



June 12<sup>th</sup>, 2020

Hon. Doug Downey, Attorney General  
Ministry of the Attorney General  
McMurtry-Scott Building, 720 Bay St,  
Toronto, ON M7A 2S9

Dear Honourable Doug Downey,

Re: Regulations to Bill 190, COVID-19 Response and Reforms to Modernize Ontario Act

Please find attached an advance draft of an upcoming article, as the Durham Community Legal Clinic's ("DCLC") submissions with respect to Bill 190 (See Parts II-III). Our submissions are unique in that they highlight the importance of implementing the modernization of commissioning and notarizing in a manner that reflects the needs of low-income and disadvantaged Ontarians.

Our position is that the Government of Ontario should implement and maintain a Portal that supports virtual commissioning and notarizing. This Portal should also allow for secure document exchange as well as verification and identification of individuals involved in the processes typically associated with commissioning and notarizing.

Where the government instead seeks to use an approved vendors list, they should do so in ensuring that accessibility to the general public is still maintained, and that any services developed do done with a consideration for low-income and marginalized populations in the province.

Sincerely,

Omar Ha-Redeye  
Executive Director

## Being Innovative in Exploring Litigation Alternatives

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**Abstract.** The COVID-19 pandemic has provided numerous challenges to legal practitioners, and especially in the area of virtual commissioning and notarization. This paper looks at some of the legislative developments during the pandemic, as well as some of the technical requirements that might make online commissioning and notarization possible, while utilizing an anti-oppression framework. Finally, the paper reviews some of the advances in artificial intelligence that might be of interest to the trust and estates bar.

**Keywords.** COVID19, pandemic, legal technology, innovation, blockchain, bitcoin, artificial intelligence, ODR, dispute resolution

### 1 Introduction

Innovation is often perceived as contrary to the key values in law, an industry that values consistency, stability, and certainty. Even with principles like the living tree doctrine, change happens slowly and incrementally.<sup>1</sup> This ensures sober reflection and second thought, and softens the more radical and extreme fluctuations that can be observed in the legislature from government to government, whereby they also seek to express societal values through legislation. It also stifles the ability of law to be responsive to new challenges, especially in the area of technology, which quickly outpaces the ability of courts to be responsive to these needs.

Sometimes innovation is no longer optional. The COVID-19 pandemic of 2020 created a situation never observed before in Canada. Even prior pandemics did

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<sup>1</sup> *Edwards v. Canada (Attorney General)*, 1929 CanLII 438 (UK JCPC) at 106-107, available at: <http://canlii.ca/t/gbvs4>

not reach the scale or the extent of disruption to society and the broader legal system. The digitization of files and move towards permanent use of technology was only possible due to social isolation guidelines.<sup>2</sup> Even before the pandemic, the Auditor General of Ontario found that the number of criminal cases delayed between 2014/15 to 2018/19 rose by 27% to 114,000.<sup>3</sup> In light of the constitutional principles in criminal cases,<sup>4</sup> the courts have rightly prioritized these cases over civil matters.<sup>5</sup> Effectively this means that the interventions and innovation introduced during the pandemic will still be focused on criminal matters, leaving many civil matters floundering, including in trusts and estates.

The solution in these situations may be obvious, but it is not something new or innovative. It requires counsel to work creatively and collaboratively, to narrow the issues wherever possible, and to push to find resolution outside the courts, even where it may not appear possible to do so. There are conflicting narratives as to the history of the bar in Ontario, with one account describing a bunch of cigar-smoking, scotch-drinking “cowboys” (and they were just boys). The other account lauds a level of civility and mutual respect between colleagues, where many civil disputes were resolved over a coffee or tea. A trial may not be a tea party,<sup>6</sup> but cost-effective and pragmatic resolution in civil litigation still might be. In reality, both accounts are

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<sup>2</sup> John Lancaster, “How COVID-19 helped push Ontario's low-tech justice system into the 21st century,” CBC News, June 4, 2020, available at: <https://www.cbc.ca/news/canada/toronto/covid-19-technology-courts-ontario-1.5596643>

<sup>3</sup> Office of the Auditor General of Ontario, “Annual Report 2019: Reports on Correctional Services and Court Operations,” Fall 2019, available at: [https://www.auditor.on.ca/en/content/annualreports/arreports/en19/2019AR\\_v3\\_en\\_web.pdf](https://www.auditor.on.ca/en/content/annualreports/arreports/en19/2019AR_v3_en_web.pdf)

<sup>4</sup> *R. v. Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631; *R. v. Cody*, 2017 SCC 31 (CanLII), [2017] 1 SCR 659.

<sup>5</sup> Brian Sunohara, “Delay: Jordan’s big effect on civil litigation,” *The Lawyer’s Daily*, Oct. 10, 2019, available at: <https://www.thelawyersdaily.ca/articles/15845>

<sup>6</sup> *Groia v. Law Society of Upper Canada*, 2018 SCC 27 (CanLII), [2018] 1 SCR 772 at para 3.

probably true, and there likely has always been elements of the bar that are more interested in their ego, and others who are more concerned about benefiting their clients. This summary paper is intended entirely for the latter audience, and the former may kindly excuse themselves at this juncture.

This paper will look at innovation in the areas of trusts and estates in three different areas, especially during the COVID-19 pandemic: 1) in virtual mediations and discoveries for ongoing proceedings; 2) legislative and technological changes facilitating virtual commissioning and notarizing; and 3) the use of artificial intelligence for use during mediation and arbitration. The pandemic has forced technology on to the legal profession,<sup>7</sup> including in the areas of trust and estates, but there are still many technological innovations in development which should be considered for adoption in the future.

## 2 Virtual Mediations and Discoveries

Mediators in trust and estate disputes have used technology for mediations even prior to the pandemic, typically via telephone. Advances in technology easily allow for videoconferencing today, and there are a variety of platforms currently being used in the bar. Despite early concerns during the pandemic around Zoom, much of these security and privacy features have largely been addressed,<sup>8</sup> and it remains the most

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<sup>7</sup> Justice Myers ordered a videoconference for a pre-trial questioning of a witness in *Arconti v. Smith*, 2020 ONSC 2782 (CanLII) at para 19, “In my view, the simplest answer to this issue is, “It’s 2020”. We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back.”

<sup>8</sup> See, for example, Omar Ha-Redeye, “Zoom, Zoom, Zoom... Videoconferencing in the Room,” *Slaw*, April 5, 2020, available at: <http://www.slw.ca/2020/04/05/zoom-zoom-zoom-videoconferencing-in-the-room/>

popular and widely used platform by lawyers, and society at large. Lawyers concerned about their client's ability to use videoconferencing platforms should consider ease of use and accessibility of platforms, even when balancing privacy and security concerns, and are encouraged to use these platforms with their client prior to a mediation occurring. Reporting studios are also conducting discoveries virtually, and are able to produce a transcript in this manner.

Some of these platforms have an ability to record a videoconference. Lawyers should obviously obtain the consent of all parties before using this feature,<sup>9</sup> and the host of the mediation should consider disabling this feature otherwise. Accessibility features such as closed captioning can allow for virtual mediations or discoveries to be more inclusive for clients or counsel with disabilities. Platforms like Google Hangouts can automatically create closed captioning in real-time while people are speaking. For the purposes of a formal record, it will still be important to utilize a transcript of a court reporter, rather than any of these automated captions. The use of virtual breakout rooms is already being widely used in many online mediations, and can be incredibly effective.

One very important consideration is related to scheduling and the need for flexibility of counsel in the use of technology platforms. Strict adherence to the *Rules of Civil Procedure*<sup>10</sup> may not be feasible or reasonable during the pandemic. Counsel may require greater latitude when using an online platform, as the pace and speed of discussions may not flow in the same manner. Interruptions or disruptions from family members or pets may occur periodically. Matters may need to be rescheduled, and timetables be reconsidered. The pandemic has not had a uniform impact on all lawyers,

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<sup>9</sup> Rule 7.2-3 of the *Rules of Professional Conduct*.

<sup>10</sup> RRO 1990, Reg 194.

and the disruption to one lawyer's practice may not be the same extent of disruption for another lawyer. This is particularly true for small and solo practices, where there may be less resources and ability to obtain assistance from others, and also where a lawyer has childcare needs during the pandemic.<sup>11</sup>

At the start of the pandemic, Chief Justice Morawetz stated,<sup>12</sup>

During this temporary suspension of regular operations, the Court calls upon the cooperation of counsel and parties to engage in every effort to resolve matters.

Part of that cooperation means having communication and discussions about what might be feasible, but it also means recognizing that the life circumstances of our colleagues in the bar may not be the same as ours. While employees in other industries may have the option of taking a leave entirely from work to deal with child care during the pandemic, many lawyers are often prevented from doing so due to their professional responsibilities. Assisting our colleagues in meeting these professional responsibilities, including the lawyers on the other side of a file, may require more than just rescheduling. An understanding that concrete steps in an action may not be feasible until the suspension of the emergency may be the inevitable conclusion in a small number of files. Ultimately that requires client management and tempering expectations about what is feasible, not just in the courts, but also in light of the challenges experienced in the bar.

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<sup>11</sup> Note that there is a marked gender disparity observed during the pandemic in regards to household duties, especially with childcare. See Amanda Becker, "The pandemic upended child care. It could be devastating for women," The Washington Post, May 20, 2020, available at: <https://www.washingtonpost.com/politics/2020/05/20/pandemic-upended-child-care-it-could-be-devastating-working-women/>; Solarina Ho, "Women juggling caregiving take brunt of pandemic labour impact," CTVNews, May 1, 2020, available at: <https://www.ctvnews.ca/health/coronavirus/women-juggling-caregiving-take-brunt-of-pandemic-labour-impact-1.4921334>;

<sup>12</sup> Chief Justice Geoffrey B. Morawetz, "Notice to the Profession, the Public and the Media Regarding Civil and Family Proceedings," Ontario Superior Court of Justice, March 15, 2020, available at: <https://www.ontariocourts.ca/scj/covid-19-suspension-fam/>

### 3 Innovations Related to Document and Identity Verification

Despite the suspension of limitations and challenges in moving proceedings along, there have been some regulatory and legal changes that could better facilitate the practice of trusts and estates during the pandemic. These changes are potentially applicable in many contexts including in the preparation of court documents. For example, where an executor of an estate seeks a Certificate of Appointment of Estate Trustee with a Will or a Certificate of Appointment of Estate Trustee without a Will, requires the executor or applicant to sign the documents in the presence of a commissioner for taking oaths and affidavits.

Starting on March 18, 2020, the Law Society of Ontario released information on their website indicating that they will interpret the *Commissioners for Taking Affidavits Act*<sup>13</sup> and *Notaries Act*<sup>14</sup> in a manner that would allow for virtual commissioning via video conferencing.<sup>15</sup> The legislative authority for the law society to do so is based on two emergency Orders in Council, pursuant to s. 7.0.2(4) of the *Emergency Management and Civil Protection Act*.<sup>16</sup> The law society provides on this website a number of checklists, resources, and other documents, including guides on reducing the risk of malpractice when virtually witnessing wills and powers of attorney, which are worth reviewing for any virtual commissioning. The law society's resources on commissioning and notarizing on this same page highlights factors related to

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<sup>13</sup> RSO 1990, c C.17; Order Under Subsection 7.0.2 (4) of the Act - Signatures in Wills and Powers Of Attorney, O Reg 129/20. The first order, on April 7, 2020 allowed for wills and powers of attorney to be executed and witnessed virtually, and the second order specified the use of "audio-visual communication technology" to meet the requirements of the *Succession Law Reform Act*, RSO 1990, c S.26, the *Substitute Decisions Act, 1992*, SO 1992, c 30, and the *Law Society Act*, RSO 1990, c L.8.

<sup>14</sup> RSO 1990, c N.6

<sup>15</sup> Law Society of Ontario, "FAQs: Practice Management," LSO COVID-19 Response, available at: <https://lso.ca/covid-19-response/faqs/practice-management>.

<sup>16</sup> RSO 1990, c E.9.

concerns of fraud, identity theft, undue influence, duress, and capacity, as well as some of the red flags or concerns that lawyers should be aware of.

On May 12, 2020, the Legislative Assembly of Ontario introduced, debated, and passed Bill 190, COVID-19 Response and Reforms to Modernize Ontario Act, 2020,<sup>17</sup> which amended the *Commissioners for taking Affidavits Act* under Schedule 4, including changes to the in-person requirement,

Administration of oath, declaration

In person

9 (1) Every oath and declaration shall be taken by the deponent or declarant in the physical presence of the commissioner, notary public or other person administering the oath or declaration.

Not in person

(2) Despite subsection (1), if the regulations made under this Act so provide and the conditions set out in the regulations are met, an oath or declaration may be taken by a deponent or declarant in accordance with the regulations without being in the physical presence of a commissioner, notary public or other person administering the oath or declaration.

[emphasis added]

Bill 190 also amended the *Notaries Act* under Schedule 13 as follows,

Powers

3 (1) Subject to subsection (2), a notary public may,  
(a) witness or certify, and attest, the execution of a document;  
(b) certify and attest a true copy of a document;  
(c) exercise the powers of a commissioner for taking affidavits in Ontario; and  
(d) exercise any other powers and perform any other functions specified by the regulations made under this Act.

...

Not in person

(3) Despite any requirement in law to exercise his or her powers in a person's physical presence, if the regulations made under this Act so provide and the conditions set out in the regulations are met, a notary public may, in accordance with the regulations, exercise his or her powers without being in the person's physical presence.

[emphasis added]

The regulations under this act have yet to be drafted or released.

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<sup>17</sup> Several of these changes were already previously introduced under Bill 161, Smarter and Stronger Justice Act, 2020, an omnibus bill with several changes across the entire justice system, and was introduced in a separate bill to expedite its adoption.

In light of the strict physical distancing and public health protocols surrounding the COVID-19 pandemic, Bill 190 clearly seeks to modernize dated procedures and protect the health and safety of both deponents/declarants and commissioners/notaries by implicitly permitting virtual commissioning and notarizing. As with any new technology or process, safeguards must be implemented to protect against the potential risks. One concern with virtual commissioning is that it does not support solemnization of evidence at the level of technology with which our current Court system and lawyers are familiar.<sup>18</sup> Another concern is the risk of “deep fakes”, which is steadily increasing in sophistication and accuracy, posing one of the most significant threats in this regard.<sup>19</sup> Deep fakes are manipulated videos in which a person in an existing image or video is replaced with someone else’s likeness. The inability to confirm the authenticity of identification or original documents in person also remains a challenge, given that the security features in most government-issued identification, and similarities to other documents cannot be easily ascertained remotely.

Not only does the identity of the declarant need to be verified, but also the video and audio data transmitted from them. As a result, virtualizing these processes increases the difficulty of accurately verifying the identity of deponents which raises several concerns including the risk of fraud. Further guidance from the law society will be required even once these regulations are made to ensure that lawyers avoid

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<sup>18</sup> *Darrell Waisberg v. J. Kirby Inwood*, 2014 ONSC 2282 (CanLII) at para 35.

<sup>19</sup> See, for example, Rene Hendrikse, “How Deepfakes Could Become A Threat To Your Identity,” *Forbes*, Dec. 20, 2019, available at: <https://www.forbes.com/sites/renehendrikse/2019/12/20/how-deepfakes-could-become-a-threat-to-your-identity/>; Drew Harwell, “Top AI researchers race to detect ‘deepfake’ videos: ‘We are outgunned’,” *The Washington Post*, June 12, 2019, available at: <https://www.washingtonpost.com/technology/2019/06/12/top-ai-researchers-race-detect-deepfake-videos-we-are-outgunned/>

malpractice claims or risk professional discipline. A motion to the law society AGM, scheduled for Aug. 10, 2020, calls for the law society to take steps to ensure that virtual technologies become a permanent fixture in Ontario, and that guidance be provided to the profession as to how to practice in this context.<sup>20</sup>

### **3.1 Technological Innovations for Document and Identity**

One way to minimize the risks highlighted with document and identity fraud is that the Government of Ontario should develop and offer a secure online portal. The strength of this approach, rather than outsourcing this to private entities, is that it allows for the government to provide verification specifically for documents and identification that are provided by them (or verified by them, from another jurisdiction). This portal should allow for the secure uploading and exchange of the documents typically involved in the commissioning/notarizing process, and have a mechanism for securely and accurately verifying the identifying deponents and provide exclusive access to a select group of individuals. With regard to uploading and exchanging of documents, TIBCO Mailbox and Secure FTP are already used in highly regulated industries such as banking, finance, and insurance. This technology is already widely available, and it would not be difficult for the government to integrate this technology or similar technologies in an online portal. The downside of this approach is that it might be more expensive to do so, and there may be ways to instead set clear guidelines for private entities, such as w3c confirming. Restricting exclusive access may also inhibit the ability to provide verification.

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<sup>20</sup> Law Society of Ontario, “Notice to the Professions,” Ontario Reports, vi-vii, June 5, 2020, available at: <http://digital.ontarioreports.ca/ontarioreports/20200605/MobilePagedReplica.action?pm=2&folio=vi#pg9>

The role of government in facilitating virtual and remote document and identify verification is important for multiple reasons, including reducing the risk of fraud or money laundering. Traditional anti-fraud and security measures, including verification of physical identification, such as driver's licenses and health cards, are likely to be utilized far less during the pandemic and its aftermath than in the past. There has already been a marked shift to online commerce in Canada, and consumers in Ontario are even less likely to use physical cash for future purchases.<sup>21</sup> The consumption patterns of the public, including acquisition of services that require or utilize identification, will also shift correspondingly online. The Government of Ontario has already taken steps, in cooperation with the federal government, to help small businesses reach more customers through the Digital Main Street platform, with an investment of \$57 million.<sup>22</sup> Unanswered questions in these initiatives include how these new online retailers will confirm the identity of a consumer for large purchases by credit card, which may have required visual inspection of a consumer's identification in the past. The need for identity and document verification for commissioning and notarizing purposes can therefore be easily connected to broader initiatives already undertaken by the government. Different legislation cover these initiatives, and it would be prudent to adopt any verification and reliability requirements with consideration of these broader programs.

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<sup>21</sup> See, for example, Ross Dias, "What will shopping in Canada look like in the aftermath of coronavirus?," *Maclean's*, June 11, 2020, available at: <https://www.macleans.ca/economy/what-will-shopping-in-canada-look-like-in-the-aftermath-of-coronavirus/>; Sean O'Shea, "The New Reality: Future of shopping malls in jeopardy as COVID-19 pandemic pushes shoppers online," *Global News*, May 31, 2020, available at: <https://globalnews.ca/news/7007677/the-new-reality-shopping-mall/>.

<sup>22</sup> Government of Ontario, "Ontario and Canada Helping Small Businesses Go Digital," Ministry of Economic Development, Job Creation and Trade, June 11, 2020, available at: <https://news.ontario.ca/medg/en/2020/6/ontario-and-canada-helping-small-businesses-go-digital.html>

Virtual and remote document and identity verification must also be facilitated by the government because of the need for accessibility to the general public. The government might consider adopting, acquiring, or consulting with private sector entities that have already developed the technology capable of facilitating these processes, for example, through an approved vendor list. Although over 50 companies worldwide already provide for validation services globally, none of them have universal adoption in any particular jurisdiction. Complete privatization of essential government services, which includes the ability of an individual to confirm their identity through government-issued form of identification, still needs to be controlled and directed by the government, even if by regulation that specifies what validation is appropriate. Abandoning these services to entirely the private sector entirely leaves them potentially susceptible to service interruptions, as a company changes their strategic direction or drops a service offering due to lack of profitability, or gaps in service provisions based on community or geography. Service Ontario offices are already located strategically throughout the province specifically for this purpose, and to ensure that these vital government services are easily accessible to all Ontarians. Government control of these processes allow for a waiver or reduction of any associated fees involved, especially for low-income populations, which is especially important given that identification is already necessary to access many existing governmental programs such as social assistance or disability benefits. A failure to properly consider the implications of utilizing technology for document and identification verification could therefore exacerbate poverty in Ontario, and cumulatively create a detrimental effect. Law reform and the modernization of government services still necessarily needs

to consider and prioritize the interests of marginalized and low-income populations, as they are the ones that will also benefit the most from an access to justice perspective.

### 3.2 Implementation of Blockchain Technology

In the development of future technologies used for document or identity verification, the government should also consider the use of blockchain technology. Canada would not be the first country to implement modern technology for identity verification purposes. Estonia is one of the leading countries that uses electronic ID and blockchain for ID verification purposes.<sup>23</sup> Blockchain technology is a decentralized, distributed ledger that records data in a network connected through peer-to-peer nodes. Blockchain is virtually impervious to tampering. Uptake in the financial industry is quickly being followed by use in a wide variety of not-for-profit and charitable sectors in Canada.<sup>24</sup> Other jurisdictions have already implemented these technologies and used them further, including through governmental initiatives. For example, India is currently looking to implement blockchain technology for its Aadhar card system.<sup>25</sup> The Aadhar card system is a government sponsored program that facilitates the identity verification for a myriad of applications, including opening a bank account, filing tax returns, and getting pension money.<sup>26</sup> This program has been heralded for increasing

<sup>23</sup> “Estonian Blockchain Technology”, online: *E-Estonia* <<https://e-estonia.com/wp-content/uploads/2020mar-nochanges-faq-a4-v03-blockchain-1-1.pdf>>

<sup>24</sup> See, for example, Omar Ha-Redeye, “Cryptocurrency in Fundraising and Social Causes,” in Aaron Grinhaus (ed.), In

*A Practical Guide to Smart Contracts & Blockchain Law in Canada* (2019), Lexis Nexis. See also more generally, Osgoode Professional Development, “The Osgoode Certificate in Blockchains, Smart Contracts and the Law,” Nov. 28-29, 2019 and Jan. 20-21, 2020, available at: <http://www.omarha-redeye.com/wp-content/uploads/2020/06/The-Osgoode-Certificate-in-Blockchains-Smart-Contracts-and-the-Law.pdf>

<sup>25</sup> C Rukumathi, E Manohar, M Sharonnisha, “Tamper Proof Certificate Authentication Using Blockchain Technology”, (2020) *International Journal of Research and Analytical Reviews* 749-754 (IJRAR)

<sup>26</sup> G Malik, K Parasrampuria, S P Reddy and S Shah, “Blockchain Based Identity Verification Model,” *2019 International Conference on Vision Towards Emerging Trends in Communication and Networking (ViTECoN)*, Vellore, India, 2019, pp 1-6, doi: 10.1109/ViTECoN.2019.8899569.

financial inclusion of low-income individuals. This centralized identification method has circumvented the need to undergo an onerous process to prove one's identification, which previously made it difficult for low-income individuals to receive various benefits. Low-income farmers in rural India, for example, now have easy access to basic services such as credit and insurance.<sup>27</sup>

Italy also has a system that allows its citizens to verify identity online and access public services through this online identification system.<sup>28</sup> Similarly, the Netherlands and the Czech Republic also utilize similar digital methods for identity verification.<sup>29</sup> Another European country, Latvia, has been using electronic identification systems since 2015 and has been allowing its citizens to use online notary services since 2018.<sup>30</sup> The e-ID cards contain biometric data and information in electronic form which makes them the “most secure personal identification tool”.<sup>31</sup> The idea behind this method is to detect fraud in a manner that would normally avoid detection if one were to physically verify identity.

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<sup>27</sup> S Rathod and SKP Arelli, “Aadhaar and Financial Inclusion: A Proposed Framework to Provide Basic Financial Services in Unbanked Rural India”, *Driving the Economy through Innovation and Entrepreneurship* 731-744.

<sup>28</sup> “Czechia, Italy (CIE) and the Netherlands eID schemes notified under eIDAS”, European Commission, available at:  
<https://ec.europa.eu/cefdigital/wiki/display/CEFDIGITAL/2019/10/01/Czechia%2C+Italy+%28CIE%29+and+the+Netherlands+eID+schemes+notified+under+eIDAS>.

<sup>29</sup> *Ibid*; “Digital Government Factsheet”, (2019) European Commission, available at:  
[https://joinup.ec.europa.eu/sites/default/files/inline-files/Digital\\_Government\\_Factsheets\\_Czech%20Republic\\_2019.pdf](https://joinup.ec.europa.eu/sites/default/files/inline-files/Digital_Government_Factsheets_Czech%20Republic_2019.pdf).

<sup>30</sup> “Latvian notaries now offer their services online”, (July 2018), Notaries of Europe, available at:  
<http://www.notaries-of-europe.eu//index.php?pageID=16347>; “Latvia: E-IDs as a Universal Means of Identification”, *European Commission*, available at:  
[https://joinup.ec.europa.eu/sites/default/files/news/2018-06/DG%20CONNECT\\_Latvia\\_E-IDs%20as%20a%20Universal%20Means%20of%20Identification\\_v%201%202.pdf](https://joinup.ec.europa.eu/sites/default/files/news/2018-06/DG%20CONNECT_Latvia_E-IDs%20as%20a%20Universal%20Means%20of%20Identification_v%201%202.pdf).

<sup>31</sup> OECD, “Access to Justice for Business and Inclusive Growth in Latvia”, OECD Publishing (2018) 66,67. Arguably though, w3 has demonstrated even more secure means of identification (<https://www.w3.org/TR/vc-use-cases/>). Biometrics also require specific consent, which can be an operational limitation.

European countries identified a number of risks at the beginning of the project. The first challenge for Latvia, for example, was the complexity of such a system. The aim was to develop a project that is “as user-friendly as possible with a focus on data security”.<sup>32</sup> Estonia focused on three keywords in overcoming security threats: risk management, continuity planning, and openness.<sup>33</sup> Being transparent and open to citizens about the possible risks and opening platforms for public debate builds trust between the state and its citizens.<sup>34</sup>

Blockchain technology is not new to Canada. Five Canadian banks, Canadian Imperial Bank of Commerce (CIBC), Royal Bank of Canada (RBC), Scotiabank, Toronto–Dominion (TD) Bank and Desjardins Group, already use blockchain technology for identity verification of their customers.<sup>35</sup> These are still essentially closed systems though, and do not integrate or interface with any public-facing documents or identification verification initiatives by the government. Even if such an initiative was accepted by private actors, there would still likely require some regulatory oversight, likely through the Ministry of Government and Consumer Services. The lack of a national identification card system in Canada, unlike the other jurisdictions discussed, can be addressed through alternative forms of identification, such as drivers’ licenses, which already contain serial numbers unique to individuals. Worth noting is the concern that in the development of any such portal, privacy

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<sup>32</sup> “Latvia: E-IDs as a Universal Means” *supra* note 30.

<sup>33</sup> “What we learned from the eID card security risk?” (May 2018), E-Estonia, available online: <https://e-estonia.com/card-security-risk/>.

<sup>34</sup> *Ibid.*

<sup>35</sup> Yogita Khatri, “Five Banks Now Let Users Verify Their Identities Using a Blockchain” (May 2019), CoinDesk, available at: <https://www.coindesk.com/five-banks-now-let-users-verify-their-identities-using-a-blockchain-app>.

considerations such as tracking individuals and unrelated data collection will need to be addressed, once such a system is developed.

The potentially high cost of initial development, and complexities related to privacy and data security, require that creation, operation, and maintenance of this portal be a government initiative. The project cannot be left to private companies for several reasons, including but not limited to the possibility of data breaches, security concerns, and profit-driven motives, as opposed to motives relating strictly to confidentiality, security, and public interest. Clients and commissioners/notaries are also more likely to have confidence in a government-operated portal as opposed to a third-party such as a private company.

#### **4. Use of AI in Dispute Resolution**

Despite the considerable amount of hype and publicity around the term “artificial intelligence” (AI) in society generally, all lawyers use some forms of AI on a regular basis. Search engines, such as Google, utilize AI in search results, which can also be customized for users who are logged in. Given the prevalent use of search engines by all members of society, reference to it can be helpful in understanding what AI can potentially offer to members of the trusts and estates bar. The way that AI works generally, and with significant oversimplification, is that a mathematical algorithm analyses a large data set of information, and produced results based on this analysis. In more complex iterations of this, which is reflective of much of the commercial products available to the legal industry, these algorithms refine themselves using feedback loops and having algorithms that operate on the analyzing algorithm. Complex operations involving the exclusion or inclusion of certain data sets then also provide a

mathematical sensitivity that reveals patterns or insights that may not otherwise be ascertainable or identifiable through independent human analysis. The power of AI comes in the computational power to analyze large volumes of data that a person would otherwise spend hundreds of thousands of hours simply to review, let alone analyze.

There has been extensive use of AI in wills and estates already, and not without controversy. Simpler versions of AI have been used for years in mass producing standard wills for rather simpler estates, and have greatly increased access to justice by providing cost-effective or inexpensive wills to a vast expanse of the general public. Criticisms from the profession often include that no estate is truly simple, and a standardized approach invariably overlooks critical aspects of a will, or even worse, creates potential liability. The compromise in these positions, which both have merit, is that a standardized will for a significant portion of the population, especially one utilizing AI technology, will provide a sufficient amount of predictability as to the dispensation of an estate. This might be especially true for estates where only nominal amounts are at stake, and there is a low-risk of conflict between the beneficiaries. Of course the value of estates change over time, and often do following the creation of these types of wills, and relationships between beneficiaries can also change and even deteriorate, especially when an estate is about to be distributed. Claims under the *Family Law Act*,<sup>36</sup> or the *Succession Law Reform Act*<sup>37</sup> can arise unexpectedly, or without knowledge of the testator at the time the will is signed. For these reasons, many trusts and estates lawyers report a boon of litigation claims arising out of automated or AI-powered wills. What is still being developed are the tools that will analyze a will

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<sup>36</sup> RSO 1990, c F.3.

<sup>37</sup> RSO 1990, c S.26.

and automatically find shortcomings and deficiencies, which would assist beneficiaries looking to make a claim. This technology already exists and is being utilized for contract and document reviews.

During the pandemic, it's likely that generalized concerns or anxiety around COVID-19 will demonstrate an increase interest of members of the public in having a will in place, especially where they do not have one previously. Social isolation directives are likely to encourage these individuals to turn online to find solutions. When combined with the rising unemployment and economic uncertainty during and following the pandemic, it's also probable that these individuals will be looking for the most cost-effective option, without an adequate understanding of the shortcomings and pitfalls of this approach towards estates planning. Members of historically marginalized communities, especially low-income populations that would be unable to obtain legal services even outside the pandemic circumstances, are even more likely to be susceptible to prematurely or imprudently obtaining a digital or AI will kit, and broader education or outreach activities from the profession are unlikely to reach these audiences.

Applications of AI in wills and estates can also be observed generally in tools that seek to provide predictive analytics into the outcomes of litigation cases, when taking into account pre-determined factors identified by the creators. More complex versions of these products create or find their own factors that may be unknown to the creators or even the profession at large, which may give rise to insights and understanding about our legal system in ways the profession has never observed before. In some cases, this may give rise to instances of unconscious bias that may be pervasive in the legal system. The bigger challenge with using historic datasets to produce

predictive outcomes is that they may unknowingly and unwittingly reinforce unconscious biases that influence outcomes in the law. Although a number of products are already on the market providing these insights, they are still early in their potential to truly glean what is occurring in litigation, and more importantly, what might occur in litigation. These products are also significantly constrained within the Canadian legal system, because the underlying principles and assumptions of data sets drawn from other jurisdictions may not valid in Canada. A specific technical issue exists where the volume of reported decisions, the main source of information for most of these predictive applications, is not sufficient to statistically provide valid and robust predictions, especially as to the likelihood of settlement.<sup>38</sup> Some platforms are attempting to develop collections of confidential settlement decisions to augment these reported decisions, which would significant improve the ability of these algorithms to glean insight into litigation options. The challenges with the nature of these settlements is that they cannot be disclosed to other counsel, meaning the use of an algorithm on a private data set fails to make this more robust data to other users. Disclosure to a vendor for analysis may itself potentially violate confidentiality provisions, especially if doing so is not provided for in the agreement. Client consent, and more importantly informed consent about how data from such a settlement might be used in the future, continue to provide logistical challenges, and may even given rise to civil claims and regulatory scrutiny.

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<sup>38</sup> Omar Ha-Redeye, “The Big Data Problem for AI in Law,” *Slaw*, Sept. 11, 2016, available at: <http://www.slw.ca/2016/09/11/the-big-data-problem-for-ai-in-law/>

## 5. Conclusions

Rapid innovation in the legal sector is crucial, not only to address concerns relating to the pandemic, but also for the purposes of moving the legal profession to a stronger and more efficient future. The safeguards discussed throughout this paper can also be implemented quickly to mitigate risks of technological adoptions, and much of the required technology already exists. Expanding upon litigation alternatives with the use of virtual mediations and notarizations will better facilitate proceedings in many areas of law.

Schedules 4 and 13 in Bill 190 were introduced to adapt to the unprecedented global circumstances created by COVID-19. The measures envisioned in Bill 190 are intended to make it easier for clients to have access to various aspects of the legal system, without jeopardizing their health or the health of legal practitioners. These changes will eventually have the potential for broader cost savings, and may facilitate access to justice, but will require even further innovation, and a commitment from government to modernize our legal system. Multiple countries from different parts of the world have been ahead of Ontario adapting new technologies such as blockchain and artificial intelligence. Ontario should utilize the experiences of these other countries as models for its own dedicated government initiative in order to keep up with the vast changes that have been created by this pandemic. This would allow the Ontario government to introduce new technologies in the legal system that allows its citizens to have remote access to justice, when their ability to have physical access is restricted.

The private bar should also take advantage of any additional or flexible time during the pandemic to explore new and emerging technologies that use artificial intelligence in dispute resolution. These platforms can help lawyers better appraise the

likelihood of success in their matter, and can therefore better inform the advice provided to clients. While many of these technologies are still in development in Canada, it is inevitable that they will play a larger role in the practice of trust and estates in the future. These developments are worth tracking, as they will have the potential to transform in many ways the approach undertaken towards litigation alternatives in the years to come.