RED BLOCK, YELLOW BLOCK, ORANGE BLOCK, BLUE:

WITH SO MUCH COMPETITION, WHAT DO WE DO?

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I. INTRODUCTION

There is a need to reform, in a radical way, Ontario's public court civil adjudication system. In this talk, I will explain why I hold that view, and I will offer some concrete recommendations to start the reform process.

I will draw on two seminal texts: the *Book of Hryniak*;[2] and the Book of Seuss, as in Dr. Seuss, specifically his classic work on court reform: *One Fish, Two Fish, Red Fish, Blue Fish*.[3]

Let me start with two teachings from the *Book of Hryniak*, taken from Verse 1:

- "Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial."

- "Without an effective and accessible means of enforcing rights, the rule of law is threatened."

What is the solution to this perilous state of affairs? Again, I turn to the *Book of Hryniak*, this time to Verse 2:

- "[A] culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system."

Strong words from our Supreme Court. A sort of *Hryniak's Trumpet* call, one might say, echoing Anthony Lewis' 1964 classic on the decision of the United States Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[1] I wish to thank my law clerk, Ms. Alexandra Allison, for her invaluable research on the history of the rules of civil practice.
[2] *Hyrniak v. Mauldin*, 2014 SCC 7, at paras. 1 and 2.
[3] Dr. Seuss, *One fish two fish red fish blue fish* (New York: Random House, 1960)

In response to that trumpet call, have the glaciers of delay in civil cases melted away? Have the mountains of punishing legal costs been flattened?

Don't think so. From what I can see, those glaciers are still lodged in the corridors of our civil courts and those mountains still stand high and mighty.

Delay dominates the passage of civil cases through our courts. I cannot cite you official statistics about how long it takes cases to go from start to finish at our Superior Court trial level because no such statistics are published. A most scandalous state of affairs for a public institution.

But I can offer you some anecdotal evidence. When I learned that I would be giving this talk, I decided to keep track of certain information about all the civil cases I heard during the first few months of this year. From January 1, 2019 until May 3, 2019, I sat on 6 civil appeal panels. During that time, 46 civil appeals crossed my desk. For each appeal, I recorded the length of time between the commencement of the action, or application, and the date of the final order under appeal.

On average, it took a civil case 38 months, or 3.2 years, to go from start to finish in the Superior Court of Justice. And that most likely understates the actual time because some of the "final" orders that were the subject of appeal to our court in fact did not end the litigation.

What impact does the choice of proceeding have on these times? Of the appeal cases I examined: (i) 8 were appeals from trial decisions and, on average, it took 3.8 years to go from the start of the action to the trial decision; (ii) there were 14 summary judgment orders in the other actions; on average those actions took 2.5 years to go from the start to the grant of summary judgment; and (iii) there were 9 applications, which on average took 2.3 years from the start until the final order.

So even when the more "summary" final adjudication on the merits tools are used – applications and summary judgment – of the cases that I saw, they spent on average from 2.3 to 2.5 years in the Superior Court of Justice.

Often the application is touted for its timely and summary nature. The advantage of that proceeding was not apparent in the cases I looked at. As presently administered, applications seem to offer no material time advantage over summary judgment motions brought in actions.

As for appeals, of the civil appeals I looked at the average lapse of time from the filing of the notice of appeal to the hearing of the appeal was 8.4 months. In 2016, I obtained some formal statistics for a talk I was giving to the Hamilton Law Association. At that time, it took about 10.5 months for a civil appeal to move from its first contact with our Court – notice of appeal or notice of leave to appeal – until the disposition of the appeal.

When you add on the average appeal time, that would mean a litigant would be in the civil court system for four years before its lawsuit came to a final end. You can earn a university degree in the same amount of time.

Half a decade after *Hryniak's* clarion trumpet call, why does it take over three years for a case to wind its way through Ontario's Superior Court civil adjudication system?

The proper verses from the *Book of Hryniak* are cited by counsel in their facta and judges in their reasons. Why, then, do the lofty aspirations and exhortations of *Hryniak* not translate into real gains on the ground? What is the cause of the persistence of a culture of delay in civil cases?

We are the cause. That is to say: your tribe and my tribe – the judges and lawyers who populate our civil adjudication system. The legal DNA that we share contains contradictory strands. We are prepared to change the world around us at the drop of a hat: no "frozen rights" for our fellow citizens; "living tree" all the way. But, at the same time, we tenaciously resist any change to the institution in which we practise our crafts and which many litigants look to in order to resolve their disputes.

We like our institution. It is comfortable. Like an old shoe.

And it is an "old shoe".

I would encourage you to walk over to the Middlesex law library and chat with Cynthia Simpson. Ask her to pull out of the glass case containing the old law books the Fourth Edition of Holmested's *Ontario Judicature Act* published in 1915. Or, when you are in Toronto, go to the Great Library and ask to see MacLennan and Langton's *The Judicature Act, 1881 and Subsequent Rules*. Better still, download it from the Great Library's website.

Stroll through them, as I did in preparing this talk, drawing on the most helpful research of my law clerk, Ms. Alexandra Allison. Does the structure of the civil adjudication system look familiar? Do specific rules of practice look all too familiar? They should. Because since the *Ontario Judicature Act, 1881*, the structure of Ontario's public court civil adjudication system and its main rules have remained unchanged. Take this one rule as an example:

> Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved.

Name that rule.

Rule 25.06(1) of our present *Rules of Civil Procedure*?[4] Not quite; the present rule reads:

> Every pleading shall contain a concise statement of the material facts on which the party relies <u>for the claim or defence</u>, but not the evidence by which <u>those facts</u> are to be proved.

What I read first was Rule 128 from the rules made under the 1881 *Ontario Judicature Act*.

Plus ça change …

[4] *Rules of Civil Procedure*, r. 25.06(1): Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved.

As best as I can discern, apart from the periodic re-arrangement of the order of the rules, incremental accretions to specific rules and, in 1985, the purging of any Latin words from the rules, to my eyes since 1881 the only major changes to the rules have been what I would term "tweaks". They are:

- DISCOVERY: Changing discovery and the production of documents from a step initially requiring some form of judicial order to one now initiated by litigants as of right and expanding those rules to address a variety of discovery-stage issues;

- APPLICATIONS: The hodge-podge of non-trial proceedings available under the pre-1881 rules were transformed into the application by originating notice of motion and, in 1985, the simple application, as consolidated in what we now know as Rule 14.05;

- CROSS-CLAIMS: In 1985, the old practice of asserting a claim against a co-defendant in one's statement of defence or by way of third party claim was replaced by the cross-claim;

- SUMMARY JUDGMENT: As well, in that year the specially endorsed writ that provided a very summary procedure for securing judgment on a liquidated claim for damages gave way to the broader – and arguably slower – Rule 20 summary judgment rule, now so beloved by counsel;

- MEDIATION: In recent years, pre-hearing mediation has become compulsory in some cases; and

- CASE CONFERENCES: Much more recently, pre-trial conferences have expanded to include case conferences available for the asking at any stage of a proceeding.

From what I can see, those have been the major changes to our civil procedure rules since 1881, some 138 years ago.

Let's put the 1881 rules into context. They came into force within a decade of the commercialization of the light bulb and telephone. Since their enactment, the world has seen the invention of several notable things, such as the car, the airplane, the computer, and the smart phone. Yet, we still essentially follow the adjudicative decision-making process for civil suits laid out in the 1881 rules.

Is it a good thing that while constitutional rights do not remain frozen at 1867 but grow expansively under the fertilization of the living tree metaphor so beloved by many Canadian jurists and legal academics, the process for adjudicating civil legal rights remains frozen in an 1881 time-warp?

That brings me to the second part of my talk. Does the inability of the public courts to adapt to changing times really matter? After all, don't all those who have civil legal disputes they want resolved need to bow to THE COURTS? Aren't we the only game in town?

II. THE DISPUTE ADJUDICATION UNIVERSE: RED BLOCK, YELLOW BLOCK, ORANGE BLOCK, BLUE

Here, I engage in a bit of show-and-tell, aided by the wisdom of the Book of Seuss.

Let's take stock of the landscapes in which our public courts operate. To assist in visualizing the landscapes, I will resort to some demonstrative aids. Brightly-coloured children's building blocks.

Now, before you take umbrage that I am resorting to such primitive, non-electronic aids before an audience of distinguished, tech-savvy legal minds, the show-and-tell that is about to unfold is one I inflicted on my Court of Appeal colleagues at our December court education luncheon.

Here is a RED BLOCK. It represents Ontario's public courts – for my purposes, the Superior Court of Justice and the Court of Appeal.

Here is a picture of a red block sitting alone in an otherwise deserted landscape. That is the public court in the exercise of its criminal jurisdiction. It has no competition. It enjoys a statutory monopoly. Or, as insightfully described in *One Fish, Two Fish*:[5]

At our house
We play out back
We play a game
Called Ring the Gack.

Would you like to play this game?
Come down!
We have the only
Gack in town.

On the criminal adjudication side of things, the public courts are the only "Gack in town". No need to fear the erosion of market share. Little incentive to think about change. Simply enjoy the comfort of the old shoe, while looking over your shoulder to ensure that the *Jordan*[6] monster does not come too close.

Not so on the civil side. Now visualize the RED BLOCK as sitting on the civil adjudication landscape.

The RED BLOCK is not alone. To it we must add the YELLOW BLOCK, the private civil arbitrators. Lots of them around every major urban centre in Ontario these days. Many of them are

[5] *One Fish, Two Fish* is the second volume in Dr. Seuss' opus on court reform. About seven years ago, in *George Weston Limited v. Domtar Inc*., 2012 ONSC 5001, at paras. 30-33, I drew on the first volume of his opus, *Green Eggs and Ham*.
[6] *R. v. Jordan*, 2016 SCC 27

judges who, when they retire, simply take off their robes, put on business attire, and cross the street to open new chambers.

What's the difference between the RED BLOCK and the YELLOW BLOCK? Well, the RED BLOCK public courts offer really low user fees, virtually unlimited access to judicial time, and the process is complicated: a lawyer's friend, but the bane of self-represented litigants. So, too, is the arbitration system, but arbitration is more expensive and you have to "pay as you play". Yet, as the litigant in an arbitration, you can choose your decision-maker and can require the adjudication to proceed quickly, if that is your want. One might say that arbitration is a system for the affluent, in contrast to the public courts which are there for the Average Jane and Joe.

But, there are more blocks that populate the civil adjudication landscape. Here is an ORANGE BLOCK. It represents the nascent government-run online civil dispute tribunals, such as the British Columbia Civil Resolution Tribunal. Its features? Very low user fees; the process is disputant-oriented, guided by government mediators; and lawyer-lite. Indeed, its process is designed so that disputants do not need to hire lawyers.

And, finally, the BLUE BLOCK. It represents the emerging artificial-intelligence powered civil dispute resolvers. In the world of AI or, as some call it, automated decision-making, the process is disputant-oriented, guided by algorithms, with no real need for lawyers.

A lawyer's nightmare? Most certainly. But welcome to the future. It is gaining traction. And it has definite attractions. Much lower costs. Much quicker results. People do not have to spend four years of their lives in a court dispute. They can use most of that time to pursue other interests and spend their money on other things, like making more money. A very powerful feature.

So, how can we describe the landscape in which the Ontario public court civil adjudication system operates? Returning to the wisdom of Dr. Seuss:

One fish
two fish
red fish
blue fish...
Say! what a lot of fish there are.

From there to here,
From here to there
Funny things
Are everywhere

III. REDESIGNING WHAT WE OFFER TO ADDRESS THE COMPETITIVE CHALLENGE HEAD-ON

To meet the competitive challenge posed by these "funny things" that "are everywhere", we - the trial and appellate courts – must initiate a structured conversation with our litigant "customers" around the following question:

> What do we, the courts, need to offer to you, the litigant customer, by way of an adjudication process so that you will choose us as your problem resolver, instead of going to (i) an arbitrator (ii) an on-line tribunal like the B.C. Civil Resolution Tribunal or (iii) human-free artificial intelligence-driven problem solvers?

Let me start the conversation by offering five, key strategic recommendations.

Recommendation No. 1: Judges must make a strategic commitment to the public adjudication of civil disputes

In the Spring 2019 edition of *The Advocates' Journal*, Stephen Grant entitled his editorial, *"Civil Justice: The poor cousin"*. Mr. Grant commented, at length, "about the utterly low financial priorities that are allocated to the justice system, especially the civil justice system." As he put the matter:

> We exalt the Rule of Law as a mainstay of our professional creed (and our own moral fibre, for that matter) but, in the sense of our physical plant, we pay it scant lip service. I'm not sure it's a whole lot better in other areas, but in family law, where probably 40 percent of litigants interact with the courts (at least in Toronto), it's a disgrace. (p. 3)

Mr. Grant's observations about the civil court's infrastructure are most accurate, although in some centres the criminal courts fare little better than the civil.

I would go further than Mr. Grant, however, and say that at present, Ontario's public court system of civil adjudication stands a poor third cousin to criminal and family law adjudication. The response on the criminal side of the courts to the *Jordan* decision has been somewhat crude: throw more bodies at the problem – a standard response of the monopolist whose game is the only Gack-in-town. The bodies thrown at the *Jordan* monster do not tend to come at the expense of family law adjudication, where today the line between the judicial adjudication of legal disputes and the provision of on-going, resource-heavy, judicial therapy services seems to be blurring. The area that has been sacrificed is civil adjudication, which has been stripped down to its bones in order to serve up the judicial bodies to feed its criminal and family law cousins.

One sometimes hears the different types of work performed by the trial division as falling into one of three "lines of business": criminal; family; and civil. Drawing on that metaphor, and just speaking for myself, it would appear that Ontario's public courts are slowly liquidating their civil adjudication business.

Not through any conscious policy. But through indifference. Ontario's civil courts seem to operate with a kind of "Field of Dreams" attitude: "If you've built it, they will come." Well, they

won't and they aren't. Our customers have an increasing number of options for the adjudication of their disputes and they are taking advantage of those options.

Instead of fighting to develop the vibrancy of the common law to meet the challenges posed by the technology-driven revolution taking place amongst a huge array of businesses, Ontario's civil public courts seem content to drift: if not oblivious to the existential threat of the other blocks on the landscape, at least indifferent to the consequences of that competition.

To address the challenge of increased competition in the civil adjudication market, Ontario's public courts must decide whether they are in or out of the civil adjudication business. Continuing to sit on the fence will no longer work.

A real culture change needs to happen. Ontario's public civil courts need to wake up to the challenge of their competitors and start hustling for civil business. The decision of whether they do or not lies in the hands of one group: the judges. If public civil adjudication has a future in this province, we who make up Ontario's judiciary need to light a fire in our collective bellies and commit to delivering a top-of-the-line civil adjudication product to our customers.

While we will need money to do so, and therefore the assistance of the government, the starting point must be a radical change in our judicial mind-set. We must want to be in the civil adjudication game, and we must be prepared to work hard to develop that business. That is not where we are today. We judges need to change.

In what ways? Let me offer several suggestions.

Recommendation No. 2: Set quality standard/benchmarks for "in-out" times

First, we should offer our civil litigation customers a "service guarantee": "If you bring your legal dispute to us, we guarantee that you will leave our system with a final result within 18 months."

Pie-in-the-sky? Hardly. Let me take you back to 1973, when the Law Reform Commission of Ontario released its *Report on the Administration of the Ontario Courts*. Justice McRuer headed the Commission at that time. Here is Recommendation No. 7 from that report:

> As a further management goal, every civil case should normally be disposed of within **one year** of the issuing and serving of the writ of summons, petition or claim. (emphasis added)

That recommendation was made back in the old "paper days". Today, with all the bells and whistles of technology just lying at our feet, waiting to be picked up, we seem unable to move cases through our system in less than three years, or triple the time advocated by Justice McRuer back in 1973.

The civil side of our courts needs to take a lesson from *Jordan*. That case clearly recognized that an entrenched culture of delay cannot be changed without the imposition of a hard "drop dead" date for every piece of litigation, in that case a constitutional cap of 30-months in-and-out. There have been plenty of aches and pains along the transitional road to achieve *Jordan's* hard cap. But – surprise, surprise – in the face of a hard "drop dead" date the judiciary, and others in the criminal

justice system, are responding and getting the job done. The Supreme Court's insight in *Jordan* was a sound one: if you leave the litigation process open-ended, the litigation work in any case will expand to fill the timeless void and thereby delay the final adjudication of the case on the merits. Real change will only come when, at the start of the litigation process, you fix the "drop dead" date for the case.

While a constitutional tool like s. 11(b) of the *Canadian Charter of Rights and Freedoms* does not exist on the civil side to impose a *Jordan*-like "hard cap", the judiciary can reach the same place by the simple expedient of adopting and applying an "in/out" service guarantee. It lies completely within our power as judges to do so because, when push comes to shove, it is the judges who ultimately control how judicial court time can and should be used – no one else.

Absent the adoption of such an "in/out" service guarantee, I have no doubt that the civil side of our courts will continue to drift and stagnate. Rule-tinkering is no substitute for a hard cap "in/out" service guarantee.

Recommendation No. 3: Discard the "generalist judge" model of public civil courts for a "specialist judge" model

Next, we need to discard the still-enduring notion that a civil court can be staffed with generalist judges.

That notion has been discarded on the criminal side. Take the example of sexual assault trials. The old view was that any judge could competently adjudicate a sexual assault trial without specific training. Experience proved that view to be very wrong. Now, all federally-appointed judges who have been on the bench for less than 5 years must attend a week-long course on how to conduct a sexual assault trial. That makes a lot of sense.

But why limit the principle of "judges should know what they are doing" to criminal cases? The principle should apply across the board. Our civil courts see a large amount of litigation involving various insurance-related disputes: coverage; duty to defend; statutory accident benefits; thresholds; and related tort issues like duties of care and causation. Where is the mandatory specialized judicial education for that large part of our courts' civil business? It ain't there. But it should be.

A civil litigant should be able to expect that the judge hearing its case has a modicum of expertise in the subject-matter of the dispute.

That happens in Toronto on the Commercial List. Why should those involved in various insurance-related or public law-related cases not receive the same level of service?

We need to develop groups of civil judges who possess the subject-matter expertise to adjudicate the more challenging civil cases and assign them to hear those cases on a routine basis.

Our competitors, the arbitrators, offer such a service. So, too, should the public courts if we want to continue to play in the civil adjudication game.

And, just as litigants who go down the arbitration road have a voice in who will adjudicate their dispute, so too should civil litigants be given some ability to select their judge from a list of subject-matter experts.

To assist in that selection process, I think the courts should develop a type of profile, or information package, about each judge that is available to the public. Such a profile would enable litigants to understand the record of the judge in meeting the three elements of the fundamental principle underpinning our civil justice system: securing the ***fair*** determination of a civil dispute, ***expeditiously***, and at a ***reasonable cost***.

Recommendation No. 4: Move from experimenting with single-judge case management to making it the default for all civil cases

Third, civil courts must use judicial time more effectively and efficiently. The old view that in a party-prosecution adversarial system it is the litigants who decide how much judicial time to use must give way to greater judicial control over the scarce resource that is judicial time.

Single-judge case management is a useful means to control access to judicial time while moving a case towards a resolution on the merits expeditiously and at a reasonable cost. Single-judge case management offers huge potential for creative innovation on how best to use judicial time.

Single-judge case management is not a stranger to Ontario's trial courts. It has been the norm on the Toronto Region Commercial List for years. This past February, the Superior Court initiated a two-year, province-wide, pilot project to make single-judge case management available to a larger number of cases. You can learn the details of the project from the Practice Advisory posted on the SCJ website: http://www.ontariocourts.ca/scj/practice/civil-case-management-pilot/

I would encourage you to select a case or two for participation in this project. Properly executed by appropriately trained judges, the case management of a proceeding focuses the parties' attention on the real issues in dispute and, with the assistance of the judge, works to shape and schedule the form of final adjudication on the merits appropriate to the specific characteristics of the case.

I worked with case management for four years as a judge on the Commercial List. It can achieve real benefits both for the litigants and for the courts. A "win-win" situation.

In my view, adopting single-judge case management as the norm for all civil cases in the public courts is an urgent necessity in order to make our public court adjudication process more competitive with the offerings of other adjudication services.

Recommendation No. 5: Think of a world beyond the 1881-based *Rules of Civil Procedure* and redesign the civil adjudication system from the ground up

My final recommendation draws on the insight in yet another passage of *One Fish, Two Fish*:

So…
If you wish to wish a wish
You may swish for fish
With my Ish wish dish

Let me "swish" for radical civil adjudication change "with my Ish wish dish". Our *Rules of Civil Procedure* are old: 125 years or so old. They have served a purpose, but they have out-lived their usefulness. They are, in their own way, the major obstacle to achieving any sort of culture change in the civil justice system that would see litigants benefiting from a process that decides their cases in not only a fair way, but in an expeditious and low-cost way.

We need a complete re-think of the civil adjudication process. One that reflects on and incorporates the best of the extraordinary changes in information management and process design we have seen over the last 30 years.

For the past two years, I have tried to interest various players in putting together a "blue-sky" civil rules redesign team. As I see it, the challenge would be to design a process for adjudicating (and/or resolving) civil cases involving claims under $1 million (economic and property claims) to replace the current process. The redesigned system would have several objectives and constraints. In it:

- A case would move from start to finish within no more than 18 months;
- The process would not require a litigant to incur legal fees greater than 5% of the claim;
- The process would be understandable to and usable by a reasonably-educated self-represented litigant;
- The process would prevent "adjudication by ambush";
- The final decision on the merits would be made by a human being, not by a computer, although I see room for the use of algorithms to make certain interlocutory decisions, especially those related to issues of discovery and production; and
- the process would use electronic documents and electronic file management/scheduling.

If “my Ish wish dish” could come true, the design team would:

- Consist of at least as many non-lawyers as lawyers/judges;
- Include representatives of our customers, both the frequent users of the public courts, such as insurance and financial institutions, as well as previous litigants whose experience was more of the “one-off” kind;
- Involve process engineering and computer systems designers;
- Involve business process expertise; and
- Draw on the views and needs of the users of the system – i.e. the litigants.

If Ontario’s public civil adjudication system is to have a future, we must stop tinkering with *Rules of Civil Procedure* and rethink our entire adjudication process. That is what the ORANGE and BLUE blocks are doing. And their fresh approaches to the eons-old need of resolving disputes involving civil legal rights may well carry the day unless the public courts are prepared to take a fresh, radical look at what they are doing.

IV. CONCLUSION

It is my strong hope that Ontario’s courts will do so. Public civil courts play an important role in preserving a free and democratic society. But they cannot take their future for granted. They have to start to fight for their place in the future because “funny things…are everywhere.”