

2013

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## Citation of this paper:

Bailey, J., Burkell, J. and Reynolds, G. (2013). Access to justice for all: Towards an “expansive vision” of justice and technology. *Windsor Yearbook of Access to Justice*, 31(2), 181-207.

## ACCESS TO JUSTICE FOR ALL: TOWARDS AN “EXPANSIVE VISION” OF JUSTICE AND TECHNOLOGY

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*In this paper, the authors examine developments in the Canadian access to justice dialogue from Macdonald’s seminal 2005 analysis to the recent reports of the National Action Committee on Access to Justice in Civil and Family Matters [NAC]. They draw on the NAC’s call for an “expansive vision” of access to justice as the basis for critically evaluating examples of particular technologies used or proposed as responses to the access to justice crisis in Canada. In so doing, they illustrate the importance of conscious consideration of deliverables and beneficiaries in prioritizing technologies for deployment, in determining how the technology ought to be deployed, and in evaluating the potential of a technology to facilitate access to justice. The authors argue that nuanced accounts of the relationships between justice deliverables, technological mechanisms for delivery and intended justice beneficiaries are essential to developing good decision-making mechanisms with respect to access to justice and technology.*

*Dans le présent article, les auteurs examinent l’évolution du dialogue canadien sur l’accès à la justice, depuis l’analyse fondamentale de Macdonald en 2005 jusqu’aux récents rapports du Comité national d’action sur l’accès à la justice en matière civile et familiale (CNA). Ils se fondent sur la « vision élargie » de l’accès à la justice réclamée par le CNA pour évaluer de façon critique les exemples de technologies particulières utilisées ou proposées pour répondre à la crise de l’accès à la justice au Canada. Ce faisant, ils illustrent l’importance d’examiner de façon consciente les livrables et les bénéficiaires pour classer par ordre de priorité les technologies à déployer, pour déterminer comment la technologie devrait être déployée et pour évaluer le potentiel d’une technologie de faciliter l’accès à la justice. Les auteurs soutiennent que des comptes rendus nuancés des rapports entre les livrables en matière de justice, les mécanismes de livraison technologiques et les bénéficiaires prévus sont essentiels pour élaborer de bons mécanismes décisionnels en ce qui concerne l’accès à la justice et la technologie.*

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<sup>\*</sup> University of Ottawa Faculty of Law (Common Law Section). Thanks to Vanessa Beaton and Aleksandra Baic for their research support. All three of the authors wish to acknowledge the Social Sciences and Humanities Research Council for funding Towards Cyberjustice: Rethinking Processual Law, an MCRI headed by Karim Benyekhlef at the Université de Montréal, of which this article forms a part.

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## I. INTRODUCTION

The Canadian dialogue regarding access to justice has taken an important turn in the last few years, more robustly conceptualizing *what* is to be accessed (“deliverables”) and *who* is intended to benefit (“beneficiaries”), as well as recognizing that access to justice initiatives that benefit some citizens or groups of citizens cannot be presumed to benefit *all* citizens. Recent initiatives<sup>1</sup> shift focus away from particular kinds of deliverables (e.g. access to lawyers and courts) and/or particular groups of beneficiaries (e.g. the middle class) toward a more “expansive vision” of access to justice.<sup>2</sup> The expansive vision not only integrates and prioritizes a variety of deliverables, but also explicitly recognizes that socioeconomic and other structural differences among citizens affect their respective abilities to benefit both from the justice system itself and from initiatives designed to improve access to justice. These developments hold important promise not just for responding to what has been called an access to justice “crisis” in Canada,<sup>3</sup> but also for tailoring responses in ways that are mindful of the differing needs and situations of *all* citizens. In this paper, and in keeping with this expansive vision, we argue that this more robust approach to access to justice must also be brought to bear on the specific dialogue around access to justice and technology.

The dialogue regarding access to justice and technology can too easily fall prey to a sort of technological determinism<sup>4</sup> that implicitly assumes that technological change is inevitable, unstoppable and *certain* to enhance access to justice.<sup>5</sup> Within this discourse, courts and the legal profession are chastised for having “some work to do to catch up to the current technology movement”, while “a growing number of judges” are reportedly “trying to drag the court system into the electronic age...”<sup>6</sup> The assumptions implicit in these sorts of observations highlight the need for the kind of nuanced and robust examination of justice system deliverables and beneficiaries more recently evident in the broader

<sup>1</sup> Such as the appointment and reports of the National Action Committee on Access to Justice in Civil and Family Matters [NAC] and the Canadian Bar Association Access to Justice Committee. Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013), online: Canadian Forum on Civil Justice <[http://www.cfcjfcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcjfcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf)> [NAC, *Roadmap to Change*]; Access to Justice Committee, *Reaching Equal Justice: An Invitation to Envision and Act* (Ottawa: Canadian Bar Association, 2013) at 16, online: Canadian Bar Association <[http://www.cba.org/dev/cba/equal-justice/secure\\_pdf/Equal-Justice-Summary-Report-eng.pdf](http://www.cba.org/dev/cba/equal-justice/secure_pdf/Equal-Justice-Summary-Report-eng.pdf)> [AJC, *Reaching Equal Justice*].

<sup>2</sup> *Ibid* at 2.

<sup>3</sup> Tracey Tyler, “Access to justice ‘a basic right’”, *The Toronto Star* (12 August 2007), online: <<http://www.thestar.com/News/Canada/article/245548>>.

<sup>4</sup> Langdon Winner, *The Whale and the Reactor: A Search for Limits in an Age of High Technology* (Chicago: University of Chicago Press, 1986) at 19-39; Amy Salyzyn, “A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario” (2012) 50 Osgoode Hall LJ 429.

<sup>5</sup> Glenn Kauth, “Ontario lagging in court technology”, *Law Times* (31 December 2012), online: <<http://www.law-timesnews.com>>.

<sup>6</sup> Kirk Makin, “Courts turn to wired justice to push to cut costs”, *The Globe and Mail* (15 May 2012) A4; Alison MacPhail, *Report of the Access to Legal Services Working Group* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2012) at 3, online: Canadian Forum on Civil Justice <<http://www.cfcjfcjc.org/sites/default/files/docs/2012/Report%20of%20the%20Access%20to%20Legal%20Services%20Working%20Group.pdf>> [MacPhail, *Access to Legal Services Report*].

Canadian access to justice dialogue. As the National Action Committee on Access to Justice in Civil and Family Matters (NAC) put it:

As part of the development of a more encompassing vision of the justice system ... it is important to develop mechanisms for good decision making about where, why and how technology is used.<sup>7</sup>

We suggest that, like the relationship between the access to justice crisis and any other kind of response to it, the relationship between access to justice and technology is neither necessary nor necessarily positive. This is true in part because technological initiatives characterized as facilitators of access to justice are not necessarily animated by a single consistent approach to what it means to deliver access to justice, nor do they benefit from explicit recognition of the ways in which a single technological response can differentially affect citizens including those who are the intended beneficiaries and those who are presumably unaffected by the intervention. Therefore, we suggest that nuanced accounts of the relationships between justice deliverables, technological mechanisms for delivery, and intended justice beneficiaries will be essential to developing the good decision-making mechanisms called for by the NAC.<sup>8</sup> Otherwise, we risk entrenching existing disparities in access to justice or even introducing new inequities, thus undermining the expansive vision’s target of enhanced access to justice for *all* citizens.<sup>9</sup>

By examining examples of particular technologies used or proposed as responses to the access to justice crisis in Canada, we hope to illustrate the importance of conscious consideration of deliverables *and* beneficiaries in prioritizing technologies for deployment, in determining how the technology ought to be deployed, and in evaluating the potential of a technology to facilitate access to justice. In particular, we want to explore situations in which technologies that increase access to justice for one constituency of beneficiaries have a different effect on access to justice for a different constituency; we also wish to examine the implications of selectively applying a technology to one constituency without changing practice for other constituencies. Just as Rebecca Sandefur has highlighted the importance of “comparative equal justice studies [that] ask whether different groups have similar or distinct experiences with the same civil justice event”,<sup>10</sup> we seek to highlight the ways in which different groups can be differently affected by the technologies deployed in the justice system.

The paper is organized as follows. Part II explores three key developments in the evolution of the Canadian dialogue around access to justice, highlighting discussions around the actual or theorized role(s) to be played by technology. Part III explores three types of technological systems noted in the literature as actual or potential facilitators of access to justice: e-filing, web-based legal information, and videoconferencing. We highlight the ways in which these technological solutions can affect both

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<sup>7</sup> Action Committee on Access to Justice in Civil and Family Matters: Prevention, Triage and Referral Working Group, *Final Report: Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector*, (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013) at 8, online: Canadian Forum on Civil Justice < <http://www.cfcjfcj.org/sites/default/files/docs/Report%20of%20the-%20Prevention,%20Triage%20and%20Referral%20WG%20.vpdf> > [Prevention, *Triage and Referral Report*].

<sup>8</sup> *Ibid.*

<sup>9</sup> See also AJC, *Reaching Equal Justice*, *supra* note 1 at 21, in which it is argued that “[c]areful planning is needed to prevent technological innovations from creating or reinforcing barriers to equal justice”.

<sup>10</sup> Rebecca Sandefur, “Access to Civil Justice and Race, Class and Gender Inequality” (2008) 34 *Annual Review of Sociology* 339 at 350.

beneficiaries and deliverables differentially for different stakeholder groups, sometimes at the expense of other responses for improving access to justice. The Conclusion reflects on the implications of the complex relationship between technology and access to justice, particularly for court administrators and others involved in making decisions about technological implementation and evaluation. We end by suggesting future avenues for ensuring that the dialogue around justice sector technology remains in step with the expansive vision advanced in contemporary Canadian access to justice discourse; a vision that takes into account what is to be delivered, to whom it is to be delivered, *and* the intersections between the two.

## II. CONCEPTIONS OF ACCESS TO JUSTICE: THE CANADIAN DIALOGUE

Access to justice has been conceptualized in numerous ways in the Canadian dialogue. Here we identify three key developments in the evolution of the conception of, and approach to, access to justice: 1) Roderick Macdonald's 2005 five-“wave” taxonomy;<sup>11</sup> 2) a vector of access to justice dialogue focused on middle income earners; and 3) the expansive vision contributed to by a number of players, particularly the NAC<sup>12</sup> and the Canadian Bar Association [CBA]<sup>13</sup> in 2013. Delineation of these three developments is not meant to suggest that one approach flowed linearly from the other, nor is it meant to suggest an absence of conceptual overlap within the three. Instead, it is intended to highlight some of the key conceptualizations of access to justice deliverables and beneficiaries that contextualize the more robust approach articulated in the expansive vision.

### A. Macdonald's Five “Waves”

In 2005, Macdonald identified five broad categories of access to justice conceptions, which he characterized as “waves”: 1) access to lawyers and courts; 2) institutional redesign; 3) demystification of law; 4) preventative law; and 5) proactive access to justice.<sup>14</sup> Each wave illustrates an important set of issues (or set of barriers) that must be addressed in order for access to justice to be achieved. While Macdonald identifies each wave as having emerged in a specific decade, issues identified in early “waves of thinking about access to justice”<sup>15</sup> continue to be of concern even as later waves or conceptions of access to justice develop. The fact that the five waves are overlapping in time rather than consecutive complicates the use of the “wave” metaphor; therefore, in order to avoid any confusion, we refer in our discussion below to conceptual clusters rather than to waves. Importantly, Macdonald advocated a shift away from access to justice strategies that focus on a single conceptual cluster toward development of a “comprehensive access to justice strategy ... [that is] multi-dimensional ... and ... take[s] a pluralistic approach to the institutions of law and justice”<sup>16</sup> – one in which the issues or barriers

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<sup>11</sup> Roderick Macdonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 19.

<sup>12</sup> NAC, *Roadmap to Change*, *supra* note 1.

<sup>13</sup> AJC, *Reaching Equal Justice*, *supra* note 1.

<sup>14</sup> Macdonald, *supra* note 11.

<sup>15</sup> *Ibid* at 21 (some conceptions of access to justice are “richer” than others).

<sup>16</sup> *Ibid* at 24.

identified in each of his waves are addressed. The expansive vision discussed in Part C below reflects such a shift.

### 1. Access to lawyers & courts

Macdonald identified access to lawyers and courts as one cluster of access to justice conceptions.<sup>17</sup> Highlighting “cost, delay, complexity in the legal system” as primary issues of concern, Macdonald noted that mechanisms for reform proposed within this cluster have included “[l]egal aid programmes (including community clinics, public defender offices, and certificate systems) to allow the poor to benefit from the services of a lawyer”.<sup>18</sup> This conception has been articulated in a variety of forms over time.

Some commentators have suggested that legal representation is essential to access to justice, particularly in family law proceedings.<sup>19</sup> Here the primary access to justice concerns appear to be that those who lack legal representation, and therefore are self-represented, are both at a disadvantage in the legal process *and* slow the justice process through their lack of knowledge and expertise. Proposed responses to the self-represented litigant vary, including advocacy for enhanced public funding of legal representation,<sup>20</sup> improved and faster access to unbundled legal services,<sup>21</sup> advice, and information,<sup>22</sup> improved pro bono programs,<sup>23</sup> and improved access to information about legal aid,<sup>24</sup> some of which could be provided online.<sup>25</sup>

Particular attention within this cluster has focused on the different service and representation needs of vulnerable beneficiaries of the justice system. For example, the CBA has noted that access to legal services is particularly important for the poor who “often have low levels of education and literacy and disproportionately experience physical and mental health and addiction issues and trauma”, as well as “experiencing more frequent, complex, and interrelated civil legal problems with more serious

<sup>17</sup> *Ibid* at 20.

<sup>18</sup> *Ibid*.

<sup>19</sup> Nicholas Bala, “Reforming Family Dispute Resolution in Ontario: Systemic Changes and Cultural Shifts” in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 271; Justice George Czutrin, “Some Reflections on Family Dispute Resolution in Ontario” in Trebilcock, Duggan & Sossin (*ibid*, 316 at 321).

<sup>20</sup> Melina Buckley, *Moving Forward on Legal Aid: Research on Needs and Innovative Approaches* (Ottawa: Canadian Bar Association, 2010), online: Canadian Bar Association <<http://www.cba.org/cba/Advocacy/PDF/CBA%20Legal%20Aid%20Renewal%20Paper.pdf>>; Standing Committee on Access to Justice, *Toward National Standards for Publicly-Funded Legal Services* (Ottawa: Canadian Bar Association, 2013) at 4-5, 7, online: Canadian Bar Association <<http://www.cba.org/CBA/Access/PDF/TowardNationalStandards.pdf>> [Standing Committee, *Toward National Standards*].

<sup>21</sup> MacPhail, *Access to Legal Services Report*, *supra* note 6 at 13-14.

<sup>22</sup> For example. Vayda and Ginsberg focus on innovative delivery through walk-in centres (e.g. Law Help Ontario), lawyer referral services (e.g. LSUC’s service), and internet information services (e.g. CLEO.net): Paul A Vayda & Stephen B Ginsberg, “Legal Services Plans: Crucial-Time Access to Lawyers and the Case for a Public-Private Partnership” in Trebilcock, Duggan & Sossin, *supra* note 19 at 246 at 252. See also MacPhail, *Access to Legal Services Report*, *supra* note 6 at 15.

<sup>23</sup> MacPhail, *Access to Legal Services Report*, *supra* note 6 at 15.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid*.

consequences and issues that threaten basic needs” such as shelter and social assistance benefits.<sup>26</sup> For this reason, Buckley and MacPhail have emphasized that integrated service models offering legal and non-legal assistance with a single point of entry may be particularly important for the poor.<sup>27</sup>

UK<sup>28</sup> and US<sup>29</sup> scholars have also contributed insights from their countries’ experiences to this aspect of the Canadian access to justice dialogue, emphasizing the importance of taking into account the different needs and abilities of low and middle income earners when deciding whether to enhance support for legal representation or to increase access to unbundled information and services. In terms of technology, drawing on experiences with online shopping in the UK that indicate “poor people still tend to use the expensive corner shop”, Smith underscored the importance of considering “what categories of people will require face-to-face contact for the foreseeable future”.<sup>30</sup>

The Canadian literature also highlights the role that geographic remoteness, and cultural and linguistic disparities play in undermining equal access to legal services. In this context, it is suggested that access to justice requires equalization with respect to the availability and quality of services for those in remote regions, with tailored outreach measures for, among others, Aboriginal<sup>31</sup> and linguistic minority communities.<sup>32</sup> Here, it is suggested that coordinated strategies for recruitment and retention of lawyers in remote communities,<sup>33</sup> as well as distance-mediating technologies such as videoconferencing, could better facilitate the one-to-one personal contact that many studies suggest is particularly important for vulnerable community members in remote communities.<sup>34</sup>

## 2. Institutional redesign

Institutional redesign is the second cluster of access to justice conceptions in Macdonald’s taxonomy. It focuses on the “actual performance of the courts, their procedures, and their organization” as the primary issues of concern.<sup>35</sup> Reforms proposed or adopted under this conception include: (i) changes to the civil justice process (e.g. small claims courts, class actions);<sup>36</sup> and (ii) government-created administrative tribunals (e.g. human rights commissions, the landlord-tenant bureau) and statutory, non-

<sup>26</sup> Standing Committee on Access to Justice, *Future Directions for Legal Aid Delivery* (Ottawa: Canadian Bar Association, 2013), online: Canadian Bar Association <<http://www.cba.org/CBA/Access/PDF/Future-DirectionsforLegalAidDelivery.pdf>> [Standing Committee, *Future Directions*].

<sup>27</sup> Buckley, *supra* note 20 at 10; MacPhail, *Access to Legal Services Report*, *supra* note 6 at 8.

<sup>28</sup> Roger Smith, “Middle Income Access to Civil Justice: Implications of Proposals for the Reform of Legal Aid in England and Wales” in Trebilcock, Duggan & Sossin, *supra* note 19, 173 at 189-190 [Smith, “Middle Income Access to Civil Justice”].

<sup>29</sup> Russell Engler, “Opportunities and Challenges: Non-Lawyer Forms of Assistance in Providing Access to Justice for Middle-Income Earners” in Trebilcock, Duggan & Sossin, *supra* note 19, 145 at 145-6 [Engler, “Opportunities and Challenges”].

<sup>30</sup> Smith, “Middle Income Access to Civil Justice”, *supra* note 28.

<sup>31</sup> Buckley, *supra* note 20.

<sup>32</sup> Karen Cohl & George Thomson, “Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services” (Toronto: Law Foundation of Ontario, 2008), online: Law Foundation of Ontario <[http://www.lawfoundation.on.ca/pdf/linguistic\\_rural\\_report\\_dec2008\\_final.pdf](http://www.lawfoundation.on.ca/pdf/linguistic_rural_report_dec2008_final.pdf)>.

<sup>33</sup> MacPhail, *Access to Legal Services Report*, *supra* note 6 at 20.

<sup>34</sup> Cohl & Thomson, *supra* note 32.

<sup>35</sup> Macdonald, *supra* note 11 at 20.

<sup>36</sup> *Ibid.*

judicial compensation schemes (e.g. no-fault insurance).<sup>37</sup> A significant body of literature and a multiplicity of reports and task forces proliferate within this cluster,<sup>38</sup> many of the key aspects of which are ably reviewed in the National Action Committee’s work discussed in part III C below.

### 3. Demystification of law

Macdonald argues that “by the mid-1980s access to justice in Canada came to be understood as centrally a problem of equality” (and more specifically, “equality of outcomes”).<sup>39</sup> Measures for achieving this deliverable include adoption, by courts, of “modern organizational thinking”, substantive reform of various areas of the law, the development of young offenders legislation, “greater attention to the idea of ‘restorative justice’”, wide adoption of the alternative dispute resolution movement, “programmes of public legal information and education”, the “plain language movement and mandatory standard-form consumer contracts”.<sup>40</sup> The label chosen by Macdonald for this wave – demystification of law – relates in particular to these final three sets of measures. As well, both the access to legal information and public legal education components of this cluster build upon core ideas from the first cluster (access to lawyers and courts) by pressing for publicly accessible information about legal process and education regarding legal rights, possibly delivered through experts or other intermediaries.

Subsequent literature relating to this cluster highlights the multiple roles played by accessible information. For example, public legal education could assist citizens in addressing the unmet legal needs that result, not from lack of access to lawyers, but from an inability to recognize an everyday problem as a legal problem.<sup>41</sup> Interventions aimed at addressing this gap could be particularly important for low and middle income earners, who appear less likely than high income earners to recognize problems as legal problems.<sup>42</sup> However, Engler has underscored the importance of evaluating the efficacy of self-help initiatives, noting a California study that showed those *without* self-help assistance paid less to settle cases with their landlords than did those *with* such assistance.<sup>43</sup>

### 4. Preventative law

Preventative law is the fourth of Macdonald’s clusters, which he says “reflect[s] the recognition that true access to justice had to encompass multiple non-dispute-resolution dimensions”.<sup>44</sup> Reforms that Macdonald associates with this conception of access to justice include “improve[d] processes for

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<sup>37</sup> *Ibid* at 20-21.

<sup>38</sup> For more information see: Canadian Forum on Civil Justice, *Inventory of Reforms*, online: Canadian Forum on Civil Justice <<http://www.cfcj-fcjc.org/inventory-of-reforms>>.

<sup>39</sup> Macdonald, *supra* note 11.

<sup>40</sup> *Ibid* at 21-22.

<sup>41</sup> Pascoe Pleasence & Nigel J Balmer, “Caught in the Middle: Justiciable Problems and the Use of Lawyers” in Trebilcock, Duggan & Sossin, *supra* note 19 at 27 [Pleasence & Balmer, “Caught in the Middle”]; Rebecca Sandefur, “Money Isn’t Everything: Understanding Moderate Income Households’ Use of Lawyers’ Services” in Trebilcock, Duggan & Sossin, *supra* note 19 at 222.

<sup>42</sup> Pleasence & Balmer, “Caught in the Middle”, *supra* note 41 at 53.

<sup>43</sup> Engler, “Opportunities and Challenges”, *supra* note 29 at 161-2.

<sup>44</sup> Macdonald, *supra* note 11 at 22.

involving the public in law-making institutions” and the extension of “access to justice concerns ... to law-making by non-public bodies”.<sup>45</sup>

Prevention has been an important element of the access to justice literature, particularly in relation to areas of high unmet civil legal need, such as consumer, family, and employment problems.<sup>46</sup> For example, it has been suggested the consumer legal problems could be prevented before they happen by developing “frontend” solutions, such as disclosing better information to consumers at the point(s) in time most relevant to making improved buying decisions.<sup>47</sup>

Preventative law is closely related to demystification of the law, as well as institutional redesign, as recent reports suggest the importance of accessible information about rights and obligations, and more assistive judicial and court staff,<sup>48</sup> in providing citizens with the knowledge base and alternative resolution mechanisms they need in order to make informed decisions about how and whether to proceed.

## 5. Proactive access to justice

Macdonald identified proactive access to justice as the fifth access to justice cluster, describing it as “providing equal opportunities for the excluded to gain full access to positions of authority within the legal system.”<sup>49</sup> Included within this cluster are initiatives such as: “improve[d] access to legal education, to the judiciary, to the public service and the police, to Parliament and to various law societies [in order to] ... overcome the disempowerment, disrespect and disengagement felt by many citizens.”<sup>50</sup>

## B. Focus on Middle Income Earners

As noted in Part A, numerous scholars have pointed out that improving access to justice for some citizens does not necessarily ensure that *all* will benefit.<sup>51</sup> Nonetheless, for a period of time, an important vector within Canadian access to justice dialogue focused specifically on one group of beneficiaries: middle income earners.

While the concern that justice was out of reach for the middle class had previously been raised,<sup>52</sup> it became a prominent focus of Canadian access to justice dialogue following a 2007 speech by Chief Justice of Canada Beverley McLachlin. Having noted that access to justice was “critical”, McLachlin

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid* at 95, 97.

<sup>47</sup> *Ibid* at 101, 105, 106, 110, 115.

<sup>48</sup> For instance, the Canadian Court Administrators Association has suggested that court staff and administrators could provide “meaningful legal assistance” to self-represented litigants, allowing them to make more informed decisions about their cases: Trevor Farrow et al, *White Paper Prepared for the Association of Canadian Court Administrators: Addressing the Needs of Self-Represented Litigants in the Canadian Justice System* (Canadian Centre for Court Technology, 2011) at 9, 23, 25, 30, 39, online: Canadian Forum on Civil Justice <<http://www.cfcjfcj.org/sites/default/files/docs/2013/Addressing%20the%20Needs%20of%20SRLs%20ACCA%20White%20Paper%20March%202012%20Final%20Revised%20Version.pdf>>.

<sup>49</sup> Macdonald, *supra* note 11 at 23; For example, see Constance Backhouse, “What is Access to Justice” in Bass, Bogart & Zemans, *supra* note 11, 113 at 126.

<sup>50</sup> Macdonald, *supra* note 11 at 23.

<sup>51</sup> AJC, *Reaching Equal Justice*, *supra* note 1; Cohl & Thomson, *supra* note 32.

<sup>52</sup> Herbert M Kritzer, “Access to Justice for the Middle Class” in Bass, Bogart & Zemans, *supra* note 11, 257 at 258.

CJC went on to suggest that while the legal system was open to wealthy corporations who could afford lawyers and to those unable to afford legal services but charged with serious crimes or faced with serious family law situations because they would receive legal aid,

it is obvious that these two groups leave out many Canadians. Hard hit are average middle-class Canadians. They have some income. They may have a few assets, perhaps a modest home. This makes them ineligible for legal aid. ... Their options are grim: use up the family assets in litigation; become their own lawyers; or give up.<sup>53</sup>

Concerns about the inaccessibility of justice for middle income earners were subsequently highlighted in a 2008 legal aid review led by Michael Trebilcock,<sup>54</sup> a colloquium on middle income access to justice, and ultimately a 2012 collection on middle income access to justice edited by Trebilcock, Duggan, and Sossin.<sup>55</sup> This discourse connected the growth in self-represented litigants with middle-income earners’ inability to afford legal representation in civil proceedings or to benefit from publicly funded legal aid. Trebilcock, Duggan, and Sossin noted that the inaccessibility of legal aid to the middle class raised major political economy problems in terms of the commitment of the middle income earners to supporting a legal aid system of which they were never beneficiaries, but only contributors as taxpayers, even while they faced similar denials of access to justice themselves.<sup>56</sup>

Although this strand of access to justice discussion focused selectively on one group of beneficiaries, the discourse did reflect a wide variety of means for delivering access to justice, incorporating several of Macdonald’s clusters.<sup>57</sup> Even within this strand, however, scholars such as Russell Engler raised concerns that strategies assisting middle-income earners might not benefit and could even further disadvantage others:

How can we be sure whether the steps we propose to assist middle-income earners are not achieved at the expense of low-income individuals and communities? How would we measure the trade-offs?<sup>58</sup>

Engler stressed the significant access to justice issues facing low-income individuals, noting that in the US 70-90% of the legal needs of the poor go unaddressed,<sup>59</sup> that unrepresented litigants are disproportionately poor and from minority groups, and that US and Canadian studies suggest that those

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<sup>53</sup> *Ibid.*

<sup>54</sup> Michael Trebilcock, *Report of the Legal Aid Review 2008* (Toronto: Ontario Ministry of the Attorney General, 2008), online: Ontario Ministry of the Attorney General < <http://www.attorneygeneral.jus.gov.on.ca/eng-ish/about/pubs/> > [Trebilcock].

<sup>55</sup> Trebilcock, Duggan & Sossin, *supra* note 19.

<sup>56</sup> Michael Trebilcock, Anthony Duggan & Lorne Sossin, “Introduction” in Trebilcock, Duggan & Sossin, *ibid.*, 3 at 4.

<sup>57</sup> In positing solutions toward resolving the middle class civil access to justice crisis, the 2012 book focused on a number of solutions that fall within several of the waves discussed in this section: (i) defining unmet legal needs; (ii) front-end proactive solutions; (iii) non-lawyer forms of assistance; (iv) access to lawyers; (v) reforming dispute resolution processes; and (vi) creating change and reform by growing legal aid into the middle class.

<sup>58</sup> Engler, “Opportunities and Challenges”, *supra* note 29 at 145.

<sup>59</sup> *Ibid.* at 147-8.

who appear in court without counsel fare worse than those who appear with counsel.<sup>60</sup> More recently, Canadian access to justice dialogue has shifted toward a more comprehensive approach that accounts for both a variety of deliverables *and* a full spectrum of beneficiaries.

### C. An Expansive Vision of Deliverables and Beneficiaries

Justice Thomas Cromwell of the Supreme Court of Canada chairs the NAC, which was established on the invitation of McLachlin CJC.<sup>61</sup> The NAC's 2013 report envisioned a society that has achieved access to justice as:

A society in which the public has the knowledge, resources and services to effectively deal with civil and family law matters:

- By prevention of disputes and early management of legal issues;
- Through negotiation and informal dispute resolution processes; and
- Where necessary, through formal dispute resolution by tribunals and courts.

In this society:

- Justice services are accessible, responsive and citizen focused;
- Services are integrated across justice, health, social and education sectors;
- The justice system supports the health, economic and social well-being of all participants;
- The public is active and engaged with, understands and has confidence in the justice system and has the knowledge and attitudes needed to enable citizens to proactively prevent and resolve their legal disputes; and
- There is respect for justice and the rule of law.<sup>62</sup>

This vision incorporates all five of Macdonald's clusters, while giving precedence to certain approaches over others (e.g. preventative, proactive, and redesigned processes over formal resolution through courts). The NAC's working group structure seems to prioritize certain clusters, including institutional redesign (Court Processes Simplification Working Group [CPSWG]), access to lawyers and courts (Access to Legal Services Working Group [ALSWG]), demystification and prevention (Prevention, Triage and Referral [PTRWG]), and a particular concern with access to justice in family law situations (Family Justice Working Group [FJWG]). Nonetheless, the reports of those working groups propose recommendations related to all five clusters.

#### 1. A comprehensive approach to deliverables

*Access to courts and lawyers* was a central consideration of the ALSWG. The working group favoured a focus on legal services rather than access to lawyers *per se* given that citizens' problems often do not involve resolution through lawyers or formal court processes.<sup>63</sup> Moreover, the ALSWG

<sup>60</sup> *Ibid* at 149-50.

<sup>61</sup> Action Committee on Access to Justice in Civil and Family Matters, *Backgrounder* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013), online: Canadian Forum on Civil Justice <<http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Access%20to%20Justice%20-%20NAC%20New%20Release%20REVISED%20FINAL%20BILINGUAL%20April%2019%202013.pdf>>

<sup>62</sup> MacPhail, *Access to Legal Services Report*, *supra* note 6 at 1-2.

<sup>63</sup> *Ibid* at 2.

recommendations emphasized “demystification of law” responses, such as expanded availability of web-based and telephone response and referral systems, supplemented by a “variety of interactive services to provide additional information, referral and assistance”, including, for example, trained intermediaries to assist in reaching hard-to-reach communities.<sup>64</sup> With respect to legal aid, the ALSWG recommended that publicly funded legal services should continue to shift from a court-centred to a client-centred model, which could be facilitated by coordinating with social services and health care in a way that better addresses the needs of low income clients.<sup>65</sup>

*Demystification of law* was emphasized by the NAC, whose PTRWG stressed approaches tailored to the needs of different populations.<sup>66</sup> The PTRWG focused in particular on development and integration of the Early Resolution Services Sector [ERSS], arguing that development of the “front end” of the justice system could obviate the need for formal legal representation in court.<sup>67</sup> The PTRWG asserted that investment in ERSS could reduce costs not only in the legal system, but also in other public sectors like health care, since unresolved legal problems tend to take a toll on mental and physical health.<sup>68</sup> Staged triage and referral services would aim to educate citizens on how to prevent legal problems, and would also offer assistance prior to entry into the formal legal system (typically through other community services that are likely to be consulted first), at first entry into the legal system (to assess which kinds of resources will be needed), and within the system to aid in understanding procedures and provide advocacy services if needed.<sup>69</sup> Finally, the PTRWG advocated for networking among the various kinds of stakeholders who could be involved in supporting a citizen with a legal problem, including community, social, and health agencies, as well as public legal information providers.<sup>70</sup>

*Institutional redesign* was emphasized by the FJWG and CPSWG. Making the court system “more efficient, proportionate, and accessible while maintaining fairness and justice”<sup>71</sup> was the CPSWG’s primary mandate. Five of their recommended responses focused on institutional redesign: (i) technological changes such as online interactive forms, e-filing, e-courts, teleconferencing, videoconferencing, and cross-jurisdictional sharing of technology-related information;<sup>72</sup> (ii) case

<sup>64</sup> *Ibid* at 8-9.

<sup>65</sup> *Ibid* at 18.

<sup>66</sup> Prevention, *Triage and Referral Report, supra* note 7 at 31, 33; Its Processes Simplification Working Group and Family Law Working Group also touched on these issues: Action Committee on Access to Justice in Civil and Family Matters, “Report of the Court Processes Simplification Working Group” (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2012) 11-6, online: Canadian Forum on Civil Justice <http://www.cfcjfcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Court%20Processes%20Simplification%20Working%20Group.pdf> [Processes Simplification Report]; Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters, “Meaningful Change for Family Justice: Beyond Wise Words” (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013) 36-45, online: Canadian Forum on Civil Justice <<http://www.cfcjfcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf>> [Family Justice Working Group Report]

<sup>67</sup> Prevention, *Triage and Referral Report, supra* note 7 at 11.

<sup>68</sup> *Ibid* at 9.

<sup>69</sup> *Ibid* at 15-16; Family Justice Working Group Report, *supra* note 66 (similar kinds of approaches were also recommended at 36-45).

<sup>70</sup> Prevention, *Triage and Referral Report, supra* note 7 at 13-21.

<sup>71</sup> Processes Simplification Report, *supra* note 66 at 3-4, 13.

<sup>72</sup> *Ibid* at 5-8.

management reforms to better assist parties in processing cases;<sup>73</sup> (iii) renewed focus on alternative dispute resolution mechanisms such as mandatory mediation;<sup>74</sup> (iv) rule reforms designed to streamline the processing of cases (e.g. more liberal rules for summary judgment);<sup>75</sup> and (v) rethinking the roles and relationships between justice sector players (e.g. considering more inquisitorial styles of judging that might better accommodate judicial assistance for self-represented parties).<sup>76</sup>

While the FJWG also recommended a number of organizational reforms,<sup>77</sup> it emphasized modification of legal culture in ways that would enable justice sector players to take on different roles and functions. For instance, the FJWG recommended: (i) a hybrid resolution system incorporating an array of consensual dispute resolution (CDR) options (especially given the often emotional issues at play in family law and recognizing that those self-representing in family court are often unsophisticated one-time litigants);<sup>78</sup> (ii) greater emphasis on law school courses and continuing legal education on building the CDR skills of lawyers and judges (especially those involved in family law litigation);<sup>79</sup> and (iii) implementation of post-resolution support services (e.g. for issues such as recalculation of support).<sup>80</sup>

*Preventative law* was also touched upon by the NAC through a number of its working groups. For example, the PTRWG's ERSS is intended not only to assist in directing beneficiaries to the most helpful sources at the right time, but also to help prevent legal problems from developing through early intervention.<sup>81</sup>

*Proactive access to justice* is evident in the NAC's stated goal of "enabl[ing] citizens to proactively prevent and resolve their legal disputes".<sup>82</sup> In this vein, the PTRWG recommended establishment of "partnerships with health and social service agencies" in order to "address the roots of the access to justice problems encountered by the disenfranchised".<sup>83</sup>

## 2. A full spectrum of beneficiaries

The NAC also acknowledged the particular access to justice difficulties faced by members of socially vulnerable groups, including the poor,<sup>84</sup> and a number of working group reports stressed the importance of tailoring responses to meet the (potentially different) needs of various stakeholder groups.<sup>85</sup> The

<sup>73</sup> *Ibid* at 9-10.

<sup>74</sup> *Ibid* at 13-16.

<sup>75</sup> *Ibid* at 19.

<sup>76</sup> *Ibid* at 22-23. On the idea of reframing the adversarial model of justice to better accommodate self-represented parties, see Engler "Opportunities and Challenges", *supra* note 29 at 159.

<sup>77</sup> Including creation of unified family courts across Canada, simplified and proportional procedures and simplified interactive forms: Family Justice Working Group Report, *supra* note 66 at 48-59.

<sup>78</sup> *Ibid* at 6, 14-17, 32-36.

<sup>79</sup> *Ibid* at 21, 25, 29-33; MacPhail, *Access to Legal Services Report*, *supra* note 6 at 20 (The ALSWG made a similar recommendation at 20).

<sup>80</sup> Family Justice Working Group Report, *supra* note 66 at 59-60.

<sup>81</sup> Prevention, *Triage and Referral Report*, *supra* note 7 at 15-16; Family Justice Working Group Report, *supra* note 66 at 36-45.

<sup>82</sup> MacPhail, *Access to Legal Services Report*, *supra* note 6 at 1-2.

<sup>83</sup> Macdonald, *supra* note 11 at 23.

<sup>84</sup> MacPhail, *Access to Legal Services Report*, *supra* note 6 at 18.

<sup>85</sup> Prevention, *Triage and Referral Report*, *supra* note 7 at 13-21; MacPhail, *Access to Legal Services Report*, *supra* note 6 at 18.

NAC’s 2012 report,<sup>86</sup> its working groups’ reports<sup>87</sup> and the CBA’s initiatives and reports<sup>88</sup> on access to justice were highlighted at the CBA’s 2013 “Envisioning Equal Justice” conference.<sup>89</sup>

The CBA’s *Reaching Equal Justice* report<sup>90</sup> expanded upon and emphasized the importance of being mindful of differences between social groups when crafting access to justice responses. It noted that the needs of low income, middle income, and affluent citizens should be accounted for in these responses because, although socioeconomic position is an “imperfect” marker for any individual’s legal needs, these positions

do however reflect differing means, capacities and social situations in a general way, and assist us to keep in mind important differences in legal needs, the impact of unresolved legal problems, and problem-solving and dispute resolution behaviour, so we can assess who is most likely to benefit from proposed innovations.<sup>91</sup>

Ensuring that marginalized communities are not forgotten or inadvertently harmed by innovations in legal services has been an ongoing project of the CBA. In an initiative that could well be categorized as a proactive approach to access to justice, the CBA, during its review of publicly funded legal aid, consulted directly with members of marginalized groups<sup>92</sup> and ultimately raised the concern that,

[w]hen legal aid innovations come from finite legal aid budgets, the emphasis on vehicles for legal information and “self help” materials has a serious risk of taking away services from the most marginalized and vulnerable people, who may well need an actual person to assist or a lawyer to manage their cases. ... [Self help offerings to marginalized persons] have often been shown to be more helpful when accompanied by people available to assist.<sup>93</sup>

That said, the CBA has also been engaged on the issue of strategies for addressing middle income earners, noting promising innovations to increase their access to legal services (including information sharing, triage and referral services, and re-engineering of legal processes), while also cautioning that solutions for alleviating the legal needs of most people (the middle class) should not divert attention or resources away from aiding the most vulnerable community members.<sup>94</sup>

Taken together, the approaches of the NAC and the CBA signal an important shift in Canadian access to justice dialogue toward a more comprehensive framework. Incorporating all five of the conceptions

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<sup>86</sup> MacPhail, *Access to Legal Services Report*, *supra* note 6.

<sup>87</sup> Prevention, *Triage and Referral Report*, *supra* note 7; MacPhail, *Access to Legal Services Report*, *supra* note 6.

<sup>88</sup> AJC, *Reaching Equal Justice*, *supra* note 1.

<sup>89</sup> Canadian Bar Association, “CBA Envisioning Equal Justice Summit: Building Justice for Everyone” online: Canadian Bar Association <<http://www.cbapd.org/>>.

<sup>90</sup> AJC, *Reaching Equal Justice*, *supra* note 1.

<sup>91</sup> *Ibid* at 16.

<sup>92</sup> Amanda Dodge, *Access to Justice Metrics Informed by the Voices of Marginalized Community Members: Themes, Definitions and Recommendations Arising from Community Consultations* (Ottawa: Canadian Bar Association, 2013), online: Canadian Bar Association <[http://www.cba.org/CBA/Access/PDF/Comm-unity\\_Voice\\_Paper.pdf](http://www.cba.org/CBA/Access/PDF/Comm-unity_Voice_Paper.pdf)>.

<sup>93</sup> Standing Committee, *Future Directions*, *supra* note 26 at 16.

<sup>94</sup> Standing Committee on Access to Justice, *Underexplored Alternatives for the Middle Class* (Ottawa: Canadian Bar Association, 2013) at 6-11, online: Canadian Bar Association <<http://www.cba.org/CBA/Access/PDF/Mid-ClassEng.pdf>>.

identified by Macdonald, this integrated vision also highlights the importance of paying attention to the ways in which certain kinds of innovations may offer greater benefits to some citizens than to others. These same insights must be brought to bear on the NAC's call to "develop mechanisms for good decision making about where, why and how technology is used".<sup>95</sup> In Part III we begin this process by exploring the access to justice implications of three technologies that have sometimes been recommended in the Canadian dialogue as access to justice facilitators: (i) e-filing and online forms; (ii) web-based legal information services; and (iii) videoconferencing.

### III. MAPPING TECHNOLOGY ONTO ACCESS TO JUSTICE

E-filing, web-based legal information services, and videoconferencing are three technologies recommended as facilitators of access to justice, particularly as mechanisms for institutional redesign, demystifying the law, and improving access to courts and lawyers.<sup>96</sup> We examine them here not for the purpose of evaluating their contributions to access to justice, but as examples that illustrate: (i) how a single uniformly applied technology can differentially impact differently situated citizen groups; and (ii) how a single non-universally applied technology can differently impact various citizen groups' experience of access to justice.

#### A. Uniform Application, Differential Impacts: E-filing & Web-based Legal Information

##### 1. Institutional redesign through smart forms and e-filing

E-filing can be understood to include "the electronic transmission of documents and other court information to and from a court", a process that typically "involves integration with a court's case management system and may further involve the storage, cataloguing and retrieval of e-filed documents".<sup>97</sup> Although the process can also enable exchange or service of documents between parties, the focus in this section is on transmission to and from courts. E-filing may be facilitated through the introduction of smart forms that are made available online (e.g. on court or related ministry of justice websites) and may be supported by digital assistant technologies that provide real time assistance to citizens as they complete fillable forms online.<sup>98</sup> Smart form platforms can enable production of completed court forms in digital format that can then be easily transmitted through an e-filing system. In jurisdictions without e-filing, smart forms completed online may then have to be printed in hard copy for physical submission at a court office.<sup>99</sup>

<sup>95</sup> Prevention, *Triage and Referral Report*, *supra* note 7 at 8. See also AJC, *Reaching Equal Justice*, *supra* note 1 at 21.

<sup>96</sup> Processes Simplification Report, *supra* note 66 at 5-8; Family Justice Working Group Report, *supra* note 66 at 48.

<sup>97</sup> Kevin Kennedy & Olivier Jaar, "E-filing Case Studies", online: (2012) CCCT-CCTJ <[http://wiki.modern-courts.ca/images/2/23/E-Filing\\_Case\\_Studies.pdf](http://wiki.modern-courts.ca/images/2/23/E-Filing_Case_Studies.pdf)> at 3.

<sup>98</sup> Jane Bailey, "Digitization of Court Processes in Canada" online: (2012) Cyberjustice Laboratory <[http://site.cyberjustice.ca/Content/documents/WP002\\_CanadaDigitizationOfCourtProcesses20121023.pdf](http://site.cyberjustice.ca/Content/documents/WP002_CanadaDigitizationOfCourtProcesses20121023.pdf)> at 11. For example, the Ontario Small Claims Court website provides a link to the Ontario Court Services Division of the Ministry of the Attorney General where a digital "Forms Assistant" guides users through the process of filling out forms, allowing them to save their work and password protect it so that they can return to it later to complete or adjust it: Ministry of the Attorney General Ontario, "Ontario Court Forms Assistant", online: Ministry of the Attorney General Ontario <<https://formsassistant.ontariocourtforms.on.ca/Wel-come.aspx?lang=en>>.

<sup>99</sup> Kennedy & Jaar, *supra* note 97 at 12.

Smart forms and e-filing can be thought of as technologies that facilitate access to justice understood as institutional redesign in that they, at least to some extent, aim to reform court procedure and organization<sup>100</sup> by introducing new mechanisms through which parties can access, complete, and file court forms. Recent studies demonstrate the potential of smart forms and e-filing to enhance access to justice. As the CPSWG noted, the availability of forms and filing through online portals may assist self-represented persons.<sup>101</sup> Both litigants and courts may benefit from reduced cost and delay because forms will be better completed at the time of filing, leading to fewer rejections<sup>102</sup> and providing court staff in physical offices with opportunities to better use their time to focus on triage and referral services, rather than on clerical work.<sup>103</sup> Web-based legal information holds similar promise.

## 2. Demystifying law through access to web-based legal information

Web-based legal information initiatives could facilitate access to justice understood as demystification of law in a number of ways.<sup>104</sup> Although legal information is accessible to the public through public libraries, law libraries, and court registries, freely available web-based legal information initiatives make this information available to a much broader range of individuals, and allow those individuals to access that information in a much broader range of situations. Alison MacPhail has written that web-based legal information services are “[o]ne of the most efficient and effective means of supplementing basic legal information to the public.”<sup>105</sup> In particular, individuals who might not be able to visit libraries or court registries due to reasons of remoteness,<sup>106</sup> accessibility, scheduling conflicts, or family responsibilities (among other reasons), would have additional opportunities to access and engage with legal information. Web-based legal information initiatives thus provide opportunities for individuals to better inform themselves about the legal system, and about their rights and responsibilities within this system. In so doing, freely available web-based legal information initiatives support and advance the open courts principle, which, as noted by Bastarache J in his reasons for judgment in *Named Person v Vancouver Sun*, “provides that information which is before a court ought to be public information to the extent possible”.<sup>107</sup>

In addition to supporting the open courts principle by making legal information more available, it can be argued that web-based legal information initiatives play a role analogous to that played by the media in “enhancing and maintaining public confidence in the justice system”.<sup>108</sup> One way in which web-based legal information initiatives enhance public confidence in the legal system is by enhancing transparency.

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<sup>100</sup> Macdonald, *supra* note 11 at 20.

<sup>101</sup> Processes Simplification Report, *supra* note 66 at 10-13; Family Justice Working Group Report, *supra* note 66 at 37-38.

<sup>102</sup> James E Cabral et al. “Using Technology to Enhance Access to Justice” (2012) 26:1 Harv JL & Tech 241 at 251-54.

<sup>103</sup> Processes Simplification Report, *supra* note 66 at 5-6.

<sup>104</sup> In addition to assisting in demystifying the law, it has also been argued that free access to web-based legal information promotes justice, the rule of law, equality before the law, and democracy. See Daniel Poulin, “Free Access to Law in Canada” (2012) 12:3 Legal Info Mgmt 165 at 168-169.

<sup>105</sup> MacPhail, *Access to Legal Services Report*, *supra* note 6 at 8.

<sup>106</sup> Cabral et al, *supra* note 102 (“[t]echnology offers many options for the largely underserved rural population” and “[i]t can assist those who have web access by providing legal information online” at 261).

<sup>107</sup> *Named Person v Vancouver Sun*, 2007 SCC 43 at para 15, [2007] 3 SCR 43.

<sup>108</sup> Ontario Superior Court of Justice, “Media”, online: Ontario Superior Court of Justice <<http://www.ontario-courts.ca/scj/media/>>.

Links to freely available web-based legal information can be incorporated into tweets, blog posts, or media reports about court decisions or legal issues to provide individuals with direct access to the primary sources on which individuals are commenting. Court judgments, reports, legislation, or other legal information can also be embedded (in full-text form) within the text of news articles and media reports. In addition to increasing transparency, web-based legal information initiatives could also enhance public confidence in the justice system by increasing accountability. Dory Reiling has argued that the availability of court judgments on free web-based services has led “reporting ... on court decisions [to] ... become more accurate”.<sup>109</sup> The ability to juxtapose legal commentary with the primary legal information on which that commentary is based further enhances the capacity of web-based legal information initiatives to demystify the law.

Lastly, it can be argued that web-based legal information enhances access to justice understood as demystifying the law by providing individual litigants (or potential litigants) with “tools” (legislation, case law, or basic information on substantive legal issues, for instance) that they can use in the context of a legal dispute.<sup>110</sup> As with e-filing and smart forms, this may be particularly beneficial for individuals unable to access legal advice (for instance due to remoteness, accessibility reasons, or the cost of legal representation) and for self-represented persons.<sup>111</sup> In addition to assisting individual litigants or potential litigants, Daniel Poulin suggests that freely available web-based legal information may also “empower not-for-profit organizations fighting for justice”, and may benefit lawyers by “ensuring better availability of legal information”.<sup>112</sup>

### 3. Addressing differential impact through design

Recent reports have been attentive to some of the potential differential impacts of e-filing, smart forms, and web-based legal information for members of vulnerable groups. For example, to the extent that these technologies are identified as potential enablers for self-represented, rural, and disabled beneficiaries, studies have clearly pointed to the need for design practices that are attentive to specific user needs. Self-represented litigants in Canada are disproportionately likely to have lower income and education, and to live with social barriers including physical and mental differences, and language and cultural barriers; furthermore, they often live in rural areas remote from physical court and legal services.<sup>113</sup> Persons living in rural regions in Ontario (for example) are less likely than their urban counterparts to have access to and comfort with technology, and they have lower literacy rates and less access to multilingual content and representation than their urban counterparts.<sup>114</sup> Visually based

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<sup>109</sup> Dory Reiling, *Technology for Justice: How Information Technology Can Support Judicial Reform* (Leiden: Leiden University Press, 2009) at 55.

<sup>110</sup> *Ibid* (“[a]ccess to information can support [a] fairer administration of justice by providing information for people to act adequately when confronted with problems with a potentially legal solution” at 206).

<sup>111</sup> MacPhail, *Access to Legal Services Report*, *supra* note 6 at 7-8; Poulin, *supra* note 104 at 168 (free access to the law initiatives such CanLII “directly serve[s] citizens, the subjects of law, because [they] make it possible for them to learn about the law and use that knowledge to better defend their interests”).

<sup>112</sup> Poulin, *supra* note 104 at 168.

<sup>113</sup> Farrow et al, *supra* note 48 at 4.

<sup>114</sup> Cohl & Thomson, *supra* note 32 at 52.

technologies may be inaccessible to persons with visual impairments.<sup>115</sup> Persons with lower education levels and linguistic or literacy barriers may also experience greater difficulty in using technologies such as e-filing and smart forms.<sup>116</sup> Similarly, Alison MacPhail has noted:

it is important to recognize that a number of individuals may not be able to benefit from web-based information. People may have low literacy skills, mental health disabilities, low cognitive functioning such as is associated with FASC, may not speak or read English or French, or may live in remote communities without consistent access to internet or even telephone service.<sup>117</sup>

Concerns have also been raised that “the emphasis on vehicles for legal information ... has a serious risk of taking away services from the most marginalized and vulnerable people who may well need an actual person to assist or a lawyer to manage their cases”.<sup>118</sup> In fact, a number of studies have shown that many vulnerable community members strongly prefer to work with trusted human intermediaries rather than through technology alone.<sup>119</sup> The literature also acknowledges privacy and security concerns arising with respect to smart forms and e-filing, which may be exacerbated for members of vulnerable communities. For example, studies suggest that self-represented litigants are more likely to access the internet from public rather than private terminals, introducing a privacy concern that is less likely to affect represented litigants.<sup>120</sup> Moreover, while all participants in the legal system share privacy and information security concerns with respect to protecting sensitive information from inadvertent or malevolent public access, this issue will be of particular concern for some of the most vulnerable community members, such as those with mental health issues.<sup>121</sup>

Existing literature, then, anticipates both that these technologies could improve court efficiencies (reducing cost and delay) and that they might be particularly beneficial for vulnerable community members such as self-represented litigants, rural residents, and those experiencing socioeconomic, linguistic, ability, and other socially-imposed forms of disadvantage. However, many studies have also

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<sup>115</sup> See e.g. Courts Disabilities Committee, *Weiler Report: Making Ontario's Courts Fully Accessible to Persons with Disabilities* (Ontario: Courts Disabilities Committee, 2006) (“[b]lind individuals too often cannot access court materials that are on-line in PDF form, because the PDF format is less accessible than other electronic formats for the range of adaptive technology that blind, low vision and dyslexic persons use to read electronic text”. See also *Canada (AG) v Jodhan*, 2012 FCA 161, [2012] FCJ 614 (a case that dealt with Ms. Jodhan’s “appli[ca]tion for a declaration ... that she had been denied equal access to and benefit from government information and services provided online to the public on the Internet and that this denial constituted discrimination against her on the basis of her physical disability, i.e. blindness, and, thus, a violation of her rights under subsection 15(1) of the *Canadian Charter of Rights and Freedoms*”); Cabral et al, *supra* note 102 at 262-63.

<sup>116</sup> Cabral et al, *supra* note 102 at 261-63; Buckley, *supra* note 20 at 82-83; Donald Horowitz, “Technology, Values and the Justice System: The Evolution of the Access to Justice Technology Bill of Rights” (2004) 79:77 Wash LR 77 at 93; Jean Holcomb, “The Digital Divide and Digital Justice: Do Clients Need a Technology Bill of Rights?”, *Washington State Bar News* (May 2000) 40-41.

<sup>117</sup> MacPhail, *supra* note 6 at 7.

<sup>118</sup> Standing Committee, *Future Directions*, *supra* note 26 at 16.

<sup>119</sup> Cabral et al, *supra* note 102 at 260; Buckley, *supra* note 20 at 83; Farrow et al, *supra* note 48 at 40-42; Alfred A Mamo et al, *Recapturing and Renewing the Vision of the Family Court* (Edmonton: Canadian Forum on Civil Justice, 2008) at 58; Cohl & Thomson, *supra* note 32 (tech with a helper for rural and linguistic minority populations at 38, 50, 52, 54).

<sup>120</sup> Cabral et al, *supra* note 102 at 265; Holcomb, *supra* note 116 at 41.

<sup>121</sup> Cabral et al, *supra* note 102 at 265.

been appropriately attentive to the importance of tailoring design to ensure that these technologies do not in fact *exacerbate* the access to justice gap for these intended beneficiaries. In this regard, the use of plain language,<sup>122</sup> availability of content in multiple language formats,<sup>123</sup> design to accommodate visual and other physical impairments<sup>124</sup> (including through adherence to principles of universal design<sup>125</sup>), provision of human assistance to augment technological assistance,<sup>126</sup> as well as special precautions to enhance privacy at public internet access points,<sup>127</sup> and linking marginalized community members with trusted intermediaries<sup>128</sup> have all been suggested.

While these suggestions are important in terms of system design and interface, and would help to ensure that web-based legal information technologies are accessible to a broad range of users from vulnerable communities, they may have limited applicability in the context of e-filing and smart forms. In terms of content, e-filing and smart forms systems are designed to reflect the standard legal issues and process that are relevant to the broadest demographic.<sup>129</sup> This standardized approach lacks the responsiveness potentially available in personal interaction, and those whose situations fall outside of the norm are more likely to find themselves unable to complete certain fields and/or in need of additional fields that were not anticipated at the time of design. The possibility of two outcomes should be considered: (i) people whose situations place them outside of the “norm” may face higher costs (including greater time expenditure) in completing forms and e-filing because they are more likely to require offline assistance and special interventions; and as a result (ii) it is likely to be necessary to provide human intermediaries to assist in addressing these situations, which could negatively affect the anticipated efficiencies of these technologies, particularly if they are intended to reduce human resource

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<sup>122</sup> A recent Canadian study found that self-represented litigants were often “disillusioned and disappointed” when they tried to work with online resources, noting weaknesses such as a lack of practical information (e.g. presentation strategies), inconsistency of information, the multiplicity of sites and “heavy use of legal jargon and unexplained legal terms”: Julie MacFarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants: Final Report* (Windsor: National Self Represented Litigant Project, 2013) at 10.

<sup>123</sup> See e.g. Cohl & Thomson, *supra* note 32 at 43; Federal Web Managers Council, *Putting Citizens First: Transforming Online Government* (np, no publisher, 2008) at 3, online: US Government <[http://www.howto.gov/sites/default/files/documents/Federal\\_Web\\_Managers\\_WhitePaper.pdf](http://www.howto.gov/sites/default/files/documents/Federal_Web_Managers_WhitePaper.pdf)> ; Council of Canadian Administrative Tribunals, *Literacy and Access to Administrative Justice in Canada: A Guide for the Promotion of Plain Language*, (Ottawa: Council of Canadian Administrative Tribunal, 2005), online: Council of Canadian Administrative Tribunals <<http://www.ccat-ctac.org/en/pdfs/literacy/Literacyandjustice.pdf>>.

<sup>124</sup> Cabral et al, *supra* note 102 (“screen readers allow visually impaired persons to use the Internet by reading a website’s text aloud” at 262).

<sup>125</sup> Centre for Excellence in Universal Design, “The 7 Principles”, online: Centre for Excellence in Universal Design <<http://universaldesign.ie/exploreampdiscover/the7principles>>.

<sup>126</sup> Processes Simplification Report, *supra* note 66 at 6; Farrow et al, *supra* note 48 at 40-42; James E McMillan, “Eight Rules of E-Filing”, (28 October 2011) online: Court Technology Bulletin <<http://courtechbulletin.blogspot.ca/2011/10/eight-rules-of-e-filing-conclusion.html>>; MacFarlane, *supra* note 122 at 115-16.

<sup>127</sup> Cabral et al, *supra* note 102 at 265.

<sup>128</sup> MacPhail, *Access to Legal Services Report*, *supra* note 6 (“[t]elephone and internet information services work best when linked with trained intermediaries who can assist users and who can develop links to hard-to-reach communities (for example, Aboriginal communities)” at 8).

<sup>129</sup> Anthony Savidis & Constantine Stephanidis, “Inclusive Development: Software Engineering Requirements for Universally Accessible Interactions” (2006) 18:1 *Interact Comput* 71 at 72.

costs. In fact, instead of reducing the need for court staff, these sorts of technologies might require a re-envisioning of staff functions, to dedicate more time to services for those requiring human intermediaries.<sup>130</sup> In the end, this could improve access to justice for vulnerable community members, who appear more likely to rely on human intermediaries,<sup>131</sup> than advantaged community members.

### A. The “narrowing” of the digital divide

The literature highlights another category of concern that also needs to be taken into account in decisions regarding online technologies such as smart forms, e-filing, and web-based legal information: the digital divide. Numerous studies show that members of a number of vulnerable community groups are at a disadvantage with respect to internet accessibility and use. Both rural residents<sup>132</sup> and those living in socioeconomically disadvantaged communities in urban centres are less likely to have access to broadband services,<sup>133</sup> potentially imposing additional challenges for these communities in using interactive forms and e-filing technologies. Moreover, Canadians with lower incomes are less likely to have access to the internet in their homes (which is an important factor in terms of privacy, frequency, duration, and depth of use),<sup>134</sup> and they are more likely than their higher income counterparts to report the cost of service or equipment as a reason for not having home-based internet.<sup>135</sup> Lower income and less educated Canadians also have lower digital skills and fluency than their higher income counterparts.<sup>136</sup> Rural women interviewed in British Columbia reported that the cost of technology was, in and of itself, a barrier to internet use, and expressed concern about extensive reliance on the internet to provide law-related services.<sup>137</sup> While some of the access to justice literature anticipates alleviation of the differential accessibility of online court services through a narrowing of the digital divide,<sup>138</sup> other commentators have suggested that without an affirmative plan to enhance accessibility and adoption, the digital divide seems likely to continue to expand.<sup>139</sup>

<sup>130</sup> Farrow et al, *supra* note 48 at 39-40.

<sup>131</sup> MacPhail, *Access to Legal Services Report*, *supra* note 6 at 8.

<sup>132</sup> Cabral et al, *supra* note 102 at 261; Trebilcock et al, *supra* note 55 at 40. See also Misty Harris “Digital Divide Persists in Canada, both in Access and Internet fluency”, *Financial Post* (21 March 2013) online: <[http://business.financialpost.com/2013/03/21/digital-divide-persists-in-canada-both-in-access-and-internet-fluency/?\\_lsa=d6a5-944d](http://business.financialpost.com/2013/03/21/digital-divide-persists-in-canada-both-in-access-and-internet-fluency/?_lsa=d6a5-944d)> (Rural residents are also less likely to use the internet than their urban counterparts).

<sup>133</sup> Michael Geist, “Canada’s digital divide likely to widen” *The Toronto Star* (5 April 2013), online: <[http://www.thestar.com/business/tech\\_news/2013/04/05/canadas\\_digital\\_divide\\_likely\\_to\\_widen\\_geist.html](http://www.thestar.com/business/tech_news/2013/04/05/canadas_digital_divide_likely_to_widen_geist.html)>; Peter Nowak “Digital Divide: the High Costs of Arctic Broadband”, *The Globe and Mail* (11 November 2012) online: <<http://www.theglobeandmail.com/technology/tech-news/digital-divide-the-high-costs-of-arctic-broadband/article5165177/?page=all>>.

<sup>134</sup> Buckley, *supra* note 20 at 80; Geist, *supra* note 133; Harris, *supra* note 132.

<sup>135</sup> Statistics Canada, *Canadian Internet Use Survey* (Ottawa: Statistics Canada, 2013), online: Statistics Canada <<http://www.statcan.gc.ca/daily-quotidien/110525/dq110525b-eng.htm>>.

<sup>136</sup> Harris, *supra* note 132.

<sup>137</sup> Cohl & Thomson, *supra* note 32 at 16, 35.

<sup>138</sup> *Ibid* at 39.

<sup>139</sup> Geist, *supra* note 133; Mariella Berra, “ICT infrastructures and social participation improvement in Piedmont” in Irina Zálišová, Iva S Walterová & Radek Bejdák eds, *Digital Governance: From Local Data to European Policies* (Prague: EPMA Publishing, 2013) 135 (expanded access might be facilitated in a number of ways, including increased availability of terminals in publicly accessible locations or, more radically, through connectivity made freely available through municipalities and/or other government bodies).

Leaving aside the question as to whether the digital divide is likely to narrow, remain constant, or expand, the current divide with respect to both access and use differentially affects vulnerable community members' access to online services, including smart forms, e-filing, and web-based legal information. Further, it is important to recognize that the newest and best technologies are typically always more expensive and thus less accessible to those of lower socioeconomic status.<sup>140</sup> As a result, even if all things considered, implementation of online technologies such as smart forms, e-filing, and web-based legal information is a sensible choice for improving access to justice, it cannot be presumed to be either neutral or sufficient in terms of enhancing access to justice for *all*.

### **B. Non-Universal Application, Differential Impacts: Videoconferencing**

Videoconferencing is a form of mediated communication that uses audio-visual technologies to allow a person or group of people in one location to engage in “virtual face-to-face interaction”<sup>141</sup> with a person or group of people in a different location. These interactions can be facilitated by a variety of technologies, including: “closed-circuit television using video cameras to transmit video”, an Integrated Services Digital Network allowing “simultaneous transmission of voice, video and data” or the Internet Protocol allowing “transfer of data packages through the Internet”.<sup>142</sup>

In Canada, the use of videoconferencing technology is most advanced in the criminal justice system, where it is used for a variety of purposes, including appearances by incarcerated accused persons on matters such as interim bail hearings, mental fitness assessments of inmates, consultation with legal counsel by incarcerated accused persons, and testimony from vulnerable witnesses.<sup>143</sup> In the civil context, it is used for, among other things, witness testimony, solicitor-client assessment hearings, and for making legal submissions in certain kinds of proceedings.<sup>144</sup>

There are three major justifications offered for the use of videoconferencing in the courts: cost reduction, reduced delay, and increased safety.<sup>145</sup> The earliest uses of remote appearance were motivated by safety-related concerns, since these cases involved testimony of vulnerable witnesses via closed circuit television. In these situations, the motivation was to protect vulnerable witnesses and reduce the trauma of the legal process.<sup>146</sup> Current videoconferencing technology allows incarcerated defendants to appear remotely from prison, eliminating both the prohibitive cost and safety concerns associated with prisoner transport. In general, the use of videoconferencing can increase efficiency and decrease cost of court proceedings by minimizing travel requirement for witnesses, defendants, legal counsel, interpreters, and even judges. The advantages are particularly significant for those for whom travel to

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<sup>140</sup> John Carey & Martin CJ Elton, *When Media are New: Understanding the Dynamics of New Media Adoption and Use* (Ann Arbor: University of Michigan Press, 2010) at 27.

<sup>141</sup> Erich Schellhamer, *A Technology Opportunity for Court Modernization: Remote Appearances: A White Paper Prepared for Association of Canadian Court Administrators and Canadian Centre for Court Technology* (Victoria, BC: Canadian Centre for Court Technology, 2013) at 11, online: Modern Courts <[http://wiki.modern-courts.ca/images/1/1b/A\\_Technology\\_Opportunity\\_for\\_Court\\_Modernization\\_-\\_Remote\\_Appearances.pdf](http://wiki.modern-courts.ca/images/1/1b/A_Technology_Opportunity_for_Court_Modernization_-_Remote_Appearances.pdf)>.

<sup>142</sup> *Ibid* at 21.

<sup>143</sup> Bailey, *supra* note 98 at 14-15.

<sup>144</sup> *Ibid*.

<sup>145</sup> *Ibid* at 16.

<sup>146</sup> N Bala et al, “Testimonial Aids for Children: the Canadian Experience with Closed Circuit Television, Screens, and Videotapes” (2001) 44:4 Crim LQ 461.

the court is difficult, inconvenient, or prohibitively expensive (e.g., persons with disabilities, those living in geographically remote locations, people under significant time and resources constraints).<sup>147</sup>

The use of videoconferencing can address a variety of access to justice conceptualizations,<sup>148</sup> but the primary motivation is to improve equity with respect to access to court proceedings (Macdonald’s second wave of institutional redesign). Videoconferencing can provide timely access to court proceedings for those living in remote communities otherwise served by relatively infrequently convened circuit courts.<sup>149</sup> It has also been suggested that videoconferencing can provide improved and more humane conditions for accused persons living in remote communities (often Aboriginal persons), allowing them to remain in their communities rather than requiring incarceration in facilities far from their homes and support systems in order to facilitate physical court appearances.<sup>150</sup> Moreover, videoconferencing can provide improved access to interpreters for members of linguistic minority groups, as well as low cost access to legal services and lawyers, which may be especially important for those living in or incarcerated in remote locations.<sup>151</sup> It can also facilitate improved and less expensive ways for persons in remote locations and persons in custody to apply for legal aid.<sup>152</sup> For individuals living in remote communities, videoconferencing may be the only way to provide timely access to court proceedings and other aspects of justice that would, without the technology, be inaccessible or accessible only at considerable and perhaps unsupportable cost in terms of expense, time, and inconvenience. In this respect, videoconferencing technologies improve access to justice for particularly vulnerable communities within the Canadian population. In some cases, the use of videoconferencing will mean the difference between having no opportunity to appear before a court (e.g. where cost prohibits building a court and extreme weather prevents circuit court from convening)<sup>153</sup> or to consult face-to-face with counsel (e.g. in areas where no one provides legal services in a particular language),<sup>154</sup> and being able to do so. Thus, there can be no question that videoconferencing improves access to court proceedings, and thus access to justice, for individuals in these circumstances.

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<sup>147</sup> Processes Simplification Report, *supra* note 66 at 7; Cohl & Thomson, *supra* note 32 at 36, 38.

<sup>148</sup> The use of videoconferencing can also be used to facilitate institutional redesign and preventative access to justice by, for example, facilitating participation in alternative dispute resolution sessions and/or providing contact with other social, family and health service providers: Schellhamer, *supra* note 141.

<sup>149</sup> Bailey, *supra* note 98 at 16.

<sup>150</sup> *Ibid*; *R v Hainnu* 2011 NUCJ 14, 274 CCC (3d) 136; National Council of Welfare, *Justice and the Poor*, (Ottawa: National Council of Welfare, 2000), online: Ontario Association of Interval and Transition Houses <[http://www.oiath.ca/assets/files/Publications/justice\\_andthe\\_poor.pdf](http://www.oiath.ca/assets/files/Publications/justice_andthe_poor.pdf)>; the Nunavut Court of Justice, Show Cause Hearings in the Communities by Mr Justice R Kilpatrick et al (np: the Nunavut Court of Justice, 2010), online: Nunavut Court of Justice <[http://www.nucj.ca/Directives/PD1\\_Communities\\_ShowCauseHearings.pdf](http://www.nucj.ca/Directives/PD1_Communities_ShowCauseHearings.pdf)>.

<sup>151</sup> Cohl & Thomson, *supra* note 32 at 30, 39-40, 79-80.

<sup>152</sup> Ontario, Ministry of the Attorney General, Report of the Legal Aid Review 2008 by Michael Trebilcock (np: Ministry of the Attorney General, 2008) at 39, online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/>>.

<sup>153</sup> *Ibid*.

<sup>154</sup> Cohl & Thomson, *supra* note 32 at 39-40.

## 1. Implementation

Although videoconferencing technology is available in some locations in the majority of Canadian provinces and territories,<sup>155</sup> coverage is not universal. In particular, at the current time the technology is not universally available in courtrooms across Canada, and not all prisons have the facilities for remote appearances by incarcerated defendants. The use of videoconferencing in civil and criminal proceedings is governed by regulatory and statutory restrictions.<sup>156</sup> In practice, the use of videoconferencing requires the support of the presiding judge and all parties. In civil proceedings, there is sometimes a cost attached to using videoconferencing, but the state tends to bear the cost of appearances by the accused in criminal proceedings.<sup>157</sup>

Across Canada, there is little standardization of equipment set up and use (e.g. positioning of the camera), and videoconferencing implementation appears to vary considerably from one jurisdiction to another.<sup>158</sup> In particular, there is no standard for the quality of videoconferencing equipment or the communication link used to carry the videoconference signal. In some cases, specialized videoconferencing equipment and software is used (e.g. Cisco), while in other cases videoconferencing is achieved using regular Internet communication software (e.g. Skype).<sup>159</sup> The minimum desired bandwidth for court videoconferencing is 384 kbps,<sup>160</sup> since at lower bandwidths communication breakdowns can occur, and a dedicated link is preferable to ensure error-free communication.<sup>161</sup> High-definition video and audio improve videoconferencing function, but require higher-end equipment, and they also increase bandwidth requirements. In order to ensure timely and effective videoconferencing, on-site and on-demand technical support should be available.<sup>162</sup>

## 2. Impact

Videoconferencing provides a real-time visual and auditory link between remote interactants. In comparison to earlier forms of mediated communication including text-only or audio-only communication, the technology provides a strong sense of ‘social presence’,<sup>163</sup> and supports effective and apparently natural communication. In contrast to face-to-face communication, however, the technology falls short: videoconferencing is *not* the same as ‘being there’. Despite continual improvements in videoconferencing technology, videoconferencing has not replaced face to face meetings in the business context, and distance education has not replaced the traditional classroom. Thus, videoconferencing does not seem to be a transparent substitute for face to face interaction: something is different.

It is difficult, if not impossible, to predict the effect of videoconferencing on court processes and outcomes, and indeed any effect is likely to be multifaceted. In the courtroom context, scholars have raised concerns about the use of videoconferencing, noting that it could have a negative impact on the

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<sup>155</sup> Schellhamer, *supra* note 141 at 98-104.

<sup>156</sup> Bailey, *supra* note 98 at 17-18.

<sup>157</sup> Bailey, *supra* note 98 at 15.

<sup>158</sup> Schellhamer, *supra* note 141.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid* at 13.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid* at 11.

<sup>163</sup> John Short et al, *The social psychology of telecommunications* (Toronto: Wiley, 1976) at 65.

perception of the witness by the court, the representation received by a defendant, the outcome of the court proceeding, or the experience of the justice system by a defendant.<sup>164</sup> Although direct evidence on the impact of videoconferencing on the courts and court processes is relatively limited, and thus some concerns are based on speculation rather than evidence, we can be certain of one thing: videoconferenced appearances of defendants, witnesses, or even court officials are *different* from face to face appearances. The literature identifies a multiplicity of ways in which hearings involving appearances by videoconference differ from those not involving videoconferencing, including the ability to confront a witness,<sup>165</sup> the ability to cross-examine,<sup>166</sup> the assessment of credibility,<sup>167</sup> the “solemnity” of the proceeding,<sup>168</sup> the jury’s perception of witnesses,<sup>169</sup> and the adequacy of representation by counsel for those appearing remotely.<sup>170</sup> These differences cannot be ameliorated by technical improvements to videoconferencing infrastructure, since they arise from a more basic (and with current technology irremediable) difference: participants in face to face interaction are in a shared space in which they directly perceive themselves, each other, additional participants in the court proceeding, and the court itself. Even if we address the most pressing technical issues and ensure the privacy and security of videoconference links, provide high-quality video and audio equipment, and offer a protected broadband connection for videoconferencing, these differences will remain. Thus, we can be certain that communications over videoconference links are *different* from face to face communications, and as a result the judicial process available through technologically mediated interaction is *different* from that available through non-mediated interaction.

### 3. Equity Concerns

It is important to note that in Canada, as in other jurisdictions, court proceedings in which all participants meet face to face in the courtroom remain the standard, with videoconferencing representing an exception to this default approach. This is a critical consideration, since court procedures are therefore optimized for face to face interaction, and judges, lawyers, and other regular participants are most familiar with this form of interaction. Moreover, when videoconferencing is used in the court context, with few exceptions (one is certain configurations of remote interpretation; a second is when counsel is located with a remotely appearing defendant rather than in the court) the remote participant is alone and physically separated from all other participants in the court process who are together in the

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<sup>164</sup> Anne Bowen Poulin, “Criminal Justice and Videoconferencing Technology: the Remote Defendant” (2004) 78:4 Tul L Rev 1089; Locke E Bowman et al, “Efficiency and Costs: the Impact of Videoconferenced Hearings on Bail Decisions” (2010) 100:3 J Crim L & Criminology 869; Molly Treadway Johnson & Elizabeth C Wiggins, “Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research” (2006) 28:2 Law & Pol’y 211; Eric T Bellone, “Private Attorney-client Communications and the effect of Videoconferencing in the Courtroom” (2013) 8:1 JCLT 24; Amy Salyzyn, “A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario” 50:2 Osgoode Hall LJ 429.

<sup>165</sup> Jacquelyn Burkell & Lisa di Valentino, “Literature Review Summary: Videoconferencing in Court”, online: (2012) Cyberjustice Laboratory at 6 <[http://site.cyberjustice.ca/Content/documents/WP004\\_VideoconferencingLiteratureReviewSummary.pdf](http://site.cyberjustice.ca/Content/documents/WP004_VideoconferencingLiteratureReviewSummary.pdf)>.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid* at 7

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid* at 8.

courtroom. Given that face to face appearance is the norm for courtroom interactions, and given that the large majority of the participants in any court proceeding are physically present together in the courtroom, it is not surprising that videoconferencing technologies are therefore optimized for the purposes of the court – ensuring that the remote participant is visible and audible to the court, ensuring that the transmission is high-fidelity and error-free, and ensuring that the remote participant appears when and where the court requires. By contrast, relatively little attention is paid to the experience of the remote participant. Although the space from which the remote participant appears is effectively part of the court, these remote spaces typically do not incorporate design considerations that would promote the feeling, for the remote participant, of being ‘part of’ the court proceedings, and little attention is paid to rituals and process that would increase this sense among remote participants.<sup>171</sup> Thus, defendants, witnesses, and other parties who appear before the court by videoconferencing have a qualitatively different experience of the court process; indeed, it might be argued that they experience a different kind of justice by virtue of their remote participation.

This distinction is particularly important given that, in Canada, the implementation of videoconferencing is not universal, even for a particular purpose (e.g. interim bail hearings<sup>172</sup>). Instead, identifiable and particular groups of citizens involved with the justice system are more likely to appear by videoconferencing in court processes, selectively subject to the qualitatively different experience of justice that results from such appearances. In particular, videoconferencing is stressed as an important mechanism for access to courts and lawyers for persons living in remote communities (for whom travel expense and inconvenience concerns are most significant), and videoconferencing is promoted for certain types of court appearances by incarcerated persons.<sup>173</sup> In Canada, those who live in remote communities are more likely to be poor,<sup>174</sup> those who are incarcerated are disproportionately likely to be Aboriginal or of some self-identified ethnic minority status,<sup>175</sup> and, in many cases, remote living, poverty, and Aboriginality intersect. Thus, one unanticipated effect of videoconferencing could be the ghettoization of the legal needs of the subset of Canadians, who often are also Aboriginal and of lower socioeconomic status, who live in remote areas.<sup>176</sup>

A second equity concern relates to the lack of standardization of videoconferencing across Canada. Not all videoconferencing is created equal: better equipment and better connections (higher bandwidth, protected) result in better videoconferenced communication. In Canada, there are no national standards for court videoconferencing technology, and the quality and availability of videoconferencing

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<sup>171</sup> For a discussion of design and operation considerations that take account of the experience of the remote participant in court proceedings, see Emma Rowden et al, *Gateways to Justice: Design and Operational Guidelines for Remote Participation in Court Proceedings* (Penrith: University of Western Sydney, 2009), online: University of Western Sydney <<http://www.uws.edu.au/justice/publications>>.

<sup>172</sup> Schellhamer, *supra* note 141 at 14.

<sup>173</sup> Office of the Auditor General of Ontario, *Annual Report*, (Ontario: Office of the Attorney General, 2008) at 221.

<sup>174</sup> Cohl & Thomson, *supra* note 32 at 31-32.

<sup>175</sup> *R v Gladue* [1999] 1 SCR 688 at para 60-61, [1999] SCJ 19; Canadian Bar Association, *Looking up Natives in Canada* by Michael Jackson, (Ottawa: Canadian Bar Association, 1988). See also Statistics Canada, *Aboriginal Statistics at a Glance*, (Ottawa: StatCan, 2010), online: Statistics Canada <<http://www5.statcan.gc.ca/olccel/olc.action?obj-Id=89-645-X&objType=2&lang=en&limit=0>>.

<sup>176</sup> Processes Simplification Report, *supra* note 66 at 8.

technology vary across jurisdictions.<sup>177</sup> This raises the spectre of a new digital divide: one in which the consequences of less sophisticated technology are borne selectively by those living in communities with fewer financial resources. As discussed earlier, this will doubly disadvantage rural residents<sup>178</sup> who are not only more likely to rely on videoconferencing as a result of their relatively remote geographic location, but who are also less likely to have less access to the highest quality videoconferencing technology and broadband services.<sup>179</sup> It is the most remote and poorest communities that will be most affected by these concerns – communities where, paradoxically, there will be the greatest pressure to use videoconferencing to reduce costs and ameliorate the cost and inconvenience of physical court appearances.

#### IV. CONCLUSION

The Canadian access to justice dialogue continues to evolve, from a sometimes disjointed discourse related to the various clusters of conceptions of access to justice documented by Macdonald, to one focused for a period on middle income earners, to a more comprehensive vision incorporating all five conceptual clusters identified by Macdonald that invites robust consideration of *all* citizens as intended beneficiaries of enhanced access to justice. Moreover, this latest “expansive vision”<sup>180</sup> is contextualized by recognition that innovations that enhance access to justice for some groups of beneficiaries may not assist, or could even come at the expense of, advances for other groups. A similarly robust and nuanced approach will be essential in responding to the NAC’s call for “mechanisms for decision making”<sup>181</sup> about deploying technology in pursuit of access to justice.

Discourse regarding technology and access to justice has too often assumed that technology necessarily enhances access to justice, perhaps reflecting a relatively widespread technological determinism that uncritically equates technological innovation with progress.<sup>182</sup> In the context of a concept such as access to justice, which is susceptible to multiple meanings and applicable across a wide stratum of differently socially situated citizen beneficiaries, such assumptions can be particularly problematic. Here, we need a robust framework capable of accounting for the multiple ways of conceptualizing and delivering access to justice, differences among the intended beneficiaries of the justice system and the complex relationships between the two.

Our three examples of e-filing/smart forms, web-based legal information, and videoconferencing help to illustrate the kinds of differential impacts that can result from a single technology. Online e-filing and smart forms can enhance access to courts and assist in streamlining filing processes, in ways that could be particularly important for those in communities remote from court offices or other forms of assistance. Freely-available web-based legal information initiatives can help to demystify the law,

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<sup>177</sup> Schellhamer, *supra* note 141.

<sup>178</sup> Cabral et al, *supra* note 102 at 261; Trebilcock et al, *supra* note 55; Harris, *supra* note 132 (rural residents are also less likely to use the internet than their urban counterparts).

<sup>179</sup> Geist, *supra* note 133; Peter Nowak, “Digital Divide: the High Costs of Arctic Broadband”, *The Globe and Mail* (11 November 2012) online: <<http://www.theglobeandmail.com/technology/tech-news/digital-divide-the-high-costs-of-arctic-broadband/article5165177/?page=all>>; Cohl & Thomson, *supra* note 32 at 1-2, 10, 31-35.

<sup>180</sup> NAC, Roadmap to Change, *supra* note 1 at 2.

<sup>181</sup> Prevention, *Triage and Referral Report*, *supra* note 7 at 8.

<sup>182</sup> Winner, *supra* note 4 at 172.

thereby addressing another aspect of access to justice. Moreover, increased access to legal decisions, legislation, and other legal information supports the open courts principle; enhances public confidence in the legal system by improving transparency; and provides self-represented litigants, lawyers, and not-for-profit organizations with tools that they can use in the context of a legal dispute.

However, differences among citizens in terms of literacy, language skills, and internet access, as well as system design practices aimed at addressing the needs of the majority will mean that not *all* citizens are likely to benefit from the introduction of these technologies. In fact, these technologies could worsen the situation of vulnerable community members vis a vis their counterparts by (in the case of smart forms) requiring them to spend extra time completing forms, and in all three cases by exposing them to greater privacy risks if they must access systems from a public terminal. Differentially negative effects for vulnerable community members are especially likely if investment in these technologies means diversion of resources from human intermediaries who appear to be particularly important to vulnerable community members' access to justice.

Our videoconferencing example provides a window into a different sort of differential technological impact. Here, a technology differentially applied to marginalized communities with laudable intentions of improving access to courts and lawyers, and, in the criminal context, of enabling those living in remote communities who are accused of crimes to remain in their communities, and of enabling vulnerable witnesses to testify in protected settings, delivers access to a qualitatively different interaction with justice when used in court proceedings. While we cannot conclude that videoconferencing delivers a better or worse experience with the justice system, we can say that this selective application of technology to some beneficiaries and not to others produces different kinds of experience with the justice system itself.

We do not suggest, nor do our examples indicate, that the effect of technology on access to justice can be simply characterized as either 'positive' or 'negative'. Instead, we suggest that, as both the NAC and the CBA have identified with respect to other innovations aimed at improving access to justice, the impact can be presumed neither neutral nor necessarily productive of access to justice for *all*. What then, does our analysis contribute to the NAC's call for thoughtful structuring of decision making around technology in the context of access to justice?

We begin with the self-evident premises that: (i) no response is perfect or without potential for differential impact; and (ii) no single initiative will resolve inaccessibility on its own. Ideally, we would envision articulation of "Access to Justice Technology Principles", such as those mandated in the 2004 order of the Supreme Court of Washington.<sup>183</sup> The order binds all Washington state courts, court clerks and court administrators to abide by the articulated principles, the first of which states:

Access to a just result requires access to the justice system. Use of technology in the justice system should serve to promote equal access to justice and to promote the opportunity for equal participation in the justice system for all. Introduction of technology or changes in the use of technology must not reduce access or participation and, whenever possible, shall advance such access and participation.<sup>184</sup>

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<sup>183</sup> The Supreme Court of Washington, *In the Matter of the Access to Justice Technology Principles*, (Olympia: the Supreme Court of Washington, 2004), online: Washington Law Help <<http://www.washingtonlaw-help.org/files/C9D2EA3F-0350-D9AF-ACAE-BF37E9BC9FFA/attachments/39237406-92BF-8F88-D9DF-77505DC54D16/273851English.pdf>>.

<sup>184</sup> *Ibid* at 10.

At the very minimum, decision-making about deployment of technology can and should be structured to ensure that different impacts are brought to the surface in every case and subjected to input from affected communities. In that regard, we suggest a structure that:

- (i) presumes that deployment of technology will *not* produce universally positive access to justice outcomes;
- (ii) proactively identifies which communities stand to be differentially affected; and
- (iii) ensures that representatives of those communities have a voice in decision making about how best to proceed.<sup>185</sup>

The question of how to ensure that members of affected communities have meaningful opportunities to participate in decision making about how best to deploy technology merits a more comprehensive inquiry. However, the NAC’s call to “put the public first” to “include all people, especially members of immigrant, aboriginal and rural populations and other vulnerable groups” in the reform process is an excellent start.<sup>186</sup> Incorporating this multiplicity of voices will, as noted in an earlier CBA report relating to access to justice metrics and marginalized community members, require a participatory framework that is “designed to be ethical, respectful, reciprocal, inclusive and culturally relevant”.<sup>187</sup> The Access to Justice Information Commissions recommended by the NAC could well provide an important foundation for input from affected communities (through direct data gathering in communities and/or through representative organizations’ membership in those Commissions) in prioritizing technologies for deployment, in determining how technology ought to be deployed, and in evaluating the potential of a technology to successfully facilitate access to justice.<sup>188</sup> Completely eliminating the differential impacts resulting from the adoption of technologies proposed as responses to the access to justice crisis in Canada is not possible. However, incorporation of technology-related issues onto the agenda of these Commissions and ensuring affected communities’ participation and representation would go some distance towards foregrounding (or at least highlighting) the possible differential impacts of the adoption of these technologies on members of affected groups. It would also offer opportunities for insight from directly affected communities on the importance of taking steps to minimize these impacts, and how to meaningfully evaluate any implemented technology’s actual contribution to *equal* access to justice.

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<sup>185</sup> Winner, *supra* note 4 at 110 (greater opportunities for communities to participate in decision-making around technology).

<sup>186</sup> NAC, *Roadmap for Change*, *supra* note 1 at 7.

<sup>187</sup> Dodge, *supra* note 92.

<sup>188</sup> NAC, *Roadmap for Change*, *supra* note 1 at 20. See also AJC, *Reaching Equal Justice*, in which the CBA suggests using “evaluation and feedback mechanisms for internet-based and other technology-assisted solutions [to] assess user experience, as well as the reasons people do not use the technology, or try to use it and give up”: AJC, *Reaching Equal Justice*, *supra* note 1 at 21.