtwijzer team and the Law Society of British Columbia to develop their service;⁴⁹ NDIS received consultation with the Department of Human Services and the National Disability Insurance Agency;⁵⁰ and MyOpenCourt, that partnered with several public institutions like McGill University and Brandeis University.⁵¹ Overall, observations from previous avoidance service ventures would demonstrate several ways stakeholders are involved in offering these services, but each had some sort of government entity that championed the cause. Moreover, avoidance services would benefit from collaboration with various areas to improve their service and better reach the citizens they are attempting to inform. This can be done by working with other public entities or utilizing private organizations' strengths and expertise to develop the service.

It is important to note that there are several concerns with the government offering avoidance services. The first of these is that it is difficult to calculate the return on investment of these services; for example, how can avoidance services' affect on the court system be quantified and put into numbers? However, several of the previously mentioned avoidance services attempt to quantify their impacts, such as the UK's Financial Ombudsman Service, which boasts its over 1 million contacts for financial problems,⁵² and MyLawBC, which commissioned a third party to understand the outcomes of its services.⁵³ Another concern with offering these services is the high cost, as was demonstrated by the NDIS⁵⁴ and

⁴⁶ Resolver, *supra* note 14.

⁴⁷ Legal Help Centre, *supra* note 33.

⁴⁸ MyOpenCourt, *supra* note 37.

⁴⁹ MyLawBC, *supra* note 26.

⁵⁰ Probyn, *supra* note 42.

⁵¹ MyOpenCourt, *supra* note 37.

⁵² Financial Ombudsman Service, *supra* note 16.

⁵³ Tandan & Djwa, *supra* note 27.

⁵⁴ Probyn, *supra* note 42.

Rechtwijzer⁵⁵ being discontinued due to cost concerns. To assist in mediating future avoidance services, as previously mentioned, government may want to consider partnering with private organizations with expertise in the area and looking at receiving funding from private organizations such as law firms. Lastly, there are liability and legal concerns with offering these services, but, as most practitioners know, a way around this is to notify users that the legal information provided on these websites is not legal advice or that users should subsequently contact a lawyer for further recommendations.

IV. ARE REFORMS ON THIS BASIS ACHIEVABLE AT A REASONABLE COST IN THE NEAR TERM?

Yes, on both a conceptual and a practical basis. Conceptually, Manitoba can build on the superb work that has already been undertaken in other jurisdictions. We have reviewed the literature and recommend, in particular, the 2015 UK Justice Council paper referenced above.

Practically, Manitoba can build on models that have been implemented successfully in other jurisdictions, in particular substantive areas of disputes. These include:

- (a) British Columbia's online Civil Resolution Tribunal.⁵⁶ This system permits certain types of civil disputes to be resolved online, onboarding participants at the beginning of the process and carrying them through to the end stage. It incorporates the three conceptual elements: dispute avoidance, dispute containment and dispute resolution. British Columbia's model is used for civil claims and condominium disputes, all with values of \$5,000 or less;
- (b) the UK Financial Ombudsman Service.⁵⁷ This system resolves disputes over financial services.

⁵⁵ Kistemaker, *supra* note 17 at 233.

⁵⁶ *Civil Resolution Tribunal*, *supra* note 29.

⁵⁷ *Financial Ombudsman*, *supra* note 16.

Since the system was put in place in 2008, it has received close to 4 million complaints, of which over 96% were resolved (as of 31 March 2019);⁵⁸

- (c) PARLe, the Québec system for the online resolution of consumer disputes. This Québec platform was developed by the Cyberjustice Laboratory at the University of Montréal and was adapted by Québec's Office of Consumer Protection;⁵⁹
- (d) the UK's Resolver, which is an online facility for managing consumer disputes. Resolver is privately run, available free of charge and highly effective.⁶⁰ Resolver is an online platform for packaging and sending consumer complaints to private providers and major government agencies and then connecting aggrieved individuals with the appropriate official at the company or government department. It does not adjudicate disputes. A Manitoba version that incorporates elements of PARLe and Resolver might be developed in partnership with government, consumer groups and organizations like the Chamber of Commerce; and
- (e) the Traffic Penalty Tribunal for England and Wales, which uses online methods and teleconferences to resolve disputes over traffic tickets.⁶¹

⁵⁸ "Annual report and accounts for the year ended 31 March 2019" (11 July 2019) at 7, online (pdf): *Financial Ombudsman Service* <financial-ombudsman.org.uk/files/238106/Annual-report-and-accounts-for-the-year-ended-31-March-2019.pdf> [perma.cc/NS6W-ZA5D].

⁵⁹ For more information about PARLe, see Karim Benyekhlef & Nicolas Vermeys "Publicly funded ODR is Now a Reality in Quebec", *Slaw* (10 February 2017), online: <slaw.ca/2017/02/10/publicly-funded-consumer-odr-is-now-a-reality-in-quebec/> [perma.cc/WZJ9-BX2M].

⁶⁰ *Resolver*, *supra* note 14.

⁶¹ See "Traffic Penalty Tribunal - Homepage" (2020), online: *Traffic Penalty Tribunal* <trafficpenaltytribunal.gov.uk/> [perma.cc/7WQN-46MG].

Note that a European Union Regulation requires all member states to provide online platforms for resolving consumer disputes.⁶²

V. DOES THIS GENERAL APPROACH HAVE TO BE IMPLEMENTED ALL AT ONCE?

The province could articulate the overall FAIR framework as a signature policy initiative and move quickly in several selected areas (thus avoiding the need to roll out the entire policy all at once). The suggested priorities relate to areas in which there are already highly effective working models.

Based on that approach, we would suggest initial consideration of:

- (a) the British Columbia online-dispute-resolution model for small claims and condominium disputes, because it is such a well-developed model with a proven track record in a Canadian jurisdiction. The online-dispute-resolution system recently implemented by the Ontario Condominium Authority Tribunal is another model which Manitoba can look to as an example of a consumer-centric approach to the design of an online tribunal. The technology and legislation can likely be readily adapted to Manitoba. Consumers generally do not even know what their rights are,⁶³ and there are often

⁶² See “Online Dispute Resolution” (accessed 5 June 2020), online: *UK European Consumer Centre* <ukecc.net/consumer-topics/online-dispute-resolution.cfm> [perma.cc/9LL5-5TRQ]; Karim Benyekhlef & Nicolas Vermeys “The ‘Success’ of Online Dispute Resolution”, *Slaw* (18 June 2018), online: <slaw.ca/2018/06/18/the-success-of-online-dispute-resolution-in-europe/> [perma.cc/S72L-CGAB].

⁶³ Rebecca L Sandefur, “Money Isn’t Everything: Understanding Moderate Income Households’ Use of Lawyers’ Services” in Michael Trebilcock & Anthony Duggan, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 222 at 223; see also Shannon Salter, “Online Dispute Resolution and Justice System Integration: British Columbia’s Civil Resolution Tribunal” (2017) 34:1 Windsor YB Access Just 112 at 127.

no fast and easy means to resolve disputes through the traditional court system;⁶⁴

- (b) the Traffic Penalty Tribunal for England and Wales model. Citizens of Manitoba have seen innovations to detect and convict traffic offenders (e.g., photo radar),⁶⁵ changes to permit police officers to file reports in court without appearing,⁶⁶ and therefore would likely welcome a counterpart initiative to make it easier for them to contest unfair or unduly harsh outcomes; and
- (c) a Manitoba version of PARLe, for resolving consumer disputes.

VI. HOW DOES THIS PROPOSAL FIT WITH PROPOSALS SET OUT IN THE FAMILY LAW MODERNIZATION REPORT?

The Family Law Modernization Report essentially incorporates these concepts in one particular context – a proposed pilot project for resolving family law disputes that arise under *The Family Maintenance Act*.⁶⁷ The model that has been proposed appears in many ways to fit within the FAIR framework that has been proposed in this paper.

I would respectfully suggest, however, that:

⁶⁴ CBA Access to Justice Committee, “Reaching Equal Justice Report: An Invitation to Envision and Act” (November 2013), online (pdf): *The Canadian Bar Association* <cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf> [perma.cc/4BYE-2KV8] [CBA Report].

⁶⁵ See Winnipeg Police Service, “Photo Enforcement” (2021), online: *City of Winnipeg* <winnipeg.ca/police/safestreeets/stats.stm> [perma.cc/Z2UW-MSZ2].

⁶⁶ Jeff Keele “Winnipeg woman upset over no show of officers in court”, *CTV News* (18 September 2020), online: <winnipeg.ctvnews.ca/winnipeg-woman-upset-over-no-show-of-officers-in-court-1.5111609> [perma.cc/G6JK-SZ3Q].

⁶⁷ “Family Law Modernization Report”, *supra* note 7 especially at 3–10.

- (a) the Family Law Modernization Report leaves many specifics to be worked out, such as exactly how mediation services would be provided, how much the province would pay to provide them, how long mediation would go on and be funded, what are the triaging guidelines for resolution officers, and what qualifications and training are required for resolution officers;⁶⁸
- (b) more analysis and planning might be needed with respect to this fact: when mediation fails, it can end up causing delays and adding to the overall cost when the parties are then forced to pursue traditional litigation,⁶⁹ putting further stress on the parties. There are no “checkpoints” (number of mediation meetings, months in mediation, cost to parties or government) proposed in the Family Law Modernization Report that would constrain the potential for mediation itself to become unduly protracted and expensive. There is no definition proposed of “when mediation fails.”⁷⁰ Alternate dispute resolution, including mediation, often works best when both parties are faced with an imminent resolution by adjudication if they cannot agree on a settlement;⁷¹
- (c) the Family Law Modernization Report does not take much account of the use of emerging technologies and the ways in which the online world can be made accessible to people who ordinarily do not use it;

⁶⁸ Stefanie Goldberg, “Triaging and Mediating to meet the needs of Families under *The Family Dispute Resolution (Pilot Project) Act of Manitoba*” (2021) 44:3 Man LJ.

⁶⁹ Laura Ervo & Anna Nylund, *The Future of Civil Litigation: Access to Courts and Court-annexed Mediation in the Nordic Countries* (Switzerland: Springer, 2014) at 332.

⁷⁰ “Family Law Modernization Report”, *supra* note 7 at 5.

⁷¹ *Ibid.*

- (d) the proposed pilot program contemplates an “Office of the Chief Resolution Officer.”⁷² The Family Law Modernization Report appears to contemplate establishing a new provincial bureaucracy. It is not clear why it would not be better to run a pilot program that is more integrated with the Family Division of the Superior Courts, including making the CRO an official of the Family Division;
- (e) a major reform that has been discussed for decades in Canada – and implemented in parts of Manitoba – has been to expand the Family Division of the Superior Courts, and often to appoint provincial judges to them, so there would be one unified point of contact for resolving disputes.⁷³ According to the federal Department of Justice, a key element of the model of the unified family court is establishing a single point of intake (such as a clerk in a unified family court or another similar officer).⁷⁴ The single point of intake is supposed to help the parties to identify the appropriate dispute resolution mechanism (such as adjudication or mediation) and access other family justice services. Following the introduction of *The Family Law Modernization Act*,⁷⁵ the Manitoba government launched phase 1 of the Family Resolution Service in June 2020. A single-window “Get Guidance” contact email and phone number connect parties to early resolution support services. “Family guides”

⁷² *Ibid* at 6.

⁷³ Department of Justice, “Unified Family Court, Summative Evaluation” (7 January 2015), online: *Government of Canada* <justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/09/ufc-tuf/p2.html> [perma.cc/YNP6-2L4S] [Department of Justice].

⁷⁴ *Ibid*.

⁷⁵ The Family Law Modernization Act, SM 2019, c 8, <canlii.ca/t/54r89> retrieved on 2024-07-02

conduct triaging and referrals, where appropriate, to cultural and/or linguistic support services.⁷⁶ See Appendix “A” to this paper, which is section 2.2.1 of the federal government’s 2009 The Unified Family Court Summative Evaluation - Final Report;⁷⁷

- (f) Bill C-78, introduced in Parliament in May 2018 and receiving Royal Assent in June 2019, imposes duties on parties to divorces to use family-dispute-resolution services (such as mediation) where appropriate, and authorizes the courts to require the parties to use these services in some circumstances.⁷⁸ These changes came into force on March 1, 2021.⁷⁹ So, conditions might be especially ripe to discuss with the federal government whether the model proposed in the provincial report might be integrated with federal reforms and institutions;
- (g) a pilot program integrated into the Manitoba Court of King’s Bench (Family Division) system might require consultation with the government of Canada but could also potentially bring in federal funding;
- (h) a pilot project integrated into the federal system might be easier, for legal and logistical reasons, to expand later into other matters (such as divorce). On the other hand, once established, a new provincial bureaucracy would not necessarily be

⁷⁶ Family Law Manitoba, “Family Resolution Service” (accessed 3 August 2021), online : *Government of Manitoba* <gov.mb.ca/familylaw/resolution/family-resolution-service.html> [perma.cc/GEX9-SFXE].

⁷⁷ Department of Justice, *supra* note 73.

⁷⁸ *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act*, SC 2019, c 16, ss 1(7), 8, 12.

⁷⁹ “Canada Gazette Publication Order” 2021, SI/2021-7, online: <gazette.gc.ca/rp-pr/p2/2021/2021-03-17/html/si-tr7-eng.html> [perma.cc/32H4-E8Y].

easy to wind down. There would be cases in progress, and a bureaucracy tends to lobby for its own continuation; and

- (i) if further developed in certain ways – such as incorporating technology, in the manner discussed in this paper or otherwise – the proposal set out in the Family Law Modernization Report could be placed squarely within a wider provincial FAIR initiative.

VII. THE FAMILY LAW MODERNIZATION ACT

Following the Family Law Modernization Report, the Manitoba legislature passed *The Family Law Modernization Act* in 2019.⁸⁰ Under this Act, a 3-year pilot program was created to implement many of the recommendations made in the Report. Resolution dispute under the pilot program will consist of two phases. In the first phase, a resolution officer will work with the parties to reach an agreement (the facilitated resolution phase). If the parties cannot reach an agreement in phase one, they will proceed to the second phase, where a hearing will be held by an adjudicator, who will make a recommended order (the adjudication phase).⁸¹ The hearing in phase two may be held by video or other electronic media,⁸² opening the door to FAIR reform.

A. Could reform in the area of family-law dispute resolution be conducted in parallel with reform of small civil disputes and traffic court?

Yes, there are many ways in which legal concepts and technology could overlap. Manitoba can mix and match any way it chooses – e.g., by moving on the family-law front without a major technology component and emphasizing technology in the small-claims and traffic-court areas. But there seems to be no inherent reason why there could not be some coordination among two or three initiatives, including family-law reform.

⁸⁰ SM 2019, c 8.

⁸¹ *Ibid*, s 9(1).

⁸² *Ibid*, s 16(2).

B. *Why is FAIR reform needed?*

Just about everyone, everywhere, agrees that the traditional approach to civil dispute resolution needs reform. Issues include:

- (a) many procedural steps must be taken before getting to adjudication;⁸³
- (b) the steps can be too complicated for many people to follow without help;⁸⁴
- (c) many people cannot afford lawyers to help them (in 2015, an average two-day civil trial cost \$31,330 in legal fees);⁸⁵
- (d) adjudication resolves disputes, but adjudicators may get the facts or law wrong (because human judgment is involved and because the information base is only what the parties give them, which may not include the whole story);⁸⁶ and
- (e) a solution imposed by an adjudicator may still not be final because of appeals or because an unhappy party resists enforcement.⁸⁷

⁸³ CBA Report, *supra* note 64 at 49.

⁸⁴ Samreen Beg & Lorne Sossin, “Should Legal Services Be Unbundled?” in Michael Trebilcock, Anthony Duggan & Lorne Sossin, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) at 195.

⁸⁵ Salter, *supra* note 63 at 118 citing Michael McKiernan, “The Going Rate” (1 June 2015), online (blog): *Canadian Lawyer* <canadianlawyermag.com/author/michael-mckiernan/the-going-rate-2913/> [perma.cc/6DSB-GTR7].

⁸⁶ Salter, *ibid* at 127.

⁸⁷ In the proposed FAIR framework, the system of appeals or judicial review must be crafted so as to support, rather than undermine, the efficiency and legitimacy of first-level dispute resolution. Ways should be found to ensure that there is a check against unreasonable decisions at the first level. But evidence, and reasonable findings of fact and law from first-level dispute resolution, should be integrated in a reasonable way into any high-level proceedings.

C. Extensive use of e-technology can contribute to a FAIR resolution

Before getting into further detail, we would note that many of the proposed models discussed in this paper rely heavily on the Internet and related technology. A number of crucial and information-intensive interactions are now occurring in online settings, including online dispute resolution.⁸⁸ This creates many advantages:

- (a) bringing two parties “together, in person, at the same time, with both parties suitably informed about the dispute is costly and difficult.”⁸⁹ Doing so involves travel, scheduling, and precisely-timed information support.⁹⁰ While courts today attempt to deal with these issues efficiently, often the cost of doing so involves imposing “large, often-forgotten costs on the public.”⁹¹ Such societal costs exist in the form of the public and police officers waiting in line for hours in courthouses.⁹² As a result, it is comparatively cheap for the user to use e-technology for dispute resolution. For some, e-technology “may be the only feasible option for individuals who are unable to afford travelling long distances”;⁹³
- (b) it creates a record of the proceedings without the need for hardcopy, transcription services, and so on;

⁸⁸ Maximilian A Bulinski & JJ Prescott, “Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency” (2016) 21:2 Mich J Race & L 205 at 206.

⁸⁹ *Ibid* at 208.

⁹⁰ *Ibid* at 208-09.

⁹¹ *Ibid* at 209.

⁹² *Ibid*.

⁹³ Joseph W Goodman, “The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Website” (2003) 2 Duke L & Tech Rev 1 at 7.

- (c) it can help inform and steer the participants, step by step, through the process;
- (d) it can use a series of Q and A documents to help a participant understand the issues, the options for resolving them, and activate various steps, such as evidence gathering, negotiated settlement and adjudication;
- (e) artificial intelligence can increasingly help with informing and guiding the user;
- (f) for people who have access to computers and knowledge of how to use them, it makes dispute resolution cheaper and more accessible;
- (g) online technology permits “asynchronous” participation, and experienced mediators are well aware of the benefits of this type of engagement.⁹⁴ A party can submit evidence online, which the other party can view and respond to, at a later point in time. This can be much more efficient than getting busy people in the same physical location (it can also alleviate access to justice issues in remote areas). Delayed responses can also give people a chance to reflect, consult, and provide more measured and constructive responses. “Since e-mail, listservs, and web postings can be written, posted and responded to at any time,” e-technology can be “substantially more convenient.”⁹⁵ “Asynchronous Internet communications have the advantage of being edited ‘best’ communications in sometimes contrast to ‘first’ (often impulsive) responses that can take place in real-time face-to-face mediation discussions”;⁹⁶

⁹⁴ *Ibid* at 8.

⁹⁵ *Ibid*.

⁹⁶ *Ibid* at 9.

- (h) there is ample evidence that online technology can be used for mediation,⁹⁷ as well as adjudication.⁹⁸ The mediator may “improve dialogue, encourage parties to share information, cultivate empathy and understanding of the other party’s interests, and perhaps even offer suggestions or proposals”;⁹⁹
- (i) online technology has also been used for negotiations. “Where an issue does not require the flexibility of a human neutral, algorithms may be designed and implemented in software and ODR tools to resolve disputes with fully automated ADR processes”;¹⁰⁰
- (j) online dispute resolution has been proven to work in emotionally-sensitive areas, including family law.¹⁰¹ There are, for example, private mediators who conduct all their family mediations through distance technology.¹⁰² It can be better for the parties not to have to be physically proximate – e.g., in high-conflict cases.¹⁰³ Additionally, the mediator can “caucus with either or both of the parties privately, without affecting the flow of the mediation”;¹⁰⁴ and

⁹⁷ Suzanne Van Arsdale, “User Protection in Online Dispute Resolution” (2015) 21:1 Harv Negot L Rev 107 at 112.

⁹⁸ See eg Salter, *supra* note 63; Catherine Tait, “Evaluation of the Distance Family Mediation Project: Report on Phase III of the Technology-Assisted Family Mediation Project” (March 2013), online (pdf): <mediatebc.com/sites/default/files/Distance-Family-Mediation-Evaluation-Report-FINAL.pdf> [perma.cc/AL5V-NZXL]; Goodman, *supra* note 93 at 4.

⁹⁹ Arsdale, *supra* note 97 at 112.

¹⁰⁰ *Ibid* at 113.

¹⁰¹ Tait, *supra* note 98.

¹⁰² *Ibid*.

¹⁰³ *Ibid* at 27– 28.

¹⁰⁴ Goodman, *supra* note 93 at 8.

- (k) ultimately, an online dispute resolution system does not need to replace the current legal system but instead would be auxiliary to it and help to modernize it.¹⁰⁵ Online technology can be supplemented, on a case-by-case basis and where necessary, with other forums, such as teleconferencing, video testimony and in-person hearings. The British Columbia online Civil Resolution Tribunal, for example, gives an adjudicator discretion to go beyond the online exchanges of the parties as and when necessary.¹⁰⁶

D. Many of the cutting-edge dispute-resolution models involve online technology. Can these models be made friendly to people who ordinarily don't use computers or the internet?

Discussions of technology often overlook that:

- (a) some people are not comfortable with technology or don't own a computer. As a result, online dispute resolution can disadvantage those who lack Internet access or those who find accessing the Internet uncomfortable or inconvenient;¹⁰⁷
- (b) the people on the wrong side of the "digital divide" (between those who are adept in the cyberworld and those who aren't) are often people with limited financial means, less than average education, or have some form of disability.¹⁰⁸ Another facet of the 'digital divide' of note in Manitoba is the lack of high-speed broadband internet in remote and rural areas of

¹⁰⁵ Bulinski & Prescott, *supra* note 88 at 213.

¹⁰⁶ "Civil Resolution Tribunal, Rules" (1 January 2020), online (pdf): *Civil Resolution Tribunal* <civilresolutionbc.ca/wp-content/uploads/2019/12/CRT-Rules-in-force-January-1-2020.pdf> [perma.cc/E2FG-RF72] at 31.

¹⁰⁷ Goodman, *supra* note 93 at 13.

¹⁰⁸ CBA Report, *supra* note 64 at 81.

the province. Many dispute-resolution services that use video-conferencing technology require a high-speed internet connection. Even the most technologically literate among us can be on the wrong side of the digital divide by virtue of one's postal code;¹⁰⁹

- (c) there is also conflicting research on whether the complete physical separation brought by ODR can reduce emotional issues connected with, amongst other issues, face-to-face confrontation, power imbalances, or allegations of abuse, or whether it increases the risk of contention between the parties;¹¹⁰ and
- (d) the potential for loss of privacy, loss of confidentiality, loss of interpersonal connection, reduced accessibility, and technical malfunctions are also perennial issues ODR technology must manage.¹¹¹

However, Manitoba could be an innovator by not only using e-technology but by helping people to use it, including by introducing measures such as:

- (a) providing phone support to accompany digital platforms, which would be in line with British Columbia's Online Civil Resolution Tribunal, which also provides access to paper-based or telephone-based services.¹¹² This could possibly be accomplished through collaboration with the existing Law Phone-In-Service run by the

¹⁰⁹ Kate Puddister & Tamara A Small, "Trial by Zoom? The Response to COVID-19 by Canada's Courts" (2020) 53:2 Can J Polit Sci 373.

¹¹⁰ Tania Sourdin et al, "COVID-19, Technology and Family Dispute Resolution" (2020) 30:4 Australasian Dispute Resolution J.

¹¹¹ *Ibid.*

¹¹² Salter, *supra* note 63.

Community Legal Education Association (CLEA);¹¹³

- (b) providing free access points to technologies. For example, there are many public libraries in Manitoba. Many people do not use them anymore. The government could invest in having dedicated spaces in libraries (or community centres, mediation centres, courts or other publicly-owned areas) with computers, privacy screens, pamphlets and other supports so that people can access online dispute resolution; and
- (c) providing in-person assistance. For example, a person who wants to fight a traffic ticket but who does not have a computer or the know-how to use one might wish to submit their evidence and arguments at a station that has been set up at a nearby library or community centre, rather than a dedicated traffic court. An in-person navigator might be made available from time to time to assist people at such locations – at the province’s expense, or perhaps using volunteers from law students, social-work students, or general community members who obtain some modest training. Another possibility is that navigators, equipped with laptops, might visit people in their homes.

The extent of the digital divide should not be overstated. The UK Civil Justice Council’s 2015 report found that the overwhelming majority of UK residents either use the internet or have their own supporters who can assist them with e-technology.¹¹⁴ Still, in an era where the government is sensitive to issues of accessibility, a component of the initiative should consider ways to enhance access to the framework for those less computer-adept.

¹¹³ See “Law Phone-In and Lawyer Referral Program” (2021) online: *Community Legal Education Association* <communitylegal.mb.ca/programs/law-phone-in-and-lawyer-referral-program/> [perma.cc/S6VF-3Y8T].

¹¹⁴ Zeleznikow, *supra* note 1 at 26–27.

VIII. POTENTIAL LIMITATIONS OF ONLINE DISPUTE RESOLUTION

While there are many benefits to an ODR system, there are also disadvantages. Some argue that “electronic communication is no substitute for the ability of face-to-face conversations to foster important process values of mediation.”¹¹⁵ When proceedings are conducted solely through an online platform, it takes away the human element of dispute resolution. “The great paradox of online mediation is that it imposes an electronic distance on the parties, while mediation is usually an oral form of dispute resolution designed to involve participants in direct interpersonal contact.”¹¹⁶ It has been argued that “mediation cannot easily be reproduced in the online environment because ‘cyberspace is not a ‘mirror image’ of the physical world.”¹¹⁷ Although online systems can offer some advantages for participation, we must take care not to ascribe too much weight to these ‘convenience’ factors. The blurring of the differences between online and in-person services may jeopardize the quality of individualized, personal justice that alternative dispute resolution represents.¹¹⁸ Participants in ODR may miss non-verbal clues conveyed by body language, touch, and smell.¹¹⁹ During classic mediations, participants typically build connections with the mediating person. Sharing one’s experience of the case directly with the opposing party and being allowed to express the accompanying emotions “can be cathartic for mediation participants.”¹²⁰ Unfortunately, the substitution of email for dialogue can make it difficult to give any weight to emotion in

¹¹⁵ Joel B Eisen, “Are We Ready for Mediation in Cyberspace?” (1998) 1998 BYU L Rev 1305 at 1308.

¹¹⁶ *Ibid* at 1310.

¹¹⁷ *Ibid*.

¹¹⁸ Timea Tallodi, “Love of Video Mediation in the Time of Covid-19: An Initial Insight into Benefits and Challenges” in Carla Ferstman & Andrew Fagan, eds, *Covid-19, Law and Human Rights: Essex Dialogues* (Essex, UK: University of Essex, 2020) at 247.

¹¹⁹ Eugene Clark, George Cho & Arthur Hoyle, “Online Dispute Resolution: Present Realities, Pressing Problems and Future Prospects” (2003) 17:1 Intl Rev L Comp & Tech 7 at 10.

¹²⁰ Eisen, *supra* note 115 at 1323.

mediation.¹²¹ The lack of direct contact in ODR reduces the personal dynamics of the process and can also create problems for participants trying to form mental connections to the dispute, resulting in a lack of a will to settle the dispute amicably.¹²² Communications online often “do not express the variable tone, pitch and volume of the participants and cannot transmit personalities or physical cues.”¹²³ This can lead to misunderstandings and difficulties in reaching an agreement.

The ODR system also needs to create and build a high level of trust of participants in the mediators.¹²⁴ ODR systems lack human connection since most of the communication is made in writing. Due to this fact, participants miss out on reading people’s body language, facial expressions, or inflections of their voices when they speak. Given ODR’s lack of personal engagement, credibility concerns may arise. However, results from hundreds of empirical studies have overwhelmingly suggested that people are not good at assessing whether an individual is lying or telling the truth based on the speaker’s demeanour.¹²⁵ “Across all studies, accuracy in distinguishing lies from truth is only a bit above 50%”, and not only does reliance on visual cues not improve accuracy, it also makes it worse.¹²⁶

Another limitation of ODR is that if a dispute goes through to adjudication, judges still need to hear the matter. At the moment, it is not possible technologically, or even desirable for that matter, for computers to fully take over the work of judges.¹²⁷ When judges are called to handle complex issues of principle and various policies, it is beyond the capabilities of the current ODR systems.¹²⁸

¹²¹ Goodman, *supra* note 93 at 11.

¹²² Karolina Mania, “Online Dispute Resolution: the Future of Justice” (2015) 1:1 Intl Comp Juris 76 at 80.

¹²³ Goodman, *supra* note 93 at 11.

¹²⁴ Mania, *supra* note 122.

¹²⁵ Michael J Saks & Barbara A Spellman, *The Psychological Foundations of Evidence Law* (New York: New York University Press, 2016) at 122 n 20 (Kindle).

¹²⁶ *Ibid.*

¹²⁷ Richard Susskind, *Tomorrow’s Lawyers: An Introduction to Your Future*, 2nd ed (Oxford: Oxford University Press, 2017) at 102.

¹²⁸ *Ibid.*

Security and record-keeping can also pose problems.¹²⁹ Providers of ODR may store “sensitive communications and records, such as personally identifying information; opinions and communications made to other disputants or neutrals with the expectation that they would not be shared; and records relating to health, education, and employment.”¹³⁰ Such digital data can be manipulated and difficult to verify; additionally, records can be stored automatically without knowing the parties involved.¹³¹ Identity issues may also arise, and proving virtual identity can be problematic, as people in an online environment do not always act the same as they would in person.¹³² New procedures will be required for client identity verification.¹³³ Concerns about proof of consent, use of personal data, privacy and discovery may also arise.¹³⁴ Increased dependence on online systems sharpens the risk of exposure to a potential system outage or cyber-attack.¹³⁵

Finally, the accessibility of ODR systems can be problematic. While Internet access is ubiquitous in Canada, not everyone has equal access.¹³⁶ “Persons with low literacy skills or low technological literacy, persons who are blind or who have visual impairments, or persons affected by poverty may have difficulty accessing online legal resources for various reasons.”¹³⁷ Barriers may also be educational, language, culture, age, or simply a phobia of using information technology.¹³⁸ Therefore, it is crucial that, in using e-

¹²⁹ Clark, Cho & Hoyle, *supra* note 119 at 20.

¹³⁰ Arsdale, *supra* note 97 at 130.

¹³¹ Clark, Cho & Hoyle, *supra* note 119 at 20.

¹³² *Ibid.*

¹³³ John-Paul Boyd “The End Is Not Yet Nigh: Remote Dispute Resolution in the Age of COVID-19”, *Slaw* (20 March 2020), online: *Slaw* <slaw.ca/2020/03/20/the-end-is-not-nigh-remote-dispute-resolution-in-the-age-of-covid-19/> [perma.cc/WJ6E-PYLP].

¹³⁴ Clark, Cho & Hoyle, *supra* note 119 at 20.

¹³⁵ David Matyas, Peter Wills & Barry Dewitt, “Imagining Resilient Courts: From Covid to the Future of Canada’s Judicial System” (4 February 2021), online: SSRN <papers.ssrn.com/sol3/papers.cfm?abstract_id=3778869> [perma.cc/6KM7-42GY].

¹³⁶ Rei-Anderson et al, “Access to Justice Online: Are Canadian Court Websites Accessible for Users with Visual Impairments” (2018) 55:3 *Alta L Rev Alberta Law Review* 647 at 653.

¹³⁷ *Ibid.*

¹³⁸ Clark, Cho & Hoyle, *supra* note 119 at 21.

technology for ODR, the needs of these marginalized groups are considered. Given this, it is crucial “when evaluating the access to justice aspect of any technological measure, to consider whether the measure has unintended negative side effects, in particular for individuals that are members of groups that are already vulnerable or marginalized.”¹³⁹ While online technologies can increase access to justice, we must take care in designing and deploying these technologies to the legal system to ensure values such as accountability, transparency, accessibility, and legal validity are not impaired.¹⁴⁰

While “ODR may take dispute resolution processes to a new level”,¹⁴¹ as these limitations demonstrate, the growth in ODR may also create several problems. With time, however, many of the issues should hopefully be mitigated or disappear “once practitioners in this field gain more experience in managing the technology and the processes.”¹⁴² The COVID-19 pandemic has provided a jumpstart for such an experience with online technologies. Despite some initial reluctance to conduct remote online proceedings, both practitioners and clients alike have embraced this technology.¹⁴³ Even after the COVID crisis, many practitioners suggest that online or semi-online proceedings will continue to be a part of dispute resolution.¹⁴⁴

IX. LESSONS FROM THE COVID-19 PANDEMIC

The COVID-19 pandemic has wreaked havoc across the globe, forcing monumental changes in how our societies operate. In response to the pandemic, courts have made an effort “to ensure

¹³⁹ Rei-Anderson, *supra* note 136 at 653.

¹⁴⁰ Vivi Tan, “Online Dispute Resolution for Small Civil Claims in Victoria: A New Paradigm in Civil Justice” (2019) 24:1 Deakin L Rev 101.

¹⁴¹ Clark, Cho & Hoyle, *supra* note 119 at 22.

¹⁴² *Ibid.*

¹⁴³ Erika Hagen, “Aftershocks: Covid-19 and the ‘New Normal’ for Family Lawyers” (2020) 45:1 *LawNow*, online: <lawnow.org/aftershocks-covid-19-and-the-new-normal-for-family-lawyers/> [perma.cc/W7QB-YJNU].

¹⁴⁴ Joshua Karton, “The (Astonishingly) Rapid Turn to Remote Hearings in Commercial Arbitration” (2021) 46:2 *Queen’s LJ* 399; Stephan Wilske, “The Impact of COVID-19 on International Arbitration – Hiccup or Turning Point?” (2020) 13:1 *Contemp Asia Arb J* 7.

that the Canadian legal system upholds one of our most fundamental rights: access to justice.”¹⁴⁵ “In the pre-COVID era, ‘access to justice’ was a moniker used to describe the challenge presented by the prohibitive cost of litigation which largely excludes low-income individuals from achieving justice through the court.”¹⁴⁶ However, the pandemic has expanded the problem of access.¹⁴⁷ Issues with access to justice are no longer confined to marginalized and low-income groups; they are a problem for all, “as the delay in having cases resolved by the courts is likely to last many months, if not years.”¹⁴⁸ Moreover, there will be a wave of new COVID-19-centric litigation in addition to the backlog of cases. Personal bankruptcies, labour and employment disputes, home foreclosures, divorce and custody disputes are but a few examples of the types of disputes that will likely surge after the pandemic.¹⁴⁹

As a result of the pandemic, there has been an expanded use of online technology.¹⁵⁰ The legal world has been no exception and has had to adapt to these unprecedented times, in many cases relying on technology.¹⁵¹ In Manitoba, all three levels of court (the Manitoba Court of Appeal, the Manitoba Court of Queen’s Bench [now King’s Bench] and the Manitoba Provincial Court) enacted temporary measures to comply with physical distancing and limit

¹⁴⁵ Ioana Jurca & Sandra (Aigbinode) Lange, “How will COVID-19 shape the future of arbitration?” (2 April 2020), online (blog): McCarthy Tétrault <mccarthy.ca/en/insights/blogs/international-arbitration-blog/how-will-covid-19-shape-future-arbitration> [perma.cc/7RW3-HKH6].

¹⁴⁶ Megan Hodges, “Access to Justice in the Time of COVID-19: Lessons from Classical Antiquity” (7 May 2020), online: Blaney McMurtry LLP <blaney.com/articles/access-to-justice-in-the-time-of-covid-19-lessons-from-classical-antiquity?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration> [perma.cc/5KBE-Z6SQ].

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ David Freeman Engstrom, “Post-COVID Courts” (2020) 68 UCLA L Rev Disc 246.

¹⁵⁰ Harry N Mazadoorian, “COVID-19 and Online Dispute Resolution It’s a Whole New World Out There” (1 April 2020), online: *Connecticut Law Tribune* <law.com/ctlawtribune/2020/04/01/covid-19-and-online-disputeresolution-its-a-whole-new-world-out-there/> [perma.cc/NJ59-W73L] at para 1.

¹⁵¹ *Order re Temporary Suspension of In-Person Commissioning and Witnessing Provisions, The Emergency Measures Act*, CCSM c E80.

the spread of the virus.¹⁵² These measures have included “the suspension or cancellation of hearings, the use of videoconferencing and teleconferencing to aid in the hearing process, and other adjustments to operations.”¹⁵³ After the preliminary onset of the virus, announcements released in April and May 2020 stated that a number of matters would be available remotely. On May 4, 2020, the Court of Queen’s Bench [now King’s Bench] announced that pre-trials, case management meetings, case conferences, motions and judicially-assisted dispute resolutions would proceed remotely through teleconference or videoconference.¹⁵⁴ On April 3, 2020, the Court of Appeal announced that all motions or applications were to be heard remotely by teleconferencing and that all appeals would be heard remotely by videoconferencing.¹⁵⁵ While some matters have been moved to in-person, for example, all trials, preliminary inquiries, and inquests, many matters have remained online, including bail applications, Provincial Court counter dockets and other intake dockets, and case management conferences the court will hear via teleconference or videoconference.¹⁵⁶ In the area of Canadian arbitration, Arbitration Place has introduced an expanded service that offers “completely remote eHearing options, as well as safe, on-site ‘distanced’ solutions” that allow dispute resolution proceedings to continue without interruption during the pandemic.¹⁵⁷

Many firms have also made a number of online services available to respond to the challenges posed by the pandemic and

¹⁵² Danielle Barchyn & Mira Bokhaut, “Manitoba Court Scheduling Amidst COVID-19” (13 May 2020), online: *MLT Aikins* <mltaikins.com/covid-19/manitoba-court-scheduling-amidst-covid-19/> [perma.cc/8RZT-6UUZ].

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ “Hearings will be Conducted Remotely by Videoconferencing during the COVID-19 Pandemic” (3 April 2020), online (pdf): *Manitoba Courts* <manitobacourts.mb.ca/site/assets/files/1966/amended_court_of_appeal_notice_april_3_2020.pdf> [perma.cc/GQY4-9R5C].

¹⁵⁶ “Scheduling Protocols for Family Division Motions and Case Conferences via Teleconference or Video Conference” (1 October 2020), online (pdf): *Manitoba Courts* <manitobacourts.mb.ca/site/assets/files/1966/notice_-_scheduling_protocols_october_1_2020-1.pdf> [perma.cc/H79A-VPWC].

¹⁵⁷ Ioana Jurca & Sandra Aigbinode, “Canada: How Will COVID-19 Shape The Future Of Arbitration?” (11 April 2020), online: *McCarthy Tetrault* <mccarthy.ca/fr/node/64061> [perma.cc/8ZTY-XAEL].

the restrictions implemented for in-person gatherings.¹⁵⁸ A criminal law firm in Winnipeg announced the launch of a new video-consultation service.¹⁵⁹ Other firms have formed COVID-19 resource centres to help their clients and the community navigate the legal and business impacts of COVID-19.¹⁶⁰ In June 2020, international law firm Norton Rose Fulbright launched ‘NRF Covid Resolve’, a new online legal framework and process for expedited dispute resolution.¹⁶¹ The dispute-resolution process is supported through a single online platform.¹⁶² The platform seeks to achieve an outcome for the dispute within four to six weeks, and “the process can be used for both disputes between companies, or for disputes between companies within the same group, operating in both civil law and common law jurisdictions.”¹⁶³ The process allows for parties to choose between “a mediation process only, a mediation process followed by documents only arbitration or an arbitration only.”¹⁶⁴

In May 2020, the Conflict Analytics lab at Queen’s University launched MyOpenCourt, an AI-powered legal aid system designed to assist small to medium-sized businesses, as well as self-represented litigants.¹⁶⁵ The algorithm uses AI technology to calculate the probability of success in a given employment-law dispute by determining the legality of a given wage cut or layoff, whether a

¹⁵⁸ See e.g. Matt Gould, “Criminal Defence Lawyer Launches Video Consultation Service to Assist Clients During COVID-19 Restrictions” (16 April 2020), online: *Brodsky, Amy & Gould* <mattgould.ca/criminal-defence-lawyer-launches-video-consultation-service-to-assist-clients-during-covid-19-restrictions/> [perma.cc/4FW2-JCSH].

¹⁵⁹ *Ibid.*

¹⁶⁰ See “COVID-19 Resource Centre” (accessed 18 October 2020), online: *MLT Aikins* <mltaikins.com/service/covid-19-resource-centre/#tab-expertise-tabs-1> [perma.cc/8SE9-W9SY]; see “COVID-19 Resource Centre” (accessed 18 October 2020), online: *Thompson Dorfman Sweatman* <tdslaw.com/covid-19-legal-updates/> [perma.cc/T3T5-WPHX].

¹⁶¹ See “NRF COVID-19 Resolve helps clients with fast-track COVID-19 dispute resolution” (June 2020), online: *Norton Rose Fulbright* <nortonrosefulbright.com/en-sg/news/5f9e6fde/nrf-covid-resolve-helps-clients-with-fast-track-covid-19-dispute-resolution> [perma.cc/D5XF-SGU6].

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ MyOpenCourt, *supra* note 37.

worker is an employee or independent contractor, or calculating severance, for example, and is capable of factoring in issues such as the existence of harassment.¹⁶⁶ If the algorithm determines that the litigant has a valid legal claim, online mediation caseworkers will attempt to resolve the dispute. Should mediation prove unsuccessful, MyOpenCourt will connect users to lawyers to continue the claim through traditional methods.¹⁶⁷

International bodies like the United Nations have also emphasized the importance of facilitating and prioritizing the online functioning of justice services in light of the pandemic.¹⁶⁸ In May, 2020, the United Nations Office on Drugs and Crime (UNODC) released a Guidance Note, “Ensuring Access to Justice in the Context of COVID-19.”¹⁶⁹ In the Note, the UNODC emphasizes that the COVID-19 crisis will “affect a broad range of human rights, including the ability of people to access justice in a timely, fair, and effective manner.”¹⁷⁰ COVID-19 provides an opportunity to “examine ways in which the justice system can become more efficient and agile, with long term impact that can last beyond the crisis period.”¹⁷¹ The UNODC recommends “facilitating access to restorative justice services, such as online mediation and alternative dispute resolution. The UNODC states that improvements could include strengthening information, communication and technology infrastructures and supporting the digitization of case management or prison population management systems.¹⁷² The “use of online procedures to file cases, the legal recognition of electronic evidence or evidence presented by electronic means, and the establishment of electronic case file and

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ United Nations Office on Drugs and Crime, “Guidance Note: Ensuring Access to Justice in the Context of COVID-19” (May 2020), online (pdf): *United Nations* <[unodc.org/documents/Advocacy-Section/Ensuring_Access_to_Justice_in_the_Context_of_COVID-191.pdf](https://www.unodc.org/documents/Advocacy-Section/Ensuring_Access_to_Justice_in_the_Context_of_COVID-191.pdf)> [perma.cc/4K2K-AEG9] at 8.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.* at 6.

¹⁷¹ *Ibid.* at 13.

¹⁷² *Ibid.*

evidence management systems” are also recommended in the Guidance Note.¹⁷³

Given the increase in the use of e-technology, it begs the question of whether we will return to our pre-COVID ways or whether many of these changes are here to stay. During this time, ODR has received unprecedented interest and attention,¹⁷⁴ with some lawyers hoping to continue increasing the use of technology even after the pandemic subsides.¹⁷⁵ In what was then known as the Court of Queen’s Bench [now King’s Bench] in Alberta, Chief Justice Mary Moreau predicted that the digital revolution in the courts will not end with COVID-19.¹⁷⁶ She has stated that the ability to take away paper “increases the efficiency of the court” and that this is not something she is going to “give up.”¹⁷⁷ Some have predicted that the crisis “will be a turning point for the use of online courts and tribunals.”¹⁷⁸ The COVID-19 crisis will likely propel a more principled approach to online dispute resolution.¹⁷⁹ As such, we must clarify elements such as third-party discovery,

¹⁷³ *Ibid* at 20.

¹⁷⁴ Mazadoorian, *supra* note 150.

¹⁷⁵ See Darryl Singer, “Wellness: My post-COVID hopes for the profession” (27 April 2020), online: *The Lawyer’s Daily* <thelawyersdaily.ca/articles/18739/wellness-my-post-covid-hopes-for-the-profession-darryl-singer> [perma.cc/4JF8-S7WB]; Gina Rhodes, “The legal landscape in the COVID-19 era” (17 April 2020), online: *The Lawyer’s Daily* <thelawyersdaily.ca/articles/18571/-the-legal-landscape-in-the-covid-19-era-gina-rhodes?category=opinion> [perma.cc/7GSS-M2HD]; Sharon D Nelson & John W Simek “Double Whammy on Law Firms: COVID-19 and the Troubled Economy”, *Slaw* (28 May 2020), online: <slaw.ca/2020/05/28/double-whammy-on-law-firms-covid-19-and-the-troubled-economy/> [perma.cc/6LBK-53HB].

¹⁷⁶ Jonny Wakefield “Digital Revolution in courts won’t end with COVID-19: chief justice; Court of Queen’s Bench [now King’s Bench] has reduced courthouse access, added online options”, *Edmonton Journal* (8 April 2020), online: <edmontonjournal.com/news/local-news/digital-revolution-in-alberta-courts-wont-end-with-covid-19-chief-justice-says> [perma.cc/3KEC-HA8Z].

¹⁷⁷ *Ibid*.

¹⁷⁸ “COVID-19: Implications for the future of Dispute Resolution” (6 April 2020), online (pdf): *Baker McKenzie* <bakermckenzie.com/-/media/files/insight/publications/2020/04/covid19-implications-for-the-future-of-dispute-resolution_v5.pdf> [perma.cc/NZV4-6XER] at 6.

¹⁷⁹ Masood Ahmed, “Alternative dispute resolution during the Covid-19 crisis and beyond” (2021) 32:1 King’s LJ 147.

online class arbitration, and whether specific consent for a virtual hearing will be required.¹⁸⁰ Issues previously identified in this paper, such as security, privacy, and the ‘digital divide’ must also be addressed and reconciled in the law.

The COVID-19 pandemic has provided a great deal of data and user experience on remote hearings and online technologies, which was previously missing. This data suggests that online or virtual hearings are best suited for matters in which the outcome is less likely to be contested, for matters interlocutory or procedural in nature, and for matters in which legal counsel represents both parties.¹⁸¹ Case conferences also appear to be well-suited to continue remotely.¹⁸²

The onset of the pandemic has required technological investment from all sides in order to make hearings function effectively.¹⁸³ As a result, many believe that the investment will not go to waste even after the immediate crisis is over: “once it is clear (as it soon should be) that smaller hearings and applications can be heard effectively and fairly over video conferencing, both the courts/tribunals and their users will expect such online contact to become the norm (or at least accepted more readily).”¹⁸⁴ The growth of online mediation is also included in this prediction: “COVID-19 poses an opportunity for online mediation to be adopted more commonly in disputes that would ultimately be referred to international arbitration.”¹⁸⁵ Factors that we should consider in determining the appropriate medium for each mediation include the needs of parties to maintain or reduce the distance (both

¹⁸⁰ Amy J Schmitz, “Arbitration in the Age of COVID: Examining Arbitration’s Move Online” (2021) 22:2 Cardozo J Conflict Resol 245.

¹⁸¹ Natalie Byrom, Sarah Beardon & Abby Kendrick, “Report and Recommendations: The impact of COVID-19 measures on the civil justice system” (May 2020), online (pdf): *Courts and Tribunals Judiciary* <judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f.pdf> [perma.cc/F37X-YCDB]; Stephan Wilske, “The Impact of COVID-19 on International Arbitration – Hiccup or Turning Point?” (2020) 13:1 Contemp Asia Arb J 7.

¹⁸² Wilske, *ibid*; see also S Dodson, L Rosenthal & C Dodson, “The Zooming of Federal Civil Litigation” (2020) 104:3 Judicature 13.

¹⁸³ McKenzie, *supra* note 179.

¹⁸⁴ *Ibid* at 6.

¹⁸⁵ *Ibid* at 6.

geographical and psychological), and their technological literacy and vulnerability to the “digital divide.”¹⁸⁶

While the measures implemented to overcome social distancing and travel restrictions may have initially been temporary, the evolving practices in the world of arbitration may survive long after the threat of COVID-19 has disappeared.¹⁸⁷ “As the focus on the use of technology in conducting arbitrations amplifies, examinations being conducted remotely, as well as online submissions, may become the norm. Every turning point in history has brought institutional reform, and most of the time, for the better.”¹⁸⁸

ODR systems risk what Richard Susskind has termed the “wheel change dilemma.” We must be cautious in our drive to incorporate online technology into our current approaches to dispute resolution, as too often it can lead to “the compromise of committing to technology but simply grafting it onto current ways of working” rather than the ideal scenario, “to build and launch an entirely new vehicle.”¹⁸⁹

While “some of the current use of ODR has accelerated more out of necessity than desire, the result is that it is proving to be a critical addition to the ADR practitioner’s toolbox.”¹⁹⁰ “Fast-evolving and improving technology, together with the emergence of numerous increasingly specialized providers and platforms, are building upon an already proven track record portending even greater and easier access and success.”¹⁹¹ The current acceptance by the legal profession of online and remote technologies must not be short-lived. Instead, the pandemic should be seen as a catalyst, as motivation to enact systemic changes in our approach to technology in the law.¹⁹² The COVID-19 experience has been encouraging, in that it has shown us that we can adapt when necessary, and now

¹⁸⁶ Tallodi, *supra* note 118.

¹⁸⁷ Jurca & Lange, *supra* note 145.

¹⁸⁸ *Ibid.*

¹⁸⁹ Richard Susskind, *Online Courts and the Future of Justice* (Oxford: Oxford University Press, 2019) at 112.

¹⁹⁰ Mazadoorian, *supra* note 150.

¹⁹¹ *Ibid.*

¹⁹² Christopher Suarez, “Disruptive Legal Technology, COVID-19, and Resilience in the Profession” (2020) 72:2 SCL Rev 393.

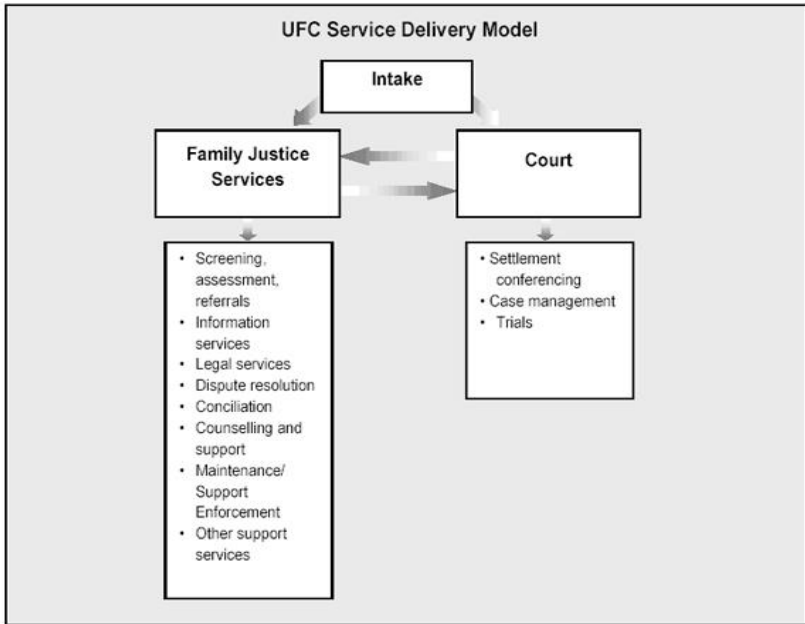
might be the perfect time for Manitoba to capitalize on the current environment and implement an ODR system.

**A Proposal for a Provincial Initiative on
Civil Dispute Resolution – A FAIR Initiative
Appendix "A": Section 2.2.1 of The Unified Family Court
Summative Evaluation Final Report**

2.2.1. Characteristics of the Unified Family Court Model

The scope of the UFC concept is presented in Exhibit 2-2, a graphic depiction of the UFC model and the elements associated with it.

Exhibit 2-2: UFC Conceptual Model of Service Delivery



Source: Justice Canada (2004). *RMAF for the UFCs*, p.8.

A key element of the service delivery model is introducing intake as the first point of access or step for Canadian families dealing with family law matters. Intake is designed to serve as a coordinating link between FJS and the court system. As such, the intake element of the service delivery model facilitates access to FJS and encourages coordination of the court “arm” of the model with the FJS arm. Through intake or other similar services, the most appropriate path to resolution is identified for each case and parties are referred to the appropriate dispute resolution mechanism and/or FJS (these are discussed in greater detail in Section 2.1.2). As illustrated above, intake or referral can lead parties to FJS or to the court. However, note that parties can move between these two parts of the system.

